TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 75  17 APRIL 2013  PAGES 7956 TO 8083

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE

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17th April 2013

Marikana Commission of Inquiry

Rustenburg

1 [PROCEEDINGS ON 17 APRIL 2013]


3 National Commissioner, you're still under oath.

4 MANGWASHI VICTORIA PHIYEGA: s.u.o.

5 CHAIRPERSON: Mr Tip, you were going to cross-examine the National Commissioner, I think you said for 20 minutes. Shall I set my watch?

6 MR TIP SC: You may set it hopefully for even less than that, Chair.

10 CROSS-EXAMINATION BY MR TIP SC:

11 Commissioner, you've heard that I have just a few topics, just a few propositions that I'd like to put to you, which I will do on behalf of the National Union of Mineworkers, the NUM. These propositions deal with only one very narrow aspect and that concerns the place of the NUM in the police planning in respect of the events of, leading up to and including the 16th of August last year. And before I put those few propositions to you, I just want to clarify what the basis is for them and, firstly, none of them concern the operational details of the police action or the police planning. In other words, the position that you've articulated several times in this Commission, that operational details were not part of your role in this, is something that we are perfectly comfortable with for the purpose of these propositions. More pertinent is another aspect of what you said to the Commission, which is that in the course of your deployment and the action that they took.

13 MR TIP SC: Yes. The first introductory proposition is that, what the operational officers of the SAPS were dealing with and the plan that they prepared had to embody various stages of deployment and various objectives that they sought to achieve through that deployment and the action that they took.

16 GENERAL PHIYEGA: Ja, I'm comfortable, yes.

18 MR TIP SC: Yes. The first introductory proposition is that, what the operational officers of the SAPS were dealing with and the plan that they prepared had to embody various stages of deployment and various objectives that they sought to achieve through that deployment and the action that they took.

21 GENERAL PHIYEGA: Yes, that is my understanding.

23 MR TIP SC: And for that purpose, Commissioner, it would follow, I think, that the police would have considered quite closely what precisely the

25 nature of the situation was that they were addressing, in other words what was really the thrust of what they had to deal with.

27 GENERAL PHIYEGA: Yes, they did. The planning takes into account the environmental and situational assessment.

29 MR TIP SC: And Commissioner, would you agree that the real focus of the plans and as conveyed to you and as you participated in the discussions around that, concerned the position of the strikers or the protesters who had by then assembled on the koppie and their conduct?

31 GENERAL PHIYEGA: Yes, that was part of it but also you would recall in my submission that other stakeholders – the community, the citizens, the businesses around the place were also affected by the interaction, so it is a comprehensive view of the situation.

33 MR TIP SC: Quite so, Commissioner. I heard that in your evidence and we're entirely in agreement with you of the comprehensive nature of what had to be done. The question, this proposition is really that the target, as it were – or perhaps that's not a good word to use – the thrust of the planning concerned the protesters.

35 GENERAL PHIYEGA: Yes.

37 MR TIP SC: And then really the heart of what I want to put to you is that in the course of your various discussions around the overview, the broad nature of the planning and the options that were considered and the purpose of it all, did not identify the NUM as an organisation as forming part of what the SAPS believed that it had to deal with at that time. Would that be fair?

38 GENERAL PHIYEGA: I would respond in this matter, that these were employees of Lonmin and what Lonmin had indicated to us is that in terms of the representation of the employees they had both employees of NUM and employees of AMCU. So when we were looking at the matter, we were looking at protesters as being part of Lonmin and some we - some of the people could have been from the community. So we didn't use to take NUM and AMCU, we were looking at employees and protesters.

40 MR TIP SC: Again Commissioner, you make a point with which we are not in dispute. Mr Zokwana has given evidence in these proceedings. You're aware, I take it, that he is national president of the NUM, is that correct?

42 GENERAL PHIYEGA: Yes, I am aware.

44 MR TIP SC: And he has placed evidence before the Commission of his view in relation to the nature of the protesters or strikers on the koppie.

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

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

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1. the most brief possible terms because it's not necessary to
2. go into great detail. He has said that those, the members
3. of the NUM on the koppie were, in effect, in transition.
4. They had departed from the principles of the NUM, they had
5. not listened to the attempts of the NUM to persuade people
6. not to participate in an unprotected strike and you
7. probably are aware that when, on the 15th of August, Mr
8. Zokwana went there in an attempt to address those on the
9. koppie he was very, very directly rebuffed. They - none of
10. the persons wished to hear him. You're aware of
11. that, are you?
12. GENERAL PHIYEGA: Yes, I'm aware that has
13. been reported.
14. MR TIP SC: So it really is against the
15. backdrop of that factual circumstance that I'm putting the
16. proposition to you in relation to the NUM as an
17. organisation and I do this, Commissioner, with a view to
18. the fact that the Commission is, in terms of its terms of
19. reference, required to consider what these various
20. organisations that populate those terms did in relation to
21. these events. So it's the NUM as an organisation that
22. comes into the picture at that stage. Do those comments
23. sufficiently clarify the position for you, Commissioner?
24. GENERAL PHIYEGA: Yes, they are helping.
25. MR TIP SC: Thank you. Then let me just
stakeholders that had a role to play, like the leaders of
each of the respective unions that we've been told represent
employees of Lonmin, to be engaged. So I believe this is
why the provincial commissioner and the commanders in the
environment reached out to AMCU, reached out to NUM. The
transitional processes were not our focus but we were
looking at employees and we were looking at who could
assist in the process of achieving this peaceful
resolution.

[10:00] MR TIP SC: Commissioner, I don't lose
sight of the breadth of what the SAPS was seeking to do in
relation to getting the engagement of the various
stakeholders and perhaps I can try and conclude these few
questions by just redefining the proposition slightly in
order to accommodate what you've just said, with which I
agree and to put it in this way, that when the police and
the planning and operational officers, including yourself
to the extent that you were engaged in an ongoing way with
those discussions, were looking at the environment, then
amongst the features that they saw was the possibility of
the NUM as an organisation playing a role in attempts to
defuse the problem.

GENERAL PHIYEGA: Yes, it is true.

MR TIP SC: And would it then also be so
that the SAPS in the course of its various deliberations

CROSS-EXAMINATION BY MR NTSEBEZA SC:

Thank you, Mr Chairman, members of the Commission. Good
morning, Commissioner. I just greeted the Commissioner,
good morning Commissioner.

GENERAL PHIYEGA: Good morning, Advocate.

MR NTSEBEZA SC: Yes. You are aware that
I represent the families of a number of those who were
killed, particularly on the 16th of August.

GENERAL PHIYEGA: Yes, I am.

MR NTSEBEZA SC: And the majority or all
of them are present here because they are keen to get
answers and they are looking forward to getting answers
from you, if you are able to provide them. And I'm sure
that you will endeavour your best to let them go away from
here with a feeling that you have done your part in
elucidating for them, to the extent that you are able to do
so, what happened, the result of which they are now without
their family members.

GENERAL PHIYEGA: Yes, Advocate, it
remains our commitment as SAPS to tell our understanding of
the facts to the best of our ability.

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

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

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

1. her professional career and her education.
2. COMMISSIONER: I don’t think the
3. objection related to that. It wasn’t clear at the time the
4. objection was made that that’s what you intended to do but
5. the direction - sorry, the objection was directed at a
6. specific question you asked which Mr Semenya contends will
7. produce an irrelevant answer.
8. MR NTSEBEZA SC: Yes, Mr Chairman -
9. COMMISSIONER: He can’t contend that
10. evidence he led, which you wish to discuss with the
11. witness, is irrelevant because he wouldn’t have led it in
12. the first place.
13. MR NTSEBEZA SC: Yes, Mr Chairman, I
14. appreciate that. That’s why I say maybe I shouldn’t have
15. said I was wondering why she became Police Commissioner but
16. before I put that – I see that you serve, if this
17. information is correct, that quite apart from your position
18. as the National Police Commissioner, you serve as the
19. chairman of the Presidential Review Committee on State-
20. owned Enterprises. Is that the position?
21. COMMISSIONER: I think you’ll find she’s
22. the chairperson of that body.
23. MR NTSEBEZA SC: Yes. There’s been a
24. very big debate about whether “man” there refers to gender
25. or to the Latin word manus which means the hand that holds
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1 the chair, but that's a debate for another day.
2 COMMISSIONER: We're not going to deal
3 with that point in our report.
4 MR NTSEBEZA SC: But that - Commissioner,
5 indeed you are referred to as the chairperson of the
6 Presidential Review Committee on State-owned Enterprises.
7 GENERAL PHIYEGA: Yes, I was.
8 MR NTSEBEZA SC: You no longer are?
9 GENERAL PHIYEGA: No, I'm not.
10 MR NTSEBEZA SC: Are you still the deputy
11 chairperson of the Independent Commission on the
12 Remuneration of Office Bearers?
13 GENERAL PHIYEGA: I was.
14 MR NTSEBEZA SC: You were. Your
15 educational qualifications are in social work and in
16 business administration.
17 GENERAL PHIYEGA: You are correct.
18 MR NTSEBEZA SC: And most of your working
19 life you have been in related fields.
20 GENERAL PHIYEGA: Yes, you are right.
21 MR NTSEBEZA SC: When you did your
22 executive management programme in 1998 with the National
23 University of Singapore, I would assume that was a course
24 by correspondence.
25 GENERAL PHIYEGA: By attendance.

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

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

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1 persons in very senior positions, people who had been in
2 the police force firstly and then in the police service for
3 a number of years.
4 GENERAL PHIYEGA: It is correct.
5 MR NTSEBEZA SC: Now there have been
6 events or instances in which you, and you'll correct me
7 here if these were not your decisions but you seem to have
8 taken commendable decisions. I take it, it is common cause
9 that there was the even of Mr Andries Tatane who was shot
10 and killed by the police in the course of a crowd control
11 situation. You know about that case?
12 GENERAL PHIYEGA: I'm aware of that.
13 MR NTSEBEZA SC: And I would assume, am I
14 assuming correctly that you would have known or you would
15 have been informed of the fact that the police people
16 involved were charged and that - ja, it's common cause that
17 they were charged but was it -
18 MR SEMENYA SC: It's irrelevant.
19 MR NTSEBEZA SC: - with your knowledge
20 and sanction?
21 MR SEMENYA SC: Chairperson, that too is
22 irrelevant to the proceedings governed by these terms of
23 reference, Chair.
24 CHAIRPERSON: There are two points
25 actually, the first is the one Mr Semenya makes, the point
25           MR NTSEBEZA SC:          Now you are reported to
24           GENERAL PHIYEGA:          Yes, I'm aware of that.
23           who I'm talking about.
22          was captured and went viral in Daveyton.  You are aware of
21           who was involved in an involvement with the police which
20           the gentleman who is known as a taxi driver from Mozambique
19          very much the National Police Commissioner then.  This is
18           the case of Mido Macia, you were
17           Commissioner.  There were people who were -
16           CHAIRPERSON:          I understand where you're
15          going, coming from.  He's making the point Mr Semenya in
14           the witnesses favour that he suggests she knew about and
13           sanctioned, alternately didn't take any steps to resist the
12           prosecution of police officers in the Tatane incident.
11          He's making the point in her favour, I don't think in the
10           circumstances I should allow the question.  Carry on but
9           MR NTSEBEZA SC:          Ma'am the question is
8           GENERAL PHIYEGA:          I actually did not
7           understand what you are asking me, I am aware of the Tatane
6           matter but what is your question?
5           MR NTSEBEZA SC:          Were you - when you - let me ask the other question.  Were
4           those police officials, before they were charged, were they
3                                   suspended?
2           MR SEMENYA SC:          But she was not there,
1           Chair, to speak – the National Commissioner was not in
0           office -
9           CHAIRPERSON:          Remember Mr Ntsebeza, that
8           according to her statement she was appointed on the 12th of
7           June –
6           MR NTSEBEZA SC:          Yes.
5           COMMISSIONER:          As you pointed out just
4          over three, sorry just over two months before the incidents
3          at Marikana.  I'm not sure that the questions you're now
2          asking relate to anything that happened during her term of
1          office.  If your question is intended to be a positive one,
0          can't take credit for anything that happened before the
9          12th I June.
8           MR NTSEBEZA SC:          When she was National
7           Commissioner.  Anyway let's talk about something when she
6           was Police Commissioner.  The case of Mido Macia, you were
5           very much the National Police Commissioner then.  This is
4           the gentleman who is known as a taxi driver from Mozambique
3           who was involved in an involvement with the police which
2           was captured and went viral in Daveyton.  You are aware of
1           who I'm talking about.
0           GENERAL PHIYEGA:          Yes, I'm aware of that.
9           MR NTSEBEZA SC:          Now you are reported to
8           have taken very swift action there.  You are reported to
7           have, and you will confirm this if this is so, you are
6           reported to have suspended the officials concerned, the
5           police officers concerned.
4           GENERAL PHIYEGA:          You are correct.
3           MR NTSEBEZA SC:          And whilst I do not seek
2           to get details from you as to on what basis you did so but
1           would it be fair to say that purely on the basis of what
0           may have been reported to you without a thorough
9           investigation into it, you felt that the best thing to do
8           is for them to be removed, should be suspended from active
7           service until -
6           GENERAL PHIYEGA:          I think on that matter
5           sufficient information and evidence in terms of our
4           protocol were at my disposal and that allowed to take the
3           action that I took.
2           MR NTSEBEZA SC:          I don't want to probe
1           more than it is necessary to do so, is sufficient including
0           the video footage that went viral?
9           GENERAL PHIYEGA:          It would certainly be
8           part of, as sufficient.
7           MR NTSEBEZA SC:          And those police
6           officers may well be found not guilty down the line but for
5           you what you saw on television, amongst others, was
4           sufficient for you to feel that those police officers
3           should be suspended from active duty until due process has
2           taken place.
1           GENERAL PHIYEGA:          With the bolding and
0           underscoring of part of sufficient, because I said to you
9           given every other thing put at my disposal, the protocols,
8           how we work, I had enough information to be able to take
7           that decision.  So it's important to say "part."
6           MR NTSEBEZA SC:          [Inaudible].
5           GENERAL PHIYEGA:          But it is so that those
4           police officers were suspended in spite of the fact that it
3           was reported that they were putting up a defence, which is
2           not unusual, it is a self-defence that the person was
1           endeavouring to wrestle a firearm from one of the policemen
0           which is why then he was dealt with in the way in which he
9           was dealt with but notwithstanding that you did -
8           GENERAL PHIYEGA:          The issues of self-
7           defence and those issues and those aspects were not even
6           part of my consideration when I took this decision.  Those
5           weren't advanced to me, they were probably advanced to
4           their lawyers and to whoever they were talking to.  They
3           were not advanced to me.
2           MR SEMENYA SC:          I am making the objection
1           that given that matter is sub judice, unrelated to the
0           terms of reference as a second basis of objection.
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1 CHAIRPERSON: What do you say about that, Mr Ntsebeza?
2 MR NTSEBEZA SC: I’ll respond with, by saying I’m trying to see if there is a consistency in the way in which the National Police Commissioner works either before or after the events of the terms of this Commission because I think the answer, I mean the question that I’m going to ask next is pretty much predictable. My learned friend must be patient. I won’t do anything that is improper.

3 CHAIRPERSON: But you’re not persisting, you’re not persisting in the question which in the form in which you put it to which Mr Semenya objected.
4 MR NTSEBEZA SC: Mr Chairman, I was merely commending the National Commissioner that in spite of the fact that there was even a defence that was being put up by those policemen according to reports, whatever she had otherwise than just viral video footage that went viral, she still was persuaded that this was a matter that called for the police officers to be suspended.
5 CHAIRPERSON: Mr Semenya, the questions appear to be based upon what is alleged to be an inconsistent attitude adopted by the National Commissioner in the case of members of the police service who are accused of irregular or improper or criminal conduct and if
6 that’s the basis of the question I’ll allow it to be asked, provided that it’s kept within a very narrow ambit.
7 MR NTSEBEZA SC: You know me, Mr Chairman. You acted swiftly there, that’s the whole nub of what I’m saying. You made sure that those police officers were suspended and irrespective of whatever they were saying in their defence.
8 GENERAL PHIYEGA: I thank you for the compliment.
9 MR SEMENYA SC: Chair, I must deal with this other objection. What went viral, to use Mr Ntsebeza’s language, are police officers who have a handcuffed man at the back of a van, pulling and driving that thing, it has absolutely no relationship with the issues that obtained in Marikana. So even the inconsistency cannot manifest if those facts remains that apart.
10 CHAIRPERSON: What do you say about that comment, that objection which Mr Semenya raises?
11 MR NTSEBEZA SC: Mr Chairman, one can only establish whether there is or is no consistency if one has got a basis in relation to which one can argue on consistency. I was that answer that has been given is enough for me to go onto the next question on the basis of which I will show the -
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1. we will arrest.

2. MR NTSEBEZA SC: Let me understand this.

3. I'm not very conversant. Are you saying the IPID have no powers to arrest anyone they have been investigating?

4. GENERAL PHIYEGA: IPID does not have cells and all those issues. They police the police and they actually would ensure that if there is a matter to be pursued for arrest, those issues would then take place but we don't police ourselves. That is the principle I'm trying to bring across.

5. MR NTSEBEZA SC: No. Commissioner, part of this exercise for my clients is for them to have confidence that they have fairness in the way in which the police conduct themselves and in the way in which the police conduct themselves in relation to other police persons. Do you appreciate that?

6. GENERAL PHIYEGA: Advocate, I understand you and I am on record in my testimony that the Constitution of the country demands of us to give our services in a fair and just manner, so we are committed to that as SAPS.

7. MR NTSEBEZA SC: Yes, which is why, therefore, the answer - oh, sorry - which is why, therefore, I am trying to get you to appreciate why I am seeking to draw parallels. Now let me ask again the question that I put to you. Are you saying to the Commission that the police, when they are being investigated, cannot be arrested by the IPID who do the investigation?

8. GENERAL PHIYEGA: I did not say that.

9. MR NTSEBEZA SC: Then let's understand what you are saying. Where they - we now know from your answer that no-one was arrested.

10. GENERAL PHIYEGA: Yes.

11. MR NTSEBEZA SC: Now, any police officers who were involved in the killings would have had to be arrested by someone.

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

13. The question is, the police who were involved in the killings had to be arrested, in the shootings, as a proposition we submit only if culpability is pointed in one way or another to their conduct.

14. COMMISSIONER: Mr Ntsebeza, what do you say about that point from Mr Semenya?

15. MR NTSEBEZA SC: Well, Mr Commissioner, members of the Commission, we have the Police Commissioner saying that as a result of some evidence, including the viral video footage in relation to Mr Mido Macia, certain things were done. Police officers were suspended, an arrest took place. Now I'm simply saying, on the basis of what the Commissioner had - I'm not saying because they were culpable, or otherwise why arrest people if you know already that they're guilty? On the strength of what was available, there is no question about who killed 34 people who died. The question is whether -

16. COMMISSIONER: I'm interested to know whether there's any evidence that indicates that policeman A killed deceased Z.

17. MR NTSEBEZA SC: Yes.

18. COMMISSIONER: Unless you're going to arrest all of them on the basis of common purpose, unless - the ballistic evidence that we've received so far, as I understand it, has been rather inconclusive and that's a matter we'll be exploring later but for your proposition to be able to stand, you have to be able to say that there was prima facie evidence that policeman A shot deceased Z and that that prima facie evidence indicates that there was not merely the physical act of shooting, but there was culpability. Now, if you can establish those points then I imagine you can proceed with the question, but the objection is that merely, the mere fact that there's prima facie evidence that a policeman shot somebody, that in itself wouldn't justify an arrest or even, presumably, the laying of a charge.

19. MR NTSEBEZA SC: Mr Commissioner,
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Marikana Commission of Inquiry

Rustenburg

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1 where, who shot who, I don't know about that and it would
2 be very dangerous of me to dabble in saying yes to a
3 statement like you are putting, to say we all know that 34
4 people were killed by the police. It is not my space and I
5 think I am not qualified to do so. And I would like to
6 say, Advocate, we have seen a lot of footage. You know
7 that this Commission is looking at a lot of reports. I've
8 seen medico-legal reports submitted here, I am not in a
9 position to say yes to such a bold, broad question and I'd
10 like to respond to your questions but to put me in such a
11 position to answer such a big, vague question, it's very
12 difficult. And through you, Judge, I really would like to
13 respond to fair questions. I don't want to respond to
14 unfair questions.

15 COMMISSIONER: I'm here to protect you
16 against being asked unfair questions and if an unfair
17 question is asked, your counsel will object and I will rule
18 on it, but it sounds as if - Mr Ntsebeza, are you
19 persisting in the question which the witness has described
20 in the terms which you've heard or are you going to put the
21 question in a more focused way, which can't be accused of
22 being unfair?

23 MR NTSEBEZA SC: In the interests of
24 progress, Mr Chairman, I want to put it to the National
25 Commissioner that I find her response most extraordinary.

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1 COMMISSIONER: No, Mr Ntsebeza, it's not
2 for you to make comments. You're here to ask questions.
3 The proposition you put was that 34 people have been killed
4 by the police, you were leading up to the point - therefore
5 people should have been arrested for it.

6 MR NTSEBEZA SC: Mm.
7 COMMISSIONER: Now, I suggest to you one
8 of the problems is, the ballistic evidence is inconclusive,
9 as I understand it, at the moment and it's not possible to
10 say, certainly on the information before us now, that
11 policeman A was responsible for the death of protester Z
12 and therefore if there's prima facie evidence that it was
13 in circumstances where there was culpability on the part of
14 policeman A, policeman A can be arrested. Absent that kind
15 of evidence, the problem arises to which the witness has
16 referred, that who must she suspend and on what basis? Who
17 is to be arrested by IPID and on what basis? Who's
18 making this humble submission. The first one is, on enquiry
19 where your clients are coming from. They see in other
20 cases, people being, who are charged with having killed

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1 people or assaulted them, they see them being suspended and
2 being charged. They don't see that happening here and they
3 think that there's an inconsistency and a problem and
4 that's why they presumably have instructed you to ask the
5 questions you're asking and I'm not unsympathetic to that
6 approach but I don't think the way you're putting the
7 questions are calculated to elicit a complete and
8 comprehensive answer to those concerns that your clients
9 have raised but perhaps you can carry on dealing with the
10 matter. I'm not stopping you from dealing with the topic
11 but I think that -

12 COMMISSIONER: The Commission resumes.

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1 and from, from everything that has been said here, that it
2 is not in issue that the police were responsible for the
3 deaths of the 34 people.

4 COMMISSIONER: Mr Ntsebeza, one of your
5 clients is very distressed. She's being helped out of the
6 auditorium. It's three minutes to 11, it'll probably be
7 best for us to take the tea adjournment at this stage.

8 [COMMISSION ADJOURNS COMMISSION RESUMES]


10 Is she now back or is she no longer in the auditorium?
11 Obviously she was very - there's something, something which
12 was distressing her very much. Do you know what the
13 situation is?

14 MR NTSEBEZA SC: Thank you, Mr Chairman
15 and Commission members. I'm advised that she is not in the
16 auditorium anymore and may I, whilst doing so, Mr Chairman,
17 make this humble submission. The first one is, on enquiry
18 I have established that her upset was after the Chairman
19 came across as saying that the house will be cleared
20 because there is heckling. It was explained, of course, to
21 her by my instructing attorneys that the Chairman has to
22 maintain the decorum of the proceedings and that there is a
23 need for - for the Chairman and the Commission members to
24 make sure that the proceedings happen in an environment
25 where there are no hecklings. What we are seeking to plead
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<td>1 with the Chairman and the Commission members is for it to</td>
<td>1 how we can avoid that because I can understand the feelings</td>
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<td>2 be taken into account that - which, as I put some of the</td>
<td>3 of the members of the family, which we have to be as</td>
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<td>3 questions on the basis that the people are seeking answers</td>
<td>4 sympathetic to as we can be. Is there any comment you wish</td>
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<td>4 to what, for them, are not clear issues and whilst it is</td>
<td>5 to make in that regard, Mr Ntsebeza?</td>
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<td>5 correct that the Chairman must make sure that the</td>
<td>6 MR NTSEBEZA SC: No, Mr Chairman, I think</td>
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<td>6 proceedings proceed in circumstances where there are no</td>
<td>7 you have said everything that can possibly be said about</td>
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<td>7 interruptions of one sort or another, it may well happen</td>
<td>8 this. I just wanted all of us, including the words from</td>
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<td>8 that now and again, either because of their understanding</td>
<td>9 the Chair again, for the boundaries to be drawn, people to</td>
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<td>9 of what the answers are or whatever, that there will be the</td>
<td>10 understand that you have a duty and a function to perform</td>
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<td>10 occasional exclamation, in which event the Chairman will</td>
<td>11 but also for the Chair and the Commission members and every</td>
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<td>11 still have to do what the Chairman will have to do, but if</td>
<td>12 one of us to know that this - I'm literally walking on</td>
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<td>12 the Chairman is able to say &quot;I warned you&quot; without saying</td>
<td>13 eggshells and there should be that level of latitude that</td>
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<td>13 &quot;I'll throw you out.&quot;</td>
<td>14 is allowed in order for us to be able to get to where we</td>
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<td>14 COMMISSIONER: Yes, yes. That's - what</td>
<td>15 want to get to with as little interruption as it possibly</td>
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<td>15 I'm now saying can be interpreted very slowly. I said that</td>
<td>16 can be.</td>
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<td>16 we expect people here, as a return for being in here the</td>
<td>17 I am not aware, other than that, now that the</td>
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<td>17 auditorium, that they will remain quiet and not make</td>
<td>18 Chair has indicated to the extent that he has and it has</td>
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<td>18 audible comments - they can make comments to themselves but</td>
<td>19 been interpreted, whatever the perception may have been</td>
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<td>19 they mustn't make audible comments which disturb the</td>
<td>20 that the Chair is unsympathetic, seems to be addressed.</td>
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<td>20 proceedings and I said if that happened I would have to</td>
<td>21 You know, Archbishop Tutu used to say perceptions are facts</td>
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<td>21 consider asking the person concerned to leave - not</td>
<td>22 to those who believe them and -</td>
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<td>22 everybody, but just the person concerned.</td>
<td>23 COMMISSIONER: I've heard him say that</td>
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<td>23 I also said that I had a lot of sympathy for what</td>
<td>24 too. You and I, both in different capacities, had long</td>
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<td>24 was clearly the attitude of the families who have</td>
<td>25 experiences working with him, haven't we?</td>
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<td>25 instructed you to ask the questions that you were asking</td>
<td>25 MR NTSEBEZA SC: Yes.</td>
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<td>1 and where I thought your questions were too widely framed,</td>
<td>1 COMMISSIONER: We both share that view</td>
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<td>2 I said I wasn't going to stop you, that line of inquiry,</td>
<td>2 that he's expressed so well.</td>
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<td>3 provided the questions were more focused. So I hope I</td>
<td>3 MR NTSEBEZA SC: Indeed.</td>
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<td>4 conveyed my sympathy to the families, my understanding of</td>
<td>4 COMMISSIONER: National Commissioner, I</td>
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<td>5 where they're coming from, but I did say and I want to say</td>
<td>5 have to remind you, you're still under oath.</td>
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<td>6 it again that we can't have this Commission proceeding if</td>
<td>6 MANGWASHI VICTORIA PHIYEGA: Yes, I am.</td>
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<td>7 it's interrupted all the time by loud exclamations of</td>
<td>7 CHAIRPERSON: Mr Ntsebeza?</td>
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<td>8 discontent or even approval from members of the auditorium</td>
<td>8 CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.):</td>
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<td>9 and I hope people will understand that. But a lot of</td>
<td>9 Thank you. Thank you, Chairman.</td>
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<td>10 trouble has been taken to see to it that the members of the</td>
<td>10 COMMISSIONER: Continue with your cross-</td>
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<td>11 families can be here because it's regarded as important,</td>
<td>11 examination.</td>
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<td>12 they should be able to be here but the need for the</td>
<td>12 MR NTSEBEZA SC: Maybe let's start there.</td>
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<td>13 proceedings to proceed with decorum, without audible</td>
<td>14 What do you understand being under oath to mean to you,</td>
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<td>14 interruptions is there and I'm sure everybody will</td>
<td>15 National Commissioner?</td>
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<td>15 understand that.</td>
<td>16 GENERAL PHIYEGA: If I use my biblical</td>
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<td>16 I'd also like to say that shortly after we</td>
<td>17 understanding, it's to tell the truth and nothing else but</td>
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<td>17 adjourned I enquired as to the position of the lady who was</td>
<td>18 the truth.</td>
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<td>18 distressed and I was assured that a social worker was going</td>
<td>18 COMMISSIONER: I think you'll forgive me</td>
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<td>19 to attend to her, to give her attention and assistance to</td>
<td>19 if I add something else. It's the truth, the whole truth</td>
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<td>20 overcome the quite palpable distress that she was</td>
<td>20 and nothing but the truth. I'm sure you understood that,</td>
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<td>21 experiencing and I hope that when she has recovered</td>
<td>21 you just didn't say it.</td>
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<td>22 sufficiently, she'll be able to come back into the</td>
<td>22 GENERAL PHIYEGA: Mm.</td>
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<td>23 auditorium but I also want to ask whether there's any</td>
<td>23 MR NTSEBEZA SC: You would agree that</td>
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<td>24 danger - I suppose there is, to some extent - any danger of</td>
<td>24 that means that the truth is, would sometimes be something</td>
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<td>25 other people being as distressed as she was. I don't know</td>
<td>25 which, because the truth is binding on your conscience,</td>
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25 something which you would say irrespective of consequences.
24 If it is the truth, it is the truth. Some people will say
23 speak the truth and shame the devil.
22 GENERAL PHIYEGA: As I’ve said, I
21 understand it to be the classical meaning of truth and the
20 biblical meaning of truth.
19 MR NTSEBEZA SC: You wouldn’t have, for
18 instance, suppressed certain things that you know to have
17 happened in a particular way but you would feel you don’t
16 have to disclose them here because they may have
15 repercussions.
14 GENERAL PHIYEGA: I still again say I
13 understand the meaning of the truth.
12 MR NTSEBEZA SC: I take that question to
11 be yes, that response to be yes, you wouldn’t suppress
10 facts or conceal facts which you knew but which would be
09 compromising.
08 GENERAL PHIYEGA: I’m comfortable in
07 saying I will tell the truth.
06 MR NTSEBEZA SC: Alright. We’ll come
05 back to this question of [inaudible]. Now, let’s just be
04 clear about what you were saying before lunch and I want us
03 to take it step by step because I don’t want again to show
02 where it is common cause. Do you accept it as common
01 cause, and please listen to me carefully, do you accept it
00 as common cause that on the 16th of August 34 mineworkers
01 were killed by the police?
00 GENERAL PHIYEGA: I understand that 34
00 miners were killed. By who, I would not go that far.
25 MR NTSEBEZA SC: Now, the police made a
24 presentation here which you signed off. It’s called
23 exhibit what – exhibit L. Can we put up exhibit L, what’s
22 this, 269? Can you zoom? I’m asked by my juniors whether
21 you can zoom. I understand you must expand or whatever, or
20 increase the size. Can you read -
19 COMMISSIONER: The piece on the screen,
18 at least on our screen, doesn’t contain the full text. I
17 take it you’re referring to Thursday –
16 MR NTSEBEZA SC: There, yes, yes – thank
15 you, Mr Chairman.
14 COMMISSIONER: Two lines from the foot.
13 It reads, “Thursday, 30 protesters were killed by the
12 police” and it goes on, “on the scene, four more later died
11 in hospital.” And I take it, it’s not intended suggest
10 that those four who died in hospital somehow didn’t die as
09 a result of injuries sustained at the hands of the police.
08 So your point is that the police presentation, in effect,
07 admits -
06 MR NTSEBEZA SC: Exactly. Do you see
05 that?
04 GENERAL PHIYEGA: Yes, I do.
03 MR NTSEBEZA SC: In fact, the four who
02 died in hospital must be assumed, on the phrasing of that
01 sentence, that they died as a consequence of the infliction
00 of death on the miners by the police. Do you agree?
00 GENERAL PHIYEGA: I see that.
00 MR NTSEBEZA SC: And do you agree –
00 COMMISSIONER: Do you agree? And I take
00 it – let’s leave those four out for the moment.
00 GENERAL PHIYEGA: Mm.
00 COMMISSIONER: It’s clear 30 died on the
00 scene, killed by the police. That’s what it says. “30
00 protesters were killed by the police on the scene.”
00 GENERAL PHIYEGA: I see that. Yes, I’ve
00 seen it.
00 COMMISSIONER: That’s common cause,
00 that’s what the police say. The four is a matter of
00 interpretation. The evidence, I think, indicates that they
00 died as a result of injuries sustained as a result of being
00 shot by the police but I don’t think you need, for the
00 purposes of your argument or your cross-examination I mean
00 after the 16th, having been killed, as it’s put, by the
00 police.
00 MR NTSEBEZA SC: Exactly. Do you see
00 that?
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25 people were killed.

GENERAL PHIYEGA: My understanding was that the context of that question was based on you asking me whether I have suspended or fired people based on that. I think we must take the entire context because where we got to was because of that question and I was saying, that is I have not suspended anybody. Then we went into the discussion of this exercise.

MR NTSEBEZA SC: Yes. Which is why I felt that we were mixing a lot of things. You were talking about liability, culpability and all of that.

GENERAL PHIYEGA: Mm.

MR NTSEBEZA SC: And I sought to clear a very basic, or what I thought was basic, but now after seeing exhibit 11 slide 269, can we proceed on the basis that that is not now an issue after – exhibit L.

GENERAL PHIYEGA: We can proceed.


Now, you have also seen footage of at least scene 1 where the police killed the mineworkers.

GENERAL PHIYEGA: Yes, I have.

---

MR NTSEBEZA SC: Before tea, sorry Mr Chair. The question I had asked before tea was to get your consensus that it is common cause that 34 people were killed by the police on the 16th of August and you said you did not know who they were killed by.

GENERAL PHIYEGA: Before the police killed the mineworkers.

MR NTSEBEZA SC: Now, let me clear up a statement, I will wait for the question.

GENERAL PHIYEGA: Yes, I have.

COMMISSIONER: I've heard your general proposition.

MR NTSEBEZA SC: Now, let me clear up a question that I didn't understand your answer to be earlier on. Did you say that the IPID do or do not have a power of arrest?

GENERAL PHIYEGA: I shall again say yes.
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1. GENERAL PHIYEGA: Mm.
2. COMMISSIONER: That used to be the case when I was on the bench, I take it it’s still the case.
3. Generally - so therefore police members of the service who wants warrants of arrest don’t have to go to a magistrate - they do sometimes, but they don’t have to go to a magistrate. They can very often get warrants from police officers who are justices of the peace. Now, are there members of IPID who are justices of the peace who can, in appropriate circumstances, issue warrants of arrest when they are applied for by the investigating officers who are investigating particular cases, who are members of IPID?
4. GENERAL PHIYEGA: Because they are police of police, I take it that they have the capacity to do so and I’m sure they can be called to, again, affirm or not affirm what I’m saying because they have to arrest us when we are wrong.
5. COMMISSIONER: You’re in the same boat that I am, you think that is the case, we’re not quite sure but we can easily find out.
6. GENERAL PHIYEGA: I am saying they have and I confirm that they have to arrest us if we are wrong.
7. COMMISSIONER: Yes. They don’t need your permission?
8. GENERAL PHIYEGA: No.

1. COMMISSIONER: And if they, if a member of IPID arrests a member of the police service, then either with or without a warrant, the member of IPID would presumably take the arrested accused to the local police station.
2. GENERAL PHIYEGA: Yes.
3. COMMISSIONER: To be put in the police cells, is that correct?
4. GENERAL PHIYEGA: Yes, Judge.
5. COMMISSIONER: And I take it the arrested person would be duly received and lodged in the cells and entered in the cell register without demur.
6. GENERAL PHIYEGA: Absolutely.
7. COMMISSIONER: I don’t know whether that clarifies the problem, your point, Mr Ntsebeza? I hope (inaudible).
8. MR NTSEBEZA SC: In fact, I’m advised that in terms of the IPID Act, the IPID has got specific powers of arrest.
9. GENERAL PHIYEGA: Yes.
11. GENERAL PHIYEGA: Mm.
12. MR NTSEBEZA SC: Now, what is the relationship between the IPID and your office as the National Commissioner of Police?
13. GENERAL PHIYEGA: None whatsoever, other than them policing us and arresting us. They are independent.
14. MR NTSEBEZA SC: Are they not answerable to you?
15. GENERAL PHIYEGA: No.
16. MR NTSEBEZA SC: Who are they accountable to?
17. GENERAL PHIYEGA: To the Minister of Police.
18. MR NTSEBEZA SC: I see. Neither administratively nor in any other way are they answerable to you, albeit as National Commissioner?
19. GENERAL PHIYEGA: No.
20. COMMISSIONER: Mr Ntsebeza, I understand that IPID is regulated by legislation and we will endeavour to get the legislation during the lunch adjournment and so I suggest, if it’s necessary for you to do so -
22. COMMISSIONER: - to move on because what you’re asking really is what are the legal provisions applicable in the case of IPID.
23. MR NTSEBEZA SC: Mm.
24. COMMISSIONER: They are in legislation, perhaps the evidence leaders can assist us otherwise we’d have to use our own resources.
25. MR NTSEBEZA SC: Yes.
26. COMMISSIONER: But we hope to have them by the end of lunch time and, if necessary, we’ll give you a copy. If necessary, you can then return to the matter -
27. MR NTSEBEZA SC: Thank you, Mr Chairman.
28. COMMISSIONER: - if there’s anything that needs to be covered.
29. MR NTSEBEZA SC: Thank you, Mr Chairman. So you are saying they are independent, certainly they are independent of being manipulated by you as Police Commissioner?
30. GENERAL PHIYEGA: I do not have those powers.
31. MR NTSEBEZA SC: You say, however, they are answerable to the Minister of Police.
32. GENERAL PHIYEGA: Yes, I said so.
33. MR NTSEBEZA SC: Do you understand that relationship to be that he is just the Minister responsible for police services or is it an oversight responsibility on the part of the Minister?
34. GENERAL PHIYEGA: Your question is not clear to me. I -
35. COMMISSIONER: I don’t want to interrupt
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1. you unduly but if we're going to have the legislation, many  
2. of these questions you're asking I think will be answered  
3. by the legislation. You will be able, if I may say so, to  
4. cross-examine the witness more effectively perhaps if  
5. you're armed with the statute, then you'll be able to check  
6. her answers against what the statute says and if her  
7. answers are wrong, well, then you can deal with it but if  
8. it's convenient for you I'd like to suggest to you, you  
9. leave this matter over till after lunch unless you've got  
10. no other cross-examination material at the moment.  

11. MR NTSEBEZA SC: Okay. No, I accept the  
12. indication from the Chair. Now, your own appointment is in  
13. terms of the Constitution, I believe section - is it  
14. section 207 -  
15. GENERAL PHIYEGA: Mm.  
17. Section 207(1), “The President, as head of the National  
18. Executive, must appoint a woman or a man as the National  
19. Commissioner of the police service to control and manage  
20. the police service.” Is that the section in terms of your  
21. appointment?  
22. GENERAL PHIYEGA: Yes.  
23. MR NTSEBEZA SC: Now, you are appointed  
24. to exercise control over and manage the police service in  
25. accordance with the National Policing Policy and the  

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

1. COMMISSIONER: Mr Semenya, do you wish to reply to what Mr Ntsebeza said?
2. MR SEMENYA SC: [Inaudible].
3. MR NTSEBEZA SC: I'm not asking for the facts of that case -
4. COMMISSIONER: I understand. Your question relates simply to the question of whether she's aware of those provisions, is that correct? Am I understanding you correctly?
5. MR NTSEBEZA SC: Yes, whether she's aware of those provisions and whether she's aware that those are the provisions that would have been used for the removal of her predecessor.
6. COMMISSIONER: Alright.
7. MR SEMENYA SC: We have a problem to the second part. Whatever answer it is, is irrelevant to the terms of reference -

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

2. MR SEMENYA SC: No, the witness had qualified that she remembers the statement and she corrected it. Mr Ntsebeza was taking issue with that. The objection was that the question was asked and answered.

3. MR NTSEBEZA SC: I'm sorry, Mr Chairman.

4. First of all, I did not mean to be discourteous to Mr Semenya. Elsewhere he sits next to me, now he sits very far from where I sit so I didn't really hear that he was -

5. COMMISSIONER: No, I don't think he meant to be - I don't think, certainly I didn't intend to suggest you were discourteous and I'm sure he didn't intend that either. He realised that sitting where he does, he can't - you can't see him when he turns on his microphone. So we can put discourtesy to the side. His complaint is he says the question has been asked and answered.

6. MR NTSEBEZA SC: No - no, I accept that qualification. She said she withdrew it. No, I proceed on that basis. In fact - and these circumstances were exhaustively dealt with by, I think Schalk Burger, the Lonmin counsel, but the statement I understand you became comfortable with after correcting it was, read the following and that - the same paragraph 24 - in what has come to be known as a misfit page but I'm not going to go into that. What you were quite content to be associated with is that you say, "I then related the same information to the Minister of Police telephonically and advised him that I shall be attending to the matter personally."

7. Right? Do you remember that that is the statement you were very keen to - it was your evidence?

8. GENERAL PHIYEGA: Advocate, I think before I even go there, you're making very serious overtures because that in the statement that you are talking about were dealt with by my lawyers on the very first day when I came here to make my presentation they were raised by Schalk Burger, by Adv Burger, we went back to that to correct the very same thing. What bothers me with what you're saying, you are then saying there is a statement and I came to be comfortable with some version and I want to say to you, the version that you say I came to be comfortable with is actually my statement and I've explained to this Commission the process, how I got to my statement which is a statement that you received even the first time. So I don't understand this whole issue to say there was a statement and then I came to be comfortable with it and those are the overtures that bothers me.

9. MR NTSEBEZA SC: Well, I was getting worried when you said I'm making overtures -
1. appreciate where I'm coming from relative to what, between the two of you and the Minister happened? In the one instance the Minister is supposed to have told you – the polite word used is "advised" – to attend to the matter personally so that you can have a first-hand account of the incident. In other words, there would have been a conversation in which the Minister then said, you know, you must go and attend to this personally.

2. GENERAL PHIYEGA: I've heard it, I'll wait for the question.

3. MR NTSEBEZA SC: Okay. The other one is just advising – Minister, this is the information I have and I'll be attending to it personally.

4. GENERAL PHIYEGA: I've heard, I'm waiting for the question.

5. MR NTSEBEZA SC: Yes. Don't be in a hurry, you'll get the question.

6. GENERAL PHIYEGA: Okay.

7. MR NTSEBEZA SC: Now, if the first statement remained – not that the Commissioner doesn't have the power to call the Minister, it can subpoena the Minister, but if the first statement had remained, the Minister, there would have been a legitimate basis to call the Minister here to –

8. MR SEMENYA SC: Chair –
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<td>says that is the statement that I regard as my own statement.</td>
<td>her case is – rightly or wrongly and as you say, we may have to decide that if it becomes relevant, but her case is that frankly the statement of the 12th of March, even though she did sign it and swear to it, was in fact incorrect, that the true factual position is set out in the page which she – the amended page which is in the first statement of the 7th of March. So her case is, I’m just seeking to correct the facts because the statement of the 12th of March in that respect is incorrect. So it’s not quite as complicated as you put it but – so I suggest you reformulate your question again.</td>
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<td>COMMISSIONER: What you were saying is, the hypothesis upon which Mr Semenya relies, we only have the ipse dixit of this witness to establish the hypothesis and you want to challenge it, is that correct?</td>
<td>MR NTSEBEZA SC: That’s exactly the point. That’s why I – yes.</td>
<td>MR NTSEBEZA SC: I don’t need to lead any evidence, Mr Commissioner. The cross-examination of this witness relevant to misfit page and – was so exhaustive that it would be the bravest counsel to say it is now established as a fact, other than the ipse dixit of the witness that that is the statement. It has created so much doubt that there has to be a finding made –</td>
<td>GENERAL PHIYEGA: Yes.</td>
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<td>MR NTSEBEZA SC: That’s exactly the point. That’s why I – yes.</td>
<td>MR SEMENYA SC: Chair, Mr Ntsebeza cannot have any basis of suggesting he will reveal evidence contradictory of the fact, the ipse dixit of the witness.</td>
<td>COMMISSIONER: Well, let’s see how he answers that. How do you answer that, Mr Ntsebeza?</td>
<td>MR NTSEBEZA SC: I’m sure you have been asked a number of questions on exhibit S. Do you have exhibit S?</td>
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<td>COMMISSIONER: So I’m afraid I will – I must disallow the objection. I’ll allow you to ask the question but please phrase your questions carefully so that we don’t spend further time on debates which may or may not generate more heat than light.</td>
<td>COMMISSIONER: Alright, when you reach the later stage you can consider how you return to it.</td>
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<td>COMMISSIONER: Mr Ntsebeza, what you’ve also got of course is the fact that she – I know she’s explained it but she did sign an affidavit on the 12th which contained the passage that you rely on. Now she’s explained, she has sought to explain that and one of the questions, if it becomes an issue for us to decide, one of the questions we’d have to decide is whether her explanation can be accepted in the light of all the evidence.</td>
<td>MR NTSEBEZA SC: Now, you were correct that you did explain yourself in the cross-examination that was exhaustive on the question of what should or should not be accepted to be the correct version of what happened, that I accept. If, however, this Commission on evaluating your answers - the questions that were put, the fit page, the misfit page - were to come to the conclusion that what you regard as the statement that must be accepted is a statement that relieves you of the burden and relieves the Minister of the burden of having to come here and explain why was it that the Minister advised you to act as you did –</td>
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<td>COMMISSIONER: Yes, I do.</td>
<td>GENERAL PHIYEGA: You are correct.</td>
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<td>MR NTSEBEZA SC: And your instruction to provincial commissioners, divisional commissioners, provincial heads, deputy national commissioners, chiefs of staff, was in terms of 2.2.3, fairly clear or indeed phase 3 minimum force. Do I understand your instruction to be that in crowd management public order policing policy had to be conducted firstly with minimum force?</td>
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<td>COMMISSIONER: Indeed.</td>
<td>COMMISSIONER: Yes, I do.</td>
<td>GENERAL PHIYEGA: You are correct.</td>
<td>MR NTSEBEZA SC: That rubber bullets were to be used only as a last resort and then to be skip fired at the crowd, by which I understand you shoot at the ground.</td>
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<td>GENERAL PHIYEGA: Yes.</td>
<td>MR NTSEBEZA SC: Return to this aspect later on.</td>
<td>MR NTSEBEZA SC: Thank you, Mr Chairman.</td>
<td>MR NTSEBEZA SC: Yes. And my reading</td>
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Tel: 011 440 3647  Fax: 011 440 9119  RealTime Transcriptions  Email: realtime@mweb.co.za
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whether, I take it Mr Bizos was intervening as a sort of  
third party or negotorium gestor or on behalf of – or  
amicus or something – on behalf of Mr Ntsebeza, but what  
effectively is your objection?  

MR SEMENYA SC: Chair, just for the  
record we have, as the South African Police Service, never  
contended that self-defence is a licence to kill or  
anything like that.  

COMMISSIONER: It is, as I understand it,  
set out effectively in the last sentence of exhibit L, is  
that “The aggression of the crowd – I’m quoting – “left the  
SAPS with no other choice than to act in private defence,  
defending their own lives and the lives of others.” Your  
case is, as I understand it - whether it will be upheld at  
the end of the day is something we don’t know the answer to  
yet – is that your clients acted in accordance with the  
rules applicable to the defence of private defence.  

MR SEMENYA SC: Indeed, Chair.  

COMMISSIONER: So Mr Ntsebeza, now that  
we’ve had this discussion, repeat your question because I’m  
not sure what the debate is about at this stage as far as  
it relates to your question.  

MR NTSEBEZA SC: Well, maybe to  
accommodate the nub of the objection I may just as well put  
it to the witness that is it a correct inference which one  

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Our submission will be that this was a public order police management by the public order police.

MR NTSEBEZA SC: Thank you, Mr Chairman.

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

MR NTSEBEZA SC: Thank you, Mr Chairman.

Our submission will be that this was a public order police...
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1. You've read now the 3.3. 2.
2. No exception.
3. And so far, is it your
4. knowledge – certainly it is what I know – that there is,
5. and I have to be careful here how I put it, there is no
6. footage that shows from the SAPS a video footage taken of
7. the crowd throughout the phases and including during the
8. use of minimum force.
9. GENERAL PHIYEGA: Yes, I have.
10. MR NTSEBEZA SC: It seems to me that it
11. is an injunction from you that must be carried out without
12. exception.
13. GENERAL PHIYEGA: You are correct.
14. MR NTSEBEZA SC: The video footage should
15. be taken off the crowd throughout the phases and including
16. during the use of minimum force.  Now, are there any
17. exceptions to this rule that you can think of?
18. GENERAL PHIYEGA: The instruction does
19. not have exceptions.
20. MR NTSEBEZA SC: And so far, is it your
21. knowledge – certainly it is what I know – that there is,
22. and I have to be careful here how I put it, there is no
23. footage that shows from the SAPS a video footage taken of
24. the crowd throughout the phases and including during the
25. use of minimum force.

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1. disrupted.
2. MR NTSEBEZA SC: Yes, I'm aware of that
3. evidence.
4. GENERAL PHIYEGA: And as a result,
5. compliance was also disrupted.
6. MR NTSEBEZA SC: Mr Chairman,
7. Commissioners, maybe through the Commission, can we explore
8. this after lunch?
9. COMMISSIONER: The Commission will take
10. the lunch adjournment.
11. [COMMISSION ADJOURNS COMMISSION RESUMES]
13. CHAIRPERSON: So I don't have to lend you
14. my copy?
15. MR NTSEBEZA SC: No, I do have a copy, Mr
16. Chair.
17. CHAIRPERSON: National Commissioner,
18. you're still under oath. Mr Ntsebeza.
19. MANGWASHI VICTORIA PHIYEGA: s.u.o.
20. CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.):
21. Thank you very much, Mr Chairman.
22. CHAIRPERSON: I take it this is almost
23. the last lap of your marathon race.
24. MR NTSEBEZA SC: I wish it was less than
25. a marathon. We were on the - we were exploring the

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1. injunction that you gave in terms of 3.3 of your letter
2. about the taking of video footage during this, in an
3. operation such as this one and we had agreed that there is
4. no exception to this rule, it must be stuck to, you had
5. written it for it to be complied with.  Now there is no
6. footage of the nature envisaged in paragraph 3.3 of exhibit
7. S.  In other words everything that happens up to and
8. including the shootings themselves, both in scene 1 and
9. scene 2, we do not have that footage from the police.  Do
10. you agree with that?
11. GENERAL PHIYEGA: Yes, I do.
12. MR NTSEBEZA SC: When did you discover
13. that there was no footage?
14. GENERAL PHIYEGA: When we were preparing
15. for the submission.
16. MR NTSEBEZA SC: How did you discover
17. that to be so?
18. GENERAL PHIYEGA: I'm sure those who were
19. responsible for the operation can tell so, but I know that
20. there were gaps in the information and the footage that had
21. supported the information.
22. MR NTSEBEZA SC: Perhaps I did not make
23. myself clear. How did you discover, I'm sure to your
24. shock, that there was no video footage particularly of the
25. happenings, police footage of the happenings at scene 1 and

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1. scene 2?
2. GENERAL PHIYEGA: I have said when we
3. were busy preparing.
4. MR NTSEBEZA SC: Is that -
5. CHAIRPERSON: Mr Ntsebeza, you can't see,
6. I can, Mr Semenya wants to say something.
7. MR NTSEBEZA SC: Yes.
8. MR SEMENYA SC: We have exhibit L slide
9. 170, second bullet point. Slide 170, the second bullet
10. point.
11. CHAIRPERSON: Yes, we've looked at that
12. before, that's the explanation why video operators at POP
13. didn't stay on the scene. We've gone through that before.
14. Ntsebeza, do you see that? The whole purpose in getting
15. a record which is set out in paragraph 3 of exhibit S can
16. apparently be frustrated when there's a whiff of sulphur in
17. the air. That seems to be the explanation but carry on
18. with your cross-examination.
19. MR NTSEBEZA SC: Yes, I was wanting to
20. establish whether that's an objection or evidence testified
21. from the bar.
22. CHAIRPERSON: I think to be fair, I think
23. Mr Semenya was trying to helpful so I don't think we should
24. -
25. MR NTSEBEZA SC: No, I don't think it's
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<td>1. helping Mr Chairman, thank you very much, I'm grateful for his offer to help. I'm asking how this witness came to the knowledge that there is no video footage.</td>
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<td>2. CHAIRPERSON: I think somebody told her, I mean it wasn't like old Mother Hubbard, she went to the cupboard and found it was empty, the video things weren't there. I take it somebody told you, is that right?</td>
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<td>3. GENERAL PHIYEGA: Yes, judge.</td>
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<td>4. CHAIRPERSON: Who told you?</td>
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<td>5. GENERAL PHIYEGA: My commanders as we were preparing.</td>
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<td>6. CHAIRPERSON: Yes, that's the answer Mr Ntsebeza.</td>
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<td>7. MR NTSEBEZA SC: Yes, it's very nice for you when it comes from a witness because I can't submit on a basis of an assumption. We have assumed a number of things and to our shock we found that our assumptions were not correct [inaudible].</td>
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<td>8. GENERAL PHIYEGA: But maybe, Advocate, I can just go back to what you asked me earlier on. I did say to you the disruption and that's part of the disruption.</td>
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<td>9. MR NTSEBEZA SC: So is your answer to a question that I have not yet asked, is your answer that there was no video footage because there was a disruption?</td>
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<td>1. CHAIRPERSON: No Mr Ntsebeza, I'm sorry, before the interpreter interprets, you've used this phrase no video footage. Now I didn't stop you before but I should have done. The fact is we've got video footage but it's not complete. So the correct formulation of the question is, the answer as to why there was incomplete video footage and possibly important segments of the action are not recorded on video was because - that's the way to phrase the question surely.</td>
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<td>2. MR NTSEBEZA SC: Mr Chairman, I take that, in fact I think I tried to qualify it twice to say in scene 1 and scene 2 and you know the injunction is very clear here, you must cover everything. Now the video footage coming from the SAPS of the shootings in scene 1 and scene 2 is non-existent, certainly it has never been sent to this Commission. We accept that, both of us. Is that what you said, you accept there is no video footage from the SAPS, specifically scene 1, scene 2 shootings?</td>
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<td>3. GENERAL PHIYEGA: I'd like to say when you talk about scene 1 and scene 2 there could be some snippets of other things other than the shooting, so it's important for me to understand whether we just talk about the shooting or any other things that could have been recorded before that for instance in scene 1.</td>
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<td>4. MR NTSEBEZA SC: Yes. Do we accept that there is no video footage taken by the police.</td>
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<td>5. GENERAL PHIYEGA: It is correct.</td>
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<td>6. MR NTSEBEZA SC: Now when I say there is no video footage, I mean there is no video footage that has been made available to the Commission.</td>
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<td>7. GENERAL PHIYEGA: It is my knowledge, that.</td>
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<td>8. MR NTSEBEZA SC: And will we be making a correct conclusion that the police did not bring that footage to the Commission because it is non-existent?</td>
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<td>9. GENERAL PHIYEGA: Every footage that we have and information that we had we submitted to this Commission. So if it is not there, it is not there.</td>
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<td>10. MR NTSEBEZA SC: I just want to make sure that that is an answer. As you stand or sit there before God, is that your evidence? You're under oath, you say there is no such footage because it does not exist?</td>
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<td>11. GENERAL PHIYEGA: Not to my knowledge.</td>
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| 12. CHAIRPERSON: I think a more correct formulation of the answer would be that to the best of your knowledge all the video footage which the police has, has been handed over to the evidence leaders because I mean you got some but whatever you got, do you say that to the best of your knowledge all the video footage the police have that's relevant to what happened has been made available to...
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you had said video footage of everything, you have circulated, nobody does not know, at least a fortnight is too short a time for everyone to have read. So must I assume that you enquired where is video footage, where's our own video footage of this thing as it happened? Did you do that?

GENERAL PHIYEGA: You would know that as we prepare, questions would be asked to say do we have video footage of that. I will give you an example. An example would be for instance a press conference that was held by the Provincial Commissioner, we didn't have a video footage of that, we would ask is there video footage, no we don't have and we would go and check whether we can get it from any of the television that may have been there. So we would ask in various areas to say do we have photography, do we have video footage, so it's a normal question that we'd ask to say what have you got to back up the information that we are receiving.

MR NTSEBEZA SC: Did you yourself ask for video material that you were expecting in terms of your own instructions should have been taken?

GENERAL PHIYEGA: I have said in this Commission that the person who was overall responsible for that, because I visited one day, the person who was overall responsible, chairing that process, was the Provincial Commissioner. "As the National Commissioner I took it to myself to visit the members to establish the progress of the preparations." Do you remember that?

GENERAL PHIYEGA: You are correct.

MR NTSEBEZA SC: Is it at the Potchefstroom meeting that you found out that there is no police video footage -

GENERAL PHIYEGA: Yes, as we were preparing, I said.

MR NTSEBEZA SC: Was Brigadier Mkhwanazi there?

GENERAL PHIYEGA: I'm not quite sure but I'm sure members who were - the commissioner who was chairing that meeting can indicate who was there.

MR NTSEBEZA SC: Now I just want to picture in my own mind and assist me to do this, as the National Commissioner you know that about a fortnight ago...

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

following your testimony throughout and disruption I think is a phrase you have used frequently. Now what do I want to get from you is not really terminology that you use, I just want you to narrate a story. You know in paragraph 30 of your statement, now I don't know what exhibit number this is, you say you learnt about the announcement of the Commission by the President and having done so, members were invited to Potchefstroom to prepare for the submission to the Commission. "As the National Commissioner I took it upon myself to visit the members to establish the progress of the preparations." Do you remember that?

GENERAL PHIYEGA: You are correct.

MR NTSEBEZA SC: Is it at the Potchefstroom meeting that you found out that there is no police video footage -

GENERAL PHIYEGA: Yes, as we were preparing, I said.

MR NTSEBEZA SC: Was Brigadier Mkhwanazi there?

GENERAL PHIYEGA: I'm not quite sure but I'm sure members who were - the commissioner who was chairing that meeting can indicate who was there.

MR NTSEBEZA SC: Now I just want to picture in my own mind and assist me to do this, as the National Commissioner you know that about a fortnight ago...
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therefore, Advocate, it wasn’t – in my opinion it wasn’t necessary for me to be asking that. I would ask questions where it is relevant.

MR NTSEBEZA SC: Perhaps let me try and explain where I come from, Commissioner, because I don’t want to be unfair to you. I want to be able to make submissions to the Commission because I am able to relate it to evidence that a witness has given and sometimes it may get, take a time to get there. All I want to know is a factual narration of what you did, what you did not do, so that I can draw the inferences. Am I correct in inferring from your answer that you did not ask anyone?

GENERAL PHIYEGA: I have answered you to say because I was not in charge of the operation, the person who’s in charge of the operation can answer you on those issues. I had gone to be briefed on the preparations for this Commission and I was briefed.

COMMISSIONER: Is the position, you went to Potchefstroom, when you got there or sometime after you got there you were told that there were gaps, significant gaps in the video material?

GENERAL PHIYEGA: That is correct.

COMMISSIONER: Presumably you didn’t consider it necessary to ask about that further because of what you’d been told, is that correct?

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1 GENERAL PHIYEGA: Because – that’s number 1, that because of what I’d been told but because I also know that a person who is in charge of operations is going to make sure that we get every other necessary footage that we have to back up what we are submitting and to make available for the Commission. I knew that that would happen.

MR NTSEBEZA SC: Let me tell you what Brigadier Mkhwanazi said in relation to this footage.

GENERAL PHIYEGA: Mm.

MR NTSEBEZA SC: He says when they got there, there they were shown media video footage and then again he went on to say he was told that there was police video footage but it was not flighted, it was not shown and when I asked him whether he had asked for that footage to be shown, given that in terms of this exhibit S it’s something that ought to have been there, he said he did not and then we went into the whole question of why didn’t he seek to establish where this video footage is. Do you understand?

MR SEMENYA SC: Chair –

MR NTSEBEZA SC: Now why I want –

COMMISSIONER: No, no, Mr Ntsebeza. Mr Semenya wants to say something.

MR NTSEBEZA SC: Oh –
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1 it again. She's unlikely to contradict the agreement that
2 she's already given.
3 MR NTSEBEZA SC: I will take your
4 assurance, Mr Chairman. Now, that being the position, I do
5 have to ask you – and please bear with me – only a
6 fortnight before that you issue a very clear, clear
7 injunction to everybody, including the person who would be
8 doing the presentation there, and in view of what you had
9 said in that circular wasn't it necessary for you to ask
10 further, from whoever was giving an account?
11 GENERAL PHIYEGA: I'm on record as
12 saying, Advocate, that to my understanding and to the best
13 of my knowledge we've submitted (a), all what we had.
14 Secondly, I've already responded to you today to say to
15 you, part of what is the limitation of the footage that you
16 are talking about is also articulated in our submission and
17 I have verbally equally said to this Commission that our
18 work had been disrupted. The incompleteness has a reason
19 and a rationale for it.
20 COMMISSIONER: That's not the question.
21 Let me intervene here for a moment. I don't think that's
22 quite an answer to the question but let me approach the
23 matter from a slightly different angle. I take it that it
24 must have been very frustrating for you that there wasn't
25 video material covering the whole operation. You had asked
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1 in your - or instructed, in fact, in your letter exhibit S
2 that video material should be taken of - those were the
3 exact words - that video footage is taken of the crowd
4 throughout the phases and including during the use of
5 minimum force. So that was your instruction and obviously
6 it was designed to ensure that when there as an incident of
7 any kind where minimum force was used, there would be no
8 scope for arguments and disputes and months and months of
9 expensive commission hearings to ascertain what happened
10 because it could all be made clear in a short while by
11 looking at video footage. Now that instruction you gave
12 was obviously not complied with for whatever reason and
13 that must have been, I would think, a source of frustration
14 for you. Would that be a fair assessment?
15 GENERAL PHIYEGA: Judge, you are right.
16 Not only frustration but concern and that is why I asked,
17 we had to look for - why did we not do that and we
18 articulate that to say part of our photographer, the
19 disruption did also disrupt the compliance.
20 COMMISSIONER: Yes, I understand. That's
21 where Mr Ntsebeza comes from when he says didn't you
22 consider it necessary to ask but I think you've covered
23 that point before.
24 GENERAL PHIYEGA: I have.
25 COMMISSIONER: Now there are two, of
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1 course, aspects to this matter. The one is you assume, I
2 take it, that everything was done as you were told, that
3 all the video material that you had was handed over, that's
4 what you were told and you say to the best of your
5 knowledge that is the case. Of course there is another
6 possibility and that is the possibility that some people in
7 the police force who hadn't obeyed in accordance with the
8 highest standards, who were aware of video material which
9 showed them doing things they shouldn't have done, would
10 have had a motive to do away with or hide or conceal or
11 destroy such footage. Now it's clear from what you say
12 that you don't believe that that's the case.
13 GENERAL PHIYEGA: Mm.
14 COMMISSIONER: And I can understand why
15 that's your attitude but I think what Mr Ntsebeza is trying
16 to examine is whether there's any scope for that
17 possibility being also correct. Am I interpreting you
18 correctly, Mr Ntsebeza? If the interpretation is wrong,
19 well then someone else can do the interpreting - do I
20 construe the thrust of your cross-examination correctly?
21 MR NTSEBEZA SC: Well, that pretty much
22 was the direction in which I was going.
23 COMMISSIONER: Alright, well now that
24 I've moved the four-wheeled vehicle a little bit further
25 forward, would you like to proceed?
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1 isn’t there because the cameras didn’t function at the
2 right time or didn’t have batteries or whatever it was,
3 although the instructions also say somewhere that people
4 must make sure the batteries are working, the cameras are
5 working before something is done. So these other aspects
6 that aren’t covered by the explanation you were given – and
7 I think that’s where Mr Ntsebeza is going. I’m trying to
8 get things moving a bit but – if he’s offended I apologise.
9 Am I right, Mr Ntsebeza? He’s not listening to me, he
10 doesn’t know -
11 MR NTSEBEZA SC: I was listening. It’s
called multi-tasking, Mr Chairman.
12 COMMISSIONER: That’s the point, the
13 explanation you were given doesn’t cover the whole field.
14 GENERAL PHIYEGA: Mm.
15 COMMISSIONER: It covers part of it but
16 there are other aspects that aren’t covered by it and is
17 that part of what you’re onto, Mr Ntsebeza?
18 MR NTSEBEZA SC: Yes, Mr Chairman. In
fact if I may follow up, you see my learned friend directed
my attention to slide 170 of exhibit L. Do you have it in
front of you?
19 GENERAL PHIYEGA: Yes, I do.
20 MR NTSEBEZA SC: Can you read it to the
Commission?

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

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

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1 GENERAL PHIYEGA: Let me see -
2 COMMISSIONER: Just read it, Mr Ntsebeza,
3 I can read it. “Captain Adrio informed the video operators
4 of POP about the information. This information is in the
5 previous bullet, that “Captain Adrio informed both the
6 video operators of the SAPS” - so there’s only two of them
7 involved – “that a journalist had reported to him that the
8 video operators of POP who were in civilian clothing were
9 identified as ‘police spies’ by the protesters and might be
10 killed if they remained in the general media group.
11 Captain Adrio informed the video operators of POP about the
12 information. Based on this information they withdrew from
13 the scene and returned to the JOC.”
14 MR NTSEBEZA SC: Thank you, Mr Chairman,
15 you have saved the Commissioner reading. Now, the
16 Commissioner has – I mean the Chairman has kindly read what
17 I said you must read. Now is that the reason that you did
18 not seek a reason why that injunction was not carried to
19 the letter?
20 GENERAL PHIYEGA: It is the response to
21 why 3.3 did not take place, by the way, where you started,
22 to say in terms of the instructions 3.3 should have
23 happened, what went wrong? And that is –
24 COMMISSIONER: Sorry, that’s correct
25 because 3.3 deals with the POP people.
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1 GENERAL PHIYEGA: Exactly.
2 COMMISSIONER: That deals with the duties of the POP –
3 of the POP –
4 GENERAL PHIYEGA: Yes.
5 COMMISSIONER: - video operators.
6 GENERAL PHIYEGA: Yes.
7 COMMISSIONER: Yes, but of course the further point is that there were other video operators as well, or there were supposed to be. The water cannons were supposed to have video cameras, working video cameras fitted to them which were supposed to come on automatically when the water cannon was activated. There were people in the sky in the helicopters who took videos which, with the greatest respect, don’t take us very much further. So I would have imagined that you might well have considered saying to them, well, I understand now why the POP video operators didn’t do anything, but there were other video cameras as well, what about them? Now, did you not ask about that?
8 GENERAL PHIYEGA: I’m aware, for instance, that when we asked about the water cannon, the water cannon operation, the operation of the water cannon, they could not operate that and I’m sure those who were in operations will come and tell you that they were not able to operate the camera on the water cannon. And I’m sure those who were on the – on the helicopter, I’m sure General Mpmembe when he comes here he’ll be able to talk to that also.
9 MR NTSEBEZA SC: Commissioner, do you say – as my attention was drawn to it by your counsel – that the explanation given in slide 170 is the reason or one of the reasons that were given as to why there was no footage in scene 1 and in scene 2 from the SAPS?
10 GENERAL PHIYEGA: I’m on record saying so.
11 MR NTSEBEZA SC: So your explanation is that, which we accepted and I would assume reasonably so, is that the POP didn’t do a job which you wanted them to do because an unnamed journalist told them that they might be killed?
12 COMMISSIONER: Captain Adrio who conveyed the information –
13 MR NTSEBEZA SC: Yes.
14 COMMISSIONER: That’s what 17 –
15 MR NTSEBEZA SC: Yes, but then Captain Adrio, from what I understand, conveyed it to her as a basis.
16 COMMISSIONER: Captain Adrio received the information from the journalist and he then conveyed that information to the two video operators, as a result of which they withdrew.

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1 which they withdrew.
2 MR NTSEBEZA SC: Yes.
3 COMMISSIONER: That’s what that says.
4 MR NTSEBEZA SC: And that was the explanation that was given to the Commissioner and the Commissioner accepted as a rational and a reasonable basis, is that right?
5 GENERAL PHIYEGA: Because it is true, our videographers could not do their job because they were seen as people who were spying on the crowd and they had to retreat and therefore, Advocate, they could not do their job.
6 MR NTSEBEZA SC: Is that an exception to your rule? If you are labelled police spies you can withdraw from the scene and not photograph anything?
7 GENERAL PHIYEGA: If the life of the police is in danger and their work is disrupted to video what they were supposed to be videoing, it is responsible for me and responsible for the commanders to act accordingly to ensure that lives are further saved. It was important. And let me also say Captain Adrio is in communications and he understands precisely the dangers of those people that are supposed to do the work that they are supposed to do and this has been reported to this Commission as a problem, the disrupting factor.

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1 those who were on the – on the helicopter, I’m sure General
2 also.
3 MR NTSEBEZA SC: Commissioner, do you say – as my attention was drawn to it by your counsel – that the explanation given in slide 170 is the reason or one of the reasons that were given as to why there was no footage in scene 1 and in scene 2 from the SAPS?
4 GENERAL PHIYEGA: I’m on record saying so.
5 MR NTSEBEZA SC: So your explanation is that, which we accepted and I would assume reasonably so, is that the POP didn’t do a job which you wanted them to do because an unnamed journalist told them that they might be killed?
6 COMMISSIONER: Captain Adrio who conveyed the information –
7 MR NTSEBEZA SC: Yes.
8 COMMISSIONER: That’s what 17 –
9 MR NTSEBEZA SC: Yes, but then Captain Adrio, from what I understand, conveyed it to her as a basis.
10 COMMISSIONER: Captain Adrio received the information from the journalist and he then conveyed that information to the two video operators, as a result of

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1 MR NTSEBEZA SC: So the police withdrew from a police operation which would have given them an ability to video an operation that had not even begun, because if you look at that slide, the timing of that slide is at half past one. They withdraw from a duty that they would have had to do almost three hours before it happened.
2 Our police who are there to protect us and maintain law and order and are responsible also for making sure that they have video footage of what might turn out to be an incident that needs a recordal to obviate the very thing that we are doing, because they are told that they may be police spies, leave the area more than two hours before the operation starts. Is that what you accepted as rational and reasonable?
3 GENERAL PHIYEGA: Advocate, I’m going to try and – you gave a long question, I’m going to try to cut it into pieces when I respond to you.
4 COMMISSIONER: May I suggest that you do so after tea. It sounds as if the answer is going to be that you did regard it as a rational and reasonable explanation and you’re going to say why, is that correct?
5 GENERAL PHIYEGA: I’ll definitely do so.
6 COMMISSIONER: Alright. Now, one of the points I wanted to make to Mr Ntsebeza is that, you know, this is all very much second and third hand. I understand
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1 you're probing her acceptance of the explanation, I
2 understand that but the real question will come up when - I
3 take it he's coming to give evidence - Captain Adrio comes
4 to give evidence and he deals with this directly and
5 perhaps one of the generals or a brigadier or somebody who
6 was on the scene is questioned about this, the matter can
7 then be gone into fully in relation to all the surrounding
8 circumstances and where the NIU were and who were supposed
9 to protect the general media group and all that kind of
10 stuff can then be gone into. So I'm afraid a detailed
11 discussion of it now isn't really going to help us, but let
12 us have our tea and when we've finished the National
13 Commissioner will give her explanation as to why she
14 accepted this a reasonable and rational explanation and
15 then we can move on. Is that an appropriate way of going -
16 MR NTSEBEZA SC: No, we can take the -
17 COMMISSIONER: Can you give us an
18 indication, I know it's difficult because you can't take
19 injury time into account but how long do you anticipate you
20 will still be with your cross-examination?
21 MR NTSEBEZA SC: I had thought that I
22 would be done by one o'clock.
23 COMMISSIONER: You thought you'd be done?
24 MR NTSEBEZA SC: I thought I would be
25 done by lunch time.

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1 COMMISSIONER: Yes, but lunch time has
2 come and gone.
3 MR NTSEBEZA SC: Today.
4 COMMISSIONER: Are you talking about
5 lunch time tomorrow now? I know it's difficult to answer
6 the question but can you give us a sort of an idea? Are
7 you likely to finish this afternoon?
8 MR NTSEBEZA SC: I would like to finish
9 this afternoon.
10 COMMISSIONER: Okay, let's drink our tea
11 with more enjoyment than otherwise in the light of that
12 information.
13 [COMMISSION ADJOURNS COMMISSION RESUMES]
15 National Commissioner, you're still under oath. Mr
16 Ntsebeza?
17 MANGWASHI VICTORIA PHIYEDEGA: s.u.o.
18 CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.):
19 Thank you, Mr Chairman. Commissioner, we now are at a
20 stage - by the way, the Chairman was correct in saying that
21 there will be, hopefully there would be people who will
22 specifically testify to the whole narrative about police
23 spies. What I sought to establish and you will correct me
24 here if I'm wrong, is whether what was drawn to my
25 attention by counsel for SAPS, being 171 - exhibit L170, is

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1 something that featured in your consideration of the
2 reasons that there was no official SAPS footage made
3 available to the Commission.
4 GENERAL PHIYEDEGA: You are right by saying
5 it's one of those. I've already touched on -
6 MR NTSEBEZA SC: Yes.
7 GENERAL PHIYEDEGA: - some of the other
8 things that the Judge alluded to and I'm sure the
9 operations people would be able to give it in more detail
10 around these matters.
11 MR NTSEBEZA SC: Yes. And in summarising
12 the position, the position is this, at 25 past one two POPS
13 video camera people get withdrawn from the scene because
14 they have been identified as police spies. That's what is
15 there.
16 GENERAL PHIYEDEGA: It is true, because the
17 situation was unsafe for them they had to be withdrawn and
18 safety became an issue.
19 MR NTSEBEZA SC: And those two for their
20 safety, from what I understand you to be saying, are
21 withdrawn and they return to the joint operations centre.
22 GENERAL PHIYEDEGA: I'm sure there would be
23 more detailed - that is recorded as such but the operations
24 people would give you more details about what they did and
25 at what point they returned to the joint operations centre

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1 and the people who are going to testify after me will talk
2 quite at length to that.
3 MR NTSEBEZA SC: You can be sure we will,
4 we will cross that bridge when we come to it, until
5 somebody says we'll double-cross that bridge when we come
to it. What I want to put - what I've always been trying
7 to get to you, Commissioner, is that you have an
8 instruction which is put in unequivocal terms that video
9 footage, without exception, must be taken throughout and
during the operation. There is an allegation at half past
11 one, even as the generals - General Annandale and everybody
12 else - are meeting just to discuss what is going to be
13 done, a meeting that lasts until about half past one, 2
14 o'clock, the operation is going to start at half past
15 three. Is it your evidence that you accepted as a basis
16 for the absence of video footage, what is being said in
17 slide 170?
18 GENERAL PHIYEDEGA: I've already said yes
19 and I shall say yes again.
20 MR NTSEBEZA SC: Now, the next question I
21 ask and I may ask you it as well, didn't you feel that it
22 was a reason that needed further interrogation from you?
23 GENERAL PHIYEDEGA: Advocate, my yes is
24 informed and my yes is *06-54 regard it as being
25 substantiated, so I'm saying yes, taking all issues into
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1 account and the question you are asking, I would say I have
2 done what I thought it would be reasonable for me to
3 actually be able to say yes.
4 COMMISSIONER: I'm sorry, I think before
5 the tea adjournment I promised you that I'd give you an
6 opportunity to give what was called a rational and
7 reasonable explanation as to why you believe the
8 explanation. I don't think I kept that promise, so would
9 you like to give that now?
10 GENERAL PHIYEKA: Okay. I think, Judge,
11 first and foremost I do need to say, when my understanding
12 and my testimony to this Commission was that we as the
13 police had done everything to plan for the operation of the
14 16th, amongst many other things that were planned for would
15 have been exactly the process of taking photos, videos, for
16 that event. I've also said, Judge, to the Commission that
17 the event of the 16th was not the first that we were dealing
18 with. I am on record saying in the past three years we've
19 dealt with over 33 000 of footage*08-39 and a lot of what
20 we were doing there to plan and to get ready, used a lot of
21 experiential knowledge, expertise that we've gathered over
22 and over and over again. I've also said, thirdly, that the
23 fact that our tested norms, experience and expertise did
24 not do what it - did not achieve or release or bring the
25 outcomes that we were used to, told a very different story

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1 and this is why I said to this Commission that in our
2 understanding the circumstances and happenings of that day,
3 in our definitions were seriously very not like the other
4 circumstances that we have encountered. The plan that we
5 thought would do what it normally do under managing
6 protests, did not do what it was supposed to do and where
7 the unprecedented nature of risk*10-25 of this matter of
8 the 16th comes into play. Our plan was disrupted and
9 therefore it yielded outcomes that we had never intended.
10 And I've also said that in terms of this the compliance
11 issues as you, as the Advocate was talking about in terms
12 of our normal way of taking pictures and all this, a number
13 of issues interrupted with those processes. It was an
14 unnatural situation in terms of our policing. Thank you.
15 MR NTSEBEZA SC: I have indicated -
16 COMMISSIONER: Yes, Mr Ntsebeza?
17 MR NTSEBEZA SC: Thank you, Mr Chairman.
18 I have indicated to you that, by no fault of your own, the
19 people I represent are unsophisticated. They want to
20 compare situations. One of the things that I know about
21 this action, I hear what you say about this action but one
22 of the things that they say is this is an event which the
23 world media who were there were able to capture, dangerous
24 as that situation was. Now, why is it that the police were
25 not able similarly to capture what happened at scene 1?

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1 Are you saying I must go back to them and say the
2 Commissioner says their operators were withdrawn because
3 they were suspected to be police spies two hours before the
4 operation started? Is that what I must tell them?
5 GENERAL PHIYEKA: I think what you should
6 tell them is that we did not have any report from any of
7 the media people there that their lives were threatened
8 directly but you can tell them that the members of the
9 police who were doing this work were actually threatened.
10 MR NTSEBEZA SC: Are you talking about
11 Warrant Officer IT Ndlovu?
12 GENERAL PHIYEKA: I may not be sure of
13 the names but I'm sure my commanders would be able to tell
14 you about exactly which warrant officers were affected
15 here.
16 MR NTSEBEZA SC: Now that's the detail
17 that the Chairman correctly indicated we will investigate
18 at that time. You have taken disciplinary action or you
19 have ordered disciplinary action to be taken against
20 members of the SAPS whenever it is necessary for you to do
21 so.
22 GENERAL PHIYEKA: You are correct.
23 MR NTSEBEZA SC: And you have done so
24 after you have evaluated whatever evidence is there.
25 GENERAL PHIYEKA: Yes, it is demanded of

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1 me to do so.
2 MR NTSEBEZA SC: Indeed you do so because
3 you want to be satisfied that, amongst other things, that
4 when orders are sent out, when instructions are sent out,
5 they must be adhered to, right.
6 GENERAL PHIYEKA: You are right and also
7 that whatever I do must be fair and just.
8 MR NTSEBEZA SC: I was asking all these
9 questions because I want to know whether, in this instance,
10 you ever thought of disciplinary action against any of the
11 members of the South African Police Service who failed to
12 comply with your instruction as carried out in exhibit S.
13 GENERAL PHIYEKA: I think you would agree
14 with me, Advocate, that this Commission, when it is done
15 and when the outcomes of this Commission are put before us,
16 we as the police will take the opportunity to evaluate
17 everything and I am on record saying relevant remedies
18 would be taken.
19 MR NTSEBEZA SC: Is the suggestion that
20 even if you are satisfied on investigation of facts, you
21 will not take action until this Commission has done its
22 work? Is that how you conceive the work of this
23 Commission?
24 MR NTSEBEZA SC: I shall not pre-empt the
25 outcome of all these processes.
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MR NTSEBEZA SC: I will come to that when I deal with the whole question of internal review, but I would like you to indicate to the Commission how it is so that when you would seek to satisfy yourself about why exhibit S, with regard to the taking of video footage, was not complied with, you are not entitled to take disciplinary action against the members involved. Are you suggesting that you would be interfering with the work of this Commission if you did so?

GENERAL PHIYEGA: (a) –

COMMISSIONER: Mr Semenya?

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

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

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

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

GENERAL PHIYEGA: Yes.

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

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

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

GENERAL PHIYEGA: I've already indicated that, responding to the Judge on the water cannon cameras, and I've said those again were a platform and I'm sure the other is...
25 would be given would be why there isn’t footage for those
24 areas and therefore, by implication, the explanation that
23 talking about are meant to give you footage for those two
22 scene 1 and for scene 2.
21 General Mpembe will talk to the footage on the helicopters.
20 somebody you say who will come and say why there is no
19 words, you have information that you were given by
18 water cannon. I have said earlier on before we left that
17 General Annandale will deal with that, is that right?
16 sorry.
15 that there will be evidence explaining lack of footage of
14 police video footage for scene 1. Who will that be, do you
13 there will be evidence from the commanders explaining the
12 footage have not produced video footage as expected?
11 technical people as to why the other sources of video
10 scene 1 and scene 2. I understood through all this
9 Annandale is one of them, General Mpembe is one of them,
8 commanders that were in charge of the operations. General
7 I thought when we talked about the video footage, we are
6 who is it going to be?
5 know? That could be General Mpembe or General Annandale,
4 police video footage for scene 1. Who will that be, do you
3 and give evidence as to why there isn’t video footage,
2 as to why the water cannons, helicopters, Nylas and
1 everything else which ought to be able to take video

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MR NTSEBEZA SC: Yes, okay. In other
technical people as to why the other sources of video
footage have not produced video footage as expected?
GENERAL PHIYEGA: Yes, I have said so and
I have confirmed that there could be, there were other platforms that could
have contributed to the footage- the water cannons and the
helicopters, not the Nylas.

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1. **Mr Gumbi:** 30 minutes or so, Chairperson.
2. **Commissioner:** Sorry?
3. **Mr Gumbi:** 30 minutes will suffice.
4. **Commissioner:** 30 minutes?
5. **Mr Gumbi:** Yes.
6. **Commissioner:** Thank you. Anybody else want to cross-examine?
7. **Mr Ntsebeza SC:** - one hour.
8. **Mr Bizos SC:** Mr Chairman, I want to bring something to your attention. The witness promised us that there would be a response to exhibit FFF21 by Monday morning past. We didn’t have anything from the police. I raised it with my learned friends, they appeared to have - well, they were non-committal. The attorney told me that he didn’t know.
9. **Commissioner:** Remind me what FFF21 was?
10. **Mr Bizos SC:** This was the parliamentary presentation -
11. **Commissioner:** Oh yes, oh yes.
12. **Mr Bizos SC:** - of the Institute of Security Studies.
13. **Commissioner:** Yes, I remember that.
14. **Mr Bizos SC:** Mr Chairman, I asked what information that the witness promised us is of some importance and we would not –
15. **Commissioner:** So you haven’t got it yet?
16. **Mr Bizos SC:** We haven’t got it and -
17. **Commissioner:** Mr Semenya, can you help us on this?
18. **Mr Semenya SC:** We are investigating how far the process is. It may very well be that the information is here and I will communicate that to my learned colleague, Mr Bizos.
19. **Commissioner:** Mr Bizos, you understand that even though the National Commissioner may leave tomorrow, she will have to come back when Mr Mpofu returns, which will be on Monday I think. So you will then get an opportunity, if it’s necessary to deal with that outstanding matter.
20. **Mr Bizos SC:** I would like - I don’t know whether to appeal to the witness or to my learned friend but I appeal to both to let us have the information that they promised that I would have had two days ago because we want to use it because when Mr Mpofu finishes, we want to question her on the further information that may be, that may be provided and we would like to take instructions. We don’t want to wait until the last minute and I would appeal to all of them that the promised information should be filed as soon as possible.
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