TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 70 2 APRIL 2013  PAGES 7437 TO 7569

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE

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CHAIRPERSON: Mr Bizos, I understand you still under oath.

MANGWASHI VICTORIA PHIYEGA: s.u.o.

CHAIRPERSON: Mr Bizos, I understand you have further questions to ask in cross-examination.

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[PROCEEDINGS ON 2 APRIL 2013]


The South Africa Human Rights Commission has applied to the Commission for an order compelling National Union of Mineworkers, NUM, to discover the following documents: 1, Records of discussions relating to disputes over benefits associated with employment at Lonmin over the five years preceding August 2012; and 2, NUM's records on format of interaction between unions and employer. This includes correspondence, as well as individual members' complaints regarding benefits, especially housing. NUM has opposed the application.

The Commission has had the benefit of submissions made by counsel for the Human Rights Commission and NUM, as well as from Mr Chaskalson SC, one of the evidence leaders. It was common cause that the Commission's power to issue the order sought is a discretionary one, in the exercise of which it must weigh up the relevance and importance of the documents sought, against the invasion of the private rights of the party whose documents are sought, and compare the likely prejudice suffered by the party requesting discovery if the application is refused, with the prejudice likely to be suffered by the party compelled to make discovery if the application is granted.

In the present case the request is both too vague and too broad and many of the documents sought will not be relevant to the issues on which the Commission has to decide. The expense to which NUM will be put if discovery is ordered and the time which will be required for it to go through its documents to track down those covered by the request, will be enormous. It is relevant in this regard that counsel for the Human Rights Commission did not suggest any way in which the broad ambit of the request could be cut down. So the prejudice to NUM if the application is granted will be substantial.

On the other hand, if one looks at the prejudice likely to be suffered by the Human Rights Commission during the hearing in the present case, then it is clear that such prejudice will be significantly less because the relevance of those documents requested, which are covered by the Terms of Reference, is relatively slight. Furthermore, insofar as those documents are concerned, that is to say those that are relevant, they are of such a nature that they could more appropriately be sought from Lonmin rather than from NUM. In the circumstances the Commission is satisfied that the application should fail. National Commissioner, you're still under oath.

MANGWASHI VICTORIA PHIYEGA:

CHAIRPERSON: Mr Bizos, I understand you have further questions to ask in cross-examination.
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MR BIZOS SC: We have not been informed or given a copy of that -

CHAIRPERSON: Sorry, Mr Bizos, I'm sorry to interrupt you. I haven't seen it, but let's ask the evidence leaders if they've got it. If they got it recently they may still be in the process of circulating it -

MR BIZOS SC: I've already had a shaking of the head by the leader of -

CHAIRPERSON: Well, I can't go on body language. It doesn't get recorded. Mr Budlender, this document to which the National Commissioner refers, obviously she didn't personally hand it over to you, so she's obviously relying on information she received that it's been sent to the Commission. Has it in fact been received by the evidence leaders?

MR BUDLENDER SC: No, Chair, we haven't seen it.

GENERAL PHIYEGA: But I have a copy -

CHAIRPERSON: Well, let's ask Mr Semenya, he may be able to help us. Thank you, Mr Budlender. Mr Semenya, can you throw light on this matter?

MR SEMENYA SC: We received the document last week and my instructing attorney tells me by 11 o'clock it will be forwarded to the evidence leaders.

CHAIRPERSON: So the evidence given by the National Commissioner so far is anticipatory. Mr Bizos, perhaps you can postpone then your - or perhaps “postpone” is an unhappy word - you can defer your cross-examination on this point until after the tea adjournment when this document will be available.

MR BIZOS SC: Yes. I will do that, Mr Chairman, because - and I will give notice of the question that I want to -

CHAIRPERSON: No, you don't have to give notice of questions, unless you want to really. You're under no obligation to do so.

MR BIZOS SC: I'll wait until we have seen this document, Mr Chairman.

CHAIRPERSON: She'll answer all the questions you're going to ask anyway, so let's see the document first and then we can take it further, if necessary.

MR BIZOS SC: I'll leave it over. I now want to deal with whether or not there was political direction in relation to the events of the 16th, Commissioner. At 9:30 on the 16th General Mbombo took part in a media briefing. It's to be found on slide 154 of exhibit L, Mr Chairman. I'll read it out. Have you got it in front of you?

GENERAL PHIYEGA: Ja, we've got it.

MR MAHLANGU: Exhibit L, yes. What slide, Sir?

MR BIZOS SC: 154. In the police's engagement with all the relevant parties, a commitment had been reached that the violence had to end on that day, Thursday, the 16th of August 2012, and weapons had to be put down by 9 o'clock that morning. Should the commitment not be honoured, the police would need to act within their mandate to ensure that peace and stability were restored in the area. Lieutenant-General Mbombo was reported on several news channels on the morning of the 16th, saying that, “Today we are ending this matter.” We want to show the video, Mr Chairman, to refresh everyone's memory of this speech, but we are told that the technicians are not yet here, so we will remind the witness, so that we can get on with it, what the vital parts are. She said amongst other things, “Today is unfortunately D-day.” Sorry, sorry, I thought that we would have the video, but I'll use my notes and put it. “I don't want to explain to you if they don't want to, what then? What I told you is today we are ending this matter,” words to that effect. What I want to ask you, Commissioner, is this. On whose authority did the speaker make that announcement?

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1 GENERAL PHIYEGA: I've already indicated earlier on that there is full delegation for the Provincial Commissioner to be in charge of the environment that she is tasked and mandated to be in charge of. She is the Provincial Commissioner of North West.

2 MR BIZOS SC: Who was present to authorise her to make that statement at that meeting?

3 GENERAL PHIYEGA: She has the full right and the responsibility to do so.

4 MR BIZOS SC: The question was, who was present. I want a list of the names, please.

5 GENERAL PHIYEGA: I don't understand your question then.

6 MR BIZOS SC: What do you not understand?

7 GENERAL PHIYEGA: What I do not - you've asked me a question. I said she is the highest most senior official in this province and she has the right, the responsibility, and the mandate, to take those type of decisions, and then you asked me a question, who was present. That's why I say I do not understand.

8 MR BIZOS SC: Were you not consulted as the National Commissioner?

9 GENERAL PHIYEGA: It was not necessary because I have said she is the highest most senior official in this province. She has the full mandate to do what she
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1 did.
2 MR BIZOS SC: In the same morning Dennis
3 Adriaao, if I’m pronouncing his name correctly, A-D-R-I-A-O, 4 said, “Today is unfortunately D-day. It is an illegal
5 gathering. We’ve tried to negotiate and we’ll try again.
6 If that fails, we’ll obviously have to go to a tactical
7 phase.” He calls himself the police spokesperson. Who
8 authorised him so early in the morning to make that
9 statement?
10 GENERAL PHIYEGA: I do not know about the
11 authority, but I can say that there is the topmost person
12 in charge of this province, and I’m sure when she testifies
13 she may be able to talk to that.
14 MR BIZOS SC: Were you consulted when the
15 decision was made that this was D-day?
16 GENERAL PHIYEGA: I’ve already answered
17 on that one to say it was not necessary for them to consult
18 me –
19 MR BIZOS SC: It was not necessary. So
20 you can’t –
21 GENERAL PHIYEGA: The commissioner has
22 full powers and mandates to run this province.
23 [10:22] CHAIRPERSON: The question isn’t whether
24 she was authorised to do it, or it wasn’t necessary for her
25 to consult you. The question I understand is whether you

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1 were consulted. Whether it was necessary for you to be
2 consulted, that’s another matter. Were you consulted by
3 the Provincial Commissioner before this decision was taken
4 and before this media briefing took place?
5 GENERAL PHIYEGA: The answer to that is
6 that again I will say, Judge, the commissioner had the
7 powers to take decisions together with everybody. I wasn’t
8 consulted necessarily on what is going to be said in the
9 press conference. I wasn’t consulted necessarily on how
10 they are going to engage AMCU, which had already indicated
11 that by that morning they will be putting down their arms.
12 CHAIRPERSON: If they were putting down
13 their arms, or if they said they were putting down arms,
14 there’s some debate about that which we don’t have to raise
15 with you. If they had said they were putting down their
16 arms, then obviously the problem would have been solved on
17 the phone, as it were. The problem was, however, if that
18 didn’t happen and they didn’t put down their arms, was it
19 then necessary to go over to action, some kind of
20 operation, to deal with the matter finally, or was it
21 something that would be considered in due course? I think
22 that’s one of the issues that arises here. Now you said
23 that you didn’t have the details of what’s going to be
24 done. I think you left that to the commanders, is that
25 correct? And to the Provincial Commissioner, the details

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1 of the plan.
2 GENERAL PHIYEGA: Yes.
3 CHAIRPERSON: Did you know that if they
4 didn’t lay down their arms that morning, as it was
5 indicated they would, that immediately that day there would
6 be action by the police within their mandate – to quote the
7 words of the Provincial Commissioner – to ensure that peace
8 and stability were restored in the area on that very day?
9 GENERAL PHIYEGA: Yes, I was aware,
10 because I said on our morning of the 15th I did say we
11 endorsed her plan to go out to encircle, disperse, and
12 ensure that those protesters are disarmed. That was known.
13 The tactical and the operational plans were left to the
14 province, but we knew that we needed to collect the arms
15 that were promised to be given; if not, make sure that we
16 collect them.
17 MR BIZOS SC: Do you agree that the final
18 phase, whatever that may mean, was a very important point
19 to be decided by you as the National Commissioner and by
20 the Minister?
21 GENERAL PHIYEGA: Perhaps I should be
22 made to understand what you mean by “final phase.”
23 MR BIZOS SC: Please speak up. I’m sorry
24 –
25 CHAIRPERSON: Mr Bizos, I’ve got another

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1 suggestion. Is it possible to turn up the volume slightly
2 with your equipment so that those who can’t hear as clearly
3 as others are assisted by the amplification? I’m sure the
4 Commissioner doesn’t like to have to shout when she gives
5 her evidence and we wouldn’t expect her to do that.
6 GENERAL PHIYEGA: Thank you, Chair.
7 CHAIRPERSON: On the other hand, Mr Bizos
8 must hear what’s said. Is it possible to amplify what is
9 said?
10 GENERAL PHIYEGA: My question was, I
11 would like to be able to answer after understanding what
12 you mean by “final phase.”
13 MR BIZOS SC: That’s what we want to know
14 from you and the generals and the brigadiers and the
15 colonels, what did they mean when they say, when they used
16 that phase in the plan. We haven’t had an answer yet.
17 Have you asked the question? The tactical phase, what does
18 that mean? Tactical phase. Your subordinates used it;
19 they have not defined it anywhere clearly for us to know
20 what they meant. Perhaps you can help us.
21 GENERAL PHIYEGA: I shall leave that
22 definition to the operational commanders because they are
23 coming to this Commission.
24 MR BIZOS SC: In their summary, and
25 particularly in paragraph 78 of exhibit L, “Address

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1 25 colleague Adv Hemraj pointed out that the plan is dealt
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1 Standing Orders, which will support me if we go to the details. I ask that the witness be asked to answer the question.
2 CHAIRPERSON: - the Standing Order first before she replies to anything. Are you referring to the Standing Order, Mr Bizos, or the two glosses on it, the one
3 MR BIZOS SC: Yes.
4 CHAIRPERSON: Or are you referring to the result of the debate last week, was the Standing Order
5 MR BIZOS SC: Yes.
6 CHAIRPERSON: What the, I think was the result of the debate last week, was the Standing Order is
7 MR BIZOS SC: I am referring to exhibit S, Mr Chairman, which is signed by the witness.
8 CHAIRPERSON: Yes. That's the gloss which she issued which relates only to the use of rubber balls.
9 MR BIZOS SC: Yes.
10 CHAIRPERSON: Or are you referring to the standing order itself?
11 MR BIZOS SC: Yes.
12 CHAIRPERSON: Thereafter two notes were issued, as it were, which are glosses on the Standing Order.
13 MR BIZOS SC: Yes.
14 CHAIRPERSON: And the second one issued, as it were, which are glosses on the Standing Orders, which will support me if we go to the paragraph to which Mr Semenya referred, but those principles then apply not because of anything she said, because she spoke about rubber bullets, but because of the Standing Order General 262, and what particular paragraph of that Standing Order are you referring to?
15 CHAIRPERSON: If negotiations fail and life or
16 MR BIZOS SC: Yes.
17 CHAIRPERSON: You're not asking her questions about the use of rubber balls at the moment; you're asking her about sharp ammunition. That's governed by Standing Order General 262, and what particular paragraph of that Standing Order are you referring to?
18 CHAIRPERSON: It applies to the use of sharp ammunition.
19 MR BIZOS SC: Yes.
20 CHAIRPERSON: And everything else.

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21 MR BIZOS SC: Yes.
22 CHAIRPERSON: Thereafter two notes were issued, as it were, which are glosses on the Standing Order.
23 MR BIZOS SC: Yes.
24 CHAIRPERSON: And the second one effectively, the one issued by the witness, withdrew the first and that deals with the use of rubber balls and rubber bullets, and so forth.
25 MR BIZOS SC: Yes.

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1 CHAIRPERSON: Prima facie I'm inclined to think Mr Semenya is correct, but I must give you an opportunity to persuade me that that view is incorrect, if you so submit -
2 [10:42] MR BIZOS SC: No, Mr Chairman, to confine it to rubber bullets, we submit that reading paragraph 11 of the Standing Orders in all, before we get to 11.7, the cautions set out in paragraph 11 put defensive measures in place as a priority. We are going to finish up that what applies to rubber bullets is a fortiori for sharp ammunition.
3 CHAIRPERSON: We had that argument last week -
4 MR BIZOS SC: Yes.
5 CHAIRPERSON: And the a fortiori objection, and what I then put to you was that her notes of, her gloss as I called it, of I think it was July 2012, didn't deal with that; it dealt with rubber bullets, that didn't have anything to say about the Standing Order insofar as it related to sharp ammunition. The principles which you contend on a sort of an a fortiori basis, if applicable, would apply I would think as part of the basic principles of the law of private defence.
6 MR BIZOS SC: Yes.
7 CHAIRPERSON: Which are referred to in the paragraph to which Mr Semenya referred, but those principles then apply not because of anything she said, because she spoke about rubber bullets, but because of the rules of private defence which are as it were incorporated into paragraph 11.7 of the Standing Order, and I think to cross-examine her on her instruction which dealt with something else is in the circumstances unhelpful. So perhaps you can - I'm not stopping you from following this line; I'm just wanting you to do it correctly, so please reformulate your question and let's proceed.
8 MR BIZOS SC: Very well. Were you aware of the - now ignore your summary that you signed. I'm quoting from Standing Order 262, paragraph 11 headed “Execution.” I'm going to read them to you one by one and ask you whether you knew about them or not, whether your generals and your brigadiers and your colonels knew about them, and on your information when you made the praising statements of the police you knew that all these had been complied with. 11.2. “If negotiations fail and life or property is in danger, the following procedure must peremptory be followed. Put defensive measures in place as a priority.” Do you know whether the police at about approximately 4 o'clock on the afternoon of the 26th, if there was any danger, whether they put themselves -
9 CHAIRPERSON: 16th, I think Mr Bizos.
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[Dialogue begins with a question about the plan's execution.]

MR BIZOS SC: Pardon.

CHAIRPERSON: 16.

MR BIZOS SC: 16, sorry.

CHAIRPERSON: Afternoon of the 16th.

MR BIZOS SC: Yes, August the 16th, did the police take any defensive measure before deciding that they were in danger and they shot sharp ammunition? Do you know whether they did that?

GENERAL PHIYEGA: Yes, according to the report I received.

MR BIZOS SC: “Warn participants according to the act of the action that will be taken against them should defensive measures fail.” Did they do that? Did anybody warn the people?

GENERAL PHIYEGA: No, because there was a disruption.

MR BIZOS SC: Well, we'll say something about your answers about the disruption and to what extent it is an excuse to ignore the orders. “Give a second warning before the commencement of the offensive measures, giving innocent bystanders the opportunity to leave the area.” Did they do that?

GENERAL PHIYEGA: No, because there was a disruption.

MR BIZOS SC: “Plan all offensive actions well and execute them under strict command after approval.” Was that done?

GENERAL PHIYEGA: The plan was done, the plan was interrupted.

MR BIZOS SC: No, was it done? Was anything like that done on the afternoon of the 16th of August?

GENERAL PHIYEGA: Yes, the plan was done, the plan was disrupted.

CHAIRPERSON: National Commissioner, it's not as simple as that. Mr Bizos has read you a paragraph of the Standing Order which deals with specific things that had to be done and he's asking you whether they were done. Now it may be that because you weren't there and you had to rely on the briefings you received, you don't know whether those things precisely were done, in which case it would save a lot of time if you just say so because otherwise he's going to keep on hammering on the point and it's not going to get us anywhere.

GENERAL PHIYEGA: Judge, the last sentence says, “Plan all offensive actions well and,” second part, “execute them under strict command,” and my answer is in two parts. I have said when I started, according to the information I received, yes the plan was done. On the second part I'm saying no because I was informed it was disrupted.

MR BIZOS SC: Paragraph 3, “If the use of force is unavoidable it must meet the following requirements. (a), The purpose of offensive actions are to de-escalate conflict with the minimum force to accomplish the goal, and therefore the success of the actions will be measured by results of the operation in terms of cost, damage to property, injuries to people and loss of life.”

The question is, before praising them on the 17th and the 20th, did you ask them whether they complied with that order?

GENERAL PHIYEGA: Yes, I did.

MR BIZOS SC: And what did they say?

GENERAL PHIYEGA: That their plan was disrupted.

CHAIRPERSON: Mr Bizos, you know I think we're going around in circles. I can understand you may want to find argument later on this aspect of the matter, but the witness's evidence seems to be quite clear. She says, when you asked her about the Standing Order she says there was a plan, it was disrupted and therefore what happened, happened because of the disruption.

MR BIZOS SC: Yes.

CHAIRPERSON: And I think she's already said and other people said it, it was part of their statement that they contend that what they did amounted to a reliance on sub-paragraph 7; they were acting in self-defence and private defence. That's what she says, that's the information she received. Now I hope you'll forgive me if I say I think we're going around in circles just a bit and repeating what's been covered already. We know that's their case. The question is whether that's correct. I'm not sure - and I say this with great respect to the National Commissioner - that she's able to help us whether the argument in relation to self-defence and private defence can succeed because she wasn't there. All she knows is what she was told, so I think some of the questions you're asking are not calculated to elicit answers that will help us to answer the questions that the President has set for us in the Terms of Reference. Please bear that in mind when you proceed. You'll have the fullest opportunity -

MR BIZOS SC: I would like to read the orders to her because we want, when we do argue that this was - on expert evidence and on the facts as they are known to us - that there was not a proper consideration as to what should happen or may happen.

CHAIRPERSON: Is she the right person to ask these questions of? She says the Provincial
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1. Commissioner made the decision, had full authority to act.
2. She says there were a lot of other high-ranking people who are in her eyes experts in the field; she wasn’t informed of the details. She is the manager and leader of the service but she has to rely on her subordinates who, as she said, are high-ranking officials with experience. Now if you have a quarrel with what happened, it seems to me it’s more appropriate to raise those points that you want to raise with those people who could answer it. She will simply say, “I don’t know, I was told things. I accept they’re correct. Whether they are correct or not, ask them.” So we will go round and round and round, and also you have the disadvantage of having shown your hand, which is not always a sensible thing for a cross-examiner to do.

But please proceed in the light of what I said.

MR BIZOS SC: No, Mr Chairman, let me try and justify why I am putting this. Our submission will be that there is joint responsibility of the Minister, of the witness, of her generals that approved this plan, or allowed it to happen, and I do not want the Commission to have the difficulty when it comes to write its report, that you can’t ask us that the National Commissioner was liable because it was not put to her. This is the concern that I have.

CHAIRPERSON: Put it to the witness, but please proceed in the light of what I said.

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1. the question, let’s get the witness’s answer. If it’s in accordance with what she said earlier, so be it. If it isn’t, well we’ll see. Don’t worry about whether your answer is the usual answer, just give us the answer and if it’s in line with what you said earlier, so be it. If it isn’t, so be it also.

7. GENERAL PHIYEGA: Yes, it did confuse me and it made me not to concentrate on the question. Can I ask for the question again?

9. CHAIRPERSON: This time without comment,

11. Mr Bizos.

12. MR BIZOS SC: Yes, thank you. The violence that took place between the police and demonstrators, the demonstrators or part of them, and the destroying of property at or near trade unions, all of this happened away from the koppie, didn’t it? So the deaths and damage to property prior to the 16th did not take place at the koppie.

19. GENERAL PHIYEGA: Yes, it did confuse me and it made me not to concentrate on the question. Can I ask for the question again?

21. 15th were violence-free –

22. CHAIRPERSON: No, I don’t think the 14th was violence-free. Mr Twala died on the 14th.

23. MR BIZOS SC: 14th –

25. CHAIRPERSON: Tuesday the 14th was the day Mr Twala died.

2. MR BIZOS SC: That was one, yes.

3. CHAIRPERSON: So that isn’t – he died through violence. He died as a result of violence, Mr Twala. So the 15th is violence-free –

6. MR BIZOS SC: Yes, well I’ll concentrate on the 15th –

7. CHAIRPERSON: - but the 14th isn’t correct.

10. MR BIZOS SC: Yes. On the 15th there was no violence.

12. MR MPOFU: Sorry to interrupt,

13. Chairperson. This point did arise before and I think the ruling that the Chair made was on the basis that we can only accept that the body of Mr Twala was found on the 14th. When he died, we don’t know.

17. CHAIRPERSON: The body was found on the Tuesday and it hadn’t been there earlier. I mean it seems pretty clear from what we’ve been told that it was noticed at that point in the middle of the afternoon from the helicopter. If it had been there earlier it would have been noticed earlier. So I think we can assume the body was found there, and I don’t remember giving the ruling you say, but I won’t quarrel with you, but it may well be that he could have been killed the day before, but I don’t think
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MR BIZOS SC: I will confine myself -

CHAIRPERSON: So if Mr Bizos can rephrase his question and we won't have to go into those waters at all.

MR BIZOS SC: In order to avoid it I will confine myself - there was no violence on the 15th.

GENERAL PHIYEGA: Yes, according to the report I received.

MR BIZOS SC: There was no violence in the morning of the 16th.

GENERAL PHIYEGA: Yes.

MR BIZOS SC: Correct?

GENERAL PHIYEGA: Yes.

[11:02] MR BIZOS SC: Now the gathering on the, at the place where 34 people were killed and 84 people were seriously wounded, is an isolated place on which the gathering took place.

CHAIRPERSON: Mr Bizos, I don't know what you mean by "isolated." The evidence [inaudible] which is important. So perhaps you should define more tightly what you mean by "isolated."

MR BIZOS SC: Well, let me say what it is not, as far as gatherings are concerned. It is not a gathering in an urban area where the gathering blocks traffic and the road has got to be cleared. There is no immovable property around with shops, where people cannot move freely. It was not a place where, as it happens at some gatherings, in the urban area shops are looted.

People were gathered on a hillside. They were singing.

Some of them were armed. On the later version of the police story there were many who were not armed. Would you agree with all that?

GENERAL PHIYEGA: I would agree with the fact that there were many people on the koppie; they were armed -

MR BIZOS SC: Some of them were armed, or do you say they were all armed, like one or two of your juniors?

GENERAL PHIYEGA: They had been meeting in that koppie over a number of days and they were gathering illegally.

MR BIZOS SC: They were gathering illegally?

GENERAL PHIYEGA: Yes.

MR BIZOS SC: We'll come to the illegality of it. What was so urgent on the 16th to decide on D-day, that it would be D-day? Why couldn't they wait for another day or two or three, to give negotiations a chance?
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1 containing the protesters continued until the plan to contain them was disrupted.
2 MR BIZOS SC: Did you ask them, why did you stop the negotiations on the 16th? Whom did you ask, and what was his or her answer to you as the responsible National Commissioner?
3 GENERAL PHIYEGA: I am sure the other people that will testify here will talk about even discussions they had on the morning of the 16th - cell phone contacts, and communication even on the morning of the 16th.
4 MR BIZOS SC: At one stage of your evidence, Commissioner, you told us that you were involved on the matters relating to these events. Did you use that expression, "you were involved?"
5 GENERAL PHIYEGA: In order to understand what – maybe the question is just too broad. When you say I was involved, and I say -
6 MR BIZOS SC: You said that you were involved, if I remember correctly.
7 GENERAL PHIYEGA: You are very correct.
8 MR BIZOS SC: You chose to defend your position by answering numerous questions, "The crowd disrupted the plan.” Am I correct?
9 GENERAL PHIYEGA: You are very correct.

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1 did you say that you were involved to some extent at some, in the course of your evidence, and then if the answer to that is yes, then the next question is, to what extent were you involved. But I see it’s quarter past 11. Would you like to think about that and we can resume the discussion after the tea adjournment? Unless you want to answer it now.
2 GENERAL PHIYEGA: No, I’ll answer that when, after having a hot cup of tea.
3 CHAIRPERSON: Alright. We will now take the tea adjournment, resume I hope at half past 11.
4 [COMMISSION ADJOURNS COMMISSION RESUMES]
5 [11:37] CHAIRPERSON: The Commission resumes. I see that someone was very busy during the tea adjournment because we’ve now all got a piece of paper on our desk that heads “Investigation into possible tampering of the crime scene - shooting incident Lonmin Mine, Marikana, 16 August 2012.” This is the statement that I take it, it was promised we would get. Do you want it to be given an exhibit number, Mr Bizos? Because you were going to deal with it in your cross-examination.
6 MR BIZOS SC: Yes, I’d like to read it before I cross-examine.
7 CHAIRPERSON: No, no, no, I understand that, but should we give it an exhibit number while we’re dealing with it?
8 MR BIZOS SC: But if it is going to be admitted now, it should be given a number.
9 CHAIRPERSON: Yes, Ms Pillay with her customary efficiency will tell us what the next exhibit number is.
10 MS PILLAY: It’s FFF23.
11 CHAIRPERSON: FFF23. “Possible tampering at,” and it’s dated the 18th of March. Well, we’ll deal with it at the appropriate time, but it’s now properly before us. You’re still under oath, National Commissioner.
12 MANGWASHI VICTORIA PHIYEGA: s.u.o.
13 CHAIRPERSON: Remember the question we were busy with was you had said you were involved – yes, I think you said you were involved to some extent in what happened, and the question was, (a), did you say that, and if so, what was the extent of your involvement, remember?
14 And you said you’d like to think about the answer to the question over a cup of tea. Are you now able to answer it?
15 GENERAL PHIYEGA: Yes, I was to some extent involved, and as I’ve already indicated to this Commission, in my role as a strategic leader of the police.
16 CROSS-EXAMINATION BY MR BIZOS SC (CONTD.):
17 I want to put to you that your reliance on the statement that the crowd disrupted the plan - remember that? You said on a number of occasions the crowd disrupted the plan.
18 What did the crowd do before the use of any force to disrupt the plan?
19 GENERAL PHIYEGA: I think it is important to say that type of disruption would in intricate and detailed terms be explained by the commanders that are going to come here, how they, you know, they’ll talk about how they pulled the fence. They’ll talk about where it was disrupted for the first time. They will talk about where it was disrupted for the second time, and I’m sure lots of lots of details that are intricate and intense will come out of that.
20 MR BIZOS SC: You chose to defend your position by answering numerous questions, “The crowd disrupted the plan.” Am I correct?
21 GENERAL PHIYEGA: You are very correct.
22 MR BIZOS SC: Huh?
23 GENERAL PHIYEGA: You are very correct.
24 MR BIZOS SC: Ja, I’m correct. I am going to put to you on the authority of experts that are going to give evidence here, that it was not the crowd that disrupted any plan there may have been, it was the police that disrupted the crowd and its behaviour. Let me give you the details. The expert will say that an excessive show of force is disruptive to peaceful crowds. Are you in
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MR BIZOS SC: Yes. The other that the

MR BIZOS SC: Yes, Mr Hendrickx sitting

behind me, among others, because there are other experts

being called by other people.

CHAIRPERSON: You’ve answered my

question, thank you.

MR BIZOS SC: Now if that is said, what

experience have you got to say that Mr Hendrickx will be

wrong if he says that?

GENERAL PHIYEGA: You’ve asked me for my

opinion. I’ve given you my opinion to say where I see many

police, I think visible policing in my opinion is a
deterrent.

MR BIZOS SC: Yes.

GENERAL PHIYEGA: I am not debating the

expert. I haven’t seen his report. I haven’t heard him.

MR BIZOS SC: Yes. The other that the

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not that where you have three to three and a half thousand

24 not to support the Commission. The question is, do you agree or

25 not that where you have three to three and a half thousand

21 where there is probably something else, the outcome

20 would be different.

MR BIZOS SC: You yourself said that this

was an exceptional event, and I don’t know whether what may

23 have happened in thousands of other gatherings is of any

help to the Commission. The question is, do you agree or

24 not that where you have three to three and a half thousand

25 not that where you have three to three and a half thousand

1 a position to agree or disagree or say you don’t know?

2 GENERAL PHIYEGA: I would say to you that

3 I would disagree. With my knowledge I would say visibly

4 policing should be a deterrent.

5 CHAIRPERSON: Mr Bizos, you said your

6 expert will say that.

7 MR BIZOS SC: Yes.

8 CHAIRPERSON: Can you tell us who the

9 expert is who will say that?

10 MR BIZOS SC: Yes, Mr Hendrickx sitting

11 behind me, among others, because there are other experts

12 being called by other people.

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14 question, thank you.

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16 experience have you got to say that Mr Hendrickx will be

17 wrong if he says that?

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19 opinion. I’ve given you my opinion to say where I see many

20 police, I think visible policing in my opinion is a
deterrent.

21 MR BIZOS SC: Yes.

22 GENERAL PHIYEGA: I am not debating the

23 expert. I haven’t seen his report. I haven’t heard him.

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17 wrong if he says that?

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19 opinion. I’ve given you my opinion to say where I see many

20 police, I think visible policing in my opinion is a
deterrent.

21 MR BIZOS SC: Yes.

22 GENERAL PHIYEGA: I am not debating the

23 expert. I haven’t seen his report. I haven’t heard him.

24 MR BIZOS SC: Yes. The other that the

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1 people, some of who may be armed, many of whom are not

2 armed, even according to Mr Semenya, being surrounded by

3 razor wire, would that not be a provocative act to peace-

4 loving people that wanted a higher wage?

5 CHAIRPERSON: Mr Bizos, Mr Semenya wants

6 to say something before the witness answers the question.

7 MR SEMENYA SC: Chair, there’s no

8 evidence of a razor wire surrounding the crowd of

9 protesters.

10 CHAIRPERSON: Yes, the evidence isn’t

11 that they were surrounds. They could have gone away from

12 the area if they’d gone in a southerly direction. As we

13 can see from the photographs which are in exhibit L there

14 was sort of a line of wire between the strikers and the

15 koppie on the one hand, and the police and the informal

16 settlement on the other.

17 MR BIZOS SC: Yes.

18 CHAIRPERSON: But they weren't

19 surrounded, so I think you’ll have to rephrase it.

20 MR BIZOS SC: Well, I’ll withdraw the

21 word “surrounding” – laying out razor wire without an

22 explanation may be a provocative act. Do you agree with

23 that?

24 GENERAL PHIYEGA: No, I do not agree with

25 that.

1 expert will say is provocative acts like the use of force

2 or the threat of a force, or what happened here, putting

3 out razor wire between the crowd and the police and their

4 vehicles, would - and apparently was – be considered a

5 highly provocative act by the police, why are they doing

6 this - I beg your pardon, by the crowd, why are they doing

7 this to us, what are they going to do to us. Are you

8 prepared to contradict Mr Hendrickx when he says that to

9 the Commission? May I just finish? Particularly without

10 any warning or explanation.

11 GENERAL PHIYEGA: I shall again give you

12 my personal interpretation. When there is a peaceful

13 gathering and people are meeting to discuss issues

14 peacefully, based on some of the statistics I’ve already

15 shared that in three years we have managed 33 000 similar

16 protests, 30 000 of which were peaceful, I would therefore

17 conclude that there would be trust to say the police are

18 here to support us to continue with our peaceful protest.

19 But where there is probably something else, the outcome

20 would be different.

21 MR BIZOS SC: You yourself said that this

22 was an exceptional event, and I don’t know whether what may

23 have happened in thousands of other gatherings is of any

24 help to the Commission. The question is, do you agree or

25 not that where you have three to three and a half thousand
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1. provocative act.
2. MR BIZOS SC: Not? Even though no
3. warning was given or nothing was explained?
4. GENERAL PHIYEGA: On that matter I go
5. back to what I've said to say had there been no disruption,
6. there would have been loudhailers talking to the
7. protesters, explaining to them precisely what is going to
8. take place.
9. MR BIZOS SC: Stun grenades were used
10. without any warning, without any explanation. Would that
11. be a provocative act?
12. GENERAL PHIYEGA: No.
13. MR BIZOS SC: Not. Well, I am going to
14. put to you that your bland denials as to whether these were
15. provocative acts or not is going to be contradicted by
16. certainly Mr Hendrickx and other experts on the management
17. of crowds. Mr Chairman, I am informed that the clip that
18. we wanted to show is now available, if we may do that.
19. CHAIRPERSON: You started on this line of
20. cross-examination and then deferred it because the clip
21. couldn't be shown.
22. MR BIZOS SC: Yes, yes.
23. CHAIRPERSON: Now it can be shown.
24. MR BIZOS SC: Now it's -
25. CHAIRPERSON: You can go back to that

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1. part of your cross-examination and proceed from there.
2. MR BIZOS SC: Yes, it's the - may I just
3. clarify, that apparently it's the same as AAA13, but the
4. portion that we want to play was - or I am informed was not
5. played to the Commission.
6. CHAIRPERSON: Well, if we haven't had it
7. before, we have to give it an exhibit number.
8. MR BIZOS SC: Yes.
9. CHAIRPERSON: And the next exhibit number
10. I would - Ms Pillay is shaking her head. The next exhibit
11. number would be FFF24, if this is in fact new material that
12. we've not actually seen before. If we have seen it before,
13. of course we just mention the previous description of the
14. exhibit. Can you help us, Ms Pillay?
15. MS PILLAY: I understood that the clip
16. that Mr Bizos wanted to play was part of AAA13, Chair, but
17. if not, then it would be FFF24.
18. CHAIRPERSON: Let's see it first and then
19. we can have consensus as to whether it needs a separate
20. exhibit number or whether AAA13 will cover it.
21. MR BIZOS SC: There's no sound, and I'm
22. sorry if I turn my back - I can see better what's on the
23. screen.
24. [VIDEO RECORDING PLAYED]
25. CHAIRPERSON: - ask you two things. Can

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1. you do something to stop that irritating noise that we
2. hear, and secondly, that we go back to the beginning so we
3. hear everything that the lieutenant-general, Provincial
4. Commissioner is saying.
5. [VIDEO RECORDING PLAYED]
6. CHAIRPERSON: Ms Pillay can tell us - is
7. that what we saw before?
8. MS PILLAY: Chair, my understanding is
9. that that portion is covered by AAA13.
10. CHAIRPERSON: Alright. Well, let's
11. regard it as coupled by AAA13. It's a very small, short
12. passage. She says "Hope we can deal with the matter, sort
13. the matter out amicably. If we can't, then I'm not going
14. to give you details, but this matter has got to end today."
15. I think that's basically what she said.
16. [11:57] MR BIZOS SC: Yes, that was it. Now to
17. be quite correct -
18. CHAIRPERSON: Mr Bizos, I don't think
19. your microphone is on.
20. MR BIZOS SC: Sorry. To be quite
21. correct, what secret was there that the commissioner was
22. not prepared to disclose? What did she not want to tell
23. the audience?
24. CHAIRPERSON: Can the witness tell us?
25. Isn't it a question you must ask her when she gives
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1 - 
2 MR BIZOS SC: I'm sorry.
3 CHAIRPERSON: - that it was none of anyone's business.
4 MR BIZOS SC: Yes.
5 GENERAL PHIYEGA: Advocate, let me just say, perhaps we may be not on the same side, but I do conduct myself with a lot of professionalism.
6 MR BIZOS SC: What do you mean by that?
7 GENERAL PHIYEGA: I would never say to you it's none of my business.
8 CHAIRPERSON: I think she means your - what she's saying to you, Mr Bizos, is she behaves in a professional manner; she would never say to you when you ask her a question, it's none of your business. That's not the way she does thing -
9 MR BIZOS SC: I see.
10 CHAIRPERSON: - and she didn't say that and she said she never would have said it. That's what she's telling you, so let's move on to something else, I think.
11 GENERAL PHIYEGA: I was saying the manner in which we run our business, I truly believe that General Mbombo in the statements that she made, she was mindful of the protocols, the prescripts, the governance of how we run things, and therefore when she answers she will be answering within that framework. She can never run this organisation like her personal business.
12 MR BIZOS SC: Do you intend to say that there are some things that may have been said between you and the commissioner in relation to this matter, you're not prepared to talk about? Are you saying that, or am I misinterpreting you?
13 GENERAL PHIYEGA: No, I'm not saying that.
14 MR BIZOS SC: Will you agree that you were given information at 1:30 in the afternoon that the tactical phase would be put into operation on that day?
15 GENERAL PHIYEGA: I'm not aware of that information and by whom.
16 MR BIZOS SC: Do you deny that that information was passed to you at 1:30, or later perhaps? The time is not so important. Are you denying that you were informed that the tactical phase was going to be enforced that afternoon?
17 GENERAL PHIYEGA: I have no recollection of that because my statement doesn't even refer to that.
18 CHAIRPERSON: Mr Bizos is referring you to paragraph 23 of your statement where you say that on the afternoon of August the 16th you received a call from Lieutenant-General Mbombo who informed you of the decision to implement stage 3 of the plan, which information I think you've relayed to the Minister, but in other words you were informed at some stage in the afternoon before the plan was implemented, or stage 3 of the plan was implemented, informing you that that decision has been taken, and I think that's what Mr Bizos is asking you about.
19 MR BIZOS SC: Yes.
20 GENERAL PHIYEGA: Okay.
21 CHAIRPERSON: Let's take it step by step.
22 The telephone call to which you refer in paragraph 23 of your statement
23 GENERAL PHIYEGA: Okay, I see that. - what time did you receive that call?
24 GENERAL PHIYEGA: Judge, I wouldn't recall, but it was in the afternoon and that's when I was informed that the 9 o'clock promise did not happen of laying down the arms.
25 CHAIRPERSON: Because you had previously said that you were told I think the previous night that there was this promise that Mr Mathunjwa had made -
26 GENERAL PHIYEGA: Yes.
27 CHAIRPERSON: - and that if the promise wasn't kept, undertaking wasn't complied with, then the police – you used the words “the police would have to disperse the crowd.”
28 GENERAL PHIYEGA: Yes.
29 CHAIRPERSON: That's the gist, is it?
30 GENERAL PHIYEGA: Yes, that is like that.
31 CHAIRPERSON: So that's where you are in your cross-examination, Mr Bizos. Is that right?
32 MR BIZOS SC: Yes, Mr Chairman. I want to refer you to paragraph 23 of your statement. Does that confirm what you have told the Chairman of the Commission that, “On the afternoon of August the 16th, 2012, I received a call from Lieutenant-General Mbombo, who informed me of the decision to implement stage 3 of the plan, which information I relayed to the Minister.”
33 MR SEMENYA SC: We have been past this...
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point before, Chair. We have been past this point before that the statement has been corrected -

CHAIRPERSON: Yes, yes, I know, but Mr

Bizos is going back to it as a sort of launching pad to which to move on to his next point. So -

MR SEMENYA SC: No, no, no, he’s reading the wrong statement, Chair.

CHAIRPERSON: Well I think I read the wrong statement too. Give him the right statement so he can read that and then we can proceed.

MR BIZOS SC: In the corrected statement you do not mention the Minister. What I want to know from you is did you communicate with the Minister what you had been told by the commissioner?

GENERAL PHIYEGA: No, I did not.

MR BIZOS SC: Why not?

GENERAL PHIYEGA: The responsibility of presenting, of implementing a dispersal and operations plan, as I’ve said is within the remedy and responsibility of the Provincial Commissioner. It is operation; it was not necessary for us to say to the Minister now we are encircling, we are disarming, and we are dispersing the crowd. It is not the type of report I give to the Minister.

MR BIZOS SC: In the earlier form of your statement you said that you did inform the Minister. Was that a mistake?

GENERAL PHIYEGA: The earlier form of my statement is the one you are reading.

CHAIRPERSON: Alright, if the later form of your statement contains that section that he read, that you relayed this information to the Minister, and I think what Mr Bizos wants to know is where did that information come from, how did those words find their way into the later version of your statement, which you’ve now repudiated, as it were? How did that mistake come about?

GENERAL PHIYEGA: Judge, what I can say is that I submitted a statement on the 3rd and I was told there was a page I didn’t sign. When it came back we started seeing those things, but my statement that I circulated to this Commission, that’s what I said to the Commissioner -

CHAIRPERSON: In other words what you were saying, if I may be so bold as to summarise what you’re saying, what you’re saying is you don’t know yourself how that mistake occurred. You weren’t aware of it until later, I take it, and then you corrected it and drew the correct position to our attention. Is that what you’re saying?

GENERAL PHIYEGA: Precisely, because I was signing because I was told there was a page I didn’t sign, there were words that shifted, but the statement that I gave to the Commission, as you can see, is signed the 7th.

That’s my statement to this Commission.

MR BIZOS SC: You know that we have the minutes of the meeting of that day and let me read the second-last paragraph of the meeting. “The Provincial Commissioner indicated that she had already communicated with the National Commissioner, informing her of the current situation and that a deadlock was reached with negotiations and also that phase 3 of the operational plan will be executed. She also indicated that the National Commissioner indicated that she will inform the Minister of Police on the current situation and actions that will be taken.” Is that minute a correct minute?

CHAIRPERSON: Mr Bizos, you didn’t give us the – is that an exhibit? I beg your pardon, I understand you’re quoting from the police hard drive. Are those minutes already before us as an exhibit?

MR BIZOS SC: I’ll have to check that.

MS PILLAY: Chair, it’s exhibit EE.

CHAIRPERSON: Thank you. Now just for the benefit of my notes, it’s a long time ago that we saw that exhibit, it’s EE, it’s the minutes of what meeting?

MS PILLAY: The JOCOM minute of the 16th of August at 1:30.

CHAIRPERSON: Yes, of course.

MR BIZOS SC: Yes, of course.

CHAIRPERSON: What’s the paragraph number that you -

MR BIZOS SC: It’s the second-last - I don’t think that the paragraphs are -

CHAIRPERSON: It’s the penultimate paragraph on the first page?

MR BIZOS SC: Penultimate paragraph.

CHAIRPERSON: I haven’t got it in front of me either, but -
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CHAIRPERSON: What is that, Mr Bizos? I’m not challenging your statement, but I don’t remember such a statute, but if there is statutory provision, where there is one, I think in fairness to the witness you could at least –

MR BIZOS SC: It’s 207(2) of the Constitution.

CHAIRPERSON: What does it say?

MR BIZOS SC: We have notes. Inter alia that you control and manage the police service in accordance with the directions of the cabinet member responsible for policing.

CHAIRPERSON: I think that’s – you see, I seem to remember –

MR BIZOS SC: The notes I have –

CHAIRPERSON: I seem to remember words to that effect. I don’t think they were accurately summarised in the question as you originally put it to the witness, so perhaps you should put the question again, this time quoting to her the exact words of the Constitution on which you rely and then we can get her answer.

MR BIZOS SC: Yes, well see, I did have a copy. I don’t know what happened to it in the meantime, but –

CHAIRPERSON: I’m sure Mr Semenya will have a copy of the Constitution readily available.

MR BIZOS SC: Oh, it’s better print, yes.

207(2), well let’s deal with you first. 207(2), “The National Commissioner must exercise control over and manage the police service in accordance with the National Policing Policy and the directions of the cabinet member responsible for policing.” Subsection (3) of section 207, “The National Commissioner with the concurrence of the provincial executive must appoint a woman or a man as a provincial commissioner for” – I beg your pardon, “under the direction of the cabinet member responsible for policing.” That’s the Minister of Police. A momentous decision such as this was, and your involvement and the Minister’s involvement, you had come down to see what was happening. The Minister, according to certain evidence, was involved. How could you not possibly have communicated to him what was communicated to you by the local commissioner?

MR SEMENYA SC: Chairperson, there is no evidence we’re aware of, of the Minister being involved, whatever that connotes.

CHAIRPERSON: I suspect that’s reference to Mr Zokwana’s evidence. You remember Mr Zokwana said that he phoned the Minister and urged the Minister to deploy more members of the police service in the area, and
the Minister undertook, as far as I remember, to attend to
the matter. I think that is what Mr Bizos refers to. If
I'm wrong, he will correct me.

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

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

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

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

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

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

MR BIZOS SC: I want to read to you
subsection (4) of section 207. "The Provincial
Commissioners are responsible for policing in their
respective provinces, as prescribed by the national
legislation, and subject to the power of the National
Commissioner to exercise control over and manage the police
service in terms of subsection (2)." Leaving the Minister
aside for the moment, you appear to be where the buck stops
in relation to anything that may happen anywhere in the
country.

GENERAL PHIYEGA: It is correct.

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

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

MR BIZOS SC: The impression that your
evidence, given in answer to our learned friend before I
started, seemed to suggest that you were in close contact
with the Minister and you took political and practical
advice from him, if I remember your words correctly.

Sorry, I have been reminded that you actually used
"leadership and support." Did you physically look to the
Minister for leadership and support?

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

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

GENERAL PHIYEGA: I would not know that.
MR BIZOS SC: I'm sorry?
GENERAL PHIYEGA: I would not know that.

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

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

GENERAL PHIYEGA: But that is not the
question you asked me. You said the gathering was in
itself not just a gathering; it had - I cannot say that
political overtures. You're talking about the gathering.
That's the question you asked me, and I said I cannot be
able to tell whether the gathering was political or
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21 capacity, which may be important because he has the final
22 say, or may have the final say, but the question is did he
23 give you any directions or instructions as to what the
24 police ought or ought not to do in relation to any specific
25 matter?

1 Apolitical. I was looking at a gathering of armed people,
2 of workers who were armed. The political nature of that
3 gathering is not for me to answer and I’m not able to
4 answer that. That's the question I understood you're
5 asking me.
6 MR BIZOS SC: Were you not aware that
7 this unprotected strike had grave political and economic
8 aspects that required solution as a matter of some urgency?
9 GENERAL PHIYEGA: In terms of the
10 question you are asking, economic, absolutely, because we
11 were invited a mine whose economic activity had been
12 challenged and they were wanting us to assist in looking at
13 the protest, the illegal protest that was taking place.
14 There were labour unions involved. I’m not aware of this,
15 the political issues I’m not able to answer to.
16 MR BIZOS SC: Now Commissioner, we will
17 eventually submit that you are avoiding truthful answers to
18 the questions relating to the Minister. You told our
19 learned friend that you look to the Minister for political
20 and other guidance, and you also said that you often
21 reported to him. Can you give us by way of example what
22 you reported to him but considered what you were informed
23 by the Provincial Commissioner you did not talk to him
24 about? You told us that you often spoke to the Minister.
25 Am I correct in that?

1 Yes, you are correct.
2 MR BIZOS SC: Can you give us examples of
3 the sort of thing that you talk to him about regularly that
4 may have been of greater importance of what was going to
5 happen on the 16th of August?
6 [12:37] MR SEMENYA SC: Chair, I think once a
7 question gets compounded it doesn’t make sense, with
8 respect.
9 CHAIRPERSON: It’s a very broad and a
10 wide question, Mr Bizos, I think. I don’t think, if I may
11 say so, you intended it quite as broadly as it actually has
12 come out, so perhaps you must think about reformulating it
13 –
14 MR BIZOS SC: Yes.
15 CHAIRPERSON: Because I think there is
16 force in what Mr Semenya has said.
17 MR BIZOS SC: In order for the Commission
18 to assess your evidence, can you give us a few examples of
19 what it was that you spoke to the Minister about so
20 regularly?
21 GENERAL PHIYEGA: I’ll start at the back.
22 Your point 24 on my statement, that last sentence will show
23 you the type of – that last, that paragraph would show you
24 the type of things I would say to the Minister.
25 MR BIZOS SC: You refer to paragraph 24?
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1. GENERAL PHIYEGA: The operational decisions are not the remedy of the Minister.
2. MR BIZOS SC: Are you able to state categorically that the decision to confront the miners on the 16th of August had no connection whatsoever with any communication or directions you received from the Minister or other higher authority?
3. GENERAL PHIYEGA: I think I hear many questions out of that; maybe if you could just dismember them.
4. CHAIRPERSON: Mr Bizos, I think the witness wants to know from you what you mean by any other higher authority, so perhaps you could ask the question firstly confining it to the Minister, and then once you’ve got that answer, then you can give her, tell her what you mean by other higher authority and then she can answer it, but I think it’s just a bit vague, the way you’re phrasing it.
5. MR BIZOS SC: We’ll deal with the question of higher authority. Let’s deal with the Minister first.
6. GENERAL PHIYEGA: Our operational instructions, as I’ve already said, are not coming from the Minister.
7. MR BIZOS SC: There is information that was discussed in the cabinet.

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

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1. GENERAL PHIYEGA: I did do that because saying here are the facts; should there be an investigation we will cooperate, comply, participate in any investigation and we would consider any other, but at this point in time we’re saying here are the facts; should there be an investigation.

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

3. MR BIZOS SC: This is what you say now.

4. GENERAL PHIYEGA: It is in the statement.

5. CHAIRPERSON: The last paragraph of FFF5

6. -

7. MR BIZOS SC: Yes, it was drawn to my attention and I will thank you.

9. CHAIRPERSON: Yes, so she said it then and she says it now.

11. MR BIZOS SC: Yes. But I’m asking you about the word “pronouncement” that you used. It has a certain meaning. It’s people in authority who say I have, I say, and it must be accepted. There is at least an implied meaning on it. Was the word “pronounced” deliberately used by you?

17. GENERAL PHIYEGA: Given the facts that were given to me on the day, that is the only information that I had at hand and that was the facts that as they came from the police. What happened afterwards, I have already articulated in my statement that we will give full cooperation with any investigation into this tragic incident.

24. MR BIZOS SC: Part of your announcement reads, “The militant group stormed towards the police, firing shots and yielding general weapons.” Is it dangerous weapons?

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1. firing shots and yielding general weapons.” Is it dangerous weapons?

3. CHAIRPERSON: The reference is to the penultimate paragraph on the second page, the penultimate sentence in fact of the penultimate paragraph on the second page.

7. MR BIZOS SC: “Police retreated systematically and were forced to utilise maximum force to defend themselves.” That tells the public in South Africa and the world at large that you, the Commissioner of Police, accept everything your subordinates told you.

12. GENERAL PHIYEGA: Yes, it is true, and also other evidence that we’ve seen on a lot of footage that was shown even in this place.

15. MR BIZOS SC: We’re talking about the 17th. We’ll come to the 20th. At that stage what other evidence, if any, did you have to corroborate what your police generals, or brigadiers or colonels, told you?

19. GENERAL PHIYEGA: Facts from the police, visual evidence on the screens, video reports, newspaper reports, carried a lot of information that also further informed me.

23. MR BIZOS SC: Are you influenced by what you read and what you listen to on the radio?

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1. what I see and read.

2. MR BIZOS SC: You’re influenced?

3. GENERAL PHIYEGA: I’m not ignorant of what I read and see.

5. MR BIZOS SC: Are you influenced by what you see and hear and read?

7. GENERAL PHIYEGA: I’m giving what I think is my best answer to your question. I’m not ignorant of what I see and read.

10. MR BIZOS SC: I’ll ask you for the last time. Are you influenced by what you see, what you hear, and what is reported to you, and do you take it all on face value?

14. GENERAL PHIYEGA: Advocate, I’ve given you what I think is my best answer.

16. [12:57] MR BIZOS SC: But you see, even before you made the statement of the 17th there were allegations that this was a massacre.

18. GENERAL PHIYEGA: On the very day that I made that statement a question was asked to me about the massacre and my response on that day was that it is an unfortunate choice of words. I was responding to a journalist that asked me that question.

24. MR BIZOS SC: Did you ask them what information they had that prompted them to call it a massacre?

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1. massacre?

2. GENERAL PHIYEGA: In a press conference you don’t have that nature of dialogue. He asked the question and I responded to the question.

5. MR BIZOS SC: Do you believe that it is your right to accept one side of a story as to what the police have done and pronounce upon it on that basis?

8. GENERAL PHIYEGA: I don’t understand your question.

10. MR BIZOS SC: Do you believe that it is your right to come to conclusions as to what the police did or did not do upon the word of members of the police force only?

14. GENERAL PHIYEGA: Because that question is carrying many things I would say the view will always be informed by information at one’s disposal, from the police, from the media, from other people. That’s what your view will be shaped by.

19. MR BIZOS SC: What is your answer to my question?

21. GENERAL PHIYEGA: My answer to your question is that views and positions are informed by the multiplicity of feeders.

24. MR BIZOS SC: Please repeat that.

25. GENERAL PHIYEGA: Views and positions are
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in making those two statements you did not act with caution, nor circumspection, but on the contrary you did not apply your mind to the circumstances. You accepted the police version without question because of your strong bond of loyalty to the police.

GENERAL PHIYEGA: Advocate, that is your conclusion; it is not my conclusion.

MR BIZOS SC: It's not your conclusion.

There has been an outcry again calling for the end of the police culture that appears to be apparent that the police are more interested in solidarity among themselves than seeking to speak the truth. Have you heard what I have said from many voices since you accepted this position?

GENERAL PHIYEGA: I have heard what you have said and I have read many books globally that also talk about that.

MR BIZOS SC: Are you concerned about the allegations that are made about this police culture?

GENERAL PHIYEGA: I think what is important is what you’ve mentioned to say about the allegations. I would be concerned if I was experiencing that. I haven’t as yet experienced that. Maybe it’s, my eight months is too short.

MR BIZOS SC: Are you not aware that there is an outcry in the public domain that this police th

MANGWASHI VICTORIA PHIYEGA: s.u.o.

cross-examination by MR BIZOS SC (CONT'D.):

Thank you, Mr Chairman. Commissioner, would you agree that persons in your position as the head of a couple of hundred thousand police officers, has to apply her mind to act cautiously and with circumspection? Would you agree generally speaking that the head of an organisation shouldn’t just speak to one side and pronounce upon the matter?

GENERAL PHIYEGA: Indeed it is necessary for a leader to take various aspects into account.

MR BIZOS SC: In making up your mind to exonerate the whole, all 600-odd police officers from any blame or any liability for what happened in Marikana, without hearing from anyone else, was not in accordance with the expectations we have of people who hold leading positions in the administration in the governing of this country.

GENERAL PHIYEGA: Only if what I said earlier on to say in taking the decision and making the inputs that I made and the statement that I have indicated at the last sentence, and also some of the, what I said, I mean if I look at this transcript, what I said towards the end of my statement, which was not in the statement, if I may just read it from a document that we were given by the evidence leaders, where I was talking about it wasn’t time for finger-pointing, it wasn’t time for all those type of things, it was time for looking at many other things, and I’ve also said I was not ignorant to what I was seeing on TV, what I was reading, what I was hearing. So I have looked at a number of things.

MR BIZOS SC: I want to put to you that

in making those two statements you did not act with caution, nor circumspection, but on the contrary you did not apply your mind to the circumstances. You accepted the police version without question because of your strong bond of loyalty to the police.

GENERAL PHIYEGA: Advocate, that is your conclusion; it is not my conclusion.

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MR BIZOS SC: Are you not aware that

there is an outcry in the public domain that this police
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1 answered the way they did. I cannot be able to cast a
2 position on that one.
3 CHAIRPERSON: Mr Bizos, I hope you're not
4 going very much further down this line of investigation -
5 MR BIZOS SC: No, I'm not. That was the
6 last question -
7 CHAIRPERSON: I don’t know if it’s going
8 to help us at all, frankly.
9 MR BIZOS SC: That was the last question,
10 Mr Chairman. It’s too long to - the line is too long to
11 burden the Commission with it, Mr Chairman. Now the
12 statement that you made on the 17th and the statement that
13 you made on the 20th were given the widest publicity. Your
14 words, particularly on the 20th, which were read out to you
15 by our learned friend that cross-examined you first, I
16 won’t quote all of them, I want to remind you of what you
17 said. “So for that I just want once more to thank you for
18 having done what you did, for having endured the challenges
19 that we endure, and as we mourn as a country, let us
20 remember that the pain that everybody is feeling is felt by
21 all of us, but all we did was to do our job and to do it in
22 a manner that we are trained, that we know it should be
23 done responsibly, caringly, focusing on that which is our
24 responsibility.” What were you thanking the 1000-odd
25 policemen that you were addressing, what were you thanking

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

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1 responsible policing -
2 CHAIRPERSON: Mr Bizos, you’re wrongly
3 quoting it. It was pointed out when she was being cross-
4 examined by Mr Madlanga that the transcript is incorrect,
5 that the word “we” shouldn’t be there. So the sentence
6 reads, “I come before you to actually say trying as it may
7 be, mourning as we are, let us take note of the fact that
8 whatever happened represents the best of responsible
9 policing.” That’s the way it should read and that’s the
10 way it was corrected.
11 MR BIZOS SC: Yes.
12 CHAIRPERSON: So the “we” is out, so it’s
13 not referring to people who represent the best of
14 responsible policing; it’s whatever happened represents the
15 best responsible – that’s what she said. It doesn’t
16 necessarily detract from your question, but it’s useful to
17 put it correctly.
18 MR BIZOS SC: Yes. Well, taken that as
19 corrected by the Chairman of the Commission, together with
20 the next paragraph but one, were they being thanked and
21 were they being praised for among other things killing 34
22 people and injuring 84 others?
23 CHAIRPERSON: Yes, Mr Semenya?
24 MR SEMENYA SC: Chair, the question has
25 been repeatedly asked and repeatedly answered.
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1 asked for this tape to be played the way it is, your
2 interpretation of the message is not what I’m saying to the
3 police.
4 MR BIZOS SC: The question is, what
5 message is it sending to the South African Police? I’m
6 asking you what message is it - if you disagree with
7 anything I say, that’s your privilege, but I am asking you
8 what message is it sending to the South African Police in
9 the present circumstances, or at the time that you made
10 them? Please answer that.
11 GENERAL PHIYEGA: The message I was
12 sending to the police was, (1), that we are mourning
13 because there is a tragedy that has befallen us as a
14 nation, and the message I sent to them was also that I do
15 thank you for following the prescripts, the protocol, in
16 executing your job, and it is separate from the mourning.
18 deleterious, not only to the police, but the country as a
19 whole, if the message is interpreted I will do what I like
20 and the Commissioner will protect me and nothing will
21 happen to me?
22 GENERAL PHIYEGA: Advocate, that is your
23 standpoint, not my standpoint and I’m not able to comment
24 on your standpoint.
25 MR BIZOS SC: Let us turn to the

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

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

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1 a statement on it and this is why I asked the commanders to
2 make sure that this statement is there and then they gave
3 it IPID.
4 MR BIZOS SC: If the contents of the
5 statement are found to be correct, do you agree that at
6 least the one person that was shot in cold blood was not
7 shot in the circumstances described by Myburgh in self-
8 defence?
9 GENERAL PHIYEGA: Only when facts that
10 confirm this, can I be able to question.
11 MR BIZOS SC: Did this statement come to
12 your notice before you made your statement or statements
13 placed before the commission?
14 GENERAL PHIYEGA: No.
15 MR BIZOS SC: You went with this
16 statement -
17 GENERAL PHIYEGA: Before I make my -
18 MR BIZOS SC: When did this statement
19 come to your notice?
20 GENERAL PHIYEGA: I think it is indicated
21 in one of the, I just want to look at that.
22 CHAIRPERSON: Mr Bizos, I think your
23 question was ambiguous. When you said the statements you
24 made and placed before the commission, I must confess I
25 thought you meant the exhibits, the witness statements, FF2
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1. the exhibit statements.
2. MR BIZOS SC: Did you consider it relevant to the issues that the commission was enjoined by the President to look into?
3. GENERAL PHYEGA: Because I considered it important, I actually asked that IPID investigate the matter and furnish us with facts.
4. MR BIZOS SC: Please answer the question. Please listen to the questions and answer them. The question was, did you think that it was an important statement to which the commission should have had it’s, an opportunity to hear the other side of the story and why did you not inform the commission here is a statement that has come to my notice and deal with it in your statement to the commission? Why did you not mention it?
5. GENERAL PHYEGA: Because the matter is being investigated by those who police us as police. MR BIZOS SC: Don’t you think that it was sufficiently important, don’t listen only to me. There is the Commissioner, listen to my warrant-officer or what he said in relation to the deliberate shooting of a helpless man on the ground. Didn’t it, wasn’t it your duty to bring that to the commission’s attention?
6. CHAIRPERSON: Before you answer the question, Mr Semenya wants to say something.
7. MR SEMENYA SC: This statement was brought to the attention of the commission by the South African police service. The witness has already told us it was created on her instruction. There is nothing untoward.
8. CHAIRPERSON: Also sent to IPID, as we all know. As far as I know anyway, all the IPID files and dockets were made available to the evidence leaders. So I don’t know whether their attention was specifically drawn to this statement among all the others.
10. CHAIRPERSON: But it certainly, well they can tell us, Mr Budlender, how did the evidence leaders get hold of this statement? Was it -
11. MR BUDLENDER SC: Chairperson, it was amongst the statements produced by the, made available by the police, that’s correct. Amongst a number of other statements made available by them. I have to say and I don’t want to give evidence and neither do I want to, and this witness has been cross-examined already for us but according to our information, there is a different account of how it came to the attention of IPID or whether it came to the attention of IPID.
12. MR SEMENYA SC: No, no, no.
13. MR BUDLENDER SC: Perhaps we shall put in, we will make available the memorandum which we have received from IPID and it can be dealt with at that time.
14. MR SEMENYA SC: Ja, through a proper witness and proper evidence.
15. MR BUDLENDER SC: - this statement available to my learned friends and we will then see where it goes from there.
16. CHAIRPERSON: What is clear, is that this statement came before the commission via the evidence leaders who got it from the South African Police. Now that is -
17. MR BIZOS SC: Thank you, Mr Chairman, the question is why the witness did not mention in her statement that evidence came, never mind the statement, evidence came to her knowledge that there was at least one deliberate murder of an injured person in her statement.
18. CHAIRPERSON: Mr Bizos, I think you have taken that a bit too far. We don’t know from the statement whether the person who was shot was one of those who died or one of those who were injured. So I think to say, talk of a deliberate murder is going too far. But I understand your question to be, why was this statement, which was evidence of deliberate criminality of either murder or of attempted murder by a policeman, why was that not specifically flagged and brought to the attention of the commission in a specific manner? I take it that’s your
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1. MR BIZOS SC: That's my question.
2. GENERAL PHIYEGA: I think the same question could be asked over why didn't I say, I talk about the investigation of [inaudible] It wasn't for anything because these facts are open, they have been declared, they are in the knowledge of this commission, there is nothing untoward. It is how I structured my statement. It wasn't for any other thing that talks to those things, I didn't refer for instance to the general investigation in my statement but I know that it is something we have done and that is significant.
3. MR BIZOS SC: Now in your evidence last week when the question of follow up on the Myburgh statement, you said "we at SAPS were stumped". What does that mean? "And could not do anything". Do you want me to read you everything that you said, I have it if it is going to help you? The extract, "we at SAPS were stumped and could not do anything, the statement was not helpful. Walter could not identify or point to the person. I did engage Walter. I wanted to understand the issues myself, Mbombo and Naidoo asked him questions about the very shooting so we could understand. He said he could not point the person and did not see a nametag". Do you remember that is what you said?

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1. GENERAL PHIYEGA: Yes, bar for that difficult English word that you used.
2. MR BIZOS SC: What is the difficulty that you have with which word?
3. GENERAL PHIYEGA: You used a word that I haven't met in my life, stumped.
4. CHAIRPERSON: It's means nonplussed or not knowing what to do. At a loss to know how to react.
5. GENERAL PHIYEGA: Ja.
6. MR BIZOS SC: It comes from cricket where it means something different. So that's what it means in this context I think.
7. GENERAL PHIYEGA: I have learned a new word.
8. MR MPOFU: Chairperson -
9. MR BIZOS SC: You actually I'm informed -
10. MR MPOFU: No, no I just wanted to assist or at least point out something, Chair. If the witness says, she is meeting that word for the first time, when it was used in a quotation of hers, then it must mean that the quotation is wrong or that it was, she was using another word.
11. CHAIRPERSON: Refer to the passage of the transcript.
12. GENERAL PHIYEGA: Yes.

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1. CHAIRPERSON: The actual page and line so we can then see, but if she says the word stumped she has heard for the first time today -
2. MR BIZOS SC: Yes?
3. CHAIRPERSON: Then she obviously couldn't have used that word, she must have used some other word, which is perhaps not correctly transcribed.
4. MR BIZOS SC: It's a difficult word, in fairness to the witness, it's suggested to me that she used the word stunned.
5. GENERAL PHIYEGA: Yes.
6. MR BIZOS SC: Is that the word that you used?
7. GENERAL PHIYEGA: I may not recall but that word I know I may have used that.
8. CHAIRPERSON: Okay, would that word accurately convey your impression of the situation you were in when you heard what the warrant officer said and he said he couldn't identify the face or the nametag of the person concerned.
9. GENERAL PHIYEGA: Yes.
10. CHAIRPERSON: Stunted would be correct word.
11. GENERAL PHIYEGA: Yes.
12. CHAIRPERSON: As far as you are concerned to convey your reaction to that, will that be right?
13. GENERAL PHIYEGA: Yes, that surprised us to say you have been there, you say you saw a person you heard the shot. We asked can you point at the person, do you know the person, because we wear nametags.
14. CHAIRPERSON: Now what exactly is the word? There are three possibilities, stumped which has now been rejected, stunned or stunned with N's? Is it stunned with two N's? Or stunned, NT?
15. MR BIZOS SC: I will give a reference -
16. GENERAL PHIYEGA: Judging from -
17. MR BIZOS SC: My colleague on my left says that the word is stunted and it appears on page 6926 at line 19 of the record but don't lets argue about the fine meaning.
18. CHAIRPERSON: Mr Bizos, she was going to say something when you went on to give the page reference. What were you going to tell us?
19. GENERAL PHIYEGA: I think the word stunned or the reaction coming from there would be a better fit.
20. MR BIZOS SC: It was support of the allegations that were made by the relatives of the deceased, the people who had been injured, the newspaper reports, the television reports, the radio reports who had
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1. made similar allegations. Do you agree?
2. GENERAL PHIYEGA: I did not agree with,
3. and I will go to Myburgh, because Myburgh we have requested
4. that this matter be investigated and because I don't have
5. facts that tell me that that happened, I would not agree
6. with you.
7. MR BIZOS SC: Did the allegations made by
8. Myburgh upset you?
9. GENERAL PHIYEGA: Yes.
10. MR BIZOS SC: Did you think to yourself
11. possibly, that what I said on the 17th and 20th may not have
12. been true because some of our men, at least one of them, if
13. that is true, behaved not in accordance with what I thought
14. they all behaved in?
15. [14:18] GENERAL PHIYEGA: This is why, because I
16. was stunned and because it was an issue of concern for me
17. as a leader that I asked for the statement and I asked IPID
18. to look at it and I’d like to have an outcome, and I was
19. surprised that Myburgh, being on the scene, told me that I
20. can't point a face, I don't know the name, I haven't seen
21. the name tag. That's why I said investigate this matter
22. and let’s get to the bottom of it.
23. MR BIZOS SC: Did it occur to you that if
24. Warrant-Officer Myburgh was telling the truth, you didn’t
25. hear the whole truth before making the statements that you

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

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

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

Mr Bizos SC: You see, according to your evidence you requested your commanders to look into this matter, but the commanders did not reveal the ID. Was it the function of the commanders to investigate the further matter, or on the directive of the Chairman of the Commission, the independent police?

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

Mr Bizos SC: By that time the Commission, or that there would be a commission was already in the public knowledge and yours.

General Phiyega: Correct.

Mr Bizos SC: The contents of the statement that was taken by the Independent Police Unit was contrary to the version put up by the senior officers, including the two that you invited to interview the witness.

Chairperson: - taken at the behest of the independent police -

Mr Bizos SC: - taken at the behest of the witness.

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

Mr Bizos SC: Well, I thought that the statement by the Chairperson that the independent police - Chairperson: I understand that this statement was eventually taken, which we have before us - Mr Bizos SC: Yes.

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

Mr Bizos SC: Well, let me just leave the statement out because of this. When you called the two generals, was it at your office?

General Phiyega: No, we were -

Mr Bizos SC: Where was it?

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

Mr Bizos SC: Did you consider that Myburgh would be in all probability an important witness before the Commission?

General Phiyega: I did not, I do not know how witnesses are chosen, but it was of interest to me to get to the bottom of this matter.

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

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

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

Mr Semenya SC: There's no basis for that proposition.

Mr Bizos SC: No, it's an inference that we are going to -

Chairperson: No, it's a point you put to see what the witness says about it. Do you agree with that or do you think that's not correct?

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

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

General Phiyega: Yes, I have, because those statements were not even taken by us; they were taken by IPID.

Mr Bizos SC: Did you have interviews with other policemen to discuss their statements with them?

General Phiyega: It is not my duty to do so. I read what they have written, what IPID has taken.

Mr Bizos SC: Why was it your duty to call the one person who made a statement destructive of the
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The question is, did you interview in the presence of two generals any other police officer of a lower rank who was at Marikana?

MR BIZOS SC: No. No, I didn't.

Myburgh -

CHAIRPERSON: Sorry, Mr Bizos. Were you informed of any other oral statements made by any other police, members of the service -

MR BIZOS SC: Can you please explain why Warrant-Officer Myburgh was privileged to be invited by the Commissioner and two generals to speak about his experience and not lots of other -

CHAIRPERSON: No, Mr Bizos, I think she's already told us that. Firstly there weren't lots of others; there weren't any others who made allegations of the kind he made. She said that it was reported to her that an oral statement had been made of the nature we know. It's obviously a serious matter. She was at Rustenburg. He was there. The two generals were there, including the
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1 do you know the person, as a warrant-officer he is superior
2 and senior to the constable and I would have expected more
3 responsibility from the warrant-officer, and that worried
4 me and it still remains worrying me.
5 MR BIZOS SC: It took the evidence
6 leaders very little time to identify the two persons that
7 Myburgh speaks of, and gave the names –
8 CHAIRPERSON: No, that’s not right, Mr Bizos.
9
10 MR BIZOS SC: The probably or likely –
11 CHAIRPERSON: Myburgh doesn’t speak of
12 any persons. What the evidence leaders did was they did
13 what I assumed IPID investigators would also have done,
14 they had regard to the type of weapon used; they had regard
15 to the fact that this person was said to come from the
16 National Investigation Unit, and they then looked at the
17 list of persons who fired bullets at scene 2 and then
18 eliminated everybody but two, but Myburgh doesn’t mention
19 those two names at all. So you’ll have to rephrase that
20 question.
21 MR BIZOS SC: Yes. The document which
22 the evidence leaders found after the matter was raised
23 before, produced two names. Now those of us who have some
24 knowledge of investigating techniques know that even if a
25 person when approached to make a statement says I will not

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<td>3 MR BIZOS SC: Yes.</td>
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<td>5 MR BIZOS SC: I want to reserve my cross-examination on that because it may have some relevance if what -</td>
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<td>9 CHAIRPERSON: Yes, you’re entitled to reserve your cross-examination.</td>
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<td>11 MR BIZOS SC: Yes.</td>
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<td>12 CHAIRPERSON: Is there anything, any other matter that -</td>
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<td>14 MR BIZOS SC: There are a few other matters.</td>
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<td>16 CHAIRPERSON: You want to proceed with your cross-examination now?</td>
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<td>18 MR BIZOS SC: Yes, please.</td>
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<td>19 CHAIRPERSON: Well, please do so.</td>
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<td>20 MR BIZOS SC: Yes.</td>
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<td>21 CHAIRPERSON: Obviously, Mr Bizos, I can’t expect you to cross-examine on that report you only got this morning because you’ve been busy cross-examining all day up to now and obviously couldn’t consider it. So I won’t prevent you from dealing with the matter later when</td>
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some of the outcomes of this Commission to point us to some
of those because as I said what we've tried to do is to do
our work in accordance to our prescripts and our protocols.
If there are omissions, then I'm sure this Commission can
point to some of those as we, as all parties has indicated
they are being engaged, are being engaged or -
MR BIZOS SC: Including the police?
CHAIRPERSON: I don't think what you said
was recorded because you lent forward and nodded your head.
I think you said yes or exactly or something like that.
GENERAL PHIYEGA: No, I didn't say yes
effectively, Judge. I said by my own admission in this
statement I am saying this Commission is meant to sincerely
take all inputs of the various parties, what we have tried
to do was use our protocols and prescripts to do our work
in accordance with that. If there were weaknesses,
conscious or unconscious, I am sure that this Commission
would be able to highlight those and those would form
future lessons for us.
MR BIZOS SC: Documents, videos, videos
that are missing for during the period that the alleged
attack on the police took place are missing. Is there
anything that you heard that was brought to your attention
during those proceedings which led you, that's the police,
were prematurely congratulated for the work that they did?

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24           MR BIZOS SC:          I'll amend –
23 certainly can't proceed on the basis that it's common cause
22 with some of the other witnesses when they come, but you
21 the point at the moment.  Maybe it's a matter you can raise
20 destroyed or whatever, but there's no evidence directly on
19 that videos were taken and suppressed or concealed or
18 That's one possibility.  The other possibility of course is
17 video camera in the right direction at the relevant time.
16 some or other reason have been a failure to operate the
15 can talk then about a gap.  I can understand there may for
14           CHAIRPERSON:          Well, I don't know that you
13 the question.
12           MR BIZOS SC:          If there is no video
11 evidence when it is categorically stated in the orders that
10           MR BIZOS SC:          If there's evidence of that
9 –
8           CHAIRPERSON:          If there's evidence of that
7           MR BIZOS SC:          If there's evidence of that
6           MR BIZOS SC:          Well, if there are
5           MR BIZOS SC:          Well, if there are
4           MR BIZOS SC:          Well, if there are
3           MR BIZOS SC:          Well, if there are
2           MR BIZOS SC:          Well, if there are
1           CHAIRPERSON:          If there's evidence of that

1        CHAIRPERSON:          I understand this is an
2 area that you may wish to explore, but I don't think you
3 can explore it with this witness in the way you're
4 proposing to do.
5           MR BIZOS SC:          Yes, very well.  There is
6 nothing that you heard or saw before this Commission that
7 cast any doubt upon the praise that you showered on the
8 police in your statements of the 17th and the 20th?
9           GENERAL PHIYEGA:          Advocate, I shall again
10 say I'm sure the learnings from this Commission would point
11 us to a number of areas and we are looking forward to that.
12           MR BIZOS SC:          Yes.  I assume that you
13 will agree that no serious misconduct on the part of the
14 police has been unearthed by the police department.
15           [14:58]   CHAIRPERSON:          What do you mean by the
16 police department?  The directorate responsible for
17 investigating allegations of malfeasance and other improper
18 conduct by the police is the Independent Police
19 Investigation Directorate.  Now I don't know whether that's
20 the department you mean, or whether you mean other sections
21 of the police.  So perhaps you must reformulate the
22 question more voluminously.
23           MR BIZOS SC:          What is the police practice
22 if allegations are made against the police?  As a matter of
21 practice are they all allowed to continue working as
20 policemen, or are they suspended from duty?
19           GENERAL PHIYEGA:          We have a very clear
18 disciplinary process and code and it follows the laws of
17 this country, of saying people have to be proved innocent.
16 We can't prejudge anything.  When reports are made we
15 investigate and disciplinary processes do take place in the
14 police.
13           MR BIZOS SC:          Mr Bizos, this sounds like
12 a new line of enquiry.
11           MR BIZOS SC:          More or less the final.
10           CHAIRPERSON:          Well anyway, perhaps we
9 could take the tea adjournment at this stage.  It's 3
8 o'clock.  How long are you going to be with this point?  I
7 see you've got a couple of pages in front of you -
6           MR BIZOS SC:          Yes, it's two and one-third
5 pages.
4           CHAIRPERSON:          Alright.  Well, I don't
3 know at what rate you -
2           MR BIZOS SC:          We'll finish it today.
1           CHAIRPERSON:          I don't know at what rate
2 you've gone through your pages so far.  Let's take the tea
adjournment and try to reassemble at quarter past 3.
24 [COMMISSION ADJOURS       COMMISSION RESUMES]
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22 you've gone through your pages so far.  Let's take the tea
adjournment and try to reassemble at quarter past 3.
21           CHAIRPERSON:          I don't know at what rate
20 you've gone through your pages so far.  Let's take the tea
19 adjournment and try to reassemble at quarter past 3.
18           CHAIRPERSON:          Alright.  Well, I don't
17 know at what rate you -
16           MR BIZOS SC:          We'll finish it today.
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<td>262, paragraph 13? Debriefing, are you familiar with that section?</td>
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<td>1 you not come here with answers, with no answers, you've come here to try and avoid personal responsibility. You have evaded answering important questions put to you. You have attempted to hide behind the organisation of bureaucracy to avoid answering straight questions. Instead of helping this Commission to seek the truth, you have pretended to be ignorant of key details and you have frustrated attempts to get to the bottom of what happened at Marikana. I don't expect you to say yes, but it's my duty to put to you what we're going to submit to the Commission.</td>
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<td>12 CHAIRPERSON: Mr Semenya, I see you've got your light on. Do you want to say something?</td>
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<td>13 MR SEMENYA SC: Yes. I can accept there is permissible limits at which my learned colleague can say they will predicate their argument finally, but attacking the, or even accusing remotely the witness of mendacity is not one of those parameters that are permissible.</td>
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<td>14 CHAIRPERSON: Mr Semenya, he says he's going to argue at the end of the case that that's the position, and he's giving the witness an opportunity to admit it or deny it. It's unlike she'll admit it. It's more likely she'll deny it. It may be a formal thing, but he says that's what he's going to argue at the end and he must give her a chance to deal with it. I think in the circumstances I must allow him to put the question.</td>
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<td>16 MR BIZOS SC: Thank you, Mr Chairman.</td>
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<td>18 GENERAL PHIYEGA: Finally at the end of this Commission when we argue, we will say that you failed to take this Commission into your confidence. We will argue that you have placed the narrow and parochial interests of the police above the interests of justice in this country. Mr Chairman, that is the end of my cross-examination. Thank you for your patience.</td>
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<td>3 Finally you’ll be pleased to hear I don’t –</td>
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<td>5 CHAIRPERSON: Do we have her answer to that?</td>
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<td>12 CHAIRPERSON: Do you want to comment on the last submission Mr Bizos made?</td>
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<td>13 [15:44] GENERAL PHIYEGA: Judge, I want to say I came before this Commission; I've answered to the best of my ability the questions that have been put to me. I am consistent with the statements I made right from the 20th that the South African Police Service shall fully cooperate with this Commission, and I trust that my other members that will be coming to this Commission will continue to do so, and I thank the opportunity of having been able to respond to the best of my ability to Adv Bizos. That he did not believe what I’m saying, accept my responses, I do understand his standpoint.</td>
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1 were not taken by us -

2 CHAIRPERSON: No, no, no, the statement

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

4 you caused it to be taken -

5 GENERAL PHIYEGA: Yes.

6 CHAIRPERSON: - after you had the

7 interview with him at Rustenburg, remember?

8 GENERAL PHIYEGA: Yes.

9 CHAIRPERSON: And you said that statement

10 was referred to IPID.

11 GENERAL PHIYEGA: Yes.

12 CHAIRPERSON: I’m saying I take it you

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

14 telephone somebody at IPID and say the statement was

15 coming.

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

17 myself.

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

19 mean -

20 GENERAL PHIYEGA: The commissioner of

21 North West can explain better the process they followed.

22 CHAIRPERSON: Yes, I see.

23 MR BIZOS SC: I deliberately finished, or

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

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

1 to happen now. Mr Malindi, please proceed.

2 CROSS-EXAMINATION BY MR MALINDI SC:

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

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

5 with me that the term “debriefing” may be defined as

6 reporting on the mission or a task?

7 GENERAL PHIYEGA: Yes.

8 MR MALINDI SC: In the process of a

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

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

11 commendation of units or individuals who have acted

12 excellently in the process?

13 GENERAL PHIYEGA: It could well be.

14 MR MALINDI SC: Do you agree as well that

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

16 recorded?

17 GENERAL PHIYEGA: Correct.

18 MR MALINDI SC: The value thereof is also

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

20 GENERAL PHIYEGA: Certainly, and

21 continuous improvement.

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

23 by means of in-service training in crowd management

24 techniques, etcetera.

25 GENERAL PHIYEGA: Yes.

1 something to the attention of the Commission.

2 CHAIRPERSON: Mr Malindi, are you ready

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

4 examine the National Commissioner on behalf of the Human

5 Rights Commission.

6 MR MALINDI SC: I am ready, Chairperson.

7 CHAIRPERSON: Proceed. Yes, probably for

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

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

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

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

12 Mr Ntsesebeza, thereafter, I think it’s Mr Tip, and

13 thereafter Mr Burger on behalf of Lonmin, thereafter Mr

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

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

16 determined. So Mr Malindi, please proceed.

17 MR MALINDI SC: Thank you, Chairperson.

18 CHAIRPERSON: I’m not indicating Mr

19 Bruinders will necessarily be the last cross-examiner.

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

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

22 grateful if they could agree among themselves if they wish

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

24 appropriate, convey that to the evidence leaders and

25 therefore it can be conveyed to me, but that’s what’s going
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agree with that statement?

3

GENERAL PHIYEGA: Yes, I do.

MR MALINDI SC: And item 13 of the Standing Orders required of your organisation to have conducted a debriefing immediately after the incident. Am I correct with that?

7...

MR MALINDI SC: Why was the debriefing as required by item 13 of the Standing Orders not conducted immediately after the event and before the announcement that the commission of inquiry will be established to investigate the events of Marikana. Am I correct?

11...

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11...

GENERAL PHIYEGA: Yes, you are correct.

MR MALINDI SC: Why was the debriefing as required by item 13 of the Standing Orders not conducted immediately after the event and before the announcement that the commission of inquiry will be established to investigate the events of Marikana. Am I correct?

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

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

[COMMISSION ADJOURNED]
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