TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

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5th April 2013

Marikana Commission of Inquiry

Rustenburg

[PROCEEDINGS ON 5 APRIL 2013]


You're still under oath, National Commissioner. Mr Mpolu.

CROSS-EXAMINATION BY MR MPOFU (CONTD.):

Thank you Chairperson. General, because we have a limited amount of time today what I propose to do is to just finish with the topic that we were dealing then I'll go slightly back to tidy up some of the issues we dealt with yesterday. Just so that we can put those to bed but when we come back we deal with other matters and then if we time I'll deal with one or two short topics before - Now but what I need to do - oh and before we part I'll then give you a kind of outline of where I will go with you towards the end of my cross-examination so that during the break you can apply your mind to some of the issues. Right, now going back to the I'm going to do is I'm just going to ask that you look at screen. There'll be a series of photos which are going to be shown which may require a warning, Chairperson. It's not going to be long and then I'll ask you or rather I'll premise some of my questions on those photos.

CHAIRPERSON: I was warned that certain video clips are going to be shown which will show pictures of people who were killed in the events of the 16th August and if there are members of the family or persons close to the people in the auditorium they may find that looking at the pictures causes them distress and unhappiness. In any event perhaps you could give the photo numbers so people who, as they read the record will know what exactly you've shown.

MR MPOFU: Yes and Chairperson and Commissioners these photographs are Exhibit K or form part of Exhibit K but that's the reference ja.

CHAIRPERSON: I said they relate to the 16th so I take it that's correct because they don't relate to the 13th or any other day.

MR MPOFU: The 16th and scene two thank you Chairperson. Okay Ja. I can't see it myself but insofar as you are able to see, are you able to see, I can see we are both challenged. Are you able to see this photograph, General?

GENERAL PHIYEGA: I see an image, not in fine. That's fine. Next one. Another daylight and evening contrast. Next one, next one. Ja and this one in particular which is an evening photo, if you can just observe the, I think the panga with the yellow handle, next to hand of the person, okay next slide. And that one which is picture 271 is probably the clearest of what I want to illustrate. Where you see the daylight photos at the bottom 270 and 271 and the evening photo above the two photos, you look at daylight photos without the panga and the evening photo with the panga. Okay, alright I think the image that we have now illustrates more clearly the general point. It was made in more detail by Mr Madlanga but I don't want to redo that because it was already done for the Commission. Okay, thank you very much.

CHAIRPERSON: For the sake of the record and those in the immediate future and possibly the more distant future who read the transcripts of these proceedings it might be helpful to say what - give the photograph numbers. I'm not sure that we've seen all these but if I'm assured that we have I accept the assurance but in any event perhaps you could give the photo numbers so people who, as they read the record will know what exactly you've shown.

MR MPOFU: Okay. Chairperson, yes. For the purposes of this part of the record I will use only this image. So I'll define what it is and then I'll give references of the other relevant photos.

CHAIRPERSON: What you showed were a number of bodies, each identified by letter, what we saw first was a picture, it looked like a piece of paper on a body with a letter written on it and that was followed by a picture, two pictures essentially. One taken I think by Warrant Officer Henderson during the day which showed that the weapons, if there were any, had been removed and the subsequent picture we saw was a picture taken at night that's to say subsequently when the weapons had been either put back or had been put there, it may be a debate exactly what happened, but that's what we saw so if we could just run through the pictures and just record what bodies there were I think is probably the easier way to do it and what the photograph numbers are then the record will be...
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1 complete.
2 MR MPOFU: Thank you, Chairperson.
3 Alright and I’ll give more detail again on the last ones
4 because as I said I’m using that to illustrate. Okay can
5 you start again, start it quickly.
6 CHAIRPERSON: The first one is J, body J.
7 also a body I.
8 MR MPOFU: I and J yes.
9 CHAIRPERSON: And I and J.
10 MR MPOFU: Yes.
11 CHAIRPERSON: And then we see, the
daylight picture is 245.
12 MR MPOFU: 245 ja. Those are the only
ones that have picture numbers.
13 CHAIRPERSON: Yes.
14 MR MPOFU: Okay move on. And then
okay that one has no number, Chair.
15 CHAIRPERSON: It’s because they’re night
time pictures. The next one is 268 and the two pictures,
the two daytime pictures are 244 and 268.
16 MR MPUFO: That’s correct, Chairperson.
17 Next one.
18 CHAIRPERSON: Then we have body K which
also is described as body 11.
19 MR MPOFU: And the next picture will be

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1 248, I think that’s still body K, Chairperson.
2 CHAIRPERSON: Yes I see, yes alright. 248
is a daytime picture.
3 MR MPOFU: That’s correct, next one.
4 CHAIRPERSON: The next one is body N,
otherwise known as body Four.
5 MR MPOFU: An evening picture.
6 CHAIRPERSON: Yes and there are two
daylight pictures 230, that’s 230 and 231.
7 MR MPOFU: Thank you, Chairperson. Next
one.
8 CHAIRPERSON: Then we have body O,
otherwise known as body 30, night time picture first and
then -
9 MR MPOFU: Yes next one.
10 CHAIRPERSON: The two daytime pictures
278 and 279 and above them the night time picture again.
11 MR MPOFU: Thank you, thank you, Chair.
12 Next one.
13 CHAIRPERSON: Then body M otherwise known
as body 13, that’s the one where the hand of the deceased
is actually on what is described as a yellow handled panga.
14 MR MPOFU: Correct.
15 CHAIRPERSON: That’s the night time
picture. The daytime pictures below are 270 and 271.

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1 MR MPOFU: Thank you, Chairperson, thank
you very much. I’m indebted to the Chairperson. Now,
General, effectively the picture, sorry I didn’t mean to -
the theory, I would put it that way that is being perceived
by these pictures is that as the Chairperson summarised,
the daylight pictures of the same body would not have
weapons and the evening pictures do have weapons and there
can only be two explanations. One is the one that we
contend for which is that the weapons were planted there on
the bodies but obviously another possibility which is that
they were removed at some stage and replaced which as I
understand is what SAPS - is the theory that SAPS is
contending for. So are we together so far?
2 GENERAL PHIYEGA: Yes.
3 MR MPOFU: Thank you. Now as I
understand it the report and you’ll correct me if I’m
wrong, in essence says that at scene two at some stage in
order to facilitate the work of the paramedics the weapons
were removed and at a later stage they were replaced. I’m
obviously cutting some of the detail but that’s the essence
of the report. Would you agree with that?
4 GENERAL PHIYEGA: Yes, I do.
5 MR MPOFU: Now before I deal with the
criticisms of the report I want maybe you and I just to
agree on the following issues. That unless there is a

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1 plausible explanation for what we have seen it would
represent an unlawful and highly irregular interference
with a murder scene, absent an acceptable explanation.
2 Would you at least go along with that? I think even myself
as not a policeman would be able to make that statement.
3 GENERAL PHIYEGA: I would go along with
that.
4 MR MPOFU: Thank you and that issue which
you and I have agreed on is what caused the local and
international uproar about the possibility of tampering
with evidence. Would you agree?
5 GENERAL PHIYEGA: I haven’t followed
that, the international uproar, but I know that it is
something that also made me request the investigation.
6 MR MPOFU: Correct. Yes of course and
you don’t have to agree with this one but if that is so at
least it gives us room, let me put it that way, to argue
which we will, that that activity, absent a plausible
explanation would amount to an admission of guilt because
innocent people don’t usually interfere with the evidence.
7 GENERAL PHIYEGA: You’ve already answered
for me, I would not agree.
8 MR MPOFU: Yes. And that it would also
at the very least open the way for us also to argue that at
least as far as scene two is concerned is where these
25 arise why is the murder scene contaminated. Now I take it
24 contamination of the murder scene and the question will
23 explanation if that isn't the case then it's a
22 calls a plausible explanation but absent a plausible
21 the same place there's no problem. That's what Mr Mpofu
20 did that, provided we can rely on the fact that he
19 and when it's all over I'll put them back and providing he
18 I'll take them away, I'll remember carefully where they are
17 I'll remember correctly where they were and put them back in
16 work among weapons because people could attack them. So
15 I'm going to demonstrate to you that there's no causal
14 doing the examination, because the statements that I saw in
13 that I gave you.
12 I accept your argument
11 understand where I'm going with this.
10 reason why the arms were removed, so it's just that you
9 we, the issue that we're discussing, fortunately we're not
8 depends upon the credibility of the people who were
7 a false impression, adverse to the protestors and obviously
6 isn't that so? So the correctness or otherwise of the
5 this report that I received from the commission has got all
4 we have to make it look like we were defending ourselves by
3 there are two possibilities, the one is it was done with
2 it's either monumental inefficiency and stupidity on the
1 one hand or if it's more sinister it's an attempt to create

MR MPOFU: Yes. Okay. Now -

GENERAL PHIYEGA: I would also not agree with that.

CHAIRPERSON: National Commissioner, do you say you wouldn't agree with that? He's putting it on the basis of absence a plausible explanation and there are two possibilities. One is a policeman came along and he said look here this is a serious matter, the paramedics are dealing with the wounded, it's dangerous to expect them to work among weapons because people could attack them. So I'll take them away, I'll remember carefully where they are and when it's all over I'll put them back and providing he did that, provided we can rely on the fact that he remembered correctly where they were and put them back in the same place there's no problem. That's what Mr Mpofu calls a plausible explanation but absent a plausible explanation if that isn't the case then it's a contamination of the murder scene and the question will arise why is the murder scene contaminated. Now I take it

there are two possibilities, the one is it was done with evil intent, to create a false case against the people. The other is just monumental inefficiency. Would you agree with that? It's either absent a plausible explanation, it's either monumental inefficiency and stupidity on the one hand or if it's more sinister it's an attempt to create a false impression, adverse to the protestors and obviously favourable to the police, I take it that must be right surely?

[09:53] GENERAL PHIYEGA: I think, Judge, what we, the issue that we're discussing, fortunately we're not starting with, it's not a leading supposition because there is work, there is reports, there is information and I'm actually responding based on the information that is, if it was a Greenfield's matter maybe I could deal with that supposition in the manner that you are putting. But now I'm saying I have assistant to look into matters, there are some facts before me. So on the basis of that I would not agree.

CHAIRPERSON: Okay. I'm not sure whether it's as easy as that. But you had people looking into it, recommended there. They spoke to the participants and they got an explanation.

GENERAL PHIYEGA: Yes.

CHAIRPERSON: Now the participants aren't likely to say we did it deliberately to create a false impression, they won't say that to your investigator, will they? Then even, and I say, we're inefficient, we, they will have to say we remembered where they were taken from, we took them away and we put them back in the same place, isn't that so? So the correctness or otherwise of the results of your investigation well in this case you did, depends upon the credibility of the people who were interviewed, is that correct?

GENERAL PHIYEGA: I do agree with that.

CHAIRPERSON: Ja.

GENERAL PHIYEGA: And also some of the expert information that we received and the people who were doing the examination, because the statements that I saw in this report that I received from the commission has got all these statements, has got expert information, has got information of the paramedics and I'm saying it's not an area where we are just supposing. There is information and on the basis of that I am saying there is possibility or non possibility, it's a judgment issue.

MR MPOFU: Yes, just so that we are clear. When you refer to experts evidence you're referring to the fact that some of the medical personnel says that, in terms of their conventions and all that, they then prefer to work with injured people when there are arms around, which is understandable. Is that what you are referring to?

GENERAL PHIYEGA: Yes there is a report from the doctor, she doesn't talk about preferences, she talks about convention.

MR MPOFU: Yes. Yes okay. That, we may just get that out of the way. I accept that, I accept the conventions and I think they make sense as I say even to a lay person. But I'm going to argue that that is not the reason why the arms were removed, so it's just that you understand where I'm going with this.

GENERAL PHIYEGA: I accept your argument but I also, that's why I'm saying, I gave you the response that I gave you.

MR MPOFU: Ja.

GENERAL PHIYEGA: Based on the body of the information that is before me to, so I also have others position.

MR MPOFU: Ja and one of the reasons why I'm going to demonstrate to you that there's no causal connection, as we lawyers call it, between those conventions and the removal of the arms is the, is the fact that, to show that there's no connection between the two is, and you can take my word on this, because I don't want to have to play the videos. Is that the removal of arms

MR MPOFU: Yes.
from the scene happened, we see it at least on some of the videos that were played which you might have seen. It happened at scene 1 almost immediately after the people had been shot and long before any paramedics were on the scene. Can you just accept that?

GENERAL PHIYEGA: I can only say you need to give me your facts to that to say when you say they were removed long before the paramedics come, when did the paramedics arrive and when did K9 arrive. It's very important for us to look at those facts.

CHAIRPERSON: Mr Semenya, do you wish to say something?

MR SEMENYA SC: Well, Chair, fortunately the witness is doubling up s me as well. There is no video material showing us at what point the paramedics arrives and at what point at scene 1 those weapons are removed.

CHAIRPERSON: Mr Mpofu, there's substance in that point. Mr Mpofu, may I ask you where we're getting with this cross-examination. The witness wasn't there, the witness commissioned a report, she received. You're questioning her about the report, she, I think indicates that she accepts the report. Well that doesn't bind us, we are in as good of a position, with respect, that she is to decide what the fact of the matter were. So I don't want to stop you unduly but I mean you had not helped taking us very much further forward at this point. There are two other points to be borne in mind. The one is that, unless it's suggested the police brought the weapons and planted them afterwards which I take it is not suggested, we have to accept that all those weapons were there and were in the possession of some at least of the strikers. The only relevance would be, I take it, that a particular striker might, on your version, be falsely incriminated as the possessor of a dangerous weapon if in fact a weapon was put in his hands and in fact he didn't have a weapon at the time. But if he didn't have it somebody else did. So I understand the relevance of the point in relation to individual strikers that weapons were in their hands, either before and they weren't removed and replaced again in the same place afterwards or, if they didn't have weapons at all and they were put there afterwards, that the only relevance of the point as I see it.

We also have a slide 252 that I want to ask Mr Semenya about, it looks to me like a daytime slide, in other words, and I'd be interested to know whether that was one of Warrant Officer Hendrickson's slides because if it was it does indicate a scene in the day time where there were weapons at koppie 3 in the close vicinity of deceased protesters, but again the fact it would be borne in mind when one assesses this whole question. But at this stage its certainly open to be argued at the end if the evidence, if there's evidential basis for it, that the removal of the weapons and their replacement was possibly not as it should have been because weapons may be put in the hands of people who weren't holding weapons before hand and the other question of course is circumstances in which this removal or replacement was revealed or communicated to the evidence leaders, that would be another aspect of evidence and basis for argument. But I think we mustn't spend too much time on an issue with this witness because with all due deference and respect to her she can't throw very much light on this, herself. Commissioner Hemraj pointed out to me that this is almost a response to what Mr Semenya said. There is a video showing the police removing a firearm from the scene pretty soon after the events.

MR MPOFU: Chairperson, there is and that's, let me start with Mr Semenya's objection. If I'm forced to play that video I will, not now because it's not ready, but I would have thought that Mr Semenya has seen the videos of the police immediately, when we are dealing with Magidiwana's evidence for example, you'll remember his evidence about the removal of the stick, we've seen all that and there's no suggestion at that stage that, that the paramedics were there. But even if there was remember, Chair, that Captain Mohlaki testified that he arrived there and when he arrived the pile was already there and there were certainly no paramedics at that stage. So that's evidence that has been led in this commission, which as I say I can go and dig it up on the record or play the videos I would have thought those issues were that side.

CHAIRPERSON: Very well, but my main concern was and the most profit to be derived putting a detailed list of questions to this witness about it because she can't throw any light herself on it, that's my main point. But Mr Semenya had another point which you are dealing partly with.

MR MPOFU: Yes I just wanted a ruling on the objection first and then I can deal with your concerns, Chair.

MR SEMENYA SC: Chair the paramedics, there is the other side of the evidence which is that those who were moving, immediately after the shooting happened from forward holding area 1 were told amongst them the paramedics to go to scene 1. Now I don't know whether they arrived subsequent to Mr Mohlaki, I say it is not evident from the videos and when Captain Mohlaki's talking about paramedics I don't know whether he's referring to the external ones as opposed to those who were at the forward holding area 1.

MR MPOFU: Okay. Chairperson, can I deal
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1 with that objection in a, by rephrasing the question.
2 Okay, General, you’ve heard the debate between myself and
3 my learned friend, Mr Semenya and in order to save time I’m
4 going to ask it along the following lines. Assume that I
5 will be able to demonstrate to Mr Semenya and to the
6 commission that by the time the weapons were removed and
7 put into a pile the paramedics had not arrived and that the
8 arms, those arms were actually removed almost immediately
9 after the shooting. Would, if that is so, would you accept
10 that they would at least as far as that removal is
11 concerned at scene 1 there would be no connection between
12 the removal of those arms and whatever the paramedics said
13 about the conventions because they were not there.
14 GENERAL PHIYEGA: I would not agree until
15 I see those facts. I can’t say yes to a thing I haven’t
16 seen.
17 MR MPOFU: I accept, of course you can’t.
18 That’s why I’m saying and I know this has been a problem
19 throughout your testimony. When I’m saying assume that
20 this is a fact, you can be sure that if later I can’t find
21 that fact the commissioners will ignore whatever followed
22 that statement, okay. You can be sure about that. So I’m
23 saying to you assume that I will be able to show that by
24 the time the arms were removed at scene 1 and the pile of
25 arms was put on the side that was done A, almost

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1 immediately after the shooting and B, before the paramedics
2 arrived. Something that I’m going to show. If that, sorry
3 please. Now if that assumption is correct, if it’s not
4 correct then we don’t have to waste time on it, but if it
5 is correct would you agree with the simple proposition that
6 there would be no connection therefore between that removal
7 of the arms at scene 1 and whatever the paramedics may or
8 may not have said about the conventions?
9 GENERAL PHIYEGA: Let me say I don’t
10 agree and then I’ll deal with other issues when you, where
11 you want us to be.
12 CHAIRPERSON: Mr Semenya has turned his
13 light on, he wants to say something.
14 MR SEMENYA SC: Chair, surely those
15 conventions are predicated on making the area safe. I
16 can’t for the life of me understand how a police operation
17 could be there with people injured and weapons lying around
18 only for them to wait until paramedics arrive so that that
19 convention can trigger in.
20 COMMISSIONER HEMRAJ: Mr Mpofu, it
21 doesn’t appear from these videos when the paramedics
22 arrive, how do you propose to show when, exactly when it
23 was that they did arrive in relation to the removing of the
24 weapons that you say are shown on the video? How are you
25 going to show that?

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1 MR MPOFU: I’ve just said, Commissioner,
2 that Captain Mohlaki gave evidence before this commission
3 that he arrived at about 4 o’clock and I asked him the
4 question when you arrived there was the pile of arms
5 already there and he said yes and he also testified that
6 subsequently the paramedics arrived or at least at that
7 stage they had no arrived. So that’s concrete evidence,
8 let alone on the video then and so on.
9 COMMISSIONER HEMRAJ: Is that what you’re
10 relying on to show -
11 MR MPOFU: Well for the concrete evidence
12 that I’m just saying the video evidence as you correctly,
13 is scant. So I’m relying on that to but I’m relying more
14 on the concrete evidence of Captain Mohlaki. But the video
15 evidence I’ll also rely on and profile this shows the
16 people literally shooting and moving in and taking the
17 arms.
18 CHAIRPERSON: So, Mr Mpofu, I think that
19 you must give serious consideration of what I am now going
20 to put to you, key witness in this whole matter is Warrant
21 Officer Breedt. His statement is annexure A to the reports
22 that was prepared. He will presumably have to be called in
23 this regard.
24 MR MPOFU: Yes, I’m going to deal with
25 him, Chairperson.

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1 CHAIRPERSON: And the, he was the one, I
2 think he’s part of the K9 group, so he actually had a dog
3 with him.
4 MR MPOFU: From Vereeniging.
5 CHAIRPERSON: Which he says that’s why he
6 couldn’t keep notes because, make notes because he had to
7 keep his dog under control.
8 MR MPOFU: Yes.
9 CHAIRPERSON: And he does say, he doesn’t
10 say, this is para 7 of his statement, he doesn’t say when
11 precisely he removed the weapons, he does say that he then
12 put them back and in paragraph 10 he says that he puts them
13 back as well as he could remember.
14 MR MPOFU: Yes.
15 CHAIRPERSON: And he says he didn’t make
16 notes because he had to keep his dog under control and he
17 says he may have made a mistake with the correct or precise
18 place, position of the weapon, he could also have made the
19 mistake in relation to the exact weapon that he put down.
20 MR MPOFU: Yes in one case he says he
21 put, he put less then what he found.
22 CHAIRPERSON: We don’t have to debate all
23 that now. The point you’re making to a very large extent
24 depends upon how accurate he was, he already admits that he
25 may well have not been accurate but, so I’m not quite sure
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how much advantage we're going to derive from a detailed cross-examination on this point with this witness whose answers are going to be hearsay in any event. But I'm not going to stop you at this stage but I just indicated to you that I would be, prefer evidence that we can use later with profits rather than evidence that we can't, it sounds to me that we're going to get.

MR MPOFU: Yes, Chairperson, I think, if I may, Chairperson, if I may, before I repeat the question for the witness. I just want to make one thing clear. I'm actually, this is the last question before I move to the area that the Chairperson has gotten into. Because the real issue with this particular witness is not so much accept what the Chairperson is saying, is not so much what this one or that one says, it is, what I'm going to take issue with, with this witness is the fact that she has accepted this report. So I'm going, I'm not there yet.

CHAIRPERSON: No, no I accept that.

MR MPOFU: Yes.

CHAIRPERSON: But even if she accepts the report we don't have to accept it. Her acceptance isn't binding on us.

MR MPOFU: No.

CHAIRPERSON: We're in a, the same boat that she is.

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the paramedics, then there's no connection between the conventions or whatever the paramedics have said or asked for in the removal. I'm just making that simple point, if I'm correct on – and maybe let me rephrase the question.

CHAIRPERSON: It's almost like an argument point but anyway if you're going to ask one question and you stick to that promise –

MR MPOFU: J'a, I promise.

CHAIRPERSON: Then subject to what Mr Semenya says I'll let you ask the question.

MR SEMENYA SC: Chair, might I just read to us what appears on page 669 of the record, because Mr Mpofu says the only concrete evidence is his reliance on what Captain Mohlaki says, to a question against line 6, the Chairperson asks, "Had the shooting happened yet, shooting happened yet?" Captain Mohlaki, "Ja, when we arrived there I think the scene was still active, because the police, with the movement of the police officials and the paramedics at the scene." So the record reads.

At page 840 what my learned colleague Mpofu is asking. Against line 5 says Mr Mpofu, "In fact, that must be so, because as you say some of the injured people had not yet been attended to?" Captain Mohlaki, "At scene 1, that's correct, Sir." Mr Mpofu, "And were the injured people, at least some of them, attended to in your presence?" Captain Mohlaki, "That's correct, Sir."

MR MPOFU: Chairperson, honestly I don't want to be drawn into this, because whether this refers to scene 1 or scene 2 or the arrival or the treatment and so on, are matters that we can deal with. I was avoiding all this by saying to the witness, if it can be shown that the removal of the weapons at scene 1 happened before the paramedics had anything to do with that scene - of course, if I've explained to the witness, if it cannot be shown and we can debate this with my learned friend later, then whatever I'm going to ask is -

CHAIRPERSON: - is the case. How do you propose to show? Is there a witness you're going to lead, or are there video clips which show that, in which case, will you be able to give us a reference to them?

MR MPOFU: Well, there are video clips which have already been shown, which, as I said earlier, to save time, because I don't have them at hand right now, I would present. If I fail to do so, as I say, then the question will fall away.

CHAIRPERSON: But you know you're putting a hypothetical question to the witness -

MR MPOFU: J'a.

CHAIRPERSON: And if the witness, whatever answer the witness gives, will depend upon whether
firstly, the hypothesis is correct –
1  MR MPOFU:    Of course.
2  CHAIRPERSON: And secondly, is her
3  response to the hypothesis going to help us to make
4  findings at the end of the day?
5  MR MPOFU:    Yes, Chairperson, it will make
6  you accept or not accept the fact that the report that she
7  has accepted, as National Commissioner, has got the flaws
8  that I’m about to point out, one of which is the one we’re
9  exploring now.
10  CHAIRPERSON: I understood you relying on
11  Captain Mohlaki’s evidence, and the passages that Mr
12  Semenya has read appear to indicate that Mr Mohlaki doesn’t
13  say what you said he said.
14  MR MPOFU:    No, Chairperson, I’ll just
15  move on to the next point. I was just I think –
16  CHAIRPERSON: I don’t want to hamper you
17  from making a point –
18  MR MPOFU:    Well, Chairperson, I rely on
19  videos, I’ve said, I rely also on Captain Mohlaki, if one
20  of them happens to be debatable, I am not in a position now
21  to play the videos or to deal with whether Mr Mohlaki’s
22  references were to scene 1 or scene 2 and all that, and
23  that’s why I’m putting it as a proposition. If indeed that
24  proposition is wrong, then we would, in two minutes, be out
25  of this point and whatever I’m going to ask will be
26  superfluous.
27  CHAIRPERSON: The problem that I have, if
28  we’re putting a hypothesis as to what Mr Mohlaki said,
29  which Mr Semenya has already shown is not correct, that is
30  my difficulty.
31  MR MPOFU:    Alright, well that doesn’t
32  deal with the videos, but I’ll move on. Thank you, Chair.
33  CHAIRPERSON: I suggest you move on, I
34  also suggest to you that if you are later able to show from
35  the videos that the points you made is correct, you will be
36  able to argue, and very forcibly in support of the argument
37  that wish now to put to the witness, so I suggest you move
38  on.
39  MR MPOFU:    Thank you, Chair. You have
40  already been referred to, and let me make this clear again,
41  what I’m dealing with now, is that you, as National
42  Commissioner, in accepting this report did not conform with
43  your duties to decisively deal with a serious matter of
44  alleged interference with the scene.
45  GENERAL PHIYEGA: That, Advocate, sounds
46  like a conclusion, and I appreciate to be taken into what
47  brings you there.
48  MR MPOFU:    Okay, yes. Well, the first
49  one is one that I canvassed with you yesterday that even if
50  we accept what the paramedics are alleged to have said, it
51  relates to injured persons and does not include the dead
52  people who were shown in the pictures.
53  MR SEMENYA SC:    Chair, that’s also not
54  correct. Breed refers to the dead people as well.
55  MR MPOFU:    Well, if that is so, then it
56  makes the matter even worse, because Breed spoke about 84 –
57  not Breed, 84 injured people and we know that on that scene
58  another 14 people died. So that means almost about a 100.
59  Actually 18 people died there, but four died in hospital.
60  That means about 102 people, and I’m putting this to you.
61  We will argue that the chances of arms from a 102 people
62  which have been removed, and replaced in the dark are –
63  makes that exercise of the replacement of those arms,–
64  something that you should not have -
65  CHAIRPERSON: I’m not sure it was pitch
66  dark, I think there were searchlights and things on the
67  scene, were there not?
68  MR MPOFU:    No, I didn’t say pitch dark.
69  CHAIRPERSON: Sure, I know you didn’t,
70  but you said in the dark, which could be the expression –
71  MR MPOFU:    Ja, skemer. Paragraph 9, “Ek
72  weet nie presies watter tyd nie, maar dit was ongeveer
73  18h15 en dit was after skemer, het ‘n swart man wie in
74  privaat klere geklee was, my op die toneel genader. Ek ken
75  nie die person nie. Ek twyfel of ek kon hom sal herken.
76  Ek het aangesien dat hy ’n lid van die polisie se fotograwe
77  by die plaaslike sentraal,” and so on. All that – all that
78  suggests the following, that Breed says it was dark –
79  already dark and he saw some private person in clothing
80  that he assumes is a member of LCRC, and that person told
81  him, op versoek, whatever versoek is –
82  MR MAHLANGU: Request.
83  MR MPOFU:    Requested him to place the
84  weapons, “min of meer waar ek dit vanaf verskuif of
85  verwyder het.” And this is the kind of thing that you
86  accepted as an explanation for the tampering, is it?
87  GENERAL PHIYEGA: I think, Adv Mpofu,
88  what you are giving me is a judgment –
89  MR MPOFU:    Yes.
90  GENERAL PHIYEGA: Of my judgement and I
91  would like to say you have right to make that judgement, but
92  I still believe the judgment I made, based on the facts of
93  accepting this report, in my opinion it’s rational.
94  MR MPOFU:    Okay. And he says – Breed
95  further, “Ek het toe so goed soos ek kon onthou die wapens
96  wat ek verskuif en verwyder het terug geplaas.” In other
97  words, he’s saying, well as far as I could remember I put
98  wherever I remembered – do you also accept that as a
99  reasonable explanation of how the weapons were removed and
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25 a body and say this is person is dead. They would have
24 also did that type of test, because you don't just look at
23 decide that somebody is dead. I presume the paramedics
22 save lives, and we as police also do not use our eyes to
21 spirit of doing that was to assist those who were there to
20 placed, maybe not correctly and that type of thing, but the
19 acknowledgement that some of the weapons could have been
18 participating there, and I think there's also some
17 that's why understand the broader stakeholders that are
16 will be questioned on that, that's what I read in that, and
15 uniform. He saw some authority in that, and I'm sure he
14 I think he didn't just see it as a person not wearing
13 wear uniform, and the LCRC people were not in uniform. And
12 about somebody in private clothes. Our detectives do not
11 read through, that – let me step back and say you talk
10 acknowledgement, even in some of the statements that I've
9 supposed to be doing. And I think that maybe it's an
8 focus – the actual report also talks about focussing on
7 saving lives. And Breed and whoever else that was there do
6 that really to assist those paramedics to do what they're
5 he says, "Ek mag miskien die spies in die verkeerde rigting
gelaas het, maar dit was in 'n vertikale posisie langs die
liggaam." And then on paragraph 14 he says, "Ek het,"
this from another body now, "Ek het die panga en ander
wapens wat daar naby gelê het opgetel en bo op die rots
langs die liggaam geplaas." Then this is the highlight,
"Ek het later net die panga met die geel hand - wat ek
langs die liggaam gekry het terug langs die liggaam
gelaas." Okay, this is the key person who seems to have
14 done this. He is a warrant officer, he's not a senior
13 officer. He takes instructions from some unknown person in
private clothes. He puts weapons, as far as he can
18 remember, and we are dealing with about a 100 people.
19 Remember when he removed those weapons, he didn't know that
20 he was going to have to replace them. It's because someone
21 else said that he must replace them about two hours later.
22 I mean really would you say that this adequately and
21 satisfactorily, according to you, explains this serious
20 matter?
21
22 MR MPOFU: And then just one more, on
23 paragraph 13 he's talking about a spear that he removed.
24 He says, "Ek mag miskien die spies in die verkeerde rigting
25 geplaas." And then on paragraph 14 he says, "Ek het,"
24 this from another body now, "Ek het die panga en ander
23 wapens wat daar naby gelê het opgetel en bo op die rots
24 langs die liggaam geplaas." Then this is the highlight,
23 "Ek het later net die panga met die geel hand - wat ek
24 langs die liggaam gekry het terug langs die liggaam
gelaas." Okay, this is the key person who seems to have
20 done this. He is a warrant officer, he's not a senior
19 officer. He takes instructions from some unknown person in
18 private clothes. He puts weapons, as far as he can
19 remember, and we are dealing with about a 100 people.
20 Remember when he removed those weapons, he didn't know that
21 he was going to have to replace them. It's because someone
22 else said that he must replace them about two hours later.
23 I mean really would you say that this adequately and
22 satisfactorily, according to you, explains this serious
21 matter?
22 GENERAL PHIYEGA: Advocate, the important

23 thing is to say lives had to be saved. The paramedics were
22 there. The paramedics are indicating in their statement,
21 they also refer to the conventions, to say is the place
22 safe, is it not safe, and it is in accordance with their
21 conventions that those weapons be removed so that they can
20 focus – the actual report also talks about focussing on
19 saving lives. And Breed and whoever else that was there do
18 that really to assist those paramedics to do what they're
17 supposed to be doing. And I think that maybe it's an
16 acknowledgement, even in some of the statements that I've
15 read through, that – let me step back and say you talk
14 about somebody in private clothes. Our detectives do not
13 wear uniform, and the LCRC people were not in uniform. And
12 I think he didn't just see it as a person not wearing
11 uniform. He saw some authority in that, and I'm sure he
10 will be questioned on that, that's what I read in that, and
9 that's why understand the broader stakeholders that are
8 participating there, and I think there's also some
7 acknowledgement that some of the weapons could have been
6 placed, maybe not correctly and that type of thing, but the
5 spirit of doing that was to assist those who were there to
4 save lives, and we as police also do not use our eyes to
3 decide that somebody is dead. I presume the paramedics
2 also did that type of test, because you don't just look at
1 a body and say this is person is dead. They would have

3 MR MPOFU: Okay, I'm going to move away
4 from there. All I want to say to you is that this is not
5 at this stage so much a criticism of Breed, that will
6 happen if and when, as the Chairperson says, he comes here.
7 This is a criticism of you in accepting this kind of thing
8 and now rationalising it without taking that extra step of
9 saying, "Ja, but really, if it was dark, if this guy put it
10 maybe next to," and so on. That's your duty, as the
11 National Commissioner, who is facing a serious allegation
12 which has created international and local uproar of this
13 magnitude should not accept this kind of wishy-washy
14 report, and that you have neglected your duty, not Breed,
15 in telling us, as you did yesterday, that the matter is now
16 closed. You have accepted this and life must carry on.
17 CHAIRPERSON: - Mr Semenya, I didn't hear
18 – sorry, I didn't hear the National Commissioner say the
19 matter is closed. Certainly as far as this Commission is
18 concerned, the matter is definitely not closed, and
17 whatever – and even though the National Commissioner may
16 accept the correctness of the report, as I've said, that
15 doesn't bind us. I have no doubt we'll have argument on

18 the matter. We'll keep an open mind – the three of us, on
17 the whole matter until the very end. So it's certainly not
16 closed as far as we're concerned, but I didn't hear her say
15 it was closed either, but let's hear what Mr Semenya has to
14 say.
15 MR MPOFU: Maybe you didn't hear her,
14 Chair, but she did say it. We can play the tape.
13 CHAIRPERSON: - first. Maybe the
12 commission will say she does – anyway let's anyway let's
11 hear Mr Semenya first.
10 MR SEMENYA SC: Chair, it is precisely
9 what the Chair raises, but also too that the witness says I
8 think the decision which I hold to be rational. Mr Mpofu
7 can differ. I don't know where this is taking us to. I
6 can't see any legal predicate on which Mr Mpofu says there
5 is a duty on the National Commissioner not to accept
4 statements which he rationally says to her, are rational.
3 [10:33] CHAIRPERSON: I suppose his point would
2 be he's going to argue though at the end of the matter and
10 he wants to give her a chance to reply. I suppose - let's
9 see what she has to say. What do you say about this, do
8 you regard the matter as closed National Commissioner?
7 GENERAL PHIYEGA: Judge I have no powers
6 to close any matter of this Commission that's number one
5 but let me start off by saying to what Advocate Mpofu is
saying the fact that, without being prompted, I saw a program and I commissioned people to do investigation for me. I didn't just want to rely on the statements that were sitting in there. That in itself shows the responsibilities, the seriousness with which I treated this matter, that's fact number one. The second issue is that I have looked into all these facts has been given to me and I am saying, given what I have made out of this fact I do think there is rational explanation of what has happened and indeed you know it doesn't stop anyone to judge my judgement and I would say it is your right to judge my judgement but where I'm sitting I'm saying I have had at least some insight into what has happened and in my view it is rational and my standpoint remains. And that is my input into the Commission, the judgement of the Commission remains.

MR MPOFU: Okay. Alright thank you. Firstly let me tell you that you are changing your evidence. On the 16th when we come back I'll play the tape for you and you'll hear that I after even apologised for asking you a double question. Are you satisfied with the report and the matter closed and you said yes and I sorry those are two questions in one. But that will be a matter - it's either I'm right or you're right. That's what you said yesterday and I will show that. Secondly, yes both you and Mr Semenya are quite correct by introducing the element of rationality into it because that's exactly what I've said to you I'm going to argue that a reasonable National Commissioner in your position presented with this kind of thing would not be satisfied and say and that's what I will argue, so rationality is definitely going to be part of it and that's the only issue I'm going to argue on this.

CHAIRPERSON: She made the rationality point already and she answered, gave her answer to it so I think that -

MR MPOFU: Thank you Chairperson.

CHAIRPERSON: - you can now perhaps move on to another matter.

MR MPOFU: Yes thank you.

GENERAL PHIYEGA: But Judge there's something, can I say something?

CHAIRPERSON: Yes.

GENERAL PHIYEGA: The question you asked that day was based on 22 and 23 of the report that I have given because the report was still saying progress with the investigation is still to be reported and I said we circulated another report. And we will be also sharing, you know, a composite report that covers everything.

MR MPOFU: Yes. No that was not me, that was Mr Madlanga. That was Mr Madlanga and on the basis of that answer you presented us with the latest report. What I asked you, was yesterday I said is the matter now, meaning yesterday, is the matter now, are you now satisfied and is the matter now closed? But let's not quibble about such -

CHAIRPERSON: I find despite my efforts to close the door on this one for the moment we will revisit this probably on the 16th and we'll deal with it then with such fortitude as we can muster.

MR MPOFU: Okay the last point I want to deal with on this topic is whether or not you'd agree with me that - and that deals mainly with what the Chair was saying that look whether Mr X had the weapon or not, it doesn't matter you know because somebody had the weapon. Not Mr X -

CHAIRPERSON: It does matter, it does matter in relation to the particular person in whose hand the weapon was placed if he didn't have the weapon there before. It does matter to that extent but in the overall picture as to whether the people on the koppie had dangerous weapons it isn't necessarily so important who had what but it is a fact. You can't ignore the fact that if a weapon was put in the hand of somebody who didn't have the weapon beforehand that is contamination and tampering and...
of my learned colleagues in relation to the Myburgh matter
that you referred it to IPID because you did not want to
investigate yourselves? Why was this serious matter of the
tampering report treated differently and you investigated
yourselves?
GENERAL PHIYEGA: The main reason is that
in this incident there was no person killing another
person, police killing another person. When those types of
issues, it's categorical it's clear, I can't even touch
that. If a policeman kills another person IPID must come
in. In this regard I wanted to understand these pictures
to say why are our pictures daylight ones and why are the
LCRC ones that we got here yellow or whatever but I wasn't
dealing with life being taken, I was looking at pictures.
And it is within my limits to do so.
MR MPOFU: Well I understand from that
answer that you are making a distinction between cases
where there's an allegation or a possibility
of a policeman having caused a death in which
case it gets referred to IPID or other forms of serious
allegations against sorry, of serious misconduct on the
part of the police, which according to that answer should
not be referred to IPID but should be investigated by
yourselves.
GENERAL PHIYEGA: I'm saying to you I saw
pictures that are different. I had pictures that we
submitted to this Commission, I saw pictures that were with
the evidence leaders that were different from ours and I
wanted to understand and I asked this investigation and I
understand now.
MR MPOFU: Okay you didn't answer my
question but I'll ask another one. Should I also
understand from that answer you gave before this one that
you regarded the Myburgh allegations as involving a
policeman killing somebody?
GENERAL PHIYEGA: There was an allegation
by Myburgh that he saw - that he heard a shot and that shot
he saw somebody dead and he made a statement also, the
statement that he has made alerted to those types of
allegations.
MR MPOFU: Okay that also is not an
answer to my question but, Chair, just in case I get this
right - you know there are allegations about a sangoma was
killed recently with an R5.
GENERAL PHIYEGA: I don't know about the
allegation, I know about a sangoma who is dead.
MR MPOFU: But all I'm asking you, Madam,
is whether you are aware that that dead sangoma, around his
death there are allegations that he was killed with R5
which is police issue?
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1 know that there is somebody who died, shot with an R5, a
case number has been opened and it’s being investigated and
let me put it on record to say if there is a policeman that
has shot any other person it doesn’t matter where it is
IPID will be involved.

6 MR MPOFU: Okay thank you. Commissioner, just bear with me one second, Chairperson. Just in the
same vein I’m just going to touch on the Myburgh case and I
promise you it will be one or two questions because I don’t
want to spoil the good work that Mr Madlanga did on it.
Well firstly on that subject would you agree that the
identification or the process to identify the people
involved was demonstrated by Mr Madlanga in a few minutes
and Mr Madlanga is an advocate from the Transkei so he’s
not a detective but he was able to crack the case in a few
minutes and left us with at least two people, two
constables from NIU that would be the suspects.

CHAIRPERSON: What exactly is the
question. You put certain factual statements to the
witness, what is the question -

MR MPOFU: The question is what I said,
which is would you agree that this - it wouldn’t take much
effort as was demonstrated here to narrow the suspects at
least to two people as was done by Mr Madlanga.

GENERAL PHIYEGA: Maybe let me enlighten

this, I’m also from the Limpopo initially.

MR MPOFU: Okay then I should rely on the
attitude.

GENERAL PHIYEGA: I think the important
thing is that when IPID is investigating that would be the
role of the IPID to do that, I can’t interfere with their
investigation.

MR MPOFU: Fair enough. The real
question that I wanted to ask you is this and you or may
not agree with me because some of it is speculative. On
FFFB and as I said I’m not going to repeat that whole
exercise, okay I’ll help you with it. In FFFB Mr Madlanga
had reduced this possible person who killed, as you agreed,
the other person to a Constable Hallam or a Constable
Thafeni, number 3 and 23.

[10:53] CHAIRPERSON: I don’t think you can say
that either of those persons necessarily killed somebody
else, but it either killed probably, or attempted to kill, because all that Myburgh says is, a shot was fired. He
doesn’t, he heard a shot fired - been fired. He doesn’t
say that someone died as a result of that. That is an
inference that may be drawn. The other inference is, it
may have been an attempted murder. But anyway, but it’s
not really material for the question you are asking, but I
am just doing it for the purposes of making the record
correct.

MR MPOFU: Chairperson, also for the same
purposes, I must say that it’s not Myburgh, it’s the
witness who said this involves a killing, which is why it
was referred to IPID. 2) Myburgh says that the killer,
alleged killer said, when he asked, “what are you doing?
They deserve to die.”

CHAIRPERSON: Again that’s consistent
with an attempt to kill, but again, I assume that a
policeman who attempts to kill somebody else, his case is
also referred to IPID, so we don’t have to spend extra time
on that.

MR MPOFU: I would assume so. For the
sake of progress, I’ll say “alleged killing.” The real
point is that Mr Madlanga had reduced it to a Constable
Halam and a Constable Thafeni, remember that.

GENERAL PHIYEGA: The matter has been
dealt with, what’s the question?

MR MPOFU: That is the question, do you
remember that?

GENERAL PHIYEGA: I remember that.

MR MPOFU: Ja, okay. Now, the - Halam,
and maybe you can assist there, Halam doesn’t sound like an
African surname, does it?

GENERAL PHIYEGA: I don’t know.

CHAIRPERSON: Mr Tokota tells there’s an
Adv Halam, he is a Xhosa gentleman. So I am not sure that
the inference that you are seeking to draw is fact.

MR MPOFU: I also know of an Adv Peter,
who is a Xhosa, but that’s by the way – the point I am
making is that it doesn’t sound -

CHAIRPERSON: - investigation, thank you,
Mr Mpofu.

MR MPOFU: Thank you, anyway the only
point I am making is that actually it’s not even just
about, it’s not about race as such, it could have been the
other one is tall, the other one is short, the other one is
fat, the other one is thin, it doesn’t matter. All, I am,
the point I am making is that once it’s been reduced to two
people, it would be easy, either using their race, their
height or whatever it is, to say to Myburgh, it’s now
between these two, and that might have jolted his memory,
that’s all. Would you agree? If you don’t, you don’t, and
we’ll move on.

GENERAL PHIYEGA: I said that type of
information is going to help IPID - referred to IPID.

MR MPOFU: Thank you, Chairperson, I am
going to move to another topic, maybe it might be a
convenient stage.

CHAIRPERSON: Very well. We will take
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MR MPOFU: Thank you, Chairperson.

[COMMISSION ADJOURNS COMMISSION RESUMES]


National Commissioner, you’re still under oath. Mr Mpolu?

MR MPOFU: Thank you, Chairperson.

General, now I’m going to, as I said in the morning, just step a little bit back and deal with some of the preliminary issues that – or rather complete some of the issues we dealt with yesterday which I’m sure you and I are going to agree on, at least initially. Now, what I propose to do is to outline for you – you know, there’s this body of what I call the regulatory and policy framework and so on and which is a lot of documents and legislation. And what I’ve done is I’ve extracted some of what I think are the key principles and philosophies from those documents which I will be questioning you about, but I first want us to agree that those are - those can be distilled from the framework. Are we together?

GENERAL PHIYEGA: I’m listening.

MR MPOFU: Right. And we had started with some of this yesterday. In terms of the philosophical background of the policies and principles around crowd management which are mainly contained in FFF1, but also in other documents, you would agree with me as it is indicated in the very first line of FF1, that those policies are deeply rooted in the socio-political changes that occurred in 1994. Agreed?

GENERAL PHIYEGA: I’m working with you.

MR MPOFU: Okay, I prefer instead of working with me, if you agree or not agree.

GENERAL PHIYEGA: Perhaps my use of working with you is that it’s a process. You are going to come to a point where you say this are this. So I am safer saying I am working with you.

MR MPOFU: No, you are right, but for the sake of progress I think let’s do it one by one, because then you might agree with three and the other two you don’t, so let’s rather do it one by one. So would you agree – okay, let me – I’ll read it out. It says, the very first line of FF1, "As a result of the vast socio-political changes that have occurred in South Africa over the past few years many approaches, tactics, techniques must be developed", and so on and so on.

GENERAL PHIYEGA: That helps.

MR MPOFU: Okay, okay. So that’s one of the principles. Oh, ja. And then another principle of the Foundation that can be distilled from this body of document is that it is steeped in the culture of fundamental rights and the constitutional principles, correct?

GENERAL PHIYEGA: Correct.

MR MPOFU: And is it also correct that what it seeks to do, in a nutshell, it moves from a culture of crowd control to a culture of crowd management?

GENERAL PHIYEGA: That is the spirit, yes.

MR MPOFU: And would you also agree that very clearly what comes out of this and in particular even from the Act, the Regulation of Gatherings Act, is what one might call a new participatory spirit or ethos, in other words involving all stakeholders?

GENERAL PHIYEGA: I would agree.

MR MPOFU: And that another fundamental principle is the prevention, and I use that word advisably, the prevention of violence.

GENERAL PHIYEGA: Just repeat that again.

I didn’t get it.

MR MPOFU: Another key principle that we can distil from this body of policies and regulations is the prevention of violence.

GENERAL PHIYEGA: The prevention of violence or management – or public, but I’m a little bit lost on that one, to say you prevent violence or do you manage violence what are you doing?

CHAIRPERSON: Well, you try as far as you can to ensure that there isn’t violence, but that’s if you can, obviously if you can’t you then got to manage it, but you – but your first objective, perhaps one of the primary objectives is to prevent violence insofar as you can do so. That must be right, sorry.

GENERAL PHIYEGA: Okay. Let’s agree and continue.

MR MPOFU: Sorry?

GENERAL PHIYEGA: I agree, let’s continue.

MR MPOFU: We are agreed? Okay. And just to assist you in total you may be hesitant, the - 2.3 -

GENERAL PHIYEGA: Ja, it’s fine. We can continue.

MR MPOFU: Page - no, well, I want to emphasise it. 2.3 says, “To accomplish the following ideals for crowd management situations”, and then it says, “1. No loss of life”, no loss of life. “2.3.1 No damage to property, 2.3.3 No injuries.” And as the chairperson says obviously that’s the goal. It doesn’t mean it will always happen. Agreed?

GENERAL PHIYEGA: Mm.

MR MPOFU: Okay. And those are what I would call the foundational principles of the new approach.
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1 And then to achieve this there seems to be an overemphasis, Page 7822
2 if it is possible, on communication, dialogue, accuracy of Page 7823
3 information. Do you agree?
4 GENERAL PHIYEKA: I would agree.
5 MR MPOFU: In fact, on that particular
6 one at 4.2.2.5 of FFF1 it says, “The importance of constant
7 two-way communication, negotiation and liaison among all
8 relevant role-players cannot be overemphasised”.
9 GENERAL PHIYEKA: Okay.
10 MR MPOFU: And then somewhere – I’m just
11 reading random extracts – at 5.2.2 it says, “Even if
12 problems arise the first step to solving them must still be
13 continuous dialogue and communication”. That’s 5.2.2.
14 GENERAL PHIYEKA: Yes.
15 MR MPOFU: Then 5.2.4 to 5.2.7 describes
16 a warning and then a second warning and so on, so it’s all
17 pervasive, this need for constant communication, dialogue
18 and information accuracy.
19 GENERAL PHIYEKA: Yes.
20 MR MPOFU: Agreed? And then another very
21 important principle which comes out and it comes out – this
22 one comes out of the Constitution of the Republic. It
23 appears in the legislation. It appears in your duties as
24 they are outlined in the Constitution, actually as the very
25 first one, and also from the policies, and that is the

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1 principle of impartiality.
2 GENERAL PHIYEKA: Correct.
3 MR MPOFU: And that principle of
4 impartiality you would agree means not taking sides in
5 whatever the dispute might be there in society, but
6 maintaining law and order and all those good things.
7 GENERAL PHIYEKA: True.
8 MR MPOFU: Sorry, that is true?
9 GENERAL PHIYEKA: Hm.
10 MR MPOFU: And another one is the
11 promotion of tolerance on the part of the police. In fact,
12 it goes even beyond what would be expected of tolerance, of
13 you – not you and me because you are part of the police –
14 but of an ordinary person in the sense that the passage
15 that there’s – even when you are being thrown with stones
16 you must still be tolerant which could not be expected from
17 an ordinary person. Would you agree with that?
18 GENERAL PHIYEKA: Yes.
19 MR MPOFU: In other words it expects, it
20 expects – let’s put it this way, it expects more from a
21 police official than it would from an ordinary citizen
22 because I think I would complain as an ordinary citizen if
23 someone was going to say to me, as they say in 3.3.5,
24 “During an operation where individuals or crowds are
25 hostile towards the police, verbal abuse, stone throwing,
MR MPOFU: Okay. Okay, I’ll put it even more clearly or at least try to assist you. You and I have agreed on ten principles that symbolise crowd management in the – in democratic South Africa.

MR MPOFU: I’m saying now, you can pick any one, if one, so that we don’t have this blanket thing about the ten, if the police have breached one of those principles, would you agree that that would be acting unlawfully or at the very worst against –

CHAIRPERSON: I don’t think you can ask the witness for her opinion of the law.

MR MPOFU: Okay.

CHAIRPERSON: You can ask, I suppose, whether it’s contrary to the spirit of the –

MR MPOFU: Indeed.

CHAIRPERSON: - or something of that nature, but it’s not for her to testify to what the law is, and it’s not appropriate for you to put questions of law to her. That will be a matter for argument.

MR MPOFU: I accept that, Chairperson.

If one of those principles can be shown to have been breached by the police, would you agree that certain steps and remedial action would have to be taken?

GENERAL PHIYEGA: Of those ten principles that you have mentioned I have said to you just in my previous answer that they would need to be tested and then we would – I’d make –

MR MPOFU: I accept that.

GENERAL PHIYEGA: Okay, and the one who’s alleging makes their own principles – their own input. And in most of the instances it would be circumstances from both sides, and somebody who is as neutral as the judge probably will then say, looking at this debate, which way is it going? And if he is fair and rational, that both parties, whatever the outcome, remedies would have to be looked into.

MR MPOFU: Yes, I think you’ve answered the question at the end, ja. I was just going to say, yes, assume all that has happened, the input, the what have you, both sides, all that has happened, and then it is – but you’ve answered, which I’ll take as a yes.

GENERAL PHIYEGA: Advocate, I think just take my answer as it is. Don’t try and narrow it. I think that explanation is important to me.

MR MPOFU: Okay, well, then I have no option but to ask you the question again. If after all the things you have said the input from both sides, the, this one has put their side and they’ve been evaluated and so on and so on, if it is found that the police have breached one of these principles then such remedial action would be in order. Correct?

CHAIRPERSON: Mr Semenyana.

[11:55] MR SEMENYA SC: One has allowed all these hypothetical questions, but if the commissioner were to make a finding, what would then happen? One, the witness has answered to it, but secondly surely it depends on whether that finding is correct on the evidence and I don’t know whether we should necessarily at this point, one, make a contemplation and the finding will be made, one. Secondly, that it will be a finding that is consistent with the evidence, thirdly, that is one that will be embraced necessarily as corrective in its nature.

CHAIRPERSON: I thought you answered yesterday, that if we were to find - there are various possibilities we could find in favour of the police, alternatively we could find against the police on certain aspects. In that event, I think she indicated they would consider, she and her colleagues, would consider our findings. If they agreed with them, they would accept them. If they didn’t agree, they couldn’t appeal. And if there civil litigation thereafter, in effect based on our findings, and they thought our findings were wrong, they would defend the civil litigation, I understood that to be the argument. She also said she can’t say at this stage what she’d do, before she’s seen our report, she won’t know whether she agrees with it, and whether there’s a basis for departing from it or accepting it. That was the evidence she gave yesterday. I don’t understand Mr Mpofu quite to be dealing with that at this stage –

MR MPOFU: Then you understand me correctly, Chair.

CHAIRPERSON: Perhaps you could rephrase it. I mean basically your point is that if it appears, after a full investigation, that the standing orders and the applicable principle has not been applied, if that appears, I presume you would have to accept, to the police, not just because we say so, because we may be wrong. Obviously we’ll try not to be, but we may be, but if they are satisfied that prima facie there’d been a breach of the relevant prescripts, they will take some action. I think that’s your question, and I’d be surprised if she said they wouldn’t, but anyway let’s see whether I’m in for a surprise or not.

MR MPOFU: Yes, I have been surprised before, Chair.

CHAIRPERSON: Do you understand, National
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1 Commissioner? The point is, if, after this whole exercise,
2 all these matters have been looked at, it seems that the
3 prescripts haven't been complied with, some of them have
4 been complied with, and not because we say so, but because
5 – because we could be wrong, but because you, having
6 considered what we have to say, agree that that is so, then
7 some remedial action would be taken. I take it that's a
8 fair proposition to put.

9 GENERAL PHIYEGA: I thought I've answered
10 that, Judge, but I will say the outcome positive or
11 negative will have to be embraced. Where there are needs
12 for remedies that will be taken care of.

13 MR MPOFU: And if individuals are found
14 to have been responsible for those breaches, right through
15 the chain, then there should be consequences and heads must
16 roll, correct? Given the fact that so many lives have been
17 lost and so on.

18 GENERAL PHIYEGA: Advocate, because of
19 the circumstantial nature of these things, I'm comfortable
20 in just saying relevant remedies will be looked into,
21 because what gives me a problem, if you just - just jump in
22 here and say heads shall roll, really it's not a fair – you
23 start from a pre-judgement, you start from a very wrong, I
24 would say relevant remedies.

25 MR MPOFU: No, I’m happy with that.

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1 Relevant remedies, including but not limited to the rolling
2 of heads, where necessary.

3 GENERAL PHIYEGA: That is yours,
4 Advocate, it's not mine, I really don't want to ascribe to
5 that.

6 MR MPOFU: Well, as far as the police
7 officials are concerned, at least, the law is very clear.
8 Firstly, do you understand that what are called standing
9 orders, the standing is just an adjective, but they are
10 orders like any other order, they just happen to be
11 standing orders, but they the same as saying go and pick up
12 that thing and so on, they are orders in the police lingo,
13 so to speak, language, sorry.

14 GENERAL PHIYEGA: Depending on what you
15 are talking about, standing orders, they are guidelines,
16 there are instructions, they are all those things.

17 MR MPOFU: Okay, well fortunately this
18 thing I’m going to read to you covers both. Section 47 of
19 the South African Police Act says, “Subject to sub-section
20 2 a member,” which includes you and all the people who
21 report to you, “shall obey any order or instruction given
22 to him or her by a superior or a person who is competent to
23 do so, provided that a member shall not obey a patently
24 unlawful order or instruction. So it doesn't matter
25 whether it's an instruction or an order. All I’m saying is

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1 that as far as members of SAPS are concerned, the
2 disobedience of a standing order is covered by what I've
3 just read, do you -

4 GENERAL PHIYEGA: You are right and being
5 a lawyer, that’s why talk about circumstantial evidence and
6 all those issues, all those aspects are taken into account.
7 MR MPOFU: Alright. And therefore
8 bearing now what I’ve read to you in mind, and going back
9 to what we said earlier, if any member of the police is
10 found to have breached the standing orders, then
11 consequences should follow, including but not limited to
12 the rolling of heads, given the magnitude of what happened
13 here.

14 GENERAL PHIYEGA: I’ll again exclude the
15 rolling of heads -

16 MR MPOFU: Exclude?

17 GENERAL PHIYEGA: Because I don't want to
18 talk to – I said relevant remedies, I don't want to use
19 your words of rolling of heads. And my acceptance of what
20 you are saying is also taking into account to say, indeed,
21 they have to follow standing orders, but when you charge
22 any person and have a hearing, all circumstances are taken
23 into account. It’s not just a straight line, and that's
24 why I’m saying you, as lawyer, would understand better when
25 you talk about circumstantial evidence.
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<td>saying that obviously, depending on the seriousness of the matter, if it was very serious, those steps might well include the dismissal of the appointment of the member. In other words, the member would effectively be ejected from the police service, if the case was serious enough to justify that, and I think that's just the point he's putting, and I take it you'd agree with that, because in other words, the appropriate penalty would vary from I'm presuming something like a caution all the way up to dismissal from the service. And he uses - discharge is the correct word, he uses the unhappy phrase rolling of heads, which connotes aspects of capital punishment that we turned our back on, but he's really talking about a whole range of sentences from a caution all the way up to a discharge. That must be so, and it would always depend upon a thorough consideration of all the relevant circumstances, is that correct?</td>
<td>satisfactorily with the issue of the internal disciplinary proceedings that have been postulated by the Chairperson. Now, I'm asking you a different question, which is if, as a result of the same breaches, members are found guilty in a court of law in criminal proceedings, then those members would be discharged. Let's put it nicely, correct?</td>
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<td>CHAIRPERSON: I know it's a figure of speech. MR MPOFU: It's a figure of speech.</td>
<td>CHAIRPERSON: Wouldn't it depend on what they were found guilty of? You can't - merely because they were found guilty of riding a bicycle without a light after sunset, that wouldn't mean they would be discharged, it would surely depend on the nature of the charge.</td>
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<td>MR MPOFU: Yes, Ma'am. MR MPOFU: Yes, but if there has been a due process and the hacking is justified, I'm sure you won't hesitate -</td>
<td>MR MPOFU: Funnily enough, that is not the law, Chairperson, but the part that I've left out is if they're found guilty and they - and sentenced to a term of imprisonment without the option of fine, for whatever, then they would be discharged, correct?</td>
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<td>GENERAL PHIYEKA: You just spoke about the significance of my role and the image I portray. I don't want to be seen with look like someone who's having an axe and hacking everyone who is alive.</td>
<td>GENERAL PHIYEKA: In terms of the agreements that we have also, I do have the capacity to condone certain things.</td>
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<td>MR MPOFU: Yes, but if there has been a due process and the hacking is justified, I'm sure you won't hesitate -</td>
<td>MR MPOFU: No, you don't. Okay, let me tell you, under Section 36.1 of the Police Act, &quot;a member who is convicted of an offense and is sentenced to a term of imprisonment without the option of a fine shall be deemed to have been discharged from the service, with effect from the date, following the date upon such</td>
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<td>CHAIRPERSON: As Mr Mpofu would say, I think we can take that as a yes, albeit a qualified one.</td>
<td>sentence, provided that if such a term of imprisonment is wholly substandard, the member concerned shall not be deemed to have been so discharged -</td>
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<td>CHAIRPERSON: Do you understand the point? If somebody is convicted in court and given a jail sentence which is not suspended, he or she can't continue to be a member of the police service in the prison cell, and there's an automatic discharge from the imposition of the sentence. That's what this Section says.</td>
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<td>GENERAL PHIYEKA: Yes.</td>
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<td>CHAIRPERSON: It doesn't appear, unless there's another section that counsel hasn't quoted, that there's a section that says that notwithstanding all of that, you can undo that by administrative - from your office.</td>
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| | GENERAL PHIYEKA: I understand that, but I was starting from what you mentioned earlier on, to say it depends on what has happened to that person. If I'm found guilty of maybe reckless driving, and I'm charged, and I don't have those things, I can condone it, even if there's a criminal charge, there are certain things that allows me to look at the nature of the crime, and I can condone some things, but the one that you are talking about it's probably different, I was starting from where the Judge was starting and linking to what you are saying to
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1. which is the National Planning Committee report which was 
2. that was referred to earlier by Mr Mahlanga, but I'm going 
3. to refer you to a different section. It's FFF13, page 293.  
4. For the sake of saving time, I will just read it out 
5. quickly, and if you forgive me I will jump around because 
6. it's quite a long section, so I will jump certain parts but 
7. I will tell you when I do so.  
8. CHAIRPERSON: I'm sure the witness has 
9. the relevant page in front of her.
10. MR MPOFU: Yes, okay let me first say 
11. this - 
12. CHAIRPERSON: The interpreter is looking 
13. for the page.
15. CHAIRPERSON: When he has found it -  
16. MR MPOFU: Yes, I just wanted to assist, 
17. Chair, in that exercise. The odd numbers - 
18. CHAIRPERSON: 192 has a picture two 
19. ladies, one member of the force and a civilian I take it at 
20. the foot of the page, and the following page 393 who hasn't 
21. got a page number on it, but it's got a reference on the 
22. right hand side to an integrated approach to building 
23. safety. Have you got that page in front of you? Right, 
24. now you can carry on, Mr Mpofu.  
25. MR MPOFU: Thank you, now it's a long
1. complex relationships among these sectors, it is clear that
2. the higher their confluence, the more motivated people are
3. to commit criminal offences.” Yes, I’m sure you can read
4. it with your own time, but you get the gist that this seems
5. to promote an approach that deals with root causes, rather
6. than simply viewing something as a security matter, so to
7. speak. Agreed?
8. GENERAL PHIYEGA: Yes, I do.
9. MR MPOFU: Now in view of that approach
10. which you and I agree with, would you agree that this
11. conflict that we are dealing with here, the conflict that
12. happened in Marikana before the massacre, that it also was
13. not uni-dimensional and as I have said to you yesterday,
14. there is no point denying that it had a law enforcement
15. element to it. But to view solely as a law enforcement
16. issue, would be missing the approach that seems to be
17. advanced by the National Planning Commission. Agreed?
18. MR SENEMYA SC: Chair, Mr Mpofu, uses
19. very long sentences, embedded in them are words like
20. massacre and it would be pitiful if the answer to the
21. question is reinterpreted to say the commission agreed to
22. the massacre component of the question.
23. MR MPOFU: Okay, Chairperson, fair
24. enough. Yes I know, well everyone else refers it like
25. that, but I know in SAPS it’s called the tragedy. The

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1. tragedy.
2. GENERAL PHIYEGA: I think in responding
3. to you because you have read a long thing, you have gone
4. through your documents that is future looking, that is
5. aspirational, the preferred approach as you have put it,
6. and I have already said in this commission that it’s
7. something we would be embracing to look as we go forward.
8. That’s one. Secondly, I just want to say the nature of our
9. intervention you know is the end of the line thing. Events
10. have taken place. What has gone through the pipeline,
11. whether there hasn’t been intervention by all these
12. socioeconomic dynamics are things that are input into that
13. pipeline. As police we are catching that thing, the
14. violence or whatever is happening. A lot of intervention
15. from a safety and security point of view is situational
16. around that. Even the negotiations are not looking at
17. whether people are being paid or whether people are being
18. given accommodation or we are dealing with the issues. The
19. negotiations would be with the issues that is presenting.
20. So our view of the matter from a safety and security point
21. of view is influenced by that because it is happening. You
22. have to act, it is a here and now issue. So I do
23. understand what you are saying and I agree with but I’m
24. just saying our intervention is based on what is happening
25. here and now. End of the pipeline.

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1. MR MPOFU: Okay, well I’m glad that we
2. agree. I thought we would because my reading, and correct
3. me if I’m wrong, was that the police viewed the events, at
4. least leading up to the 16th as at the minimum, two
5. dimensional, as the labour dispute that is there but also
6. as the law enforcement issue and that is why they said look
7. we won’t deal with the labour issue because we don’t have
8. the expertise, but that at least they viewed it as such. I
9. didn’t think that you would have a problem with that.
10. CHAIRPERSON: I’m not sure what you are
11. putting is correct. My understanding is, that firstly the
12. police did negotiate and try to solve the problem by
13. negotiation. But secondly, as far as the police attitude
14. is concerned before this commission, I think it was clear
15. from Mr Semenya’s opening statement that the police say
16. that they, that Lonmin are also subject to criticism and
17. that Lonmin, there is a passage towards the end of the
18. opening.
19. MR MPOFU: That’s exactly the point.
20. CHAIRPERSON: Where they say that, I’m
21. trying to find it at the moment but they do say in terms
22. that they criticised Lonmin -
23. MR MPOFU: Yes, severely.
24. CHAIRPERSON: For doing and not doing
25. the, it’s paragraph 58 of the statement.

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1. MR MPOFU: Mm.
2. CHAIRPERSON: So therefore I think what
3. you put to the witness which ignores that aspect of the
4. matter isn’t entirely accurate but it’s now 4 minutes to go
5. before half past, I indicated to you we have to adjourn at
6. half past, so either you can round this point off in four
7. minutes or you can return to it on the morning of the 16th.
8. MR MPOFU: No, Chairperson, well I think
9. on the morning of the 16th we will have forgotten that what
10. you have just put to me, Chairperson is not what -
11. CHAIRPERSON: So you can make a note of
12. it now to remind you on the morning, Mr Mpofu.
13. MR MPOFU: Yes. Well I think it’s much
14. more efficiently dealt with right now. What you are
15. saying, Chairperson, is exactly the point I’m making.
16. CHAIRPERSON: Okay.
17. MR MPOFU: So I don’t see the inaccuracy.
18. I’m simply saying it’s exactly because of that attitude of
19. the police, exactly because General Mpembe said in so many
20. words look I’m going to deal with the law enforcement
21. issues, and I expect you people to deal with the other
22. issues. That confirms what I’m putting to the witness,
23. that not in the future, but already the police have taken
24. the attitude that something like this had to be looked at
25. in its entirety and including the law enforcement element
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I know you are busy. But could you kindly have a look at the IPID documentation in the period?

CHAIRPERSON: You did say you would tell her things that you were dealing with next time. So she could prepare which you have now done. Of course, on the morning of the 16th as I see it, we will probably, no we won't probably, we will return to the question of your application for removal of the seat of the commission, and as far as I know, no replying affidavits have yet been filed in answer to the opposing affidavits filed by the royal family and the neighbouring municipalities but I take it that will all be done, so we will be able to deal promptly on the morning of the 16th with a resumption of the argument in respect of the proposed move.

MR MPOFU: Yes. Yes, Chairperson.

Chairperson, okay I’m going to ask for one indulgence which I’m not very optimistic I’m going to get, but before I do that can I just address the issue you have raised. Yes, Chairperson, at this stage the position is that on the 16th we will start with that argument and at this stage our instructions are to draft such an affidavit. However, there still remains a possibility that we might take the view that the matter can be argued on the papers as they stand, but should that be the case we will talk to the other colleagues. But the indulgence I was seeking, Chair,

please if I could just read out to the witness -

CHAIRPERSON: I indicated that there were reasons why we had to stop at half 12.

MR MPOFU: Yes.

CHAIRPERSON: And did give ample warning of that.

MR MPOFU: Yes.

CHAIRPERSON: And it's now beyond half part 12. So anything you want -

MR MPOFU: No, it’s for the benefit of the witness not for me.

CHAIRPERSON: You can give it privately to the witness between now and the 16th. We will now take the adjournment until 10 o'clock on the morning of the 16th.

MR MPOFU: I will do so.

[COMMISSION ADJOURNED]
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