

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 68 27 MARCH 2013 PAGES 7229 TO 7356

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 27 MARCH 2013]
 2 [09:35] CHAIRPERSON: The Commission resumes.
 3 Before the National Commissioner continues with her
 4 evidence I understand that Mr Malindi SC on behalf of the
 5 South African Human Rights Commission has a statement he
 6 wishes to read out.
 7 MR MALINDI SC: Thank you very much,
 8 Chairperson. Chairperson, I carry instructions to read the
 9 following statement and in relation to the matter that has
 10 occupied my client and the Commission for the last few
 11 days. The statement reads as follows, Chairperson,
 12 "Following a South African Human Rights Commission press
 13 release commenting on the evidence of the National
 14 Commissioner of Police and interviews commenting on
 15 procedural concerns in relation to phase two, the SAHRC,
 16 based on advice received from its legal representatives and
 17 in light of the ongoing nature of the Commission and the
 18 SAHRC's role as a participant unequivocally retracts them."
 19 CHAIRPERSON: Thank, Mr Malindi.
 20 National Commissioner, you're still under oath. Before Mr
 21 Bizos continues with cross-examination I'd like to ask you
 22 whether you've yet been able to obtain the letter that you
 23 promised you'd give us yesterday? Remember it was a letter
 24 about the implementation of the recommendations of the
 25 National Planning Commission. I understood you to say that

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1 you were going to contact your office. You did say you'd
 2 try to give it to us yesterday. I understand these things
 3 aren't always easy to arrange but do you think we'll be
 4 able to get it in the course of the day?
 5 GENERAL PHIYEGA: Yes, it came.
 6 CHAIRPERSON: FFF16, Ms Pillay?
 7 MS PILLAY: That's correct Chair.
 8 CHAIRPERSON: Thank you very much. Mr
 9 Bizos I take it you wish to continue with your cross-
 10 examination.
 11 CROSS-EXAMINATION BY MR BIZOS SC (CONTD.):
 12 National Commissioner, I want to read you, to you a
 13 paragraph of our learned friend's opening address. Please
 14 listen carefully because I'll have to ask you a number of
 15 questions about it. I'll read, Mr Chairman, you will find
 16 this paragraph in the address of my learned friend. "Mr
 17 Chairman, members of the Commission" -
 18 CHAIRPERSON: What paragraph number, I
 19 didn't -
 20 MR BIZOS SC: 128 to 129 of pages - of
 21 the consolidated transcript, page 128 to 129, Mr Chairman.
 22 "Mr Chairman, members of the Commission we also deal with
 23 the applicable Standing Orders, Policy Considerations,
 24 Legislation or other instructions that are pertinent to these
 25 matters."

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1 CHAIRPERSON: I'm sorry I wasn't on the
 2 air. I know you're reading from the consolidated
 3 transcript -
 4 MR BIZOS SC: Yes, that's what I have in
 5 my notes.
 6 CHAIRPERSON: Are you reading - is Mr
 7 Semenya in that passage reading from the opening statement
 8 which has been put before us as Exhibit FFF9?
 9 MR BIZOS SC: It was taken as such, yes
 10 that is so.
 11 CHAIRPERSON: I understand you want to
 12 read it now, perhaps if you could those assisting you to
 13 trace the paragraph number so we can find it in FFF9
 14 because that's what we're working with which makes it
 15 easier but I won't stop you at the moment. Carry on
 16 reading from the transcript but if your - at a later
 17 sitting you can give us the information in the course of
 18 the morning I'd appreciate it.
 19 MR BIZOS SC: I'll start again. "Mr
 20 Chairman, members of the Commission we also deal with the
 21 applicable Standing Orders, Policy Consideration,
 22 Legislation or other instructions that are pertained to
 23 these matters. Under those headings we propose to give a
 24 presentation regarding the training of the various units of
 25 the police service. The Policy Considerations which apply

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1 in crowd control and management, the constitutional mandate
 2 of the police service and the various provisions of various
 3 statutes dealing with police conduct." And this is the
 4 important part. "These, however, and the evidence, will be
 5 were not adequate instruments, underlined, were not
 6 adequate instruments to deal with the treacherous situation
 7 of more than 3000 belligerent protestors who were armed and
 8 resisting any effort to disarm." You've heard it, do you
 9 agree with what Counsel for the police told the Commission
 10 in this paragraph?
 11 CHAIRPERSON: National Commissioner, do
 12 you have the document in front of you?
 13 GENERAL PHIYEGA: I have the document but
 14 I don't know where they're reading from.
 15 CHAIRPERSON: Well Advocate Hemraj has
 16 found the passage in Exhibit FFF9, it's paragraph 43 which
 17 you'll find on page 14. That absolves those assisting you
 18 Mr Bizos from conducting a further search. You must give
 19 the National Commissioner a chance to read it herself
 20 before she answers your question.
 21 MR BIZOS SC: Yes, yes thank you. Are
 22 you waiting for me?
 23 GENERAL PHIYEGA: Yes, I'm waiting for
 24 the question, I thought I had to wait.
 25 MR BIZOS SC: I'm sorry I thought you

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1 were still reading. Have you read it?
 2 GENERAL PHIYEGA: Yes I have.
 3 MR BIZOS SC: Do you agree with it?
 4 GENERAL PHIYEGA: Yes I do.
 5 MR BIZOS SC: Without any reservation?
 6 GENERAL PHIYEGA: With qualification.
 7 MR BIZOS SC: Pardon? With
 8 qualifications, what qualifications do you want to make?
 9 GENERAL PHIYEGA: That the incident was
 10 unprecedented.
 11 MR BIZOS SC: You want to add that it was
 12 unprecedented. Very well. Anything else that you want to
 13 do, to say about it?
 14 GENERAL PHIYEGA: No.
 15 MR BIZOS SC: No. Right let us just
 16 start off with a document which you've signed which is
 17 before the Commission as Exhibit S. Do you recall it?
 18 GENERAL PHIYEGA: I don't have it.
 19 CHAIRPERSON: Would you remind us what
 20 Exhibit S is?
 21 MR BIZOS SC: It's a letter written by
 22 the witness, Mr Chairman, to all Provincial Commissioners
 23 and others, written on the 20th July 2012. Remember that
 24 letter?
 25 GENERAL PHIYEGA: I'd like to have it

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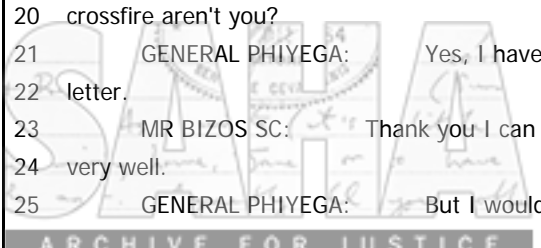
1 before me.
 2 MR BIZOS SC: Sorry you'll have to speak
 3 up a little louder.
 4 CHAIRPERSON: She said she'd like to have
 5 it before her which is a fair request in the circumstances.
 6 MR BIZOS SC: Yes. You want to have a
 7 look at it to remind you and to acknowledge that it is your
 8 signature?
 9 GENERAL PHIYEGA: I acknowledge that it
 10 is my signature, I would like to read it again.
 11 MR BIZOS SC: Forgive me but having
 12 regard for my age maybe you have to speak a little louder
 13 for me to hear you loud and clear please.
 14 GENERAL PHIYEGA: Okay, my apologies
 15 because the sound operator asked me to speak lower, I don't
 16 know what -
 17 MR BIZOS SC: Well if I have to compete
 18 with him I would appeal to him to be tolerant.
 19 CHAIRPERSON: You're caught in the
 20 crossfire aren't you?
 21 GENERAL PHIYEGA: Yes, I have signed the
 22 letter.
 23 MR BIZOS SC: Thank you I can hear you
 24 very well.
 25 GENERAL PHIYEGA: But I would need time

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1 to read it.
 2 MR BIZOS SC: I can hear you very well.
 3 GENERAL PHIYEGA: I'm ready.
 4 MR BIZOS SC: Yes did you draft that
 5 letter yourself?
 6 GENERAL PHIYEGA: This letter is drafted
 7 by my Operational Commander.
 8 MR BIZOS SC: Did you agree with his
 9 draft?
 10 GENERAL PHIYEGA: Yes, I did.
 11 MR BIZOS SC: Did you consider that what
 12 you set out in relation to the rights of the people
 13 situations where they have gathered? The letter really
 14 deals with the management of crowds and what ought to
 15 happen and what ought not to happen. And you sent this to
 16 all the commanders and you expected all the people under
 17 your overall command to comply with it.
 18 GENERAL PHIYEGA: Yes, I did.
 19 MR BIZOS SC: More particularly and the
 20 one that is of particular relevance to this is if you have
 21 to shoot, shoot below the belt and not the upper body.
 22 Those are in effect your words are they not?
 23 GENERAL PHIYEGA: You are correct.
 24 MR BIZOS SC: And you expected your
 25 commanders and all those under you to obey that instruction

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1 from you because it was in accordance with what the
 2 constitution requires. Is that correct?
 3 GENERAL PHIYEGA: Yes.
 4 MR BIZOS SC: It's what the legislation
 5 expects.
 6 GENERAL PHIYEGA: Yes.
 7 MR BIZOS SC: And are the Standing Orders
 8 expected to be obeyed?
 9 GENERAL PHIYEGA: The Standing Orders are
 10 consistent with this letter.
 11 MR BIZOS SC: Now we will deal with it in
 12 greater detail later but I want you to accept for the
 13 purposes of this question that there will be evidence from
 14 experts in pathology that examines the bodies of the dead
 15 and the records of the injured. Hardly any, hardly any of
 16 the people that were killed or the people that were injured
 17 were injured below the belt. Now I don't want to have an
 18 argument, the sort of argument that you had with my learned
 19 friend, I want you to assume that qualified pathologists
 20 and experts that examined the bodies and the records of the
 21 injured people will say that the vast majority of the
 22 people that were killed or injured were not shot in the
 23 lower part of the body. Please accept that for the
 24 purposes of this evidence. If that is so has your
 25 particular order, has your particular order been



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1 deliberately avoided in what happened at Marikana?
 2 GENERAL PHIEGA: I first just want to -
 3 CHAIRPERSON: Before you answer, National
 4 Commissioner, your counsel wishes to say something.
 5 MR SEMENYA SC: In fairness to the
 6 witness the document refers to rubber rounds. I don't know
 7 if my learned colleague is making reference to the injuries
 8 occasioned by rubber rounds.
 9 MR BIZOS SC: It includes all the wounds.
 10 A few of which were with rubber rounds.
 11 CHAIRPERSON: Are you referring, Mr
 12 Bizos, to paragraph 3.2 of Exhibit S?
 13 MR BIZOS SC: Yes.
 14 CHAIRPERSON: That in turn the rubber
 15 rounds must be skip fired to target at the legs of the
 16 crowd.
 17 MR BIZOS SC: Yes well I don't have to
 18 explain that a fortiori if I may use the expression, I'm
 19 sure that the witness with her background understands what
 20 that means, with sharp of ammunition.
 21 MR SEMENYA SC: No, Chair, it cannot be -
 22 CHAIRPERSON: The question was to see
 23 whether her instruction had been deliberately disobeyed. I
 24 think that's the summary of your question. Now her
 25 instruction that you're talking about only deals with

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1 rubber rounds. I don't know if the principle of a fortiori
 2 applies to such an extent that one can say that by
 3 implication she also gave such an instruction in respect of
 4 ammunition other than rubber rounds. So I think to be fair
 5 to her you should step back a pace or two -
 6 MR BIZOS SC: Yes I will do that -
 7 CHAIRPERSON: And approach the matter
 8 from a different angle because in fairness to her the way
 9 you're pointing at the moment isn't absolutely correctly
 10 focused.
 11 MR BIZOS SC: Yes.
 12 [09:55] CHAIRPERSON: I anticipated - I thought
 13 might be your objection but if there's another objection
 14 that I haven't dealt with, please speak now if you consider
 15 it appropriate.
 16 MR SEMENYA SC: No, I'm covered, Chair.
 17 MR BIZOS SC: Let us give you the
 18 background which may clarify the matter for you,
 19 Commissioner. The purpose in your letter that they must
 20 shoot even rubber bullets below the belt, was probably
 21 motivated by the fact that a person shot with a rubber
 22 bullet on the chest actually died. Do you recall that?
 23 The name of the deceased was Tatiana and there was quite
 24 wide publicity that even a rubber bullet directed to the
 25 upper body may cause death. Do you recall that?

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1 GENERAL PHIEGA: Yes, I do but may I
 2 just raise something you raised earlier on? I think, I
 3 don't want to be wrong with the protocol. You have said in
 4 my answering you do not want me to answer the way I
 5 answered yesterday and I just want to know if there is a
 6 limitation in how I respond.
 7 MR BIZOS SC: Ignore that, I'm sorry,
 8 ignore it. Just answer the question.
 9 CHAIRPERSON: The request or instruction
 10 or whatever it was has been withdrawn by Mr Bizos, so just
 11 answer the questions as you consider appropriate.
 12 GENERAL PHIEGA: Yes, I recall -
 13 CHAIRPERSON: If you have to be pressed
 14 on some answers, you will be but answer them as you
 15 consider appropriate. It's your evidence, you're the
 16 witness.
 17 GENERAL PHIEGA: Thank you. Yes, I
 18 recall.
 19 MR BIZOS SC: The reason why you included
 20 that in your letter was because you have respect and the
 21 police have respect and the Constitution guarantees the
 22 right to life and the right not to be injured and this is
 23 why you put it in.
 24 GENERAL PHIEGA: Yes, my organisation
 25 does so.

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1 MR BIZOS SC: The recipients of your
 2 letter must, of necessity, have understood that anything
 3 more lethal than a rubber bullet should most certainly not
 4 be directed onto the lower body of any person.
 5 MR MAHLANGU: Do I understand, the lower
 6 body?
 7 MR BIZOS SC: Not to the upper body but
 8 to the lower body. If you have to shoot, particularly with
 9 sharp ammunition or even a rubber bullet, do it on the
 10 lower part of the body.
 11 MR SEMENYA SC: Chair, that's not what
 12 the document says.
 13 CHAIRPERSON: Yes, Mr Bizos, you -
 14 MR BIZOS SC: I saw an objection, I must
 15 -
 16 CHAIRPERSON: Yes, there's an objection.
 17 Before I rule on the objection I must give you a chance to
 18 answer, mustn't it?
 19 MR BIZOS SC: I see. Mr Chairman, I'm
 20 entitled to put to the witness when she said that you
 21 mustn't shoot rubber bullets to the upper part of the body,
 22 it goes without saying that anything more dangerous than a
 23 rubber bullet must not be shot in the direction of the
 24 upper part of the body. I submit that it is a legitimate
 25 question for the witness to answer as to whether that can

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1 be read into her document or not.

2 CHAIRPERSON: Mr Semenya, do you wish to

3 reply to Mr Bizos?

4 MR SEMENYA SC: The question cannot be

5 with reference to the document. The document does not

6 connote that meaning. We can all read it ourselves, Chair.

7 In particular, Chair, the document cannot be understood to

8 say even in self-defence you have to fire with some

9 ammunition below the – the legs.

10 CHAIRPERSON: Perhaps your question can

11 be reformulated in a way that avoids the objection, but

12 achieves the result that you want to achieve.

13 MR BIZOS SC: Yes, I'll try. Would it

14 be, would it have been as important to you that people

15 should not be shot in the upper part of their body with

16 ammunition more damaging than a rubber bullet?

17 GENERAL PHIYEGA: I think it would be

18 important but we would require to engage it in a similar

19 rigour that we did with this document, I have not had an

20 opportunity of addressing that.

21 MR BIZOS SC: We'll leave it at that for

22 a moment. Don't you think that – or do you think that your

23 order was disobeyed by the people who did the shooting at

24 Marikana on the 16th? In fact, most of the injuries were on

25 the upper body.

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1 CHAIRPERSON: I think that avoids the

2 problem. Her instruction relates to rubber bullets and

3 rubber rounds. As I read it, it effectively, it follows on

4 an earlier document, exhibit T, to which it refers which

5 was issued on the 20th December 2011 and if you read that

6 document, these two documents together, T and S, they seem

7 to me to amount to what one might regard as glosses on

8 standing order general 262.

9 MR BIZOS SC: Yes.

10 CHAIRPERSON: Standing order 262 is where

11 you start. Then that, to be read as glossed as it were by

12 exhibits T and S. Exhibit S is a part of the gloss. It

13 says when you're shooting, you must only use rubber rounds,

14 as I understand it or balls, not bullets and as you say you

15 must shoot below the belt. She doesn't deal in S, because

16 it's a gloss on something else, with sharp ammunition.

17 Your question relates to sharp ammunition which is

18 something dealt with by standing order general 262 and I

19 would imagine that the point that you're aiming for – if

20 that's the right word in this context – is dealt with in

21 paragraph 11 of that standing order, in particular 11.3.

22 That, if I may be permitted to say so, is the profitable

23 line to follow in regard to the point you wish to make but

24 to put it on the basis of what she wrote in S, which is a

25 gloss on the earlier document which only deals with rubber

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1 rounds is, I think, could be misleading. I'm not

2 suggesting you're doing it intentionally but perhaps if you

3 could approach it the way I've suggested, we can move

4 forward on this point.

5 MR BIZOS SC: I'll come back to it once

6 I've had a look at the – all these instruments were not

7 adequate instruments to deal with a treacherous situation.

8 We'll leave the question of your view of the standing

9 orders for a moment. Section 11 of the Constitution says

10 everyone has a right to life. Section 12(1)(c), everyone

11 has the right to freedom and security of the person, read

12 with sub-paragraph (3), to be free from all forms of

13 violence from either public or private sources. Do you

14 agree with your counsel's statement that those two sections

15 of the Constitution were not adequate instruments to

16 protect the lives of people?

17 CHAIRPERSON: I don't know that that's

18 exactly what Mr Semenya said. Mr Semenya – I'm sorry,

19 forgive me – what he said was he referred to the

20 constitutional mandate of the police service and the

21 provisions of the various statutes dealing with police

22 conduct and then he said, the evidence, however, will be

23 that some of these instruments were not adequate to deal

24 with the treacherous situation of more than 3 000

25 belligerent protesters who were armed and resisting any

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1 effort to disarm them. Now I don't read that as a

2 criticism of the Constitution or a suggestion that the

3 constitutional provisions weren't adequate to deal with the

4 situation. He, in turn, talks about some of these

5 instruments and that looks like a reference to, amongst

6 other things, provisions of the various statutes dealing

7 with police conduct, but I think the question the way you

8 put it isn't entirely accurate but unless there's something

9 else that he said which I haven't got before me at the

10 moment, from which it's clear that the point you put is

11 correct, it seems to me that the question can't be allowed

12 – subject, obviously, to what you're going to say in reply

13 to the point I put to you.

14 MR BIZOS SC: Mr Chairman, the ordinary

15 meaning of the words used by my learned friend is clear,

16 that the protection that was envisaged by statutes, and the

17 Constitution is part of it, could not be – were not

18 adequate instruments to deal with the situation. I am

19 entitled to ask, and I do ask, is what were the actual

20 shortcomings in the training policy or the law of the

21 Constitution that hampered the efforts of the police at

22 Marikana.

23 CHAIRPERSON: I've no problem with that

24 question and I don't think –

25 MR BIZOS SC: Well –

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

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

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1 and principles enshrined in the Constitution, including the
 2 following principles – a high standard of professional
 3 ethics must be promoted and maintained, services must be
 4 provided impartially, fairly, equitably and without bias,
 5 public administration must be accountable, transparency
 6 must be fostered by providing the public with timely,
 7 accessible and accurate information. Was that available to
 8 you and the police?
 9 GENERAL PHIYEGA: Yes.
 10 MR BIZOS SC: And two more important
 11 ones, standing order 263 of crowd management, the use of
 12 force must be avoided at all costs. Are you aware of that?
 13 CHAIRPERSON: 260, you mean 262(11)(1).
 14 MR BIZOS SC: Yes.
 15 CHAIRPERSON: The use of force must be
 16 avoided at all costs and members deployed for the operation
 17 must display their highest degree of tolerance. Then it
 18 goes on about that and then in (3) it says, if the use of
 19 force is unavoidable, it must meet the following
 20 requirements.
 21 [10:15] MR BIZOS SC: Yes. And national
 22 instructions and standard operating procedures are to be
 23 observed and the code of conduct of SAPS published on June
 24 10th 2005, police must be disciplined with controlled
 25 supervision. What shortcomings were there that prevented

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1 the police from avoiding the killings, what shortcomings?
 2 If all those were there, what more did you need in order to
 3 avoid the killings?
 4 GENERAL PHIYEGA: I think the important
 5 thing in responding to your question is that I would like
 6 to say the situation was different. I have said the
 7 situation was unprecedented.
 8 MR BIZOS SC: We will deal with whether
 9 or not it was unprecedented in a short while. Have you got
 10 anything else to say in answer to the question?
 11 GENERAL PHIYEGA: I just wanted to say
 12 that the circumstances that pertained to the situation were
 13 also important.
 14 MR BIZOS SC: But what I want to ask you
 15 is this, do you agree with the allegation made by counsel
 16 for the police that the problem was that there were 3 000
 17 belligerent protesters who were armed, resisting any effort
 18 to disarm?
 19 GENERAL PHIYEGA: I agree with that
 20 statement and that is why I am talking about circumstances
 21 that pertained.
 22 MR BIZOS SC: But was your information
 23 that there were 3 000 belligerent protesters who were
 24 armed, 3 000 protesters who were armed? Was that the
 25 information upon which you based your support for this

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1 plan?

2 GENERAL PHIYEGA: Yes and it was many

3 other circumstances.

4 MR BIZOS SC: Now, if there were not

5 3 000 belligerent protesters who were armed and resisting

6 any effort to disarm, then the instruments that your

7 counsel said were inadequate may be a wrong statement to

8 make.

9 GENERAL PHIYEGA: That would be subject

10 to different facts being presented.

11 MR BIZOS SC: Yes. Well, you know, we

12 don't have to keep it under the table. The South African

13 Police and their witnesses couldn't make up their mind how

14 many armed people there were. Here they'd obviously told

15 our learned friend that there were 3 000 armed people. We

16 know that elsewhere during the proceedings, Mr Semenya put

17 to a witness that there were only 2 to 300 who were armed,

18 there were others who were peaceful, unarmed and left

19 peacefully. Which of the two versions you, as

20 Commissioner, operated on?

21 GENERAL PHIYEGA: I would not speculate

22 on those two versions because I haven't seen alternative

23 facts. I see the statement of Mr Semenya. And the second

24 thing is that as police, people who are armed in any march

25 would be a concern for us, as the Constitution does allow

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1 people to protest peacefully and unarmed. So any number of

2 people, whether there are two or seven, would concern us.

3 MR BIZOS SC: Please answer the question

4 which I will try and make clearer. As the National

5 Commissioner, were your actions premised on having to deal

6 with 3 000, to use the precise words used by your counsel,

7 who were armed and resisting any effort of disarming, to

8 disarm, 3 000 or only 2 to 300? Which one did you operate

9 on? On what numbers did you base your conduct and the

10 decisions that you took?

11 MR SEMENYA SC: Perhaps it is conduct of

12 the police, not of the Commissioner.

13 CHAIRPERSON: Well, he asked her what she

14 based her conduct on. There are various answers she can

15 give which I don't think either of us should suggest to her

16 but I think it's a permissible question. I'm not sure what

17 the answer would be, let's see. I understand the point you

18 make, Mr Semenya, but I don't think it's a basis for

19 stopping Mr Bizos from asking the question he's asking.

20 The conduct, your conduct insofar as you were involved in

21 making decisions and doing things yourself, to what extent

22 was such conduct, if any, based upon an acceptance of the

23 figure of 3 000 as opposed to the figure of 300? That's Mr

24 Bizos's question, is that right, Mr Bizos?

25 MR BIZOS SC: Thank you, Mr Chairman,

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1 yes.

2 GENERAL PHIYEGA: Judge, the important

3 thing for me is to say I, as police, whether it's two or

4 three that are armed in a protest it bothers us, so it is

5 immaterial whether it's 300 or 3 000. Armed protesters, by

6 the law, are not allowed.

7 MR BIZOS SC: The contradictory

8 statements made about the number of people involved, armed

9 and unarmed, are a matter of record. The instruments that

10 would have been required in order to disarm and arrest 2 to

11 300 people must have been completely different to doing the

12 same to 3 000 people. Would you agree with that?

13 GENERAL PHIYEGA: I would refer you to

14 the statement of my lawyers, section 43, because those are

15 the facts that we placed before this Commission.

16 MR BIZOS SC: Would the tactics for

17 controlling 3 000 armed people, all of whom were armed,

18 have to be different if only a select group of warriors, to

19 use your counsel's words, as a separate group – would the

20 tactics of necessity have to be different?

21 GENERAL PHIYEGA: I may not be able to

22 talk about those specific tactics and I'm sure my

23 commanders will do so but we would gun towards disarming

24 and dispersing those people.

25 MR BIZOS SC: You know you are the

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1 commander-in-chief, Commissioner.

2 GENERAL PHIYEGA: Ja.

3 MR BIZOS SC: And I am asking you, would

4 the tactics be the same if indeed there were 3 000 police

5 but the majority were unarmed and it was necessary to

6 disarm, according to your counsel, between 2 000 and 300

7 people in a different group, separate from the big group.

8 CHAIRPERSON: You said between 2 000 and

9 300, you meant 200 and 300.

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

11 A separate group with 2 to 300, would the tactics have been

12 different? What do you say? Never mind what your

13 commanders may say, you're the commander-in-chief and we

14 want an answer from the commander-in-chief.

15 GENERAL PHIYEGA: There would be

16 consistency in the tactics. The tactics would be to

17 encircle, to disarm and to disperse the people.

18 MR BIZOS SC: I'm going to put to you so

19 that they can deal with it, my colleagues, that this change

20 from what was said in their opening address to a lesser

21 group, came about as a result of the filing of a report of

22 an expert that to try and deal with 3 000 armed people is

23 nonsensical and that is why there was this change of the

24 story.

25 CHAIRPERSON: Are you able to comment on

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1 what counsel has put to you in that regard?
 2 GENERAL PHIYEGA: No, I'm not.
 3 MR BIZOS SC: Very well.
 4 COMMISSIONER HEMRAJ: Could you perhaps
 5 tell us which expert report you're referring to, Mr Bizos?
 6 MR BIZOS SC: Mr Hendricks.
 7 COMMISSIONER HEMRAJ: Thank you.
 8 MR BIZOS SC: Whose statement had been
 9 filed after my learned friend cross-examined the witness
 10 whose name I forget –
 11 CHAIRPERSON: I think you're talking
 12 about Brigadier Mkhwanazi. Wasn't it Brigadier Mkhwanazi?
 13 MR BIZOS SC: No, I think it was one of
 14 the witnesses who were called by Mr Mpofo –
 15 MR MPOFU: Yes, it was Magidiwana,
 16 Chairperson and –
 17 CHAIRPERSON: No, what happened was when
 18 Mkhwanazi was being cross-examined, Mr Bizos put things to
 19 him and handed in what amounted to a file note.
 20 MR MPOFU: Oh yes.
 21 CHAIRPERSON: And then subsequently the
 22 expert summary was filed –
 23 MR MPOFU: Correct.
 24 CHAIRPERSON: - to which reference is
 25 made. I'm not sure whether Mr Bizos and I'm going to ask

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1 him, is referring to the filing of the file note in which
 2 certain views of Mr Hendricks – I think he's a Colonel
 3 Hendricks – were set out or whether he's referring to the
 4 fuller expert summary that was filed later.
 5 MR BIZOS SC: I deal with the letter I
 6 think which gives it greater detail but the witness has
 7 chosen not to respond, I will not –
 8 CHAIRPERSON: I can understand that. If
 9 you ask President Obama, who is the commander-in-chief of
 10 the United States forces, the question about submarine
 11 warfare, he may also say he would prefer his submarine
 12 commanders to answer rather than answering it himself and
 13 I'm not sure the analogy is entirely inappropriate.
 14 MR BIZOS SC: Perhaps, with respect, I
 15 still - why, that she may have been able to [inaudible]
 16 that are, of running a big country. Here we were dealing
 17 with a situation where the commander-in-chief actually went
 18 on – well, it'll come out, of the role that she actually –
 19 CHAIRPERSON: It's a matter for argument,
 20 I think –
 21 MR BIZOS SC: Yes.
 22 CHAIRPERSON: But anyway, proceed with
 23 your cross-examination, let me not unduly hamper you. Let
 24 me not hamper you at all.
 25 MR BIZOS SC: Now I want to deal with

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1 something that my learned friend Mr Madlanga dealt with but
 2 in greater detail, that there is a regrettable trend to
 3 indulge in what one of the writers has described as
 4 political rhetoric. I'm not unmindful of the fact that
 5 some of the statements were made before your appointment
 6 but listen carefully because they form a part of the
 7 context of the environment in which Marikana has happened.
 8 Would you agree that statements made by people in the
 9 executive positions in government in relation to the police
 10 may have an impact on public statements that have been
 11 made?
 12 CHAIRPERSON: I don't understand that
 13 question.
 14 MR BIZOS SC: Sorry, I misread it –
 15 CHAIRPERSON: I think there's a slip of
 16 the tongue there.
 17 MR BIZOS SC: The impact of public
 18 statements of high profile officials on the police.
 19 GENERAL PHIYEGA: No.
 20 MR BIZOS SC: You can ignore them. Do
 21 you ignore them?
 22 GENERAL PHIYEGA: It's not a question of
 23 ignoring them. I'm saying – I'm saying no, they would not
 24 have an impact on how we do our work because we have
 25 protocols, we have SOPs, we have guidelines that you were

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1 speaking about. That is what regulates how we do our work.
 2 MR BIZOS SC: If the Minister in the
 3 cabinet makes a statement about the conduct of the police,
 4 would the Commissioner, would the commanders, would the
 5 brigadiers, would the colonels, would the captains, would
 6 the majors, would the warrant officers ignore it?
 7 [10:35] GENERAL PHIYEGA: We are a very
 8 disciplined and controlled organisation. It is important
 9 for us to operate according to norms, regulations and
 10 standards. If those issues are to be taken into account,
 11 they have to find their way into our regulations, into our
 12 standards. You can't just listen to a person and start
 13 acting otherwise. It will be ultra vires.
 14 MR BIZOS SC: Am I wrong in remembering
 15 you saying that the politicians give you support and
 16 guidance, did you say that? Leadership support.
 17 GENERAL PHIYEGA: It is correct.
 18 MR BIZOS SC: Let me read to you –
 19 CHAIRPERSON: Sorry, the answer – because
 20 I must confess I thought I heard her say that the Minister
 21 of Police –
 22 GENERAL PHIYEGA: Yes.
 23 CHAIRPERSON: - gives guidance and
 24 support –
 25 MR BIZOS SC: Well, it may be –

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1 CHAIRPERSON: You make, you've put the
 2 question more broadly.
 3 MR BIZOS SC: More general.
 4 CHAIRPERSON: And I'm not sure that she
 5 made the statement in the broad way that you've put it.
 6 MR BIZOS SC: Well –
 7 CHAIRPERSON: Well, let's ask her. You
 8 hear the debate between Mr Bizos and myself –
 9 GENERAL PHIYEGA: No, not general, the
 10 Minister of Police as prescribed by the Police Act and the
 11 Constitution.
 12 MR BIZOS SC: Yes. Now, Deputy Minister
 13 of Safety and Security, Susan Shabangu, on the 9th of April
 14 2008 is recorded as having said, "You must kill the
 15 bastards if they threaten you or the community. You must
 16 not worry about the regulations. I want no warning shots.
 17 You have one shot and it must be a kill shot."
 18 CHAIRPERSON: National Commissioner, if
 19 you're look in the exhibits that were handed in yesterday,
 20 FFF14 –
 21 GENERAL PHIYEGA: Okay.
 22 CHAIRPERSON: - the publication by Mr
 23 David Bruce, you'll see the passage which Mr Bizos has read
 24 is at page 14 and it's the first paragraph beginning on
 25 that page. You might like to read it first before

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1 answering.
 2 MR BIZOS SC: Have you read it?
 3 GENERAL PHIYEGA: Yes, I have.
 4 MR BIZOS SC: We'll read the rest of it.
 5 "I want no warning shots. You have one shot and that it
 6 must be a kill shot. I will not tolerate any pathetic
 7 excuses that you not been able to deal with crime. You
 8 have been given the guns, now use them." What effect would
 9 a statement, "You must not worry about the regulations"
 10 have on members of the police force?
 11 GENERAL PHIYEGA: The team I lead does
 12 not have an alternative.
 13 MR BIZOS SC: I beginning your pardon?
 14 GENERAL PHIYEGA: The team I lead does
 15 not have an alternative –
 16 MR BIZOS SC: I've asked you, I am asking
 17 –
 18 CHAIRPERSON: No – no, Mr Bizos.
 19 MR BIZOS SC: Sorry –
 20 CHAIRPERSON: Give her a chance to finish
 21 her answer. I'm sorry, I think it best to go back to the
 22 beginning of the sentence and start again.
 23 GENERAL PHIYEGA: The team I lead does
 24 not have an alternative. They have to do their work
 25 according to the prescripts that are written. They cannot

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1 do their work according to any other type of commands that
 2 come from anybody.
 3 MR BIZOS SC: This statement came from
 4 the Deputy Minister of Safety and Security, Susan Shabangu.
 5 In your opinion would that adversely affect the members
 6 under your command, if you had been in command at the time,
 7 about respect to the Constitution, the regulations, the
 8 Act, about shooting?
 9 GENERAL PHIYEGA: I first recognise the
 10 fact that you say this did not happen during my time,
 11 that's number 1. Secondly, that you are asking for a
 12 speculative response from me and I would say again that
 13 people have the right to voice their opinion and their
 14 views but we as police are not guided by that, we are
 15 guided by prescripts.
 16 MR BIZOS SC: If this had been said at
 17 the end of June last year when you were appointed National
 18 Commissioner, what would you have done?
 19 GENERAL PHIYEGA: I will again say that
 20 statement will not interfere with how we, as police,
 21 execute our work. We are strictly regulated by our
 22 prescripts.
 23 MR BIZOS SC: What would you have done?
 24 Would you have called your men and said ignore this
 25 "Minister's", in inverted commas – forget about my comment

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1 – forget about this statement of the Minister, order number
 2 so and so is much more powerful than her voice, ignore it?
 3 Would you have done that?
 4 GENERAL PHIYEGA: I would not go as far
 5 as dealing with it but I would issue an instruction that
 6 says remember the protocols and the prescripts that govern
 7 how you should do your work –
 8 MR BIZOS SC: And ignore, and ignore the
 9 Minister's statement?
 10 GENERAL PHIYEGA: Because I do not know –
 11 MR BIZOS SC: Would you say ignore the
 12 Minister's statement?
 13 CHAIRPERSON: Mr Bizos, I think she was
 14 still answering the question, were you?
 15 GENERAL PHIYEGA: I do not know what
 16 influences that statement, I have no control upon it. What
 17 I have control upon is to tell my members on how to
 18 professionally and regimentally to follow their prescripts,
 19 that I have control upon. Variables that I have no control
 20 upon really would just be taking away our energy. I would
 21 advise them to do their work in the manner that they're
 22 supposed to do it.
 23 MR BIZOS SC: Let's take a couple more
 24 similar statements. Minister Mthethwa, Minister of Safety
 25 and Security in 2009, page 15 of the Bruce document,

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1 exhibit FFF14 –

2 CHAIRPERSON: Mr Bizos, if you're quoting

3 the passage in italics, it's actually November 2008.

4 MR BIZOS SC: I don't believe that –

5 CHAIRPERSON: Yes, if that's the passage

6 you're quoting, all I'm saying is it's November 2008. I

7 don't want to interrupt you but you said 2009.

8 MR BIZOS SC: Sorry.

9 CHAIRPERSON: There's an earlier

10 reference to something in 2009 but that was the change of

11 the name of the department, I think.

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

13 We don't believe that if you are faced with criminals armed

14 with sophisticated weaponry, the police's task would be to

15 take out some human rights charter. Mr Chairman, whilst we

16 are dealing with Mr Bruce, may I just place on record

17 something about Mr Bruce? He is an expert who actually

18 gave evidence before the Constitutional Court in the

19 Walters case dealing with section 49. He is mentioned by

20 name in the judgment of Justice Kriegler as an expert. I

21 merely thought that it may be of some assistance because

22 there were questions yesterday, given an objection, and who

23 is Mr Bruce. I think –

24 CHAIRPERSON: - referred to what it says

25 on page 3 of this exhibit where he's described as the

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1 country's, I take it it must be one of the country's

2 leading experts on issues relating to the police use of

3 force, but anyway –

4 MR BIZOS SC: But that's by the way.

5 CHAIRPERSON: - you've said what you've

6 said but to be fair to the witness, let's focus on the

7 question you were asking her so that she can give us a

8 focused reply.

9 MR BIZOS SC: Yes. Do you agree with

10 that statement?

11 CHAIRPERSON: In fairness, it should be

12 pointed out to you that you were dealing with CIT heists,

13 cash in transit heists. It was in that context in which

14 the statement was made.

15 GENERAL PHIYEGA: I think it's a

16 statement that was made in context and I wouldn't want to

17 judge it and can I reserve my opinion?

18 MR BIZOS SC: Whatever the context may

19 be, as National Commissioner do you believe that, in law,

20 is a policeman entitled to kill a criminal because he is a

21 criminal?

22 GENERAL PHIYEGA: I do not believe that

23 police go out to kill people. Police –

24 MR BIZOS SC: Do you consider the

25 reference, the police's task would be take out some human

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1 rights charter, not to take out some human rights – do you

2 regard that as a lack of respect for the rights that are in

3 human rights charters? Is it ironic? Is it sarcastic? Do

4 you subscribe to it?

5 GENERAL PHIYEGA: I said in terms of that

6 statement, given the context that was given, I really would

7 like to reserve my opinion.

8 MR BIZOS SC: The second part of the

9 statement is to the following effect, "Now we are saying to

10 the police that we ourselves had an obligation as well to

11 strengthen the arm of these task forces so that they are

12 able, on the field, to teach those people a lesson, to

13 fight fire with fire. There is no other way on that."

14 That is to be found on page 15 of the same document.

15 CHAIRPERSON: The witness has been

16 looking at –. The field that's being spoken about appears

17 to be the killing field where criminals are killing law

18 abiding citizens.

19 MR MAHLANGU: Possibly the question was

20 asked whilst I was interpreting, Mr Chairperson.

21 CHAIRPERSON: The passage that was put

22 says they, that's the police, are able on the field to

23 teach those people a lesson and I'm just pointing out that

24 the field referred to is described two sentences earlier as

25 being the killing field where criminals are killing law

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1 abiding citizens.

2 MR BIZOS SC: Did you –

3 CHAIRPERSON: Just give the witness a

4 chance to answer the question.

5 MR BIZOS SC: Sorry.

6 GENERAL PHIYEGA: I'm looking at the

7 paragraph, I haven't heard the question.

8 CHAIRPERSON: Ask the question against,

9 Mr Bizos.

10 MR BIZOS SC: Do you agree with it?

11 GENERAL PHIYEGA: I'm consistent with –

12 MR BIZOS SC: That there is no other way,

13 other than killing.

14 GENERAL PHIYEGA: I'm consistent with my

15 first answer. I – the context that sets out this, you

16 know, I see a paragraph, I see whatever. I really would

17 like to reserve my opinion on this paragraph.

18 MR BIZOS SC: This question of context,

19 I'm going to put to you what we will argue, that you are

20 actually not prepared to say anything that may be any form

21 of criticism of any superior politician or any of your

22 colleagues, the police can do no wrong in your mind and

23 you're not prepared to make any admission or condemnation

24 on the behaviour of any of them.

25 GENERAL PHIYEGA: Advocate, I cannot

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1 again disagree or contest your standpoint but I would say I
 2 do not agree with what you say.
 3 MR BIZOS SC: Did you study before you
 4 accepted appointment or shortly thereafter, under what
 5 circumstances may a policeman kill a criminal?
 6 GENERAL PHIYEGA: Before I took this
 7 appointment really I was just acquainting myself like any
 8 ordinary citizen.
 9 MR BIZOS SC: Is a policeman expected,
 10 even though there is an armed suspect, to kill the suspect
 11 just because the suspect is armed? Have you read anywhere
 12 in the law or what the duty of the policeman is under those
 13 circumstances?
 14 [10:55] GENERAL PHIYEGA: I think you earlier on
 15 took me to a number of sections of the Constitution, our
 16 Act, to talk about right to life and I think social
 17 respect. I think any other thing that the police does,
 18 other than following the prescripts, circumstances predict
 19 what happens in that situation.
 20 MR BIZOS SC: Did you not think that
 21 those statements and others exhort the police to kill, not
 22 to hesitate before firing, not to worry about the
 23 regulations, to teach them a lesson and to use maximum
 24 force, might that sort of talk have been influencing
 25 members of the force of various ranks to behave at Marikana

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1 in the manner in which they did on the 16th of August?
 2 GENERAL PHIYEGA: No.
 3 MR BIZOS SC: Well, you say no. The
 4 doctrine of maximum force is often used by members of the
 5 police and politicians and particularly Minister Mthethwa
 6 has referred to it publicly on several occasions. You can
 7 see it, Mr Chairman, in the document handed in by Kasak on
 8 pages 19 to 32.
 9 CHAIRPERSON: We've read the document, I
 10 don't know if the witness has had an opportunity.
 11 MR BIZOS SC: You have –
 12 CHAIRPERSON: I say we've read that
 13 document.
 14 MR BIZOS SC: Yes.
 15 CHAIRPERSON: I'm not sure if the witness
 16 has had an opportunity to study it. It's now 11 o'clock,
 17 so perhaps it would be appropriate for you to give the
 18 witness the document that you're referring to, give her an
 19 opportunity to read the relevant passage and perhaps after
 20 – because it's not fair to ask her the question before
 21 she's had a chance to look at it – and you can resume your
 22 cross-examination after the tea adjournment. Would that be
 23 in order? The Commission will now take the tea adjournment
 24 and we'll have to perhaps reassemble in half an hour.
 25 [COMMISSION ADJOURNS COMMISSION RESUMES]

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1 [11:45] CHAIRPERSON: The Commission resumes. I
 2 understand that the Commissioner was delayed by urgent
 3 business to which she had to attend and so that's why we're
 4 resuming late. We understand in the circumstances that
 5 these problems arise. I see that the Kassack submission
 6 has now been handed to us, presumably we should give it an
 7 exhibit number, should we, if it's going to be referred to.
 8 MR BIZOS SC: It'll be FFF16, Mr
 9 Chairman.
 10 CHAIRPERSON: Thank you.
 11 MS PILLAY: Chair, it should be -
 12 MR BIZOS SC: We have put a copy before
 13 the witness.
 14 CHAIRPERSON: Let's ask Ms Pillay.
 15 You'll forgive me if I say I prefer her views on what the
 16 exhibit number should be, to yours.
 17 MR BIZOS SC: So do I.
 18 CHAIRPERSON: Yes, Ms Pillay?
 19 MS PILLAY: It should be FFF17.
 20 CHAIRPERSON: FFF17. Sorry. Well, that
 21 saves us embarrassment, thank you very much. Before I
 22 remind the Commissioner, the National Commissioner that she
 23 is under oath, I want to say something. I'm informed that
 24 the family members will be leaving today during lunch time
 25 for the Easter holidays and they'll be rejoining us on the

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1 16th of April. We wish them a safe journey back home and a
 2 blessed Easter holiday. We understand that they make great
 3 personal sacrifices to come here to be present at the
 4 sittings of the Commission and we understand their reasons
 5 for doing so and respect them for that. National
 6 Commissioner, you're still under oath.
 7 MANGWASHI VICTORIA PHIYEGA: Yes, I am.
 8 CHAIRPERSON: Mr Bizos, I take it you
 9 want to question the National Commissioner now about
 10 passages in exhibit FFF17?
 11 CROSS-EXAMINATION BY MR BIZOS SC (CONTD.):
 12 Yes, Mr Chairman, thank you. Commissioner, before you here
 13 is the document exhibit FFF17. You had an opportunity of
 14 reading the paragraphs that we asked the person, I think
 15 the interpreter, have you had an opportunity of reading
 16 paragraphs 7 to 10?
 17 CHAIRPERSON: Is that pages 11 – is that
 18 page 11?
 19 MR BIZOS SC: 19.
 20 CHAIRPERSON: 19? Oh, I see. Oh, it is
 21 another chapter.
 22 MR BIZOS SC: Yes, chapter 5, existence
 23 of an unlawfulness of doctrine of maximum force.
 24 CHAIRPERSON: Yes, I see.
 25 MR BIZOS SC: Section –

<p style="text-align: right;">Page 7269</p> <p>1 CHAIRPERSON: You're ahead of me, 2 National Commissioner, you got to the relevant passage 3 before I did, is that right? 4 GENERAL PHIYEGA: Yes, I'm on the right 5 page. 6 CHAIRPERSON: Let's all stay there. 7 Carry on, Mr – 8 MR BIZOS SC: Have you had an opportunity 9 of reading paragraphs 7 to 10? 10 GENERAL PHIYEGA: Advocate, I've tried to 11 use my cursory speed reading – 12 CHAIRPERSON: Under pressure. 13 GENERAL PHIYEGA: Ja. 14 MR BIZOS SC: Well, what we are going to 15 say is that the use of force must correspond to the 16 seriousness of the situation in relation to standing order 17 262. At 11.3, "Should use of force be unavoidable it must 18 meet the following requirements" and I want to go through 19 the requirements with you. "It must be proportional to the 20 threat," on top of page 20, do you see that? 21 GENERAL PHIYEGA: Yes, I do see that. 22 MR BIZOS SC: Now, if we deal with 23 Marikana we have the following situation in relation to the 24 16th, 34 dead, 84 injured, most of them on the upper part of 25 their body. The police version is that they shot them in</p>	<p style="text-align: right;">Page 7271</p> <p>1 understand that to be her attitude. 2 GENERAL PHIYEGA: And the commanders, 3 Judge. 4 CHAIRPERSON: And the commanders too, so 5 the commanders are going to be questioned about this, I 6 take it. There's going to be argument and we will then 7 have to give a finding – 8 MR BIZOS SC: I understand – 9 CHAIRPERSON: And her point, as I 10 understand her, is to say well, I don't want to, I'm not 11 really able to express an opinion on this, I accordingly am 12 not able to answer the question. So you can't then say 13 that she said it was proportional because she – she doesn't 14 say whether it's proportional or not. 15 MR BIZOS SC: Am I not entitled to ask 16 her, as a high ranking officer in the police force, as to 17 whether there is, on the face of it, any sign of 18 proportionality? I must surely be entitled to test then 19 how she believes the situation – 20 CHAIRPERSON: You're entitled to answer 21 that question but we must listen carefully to her answer 22 before we carry on. 23 MR MPOFU: Chairperson, sorry, I don't 24 want to barge in into this but our position on this 25 particular objection is that if the witness says that the</p>
<p style="text-align: right;">Page 7270</p> <p>1 self-defence. Would you say that having regard to those 2 injuries and the absence of any injury on any police 3 officer, the action of the police was proportional? 4 GENERAL PHIYEGA: My response would be in 5 two parts. We are on record in my statement and in our 6 submission that indeed police acted in self-defence. On 7 the issue of proportionality, I am hoping that the debates 8 from the experts and from the commanders and the outcome of 9 this Commission would give a judgment on that. I am not 10 qualified and I don't feel comfortable to give an answer on 11 the proportionality matter. 12 MR BIZOS SC: Don't the figures mean 13 anything to you, Commissioner? Is it a miracle or an act 14 of God that not a single scratch on any of the few hundred 15 policemen and so many deaths and so many injuries and you 16 say that that is still proportional? 17 CHAIRPERSON: Before you answer, National 18 Commissioner, Mr Semenya has an objection. 19 MR SEMENYA SC: Well, the witness has not 20 said it was proportional. 21 CHAIRPERSON: She can't answer. She says 22 it's merely a matter beyond her competence to say it was 23 proportional and she leaves it, presumably, I don't know if 24 she says so in terms but she leaves it for counsel's 25 argument and then for the report of the Commission. I</p>	<p style="text-align: right;">Page 7272</p> <p>1 police acted in self-defence, that in itself embraces the 2 element of proportionality because self-defence is the 3 proportional attack on – 4 CHAIRPERSON: Response to a threat. 5 MR MPOFU: Yes, Chair, to an attacker. 6 Correct, thank you Chairperson. 7 CHAIRPERSON: Mr Bizos, perhaps you can 8 perhaps then revisit the question from the angle suggested 9 by Mr Mpfu. 10 MR BIZOS SC: Yes. The defence of the 11 police is that they acted in self-defence, that was that 12 their lives were in immediate danger, this is why they shot 13 the people and killed so many and wounded so many. As an 14 intelligent head of the police, does it not appear to be 15 strange to you that there wasn't a single scratch on any 16 policeman and such a heavy death number due, result and 17 injuries? This is the question. As an individual, make an 18 honest answer. Tell us, do you feel that there is any 19 substance in the self-defence story? 20 GENERAL PHIYEGA: You were saying where 21 there is substance in the argument of police for self- 22 defence. I say it is our submission that the police were 23 defending themselves. Yes, there is substance. 24 MR BIZOS SC: The question is, how did 25 they manage not to have a single scratch if there was this</p>

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1 attack that they describe? Please come to terms with the
 2 question.
 3 GENERAL PHIYEGA: I do want to say the
 4 police are trained and the police do their work
 5 professionally and I think it is those type of elements
 6 that assisted them to be able to do their work in that
 7 manner.
 8 MR BIZOS SC: Do you think you've
 9 answered the question?
 10 GENERAL PHIYEGA: I have answered to the
 11 best of my ability the way I understood the question.
 12 MR BIZOS SC: Well, we will leave it at
 13 that and argue that you are an example of the attitude that
 14 I'm not prepared to admit that the police did anything
 15 wrong and I will – nothing that you place before me will
 16 change my mind. Am I correct in that?
 17 GENERAL PHIYEGA: Advocate, that's a
 18 conclusion you are coming to. I personally do not agree
 19 with your conclusion but I cannot make you change your
 20 conclusion.
 21 MR BIZOS SC: You see that the heading of
 22 this article is "The existence and unlawfulness of the
 23 doctrine of maximum force."
 24 GENERAL PHIYEGA: Yes, I do.
 25 MR BIZOS SC: Do you know of any law in

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

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

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

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1 MR BIZOS SC: Yes. This is the defence
2 of the police in this case, despite the objection by my
3 learned friend that the police never used those words, you
4 used them in your statement.
5 GENERAL PHIYEGA: But what is the
6 question?
7 MR BIZOS SC: Sorry? Are you asking a
8 question?
9 GENERAL PHIYEGA: Yes, you've made a
10 statement. I'm still waiting for the question.
11 MR BIZOS SC: I asked you whether you
12 knew anything about maximum force, you said you knew
13 nothing about it and my learned friend, in order to – never
14 mind the order to – my learned friend objected that the
15 police never used the words "maximum force" as part of
16 their defence. And what I am telling you now is that in
17 your own statement you used the words "maximum force" and
18 the objection is therefore not supported by the facts. The
19 question to you is, why did you use the term "maximum
20 force" if it was not part and parcel of the police's
21 defence?
22 [12:05] GENERAL PHIYEGA: Advocate, I will still
23 go back to what I said and I think it constitutes my
24 response to you. I have said the police acted in self-
25 defence.

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1 MR BIZOS SC: National Commissioner, do
2 you not understand the question?
3 GENERAL PHIYEGA: Maybe I don't.
4 MR BIZOS SC: You used the words "forced
5 to utilise maximum force." Did you use those words?
6 GENERAL PHIYEGA: It is in my statement,
7 yes –
8 MR BIZOS SC: Did you use the words?
9 GENERAL PHIYEGA: Yes, I did.
10 MR BIZOS SC: Next question, where did
11 you get the expression from, maximum force? What law or
12 what order did you get the words from?
13 GENERAL PHIYEGA: This is a media
14 statement and not all the words that are sitting here are
15 sitting in laws.
16 MR BIZOS SC: Please answer the question.
17 Where did you get the words from?
18 GENERAL PHIYEGA: It is my answer to you,
19 to say –
20 MR BIZOS SC: You made them up?
21 GENERAL PHIYEGA: - the words that are
22 sitting here –
23 CHAIRPERSON: Give her a chance to answer
24 please.
25 GENERAL PHIYEGA: Ja. It is my, my

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1 answer to you to say the police used that maximum force in
2 self-defence and the words that are sitting in this
3 statement which is a media statement, are not necessarily
4 sitting in any legislation. Some may be, some not.
5 CHAIRPERSON: No, no, I'm afraid that's
6 not really sufficient, where you get them from. I
7 understand your answer but the question is, where did you
8 get the words from?
9 GENERAL PHIYEGA: If I can – these are
10 English words, they don't come from any legislation.
11 MR BIZOS SC: The Minister, Mr Nathi
12 Mthethwa, at a time he was the Minister of Safety of
13 Security and now is still Minister of Police, which is the
14 same ministry isn't he?
15 GENERAL PHIYEGA: Correct, sir.
16 MR BIZOS SC: In an interview with the
17 Weekend Argus in July 2009, "We are saying in dangerous
18 situations we will be flexible so that the police can use
19 maximum force." And in full – I only have a –
20 CHAIRPERSON: Sorry to interrupt you, are
21 you quoting again from paragraph 10 on page 20 of exhibit
22 FFF17?
23 MR BIZOS SC: Precisely, Mr Chairman, I
24 continue reading it –
25 CHAIRPERSON: I think in fairness to the

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1 witness, she must get an opportunity to look at it.
2 MR BIZOS SC: Let me read it. "We are
3 saying in such dangerous situations we'll be flexible so
4 that the police can use maximum force without these
5 surprises happening. When criminals shoot the police, they
6 boast about that, while the police are here to protect the
7 public and to protect the property of the country. As long
8 as section 49 is there, these criminals will have a field
9 day, said Mr Mthethwa." You are aware of that statement
10 having been made by our Minister?
11 GENERAL PHIYEGA: I am not.
12 MR SEMENYA SC: Chairperson –
13 CHAIRPERSON: Yes, Mr Semanya?
14 MR SEMENYA SC: We have followed the
15 footnote, annexure B there, which is referenced to that
16 statement. When we go to the link which is identified
17 there, this quote does not exist at all.
18 CHAIRPERSON: I'm sorry, what page of
19 exhibit FFF17 are you referring to?
20 MR SEMENYA SC: That quotation ends with
21 a footnote 40 there.
22 CHAIRPERSON: Yes.
23 MR SEMENYA SC: In square brackets it
24 says "[Annexure B]." When we go to annexure B with that
25 link, that quotation does not exist in the document.

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1 CHAIRPERSON: Yes, yes, I see that. Yes,
 2 Mr Bizos, you see if you look at page 35 there's footnote
 3 39 and then there's a gap and then there's footnote 41.
 4 Now there appears to be a problem of some sort.
 5 MR BIZOS SC: We'll investigate that, Mr
 6 Chairman, we will go to the person that wrote it. There
 7 may be an explanation which we cannot –
 8 CHAIRPERSON: The point is that until
 9 that's cleared up, it's not fair to put –
 10 MR BIZOS SC: I will not –
 11 CHAIRPERSON: - to the witness a
 12 statement made by the Minister in respect of which there
 13 appears to be a question mark.
 14 MR BIZOS SC: - I will defer further
 15 cross-examination.
 16 CHAIRPERSON: Yes, I understand.
 17 MR BIZOS SC: Page 24 of FFF14, we find
 18 the following – we just want to find the passage because I
 19 have it in notes and I want to find it in the document, Mr
 20 Chairman.
 21 CHAIRPERSON: Are you referring to the
 22 passage –
 23 MR BIZOS SC: Let me read from my notes –
 24 CHAIRPERSON: - made on the 8th of July
 25 2011?

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1 MR BIZOS SC: Yes.
 2 CHAIRPERSON: Which is in the fourth
 3 paragraph on page 24.
 4 MR BIZOS SC: Yes, that's where we are.
 5 Yes, let me read it from there. "There must be a good
 6 appreciation of the distinction between the need to use
 7 maximum force against violent criminals and minimum force
 8 in dealing with fellow citizens." Are you aware that the
 9 Minister made such a statement?
 10 GENERAL PHIYEGA: No, I'm not aware.
 11 MR BIZOS SC: Yes. If he did use maximum
 12 force, as you did, what did you mean by maximum force?
 13 GENERAL PHIYEGA: I will not be able to
 14 talk for the Minister but I, in my statement, was saying
 15 the police had to use the necessary force to defend
 16 themselves.
 17 MR BIZOS SC: We were forced to utilise
 18 maximum force. What did you mean by maximum force? You
 19 used the words, what did you mean?
 20 GENERAL PHIYEGA: I've just answered to
 21 say the context I used was to say they must use the
 22 necessary force to defend themselves. That's what I meant.
 23 MR BIZOS SC: Doesn't it mean in police
 24 circles, maximum force, kill them?
 25 GENERAL PHIYEGA: That is not my answer

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1 to you. My answer to you is for them to use the necessary
 2 force to defend themselves.
 3 MR BIZOS SC: Not to kill them?
 4 GENERAL PHIYEGA: Advocate, my answer to
 5 you is that they should use the necessary force to defend
 6 themselves. You might not like my answer but that's my
 7 answer to you.
 8 MR BIZOS SC: Are there requirements of
 9 what is necessary force?
 10 GENERAL PHIYEGA: The only requirements
 11 we can use are the prescripts that we have, the standing
 12 orders, the legislation that this country has. Those are
 13 the requirements we use.
 14 MR BIZOS SC: Is there one law for
 15 criminals and another law for citizens, as far as the
 16 police are concerned, in the force that they are entitled
 17 to use?
 18 GENERAL PHIYEGA: No.
 19 MR BIZOS SC: You took an active part in
 20 the planning of what happened in Marikana.
 21 GENERAL PHIYEGA: Perhaps what would help
 22 me to respond is to say what active part means.
 23 MR BIZOS SC: You were the National
 24 Commissioner and you had a responsibility to lead any
 25 police action - to take place on the 16th.

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1 GENERAL PHIYEGA: Yes, I am the National
 2 Commissioner. Yes, I take overall responsibility for
 3 policing.
 4 MR BIZOS SC: You attended a meeting on
 5 the 16th – on the 13th in the evening at Marikana.
 6 GENERAL PHIYEGA: Yes, I did.
 7 CHAIRPERSON: It was the Monday, the same
 8 day –
 9 MR BIZOS SC: It was the 13th.
 10 CHAIRPERSON: - that the incident took
 11 place on the field near the railway line.
 12 MR BIZOS SC: Yes.
 13 CHAIRPERSON: Where two policemen were
 14 killed and I think another wounded and some civilians
 15 killed –
 16 MR BIZOS SC: Well, what day were you at
 17 a meeting in Marikana in order to discuss Mr Scott's plan?
 18 GENERAL PHIYEGA: I was never in a
 19 meeting where Mr – I was discussing Mr Scott's plan.
 20 CHAIRPERSON: My understanding of her
 21 evidence is, when she was told what happened on the field
 22 by the railway line she – the killing of two policemen,
 23 wounding of another and the killing of civilians and so on
 24 -
 25 MR BIZOS SC: Marikana –

<p style="text-align: right;">Page 7285</p> <p>1 CHAIRPERSON: - she then went to 2 Marikana. 3 MR BIZOS SC: Yes – 4 CHAIRPERSON: That was on the Monday the 5 13th. 6 MR BIZOS SC: Yes. 7 CHAIRPERSON: As far as I can recall, 8 Lieutenant Scott's plan was only formulated thereafter. I 9 could be wrong on that but that's my recollection. 10 MR BIZOS SC: Let me get clarity. Was 11 there a meeting on the evening of the 13th which you 12 attended at Marikana? 13 GENERAL PHIYEGA: Yes, I have. 14 MR BIZOS SC: Who else was there? 15 GENERAL PHIYEGA: I have indicated in my 16 statement, we can go to that. 17 MR BIZOS SC: Go to that and tell us 18 please? 19 GENERAL PHIYEGA: I would need some time 20 to go there. 21 MR BIZOS SC: Yes, it's paragraph, from 22 paragraph 14 on, are those the people? General Mbombo – 23 GENERAL PHIYEGA: From paragraph 12. 24 MR BIZOS SC: Not paragraph 14? 25 GENERAL PHIYEGA: I would like to read it</p>	<p style="text-align: right;">Page 7287</p> <p>1 MR BIZOS SC: Oh yes, no, I think 2 paragraph 25 I think is the – 3 CHAIRPERSON: Paragraph 25 – 4 MR BIZOS SC: Yes, I was going to – 5 CHAIRPERSON: She says, that talks about 6 – paragraph 25 talks about the 16th. 7 MR BIZOS SC: Yes. 8 CHAIRPERSON: The relevant paragraph here 9 I think is paragraph 20, where she says that she, at about 10 11 o'clock that night she met operational officers at the 11 JOC, she got an overview, emphasised the importance of 12 ensuring efforts were made to prevent further loss of life, 13 destruction of property. She urged them to seek assistance 14 from other SAPS units and then she left and that's round 15 about 11 o'clock on the evening of the 13th. If you look at 16 exhibit L, slide 64 – 17 MR BIZOS SC: Yes. 18 CHAIRPERSON: It appears that the 19 operational plan was finalised the following day, i.e. on 20 the 14th. 21 MR BIZOS SC: Yes. 22 CHAIRPERSON: So the question you asked 23 requires revision in the light of – 24 MR BIZOS SC: Thank you for the 25 assistance, I will. Was the, what was to be done,</p>
<p style="text-align: right;">Page 7286</p> <p>1 from paragraph 12. 2 MR BIZOS SC: Yes? 3 GENERAL PHIYEGA: "On the 13th of August 4 2012 at about 15:00 or much later, I received a call from 5 the Provincial Commissioner of the North-West, Lieutenant- 6 General Mbombo. She informed me that in the week before 7 the 14th of August 2012 a situation had developed in 8 Marikana and more particularly at Lonmin Platinum Mine, 9 which claimed the lives of four people, including two 10 security guards. This necessitated the deployment of more 11 police officers to keep the peace. She advised me that 12 violence has escalated, resulting in further deaths of five 13 people. These casualties included four – two police 14 officers. I regarded the information that had been given 15 to me by General Mbombo as sufficiently grave to cause me 16 to travel to Marikana. I left Marikana on the same day, 17 for Marikana on the same day, accompanied by the Provincial 18 Commissioner of Gauteng, General Mzwandile Petros, and we 19 arrived at around 18H00. We met with Lieutenant-General 20 Mbombo, Major-General Mpembe, Brigadier Calitz, the 21 operational commander at the time" - and I have indicated 22 in my verbal submission here that because it was at the JOC 23 there could have been other people. 24 CHAIRPERSON: It may cut things short if 25 I point out –</p>	<p style="text-align: right;">Page 7288</p> <p>1 discussed on the evening or night of the 13th? 2 GENERAL PHIYEGA: When you say what was 3 to be done, what are you referring to? 4 MR BIZOS SC: Was there a discussion on 5 the evening of the 13th of what was the plan to be done in 6 order to deal with the problems of Marikana miners 7 gathering on the koppie? Was there a discussion on the 8 evening of the 13th? 9 GENERAL PHIYEGA: The evening of the 13th 10 we did not discuss the plan. 11 MR BIZOS SC: You didn't discuss the 12 plan. Did you discuss it on any other day before the 16th? 13 GENERAL PHIYEGA: No. 14 MR BIZOS SC: You didn't see it? 15 GENERAL PHIYEGA: No. 16 MR BIZOS SC: Not before the 16th? 17 GENERAL PHIYEGA: No. 18 MR BIZOS SC: You didn't approve of it? 19 GENERAL PHIYEGA: It is not a question of 20 approving because I have delegated authorities to those in 21 command who are in operations to be able to do so. 22 MR BIZOS SC: Did you not see the plan 23 before the 16th? 24 GENERAL PHIYEGA: I said yes, I have not 25 seen it.</p>

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1 MR BIZOS SC: So the plan was implemented
2 without you having any knowledge of what the police plan
3 was?
4 GENERAL PHIYEGA: Indeed, because the
5 delegated authority of my powers is in the right hands for
6 those people who are in charge of operations to be able to
7 do what they are supposed to do. It is expected to them –
8 MR BIZOS SC: To whom did you delegate
9 your authority?
10 GENERAL PHIYEGA: My authority is first
11 and foremost delegated to the Provincial Commissioner of
12 this province who, in turn, has the responsibility to
13 delegate authority to other people. And furthermore, my
14 authority is also delegated to the divisional
15 commissioners, other specialists and experts in doing
16 particular things and they equally have the responsibility
17 to delegate to their sub-commanders.
18 [12:25] MR BIZOS SC: We have no doubt that you
19 have power of delegation but do you accept responsibility
20 for what the people that you have delegated authority, did?
21 GENERAL PHIYEGA: The Constitution does
22 say I have the responsibility to manage and control the
23 service and I do manage and control the entire service.
24 MR BIZOS SC: But the question was, do
25 you accept responsibility for what your subordinates do or

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1 don't do?
2 GENERAL PHIYEGA: Yes, I do.
3 MR BIZOS SC: Thank you. You take
4 responsibility for any act or omission that may have been
5 performed by the South African Police Service in relation
6 to the events of the 16th of August?
7 GENERAL PHIYEGA: I'm going to qualify my
8 response. I said to you, I've already answered you on the
9 responsibility part and my qualification is this, the
10 service employs 200 000 members and it is not a monolithic
11 block. It is made up of individuals who know that they
12 have responsibilities to carry. So at any given time, as I
13 accept responsibility, I also in a matrix session look at
14 the roles of the individuals and even in our submission we
15 talk right at the beginning, our opening statement attests
16 to that matter to say there is discipline, there is
17 individual responsibility within a collective. So that
18 matrix relationship is very crucial as I address my taking
19 responsibility and overall control of this organisation.
20 MR BIZOS SC: You had made yourself a
21 party to what your force, in your language, were doing at
22 Marikana.
23 GENERAL PHIYEGA: I didn't hear you.
24 MR BIZOS SC: Pardon?
25 GENERAL PHIYEGA: I didn't hear you

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1 there. I didn't hear the question.
2 MR BIZOS SC: You didn't get the
3 question. Perhaps both of us should speak a bit more
4 loudly so that we can both communicate. You yourself in
5 your capacity as National Commissioner took a personal
6 interest in what was happening in Marikana.
7 GENERAL PHIYEGA: It is true, Advocate.
8 MR BIZOS SC: And we are not talking
9 about whether you would be responsible for an act done by a
10 sergeant in the Western Cape, for instance, it's outside
11 your area – I'm sorry, what happened in, near Pretoria at a
12 police station on matters that you knew nothing about.
13 GENERAL PHIYEGA: I think that was a
14 little bit long. I didn't understand what I have to
15 answer.
16 CHAIRPERSON: I think what Mr Bizos is
17 saying is that if something happens in the Western Cape or
18 in Pretoria but you know nothing about it, that's one
19 thing, but he says – the words he used were, what did you
20 use, you were a party to, I think is the word you used, Mr
21 Bizos. Is that right, Mr Bizos? Did you say -
22 MR BIZOS SC: Sorry –
23 CHAIRPERSON: Did you say she's a party
24 to something?
25 MR BIZOS SC: Yes.

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1 CHAIRPERSON: What exactly was the phrase
2 you used?
3 MR BIZOS SC: Yes, she took part in the
4 discussions and kept abreast of the operations.
5 CHAIRPERSON: So he suggests that your
6 responsibility is different where you've taken part in
7 discussions and taken an interest in a particular
8 operation.
9 MR BIZOS SC: May I make it quite clear –
10 CHAIRPERSON: Is that the question?
11 MR BIZOS SC: - that she was not a mere
12 bystander.
13 CHAIRPERSON: You've heard that now. He
14 says you were not a mere bystander, you took part in the
15 discussions and you took an interest in what was happening
16 and therefore he suggests that you have a different kind of
17 responsibility from what would be the case if some sergeant
18 did something at a police station outside Pretoria. Is
19 that the question?
20 MR BIZOS SC: That's the question, thank
21 you, Mr Chairman.
22 GENERAL PHIYEGA: I would argue
23 differently and my argument would be this, you appositely
24 refer to my role as the National Commissioner who manages
25 and controls the organisation and I agreed to that. I also

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1 have said through my delegated authority my tentacles go
 2 right down to the last sweeper in the organisation. So I
 3 am connected to the organisation. The delineation you are
 4 trying to make does confuse me a bit because even the
 5 matters that you are mentioning, I am linked to through the
 6 same principle that I've mentioned earlier on of my
 7 connectivity with the sweeper.

8 MR BIZOS SC: National Commissioner, I
 9 have a document before me, a statement of one Duncan George
 10 Scott which has not yet been put in, Mr Chairman – which
 11 has been put in but not given an exhibit but –

12 CHAIRPERSON: When we came on the podium
 13 this morning we were given, it was one of the documents
 14 that was on the table.

15 MR BIZOS SC: It needs an exhibit number.

16 CHAIRPERSON: FFF18, Ms Pillay?

17 MS PILLAY: That's correct, Chair.

18 CHAIRPERSON: I'm correct in saying this
 19 hasn't been an exhibit before?

20 MS PILLAY: It hasn't been marked as an
 21 exhibit before.

22 CHAIRPERSON: Right, so this will be
 23 marked exhibit FFF18. Has the witness got a copy?

24 GENERAL PHIYEGA: Yes.

25 MR BIZOS SC: Would you please turn to

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1 paragraph 6 on page 4 and please read it out loud and clear
 2 for all to hear?

3 GENERAL PHIYEGA: "After the initial
 4 briefing, police briefing, the National Commissioner and
 5 her delegation went to a meeting with the Lonmin
 6 management. Thereafter the National Commissioner's
 7 delegation returned and – returned and a second meeting was
 8 held that evening at 23H00 with the operational officers.
 9 It was generally accepted that the situation had escalated
 10 with increasing loss of life and it was necessary to
 11 develop a co-ordinated strategy to resolve the situation."

12 MR BIZOS SC: Read paragraph 7 please?

13 GENERAL PHIYEGA: "It was discussed that
 14 in hostage release operations the STF would always use
 15 dialogue first through the SAPS hostage negotiators, before
 16 opting to resolve a situation with a tactical option and
 17 recommended that the same course of action be utilised
 18 here, namely that the protesters first be engaged by SAPS
 19 hostage negotiators to enable them to seek peaceful
 20 resolution before moving to an intervention to enforce the
 21 law. This strategy, if successful, would defuse the
 22 situation without a need for a tactical intervention and
 23 allow for a peaceful resolution."

24 MR BIZOS SC: I will read part of
 25 paragraph 8. "The next day, Tuesday the 14th of August,

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1 Major-General Annandale implemented the hostage negotiation
 2 concept and called in the SAPS crisis negotiators to engage
 3 with the protesters. During the early hours of the morning
 4 on Tuesday, the 14th of August 2012, I carried out a site
 5 visit of the area with Sinclair from Lonmin Mine for
 6 orientation purposes. From 05:30 I started working on an
 7 operational strategy which would provide the operational
 8 concept for a deployment over the next three days, as
 9 approved by the senior command of the JOC." Now lapses of
 10 memory are not unusual in proceedings such as that we are
 11 engaged in. Had you forgotten about your meeting on Monday
 12 evening and the decisions that were taken there, earlier on
 13 when you denied that you took part in any meeting and you
 14 denied that you discussed the plan?

15 CHAIRPERSON: Mr Bizos, I'm not sure that
 16 that question is quite fair in the circumstances. What
 17 paragraph 7 that you've read says is that there was a
 18 discussion about what was called peaceful resolution and it
 19 was said that the strategy, if successful, would defuse the
 20 situation without the need for tactical intervention. In
 21 the next paragraph which you read, Colonel Scott says that
 22 he started working on the operational strategy from 05:30
 23 the next morning. That obviously relates to the tactical
 24 intervention to which he refers in the previous paragraph.

25 MR BIZOS SC: But the middle of paragraph

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1 8, working on an operational strategy which provides the
 2 operational concept for deployments over the next three
 3 days, as approved by the senior command of the JOC.

4 GENERAL PHIYEGA: Yes.

5 CHAIRPERSON: So what does that mean?

6 MR BIZOS SC: It could only have happened
 7 the previous night.

8 CHAIRPERSON: What happened the previous
 9 night?

10 MR BIZOS SC: The discussion about the
 11 plan.

12 CHAIRPERSON: Well, the discussion
 13 appears from the previous paragraph to be that they decided
 14 they'd try to have a peaceful resolution and thereafter it
 15 would appear, on the next day the operational strategy
 16 started being worked on from 05:30 the next morning. So
 17 there wasn't an operational strategy at all until after Mr
 18 Scott had worked it out – Colonel Scott had worked it out
 19 and he only started working at 05:30. So I'm not sure that
 20 the question the way, as you've framed it, is necessarily
 21 fair. I'm not saying you can't ask questions on these
 22 paragraphs, obviously you can but I think that it does
 23 appear that the operational strategy didn't exist by
 24 midnight on the 13th and only started being worked on at
 25 05:30 the next morning, but anyway let's – perhaps you can

<p style="text-align: right;">Page 7297</p> <p>1 take it further than that but I don't think the question 2 the way you originally framed it was entirely correct. 3 MR BIZOS SC: The basic design was agreed 4 to the night before if the three paragraphs are read 5 together, Mr Chair. 6 CHAIRPERSON: Maybe the way to do it is 7 to put to the witness that that's the way you read it and 8 ask her whether she agrees and take it from there. 9 MR BIZOS SC: Do you agree, do you agree 10 that there was discussion, was – what was to happen in the 11 next three days during your meetings on the evening and 12 night of the 13th? 13 GENERAL PHIYEGA: I don't agree. 14 MR BIZOS SC: Were the following words 15 used during your discussions the night before – a basic 16 design, negotiate, pursue a peaceful resolution and if that 17 fails, a tactical intervention? Were those words used 18 during that night? 19 GENERAL PHIYEGA: I think it is important 20 to note that in a conversation such as that one where there 21 isn't a verbatim recording, it is very difficult to 22 remember as you put the matters but I can say issues around 23 a peaceful negotiation have always been top of our mind and 24 we discussed that and I can say in the, at that evening we 25 continued to talk about a peaceful resolution.</p>	<p style="text-align: right;">Page 7299</p> <p>1 draft of the plan, without any discussion with the senior 2 members including yourself? 3 GENERAL PHIYEGA: In my testimony I've 4 spoken of a JOC as a multi-faceted unit that brings 5 together multi-faceted commanders, operators, in one room 6 and Scott could never have alone developed this plan. He 7 worked with those he was with in the JOC and he indicates 8 in his statement that on the 14th in the morning they 9 started working on this plan. 10 [12:45] MR BIZOS SC: You and your counsel have 11 repeatedly told us about the unprecedented loss of life 12 that occurred on the 16th of August. 13 GENERAL PHIYEGA: Yes. 14 MR BIZOS SC: I assume that you mean loss 15 of life as a result of police conduct. 16 GENERAL PHIYEGA: I am talking about 17 unprecedented loss of life, not only for the 16th, for the 18 entire period. It was a lot. 19 MR BIZOS SC: But it is said in the 20 context of what happened in Marikana on the 16th. 21 GENERAL PHIYEGA: Yes, it remains 22 unprecedented. 23 MR BIZOS SC: May I ask you to speak up 24 so that I can hear you? I'm – 25 GENERAL PHIYEGA: Yes, it was</p>
<p style="text-align: right;">Page 7298</p> <p>1 MR BIZOS SC: Perhaps paragraph 71 of 2 exhibit L, slide 71 may refresh your memory that those 3 matters that are set out in the various stages 1 to 6, that 4 they may have been discussed on Monday night. 5 MR SEMENYA SC: Chairperson, the calendar 6 date on that slide is the 14th of August 2012. 7 CHAIRPERSON: I accept that but Mr Bizos 8 says if you read that, it may jog your memory as to what 9 had been discussed the previous night. That's all Mr Bizos 10 says. Now that you've emphasised that what she's been 11 asked to read to jog her memory is in fact something from 12 the 14th, then I think there's no danger of the witness 13 being overreached, as it were, by the question. So carry 14 on, Mr Bizos. 15 MR BIZOS SC: Thank you. Have you got 16 exhibit L in front of you? 17 GENERAL PHIYEGA: Yes, I do. 18 MR BIZOS SC: Please have a look at what 19 it says on slide 71 and that may refresh your memory, 20 whether these things were discussed and approved by you on 21 the evening of the 13th. 22 GENERAL PHIYEGA: I have said we did not 23 discuss the operational strategy on the 13th. 24 MR BIZOS SC: So are you suggesting that 25 Colonel Scott made up his own plan on the 14th, or his first</p>	<p style="text-align: right;">Page 7300</p> <p>1 unprecedented. 2 MR BIZOS SC: Yes. You have a very 3 impressive academic CV, Commissioner. You can say thank 4 you, if you want. 5 GENERAL PHIYEGA: I think that's a better 6 way. With the humility that I have as a person, I can only 7 say thank you. 8 MR BIZOS SC: Did you study history? 9 GENERAL PHIYEGA: Ja, when I was in high 10 school I was using a book called Boyce. 11 MR BIZOS SC: You are interested in 12 history? 13 GENERAL PHIYEGA: Well, it was to tardy 14 to read, needed a lot of information. 15 MR BIZOS SC: Yes. I'm going to quote 16 something from you and ask you whether you've heard it 17 before. "Those who cannot remember the past are condemned 18 to repeat it." Have you ever heard that before? 19 GENERAL PHIYEGA: Advocate, no, but I've 20 learned today. 21 MR BIZOS SC: It was said by a very wise 22 man, if I can give you the name if you want to, philosopher 23 George Santana, Spain, a high degree economic in the United 24 States and elsewhere. Would you agree with it that we 25 sometimes are condemned to repeat the unpleasant things of</p>

Page 7301

1 the past?

2 GENERAL PHIYEGA: I will also respond

3 with a quote that says an organisation that doesn't learn

4 does not grow. Then I will agree.

5 MR BIZOS SC: What do you remember about

6 Sharpeville?

7 GENERAL PHIYEGA: People who died.

8 MR BIZOS SC: I beg your pardon?

9 GENERAL PHIYEGA: People who died.

10 MR BIZOS SC: People who died. Do you

11 remember how many?

12 GENERAL PHIYEGA: In their 60s.

13 MR BIZOS SC: 69. And how many were

14 wounded, do you remember?

15 GENERAL PHIYEGA: I'm post-50, I don't

16 remember.

17 MR BIZOS SC: There were 180 people.

18 GENERAL PHIYEGA: I'm just saying, I'm

19 post-50 age-wise. My delete function is very active.

20 MR BIZOS SC: It's, 180. They were shot

21 by the police.

22 GENERAL PHIYEGA: Yes, I recall.

23 MR BIZOS SC: Mostly in the back.

24 GENERAL PHIYEGA: I'm understanding.

25 MR BIZOS SC: And the people who were

Page 7302

1 wounded were mostly wounded in the back.

2 GENERAL PHIYEGA: I'm following.

3 MR BIZOS SC: Do you know what the police

4 defence was?

5 GENERAL PHIYEGA: No, I don't.

6 MR BIZOS SC: They acted in self-defence

7 and they were praised for their actions by Dr Verwoerd and

8 his Minister of Police.

9 GENERAL PHIYEGA: But we also know that

10 they were not armed.

11 MR BIZOS SC: Yes, that may be. That may

12 be. Whilst you raise this question, how many people did

13 you have to deal with – 300 or 3 500 in this, in Marikana?

14 GENERAL PHIYEGA: Judge, I've already

15 answered that question.

16 CHAIRPERSON: I think counsel is entitled

17 to ask it again if it's relevant to this phase of his

18 cross-examination.

19 GENERAL PHIYEGA: Then I will refer to

20 our opening statement.

21 MR BIZOS SC: 3 000 in the opening

22 statement, all fully armed in the first version.

23 GENERAL PHIYEGA: We did say so, Judge.

24 MR BIZOS SC: In the second version, that

25 there were 200 to 300 who were armed and I don't want to

Page 7303

1 misquote my friend but I'll try my best to remember what he

2 said, others were not armed, they peacefully left the

3 scene.

4 GENERAL PHIYEGA: I think you would also

5 read somewhere in our documents and I think even in the

6 statements that those that were walking away, most of them

7 were putting down their weapons.

8 MR BIZOS SC: I want to deal with

9 numbers. Was the plan to disarm 200 to 300 or 3 000?

10 GENERAL PHIYEGA: Advocate, those details

11 my commanders will deal with but the plan was to encircle,

12 disarm and disperse those who were there.

13 MR BIZOS SC: I'm going to put to you

14 that the film that we have seen shows the vast number of

15 people unarmed. Do you accept that? You can, because my

16 learned friend would have objected if I had put it wrongly.

17 Do you agree that the majority of the people were unarmed,

18 strikers protesting for the right to earn a better wage?

19 GENERAL PHIYEGA: I do know that there

20 were people who were armed and even the pictures that you

21 talk about will show us that there are people that are

22 armed.

23 MR BIZOS SC: I want you to accept for

24 the purpose of my next question that, that I have correctly

25 described the number of people, that the majority that are

Page 7304

1 shown on the film and on the evidence that is going to be

2 led were unarmed.

3 GENERAL PHIYEGA: I think short of

4 counting, I would be very irresponsible to say

5 majority/minority.

6 MR BIZOS SC: You're not going to accept

7 an assurance from me that that is what the evidence before

8 the Commission is?

9 GENERAL PHIYEGA: No, because I wasn't

10 even on the scene.

11 CHAIRPERSON: Mr Bizos, just to get

12 clarity at the moment, there are two possible aspects in

13 respect of which this point is important. The first is

14 what actually happened. The second is what the witness's

15 understanding was at the relevant time.

16 MR BIZOS SC: Yes.

17 CHAIRPERSON: Now, are you busy with the

18 former or the latter?

19 MR BIZOS SC: At this stage I –

20 CHAIRPERSON: At this stage of your

21 cross-examination.

22 MR BIZOS SC: - for an acceptance that

23 there were unarmed –

24 CHAIRPERSON: So you're not concerned so

25 much with what she understood at the time, as what the

Page 7305

1 actual facts were.

2 MR BIZOS SC: The facts are.

3 CHAIRPERSON: Now the actual facts I

4 think are quite conveniently stated in paragraph 56 of Mr

5 de Rover's statement which you might read, but that of

6 course is – he talks about a relatively small number of

7 protesters, around 300 out of 4 000, then he goes on to

8 describe how they're dressed –

9 MR BIZOS SC: Yes.

10 CHAIRPERSON: And how they were armed and

11 so on.

12 MR BIZOS SC: Yes.

13 CHAIRPERSON: Because that appears to be

14 what the police now accept because that's what the expert

15 says, but I take it if you put it to her that way she'll

16 accept it too but still the question is, are you concerned

17 with what actually was the position or what she thought at

18 the time?

19 MR BIZOS SC: No, I want to put, let me

20 put the question.

21 CHAIRPERSON: Alright.

22 MR BIZOS SC: Having regard to the

23 evidence that I have mentioned to you and what the Chairman

24 of the Commission has said, were you planning the

25 dispersement and arrest of 3 000 people when the plan that

Page 7306

1 was being put together from the Tuesday morning, if you

2 will, to the Thursday, how many people in your view were

3 there that were armed and had to be dispersed, disarmed and

4 arrested – between 2 to 300 or 3 000 or 3 500 or, as one of

5 the generals says, 4 500? What figure did you work on?

6 GENERAL PHIYEGA: Advocate, I think this

7 Commission would benefit really intensely from listening to

8 those who were on the scene when it comes to the type of

9 questions you are asking. I cannot speculate. I can only

10 say –

11 MR BIZOS SC: Commissioner –

12 GENERAL PHIYEGA: - what I've answered

13 you is based to the best of knowledge that I have but the

14 intricacies that you are asking me can best be answered by

15 those who are positioned to better do so. I can't

16 speculate on such serious issues. And I have said in our

17 statement, we have said 3 000, that's my understanding, the

18 best knowledge that is here but I'm sure my commanders,

19 when they come here with the statements that are given,

20 they would be able to – those details, granular matters,

21 they would be able to deal with because those are related

22 to the scene.

23 MR BIZOS SC: You as the leader have

24 taken responsibility for what has happened.

25 GENERAL PHIYEGA: Correct.

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1 MR BIZOS SC: You have praised your

2 police officers to the sky on the 17th and the 20th. The

3 expert engaged by your police force says from still and

4 video images taken by SAPS between 12 and 16th August 2012,

5 the militancy of a relatively small number of protesters,

6 around 300 out of 400, was quite apparent – 300 out of

7 4 000, I'm sorry, yes. This is your expert –

8 GENERAL PHIYEGA: Yes.

9 MR BIZOS SC: - employed by your police

10 force, who must have been given this information by your

11 colleagues, contrary to what you said on the 17th and the

12 20th that they faced 3 000 people and that you congratulated

13 them for what they had done. Please do not try and avoid

14 the question. Assume that your expert is correct, what

15 were you planning for, 3 000, 3 050, 4 000 or 4 050 or of a

16 couple hundred, what were you planning for?

17 GENERAL PHIYEGA: You've dealt with a lot

18 of things here and I can't just go yes, no – 16-24.

19 CHAIRPERSON: I think it's a question

20 with a whole lot of sub-paragraphs –

21 GENERAL PHIYEGA: Absolutely.

22 CHAIRPERSON: Would you like to deal with

23 them one by them?

24 GENERAL PHIYEGA: I would like to –

25 CHAIRPERSON: Would you like to deal with

Page 7308

1 them now or would you like to deal with them after the

2 lunch adjournment?

3 GENERAL PHIYEGA: I will deal with them

4 after lunch.

5 CHAIRPERSON: The Commission will take

6 the lunch adjournment and resume – please, if people make

7 noises, I'm giving you a warning now, if people make noises

8 from the auditorium while the Commission is in session I

9 will ask that they be asked to leave. I don't want to do

10 that because I'm sure everybody wants to hear what's

11 happening but there's a minimum of behaviour that's

12 expected from those who are in the auditorium and I expect

13 people please to respect that. This is an important aspect

14 of the matter. It's only fair to everybody that the

15 Commissioner be given an opportunity to deal fully with

16 this very important question and for that reason I'm now

17 adjourning until 2 o'clock.

18 [COMMISSION ADJOURNS COMMISSION RESUMES]

19 [14:03] CHAIRPERSON: The Commission resumes.

20 National Commissioner, you're still under oath.

21 MANGWASHI VICTORIA PHIYEGA: s.u.o.

22 CHAIRPERSON: I see that some thoughtful

23 person has given us some more reading matter in the form of

24 an article by Mr Haysom. Presumably we will hear more

25 about it, but before we do that, you were going to answer

Page 7309

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

Page 7310

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

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

Page 7312

1 this has got to do with my personal credibility. I have
 2 responded and I've said any time there is an illegal
 3 protest, and that illegal protest has people who are
 4 carrying arms, we remain fairly concerned as police.
 5 MR BIZOS SC: We're not talking about any
 6 -
 7 CHAIRPERSON: Mr Bizos, I fear there may
 8 be a misunderstanding between you and the witness. You
 9 spoke about credibility, which she took as being a
 10 suggestion that her own credibility was on the line. I
 11 didn't understand your question to be to that effect.
 12 MR BIZOS SC: No.
 13 CHAIRPERSON: Am I correct?
 14 MR BIZOS SC: No, it's the credibility of
 15 the informers to her.
 16 CHAIRPERSON: Yes, yes. She was
 17 concerned, I think, that her credibility is being attacked.
 18 MR BIZOS SC: Yes.
 19 CHAIRPERSON: And you understand he's
 20 suggesting that the people who gave you the information,
 21 their credibility is under attack. So perhaps Mr Bizos
 22 should rephrase the question, because we've had this
 23 interruption –
 24 GENERAL PHIYEGA: Yes.
 25 CHAIRPERSON: - and then you can deal

Page 7313

1 with it.

2 GENERAL PHIYEGA: Thank you for that

3 clarification. The credibility of the information you are

4 talking about, and I again say if there is an illegal

5 protest and people are armed, we as police, it doesn't

6 matter how many, we as police will remain very concerned.

7 Whether it's 3000, whether it's 300, whether it's 2,

8 whether it's 7, we'll remain very concerned because it

9 calls for certain actions from us.

10 MR BIZOS SC: National Commissioner, do

11 you not understand the purport of my question? Surely if

12 your police force faced 3000 armed men, they may or may not

13 have been entitled to use the force that they did in order

14 to kill and wound so many people. If in fact you were lied

15 to, that there were only 300 armed people, would it not

16 make a difference in assessing the credibility and the

17 worth of your force?

18 GENERAL PHIYEGA: I've already responded

19 to say I truly believed the feedback I was given by my

20 commanders.

21 MR BIZOS SC: Please answer the question.

22 GENERAL PHIYEGA: I did.

23 MR BIZOS SC: If the evidence shows the

24 statement of your counsel to the witness, the statement of

25 whoever had briefed the expert is 2700 people more than you

Page 7314

1 were told, will that make no difference to you?

2 GENERAL PHIYEGA: The difference it would

3 not make.

4 MR BIZOS SC: I beg your pardon?

5 GENERAL PHIYEGA: The difference that it

6 would not make. I would note the number, 2700, 5000, 3000

7 -

8 MR BIZOS SC: No, but you judged your

9 force and praised them -

10 GENERAL PHIYEGA: I haven't finished -

11 MR BIZOS SC: If you found out -

12 GENERAL PHIYEGA: I haven't finished

13 responding to you -

14 MR BIZOS SC: - that the information that

15 was given to you -

16 CHAIRPERSON: Mr Bizos, sorry, let her

17 finish her answer. Please, let her finish her answer and

18 then you can ask a question.

19 MR BIZOS SC: Yes.

20 CHAIRPERSON: Proceed, National

21 Commissioner.

22 GENERAL PHIYEGA: Advocate, you're

23 talking about numbers. You're throwing them forward, more,

24 less, even, whatever. I'm saying the numbers as you

25 suppose would not be an issue for me. What would be an

Page 7315

1 issue for us as police and for me as the National

2 Commissioner, is whether these members are armed in a

3 protest that is supposed to be peaceful and they are

4 supposed not to be armed. That's a very serious concern

5 for me.

6 MR BIZOS SC: Whether you were told the

7 truth about the numbers, or you were lied to, makes no

8 difference to you?

9 GENERAL PHIYEGA: Sir, I presume where we

10 are having the difference is what is a nexus for me and

11 what is a nexus for you. The nexus for me is whether these

12 members are marching legally, (1), and whether they are

13 armed.

14 MR BIZOS SC: If you were lied to by 2700

15 people, it made no difference to you?

16 GENERAL PHIYEGA: At this point in time I

17 would say to you I don't believe that anyone of us here

18 would even be able to put an audit of the numbers of people

19 that are there. We are all having guestimates; as you have

20 put it some are saying 4500, some are saying 3000. It was

21 a large crowd.

22 MR BIZOS SC: Why don't you want to

23 answer the question whether it makes any difference to you

24 whether your, the people under you misrepresented the

25 position to you by 2700 people that were allegedly armed?

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1 GENERAL PHIYEGA: And against the, in our

2 statement we have stated what to the best of our knowledge

3 are the facts, and misrepresentation to my mind even at

4 this point in time doesn't appear.

5 MR BIZOS SC: Right, National

6 Commissioner, we go on to the next point. You say that

7 this was unprecedented.

8 GENERAL PHIYEGA: Yes, I did say.

9 MR BIZOS SC: Did you have regard to what

10 happened in Uitenhage on the 21st of March 1985?

11 GENERAL PHIYEGA: In my statement I do

12 mention that post 1994 where I am talking about the

13 statistics of the new South African Police Service, we have

14 never encountered anything like that, and this is why I

15 even gave statistics to say in the past three years we've

16 handled 33000 unrests. Some were peaceful, some were not

17 peaceful. In the 18 years of existence of this country

18 we've handled close to 150000, and we have never

19 experienced anything like this.

20 MR BIZOS SC: History prior to 1994 is,

21 do you believe that what happened before during the

22 apartheid regime is a good example to look at so that we do

23 not repeat the same mistakes?

24 GENERAL PHIYEGA: I think in a rational

25 environment all those issues are taken into account.

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1 MR BIZOS SC: Should we look to the
 2 history of the past in order to avoid a repetition of that
 3 unfortunate history?
 4 GENERAL PHIYEGA: I'm sure there are
 5 relative references that have to be used, because I'm using
 6 precisely the 18 years to show that a lot of experience,
 7 and good experience, has been amassed by the police and we
 8 have continued to sustainably manage this type of protest
 9 because of experience and the training, new training, new
 10 approach that we've had as police, and this is why I'm
 11 saying this is unprecedented given the new South African
 12 Police Service.
 13 MR BIZOS SC: I will repeat the question.
 14 Do you believe that it is not necessary for us to look to
 15 the prior history, prior '94, in order not to commit the
 16 same mistakes that were committed by the apartheid regime
 17 police?
 18 GENERAL PHIYEGA: I've already responded
 19 to you, Sir. Under rational circumstances you can use
 20 history.
 21 MR BIZOS SC: We can?
 22 GENERAL PHIYEGA: Under rational
 23 circumstances you can use history.
 24 MR BIZOS SC: Do you say rational or
 25 irrational?

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1 GENERAL PHIYEGA: Rational.
 2 MR BIZOS SC: Rational?
 3 GENERAL PHIYEGA: Mmm.
 4 MR BIZOS SC: Rational. Because in
 5 Uitenhage on the 21st of March 20 protesters died, or were
 6 killed, and numerous others were injured and the defence
 7 was self-defence and Mr Louis Le Grange, the then Minister
 8 of Police and Law & Order said, "We were forced to use
 9 maximum force to defend ourselves. The police had no
 10 alternative," sorry, "the police had no alternative but to
 11 open fire in self-defence." The common factor was that no
 12 policeman had a scratch. Then during the uprising in
 13 Soweto from 1976, a couple of years thereafter, the South
 14 African Police killed a few hundred people at different
 15 times in marches or gatherings in Soweto and other urban
 16 areas throughout the country. Their defence was always, we
 17 did it in self-defence. There wasn't a scratch on any
 18 policeman. We don't want to follow that example, do we?
 19 [14:23] GENERAL PHIYEGA: Absolutely not, and the
 20 South African Police Service is not.
 21 MR BIZOS SC: Is it a mere coincidence
 22 that their defence appears to be the same?
 23 GENERAL PHIYEGA: Maybe I could say, to
 24 talk to my response to you, is that we are in a new
 25 dispensation where people can march, and during those two

Page 7319

1 periods that we're talking about people didn't have the
 2 right to protest, and maybe if I can continue, and they,
 3 you know, our Constitution is so articulate, yes, you have
 4 the right to protest and you have the right to do it
 5 peacefully, without being armed.
 6 MR BIZOS SC: Well, on the one version
 7 there were 2000, at least 2700 people there that were not
 8 armed, and according to Mr Semenya they dispersed
 9 peacefully. Now in view of your answer, it may be that
 10 those who were armed could possibly be called criminals.
 11 Those that were there to protest against their wages, what
 12 crime did they commit? What was their crime, 2700 on that
 13 version?
 14 GENERAL PHIYEGA: But you do say they
 15 walked away.
 16 MR BIZOS SC: After the shooting, after
 17 the gas, after the helicopters.
 18 GENERAL PHIYEGA: And I also said earlier
 19 on, Advocate, that remember, we were dealing with a mix of
 20 things. There was an illegal protest. There were people
 21 who were armed in that protest, and ours really was just to
 22 encircle them, to disarm them, and to disperse them.
 23 That's what we were here to do.
 24 CHAIRPERSON: Mr Bizos, I'm not sure that
 25 the facts you're putting are entirely correct. My

Page 7320

1 recollection of the evidence was that Mr Mathunjwa said
 2 that after his second speech a number of people left, and I
 3 think that's borne out by some of the videos in fact. So
 4 it wasn't just that people left after the shooting, or the
 5 teargas, or water cannon. A substantial number, I think,
 6 according – we'll perhaps look at the videos again and see
 7 whether this is so, but my impression is a substantial
 8 number left after Mr Mathunjwa's second speech and so I
 9 think the question you put has to be modified in the light
 10 of that.
 11 MR BIZOS SC: Yes, I relied on what was
 12 put by my learned friend to the witness, Mr Chairman, but
 13 now that I am reminded, I'll amend the question. Either
 14 before or after the shooting many unarmed people left
 15 voluntarily. They were not armed. The plan that the
 16 police put up in order to disperse 3000 people on the
 17 subsequent evidence and the evidence of the expert for the
 18 police, shows that in truth and in fact there were people,
 19 protesters who were not armed. If they were shot at, if
 20 they were gassed, if they were victims of stun grenades,
 21 for fear from helicopters and the killing of other people
 22 gathered a little bit in front of them, all this, all this
 23 is attacking people who had committed no crime. They're
 24 not criminals. Would you agree?
 25 GENERAL PHIYEGA: I'm sure this

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1 Commission will make a finding on that. I'm not able to
2 give an opinion now –

3 MR BIZOS SC: The Commission wants your
4 help.

5 GENERAL PHIYEGA: I'm not able to give
6 you an opinion. I'm not fit to give that type of answer.

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

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

15 MR BIZOS SC: For the sake of
16 completeness I want to deal with what happened in the Vaal
17 Triangle where my learned friend Mr Semanya and I were on
18 the same side of the people of the Vaal Triangle. Again
19 the police shot into a march in the Vaal Triangle. They
20 killed nine people. They injured quite a number. A
21 commission of inquiry was held. Judge Richard Goldstone
22 ordered that six of them should be charged with murder by
23 the attorney-general. Unfortunately the attorney-general
24 of the time in the early 90s didn't charge them. Indeed,
25 during the apartheid regime people could shoot and kill

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1 people at demonstrations with impunity. Will you accept
2 that in our Constitutional Order that is not permitted and
3 those who actually kill people without justification should
4 be punished?

5 GENERAL PHIYEGA: Yes, I do, and that is
6 the type of organisation I'm serving.

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

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

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

20 GENERAL PHIYEGA: Very correct.

21 MR BIZOS SC: Why did you say that?

22 GENERAL PHIYEGA: It is a fact.

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

25 GENERAL PHIYEGA: It's transparent and

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

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

7 GENERAL PHIYEGA: Advocate, that's your
8 interpretation. I've said I shared my CV.

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

13 GENERAL PHIYEGA: What I was asked to do,
14 what I did here and what I led, what I responded to when I
15 was here, I was talking about my curriculum vitae, where
16 I've been, what I am, what I do. The –

17 MR BIZOS SC: Not as an excuse?

18 GENERAL PHIYEGA: The interpretation you
19 are giving, that is not mine, Sir, and I don't agree with
20 it.

21 MR BIZOS SC: You say no?

22 GENERAL PHIYEGA: I don't agree with it.

23 MR BIZOS SC: Does that mean that you
24 take full responsibility in your personal and official
25 capacity for everything that happened at Marikana on the

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1 16th?

2 GENERAL PHIYEGA: I don't understand that
3 question.

4 MR BIZOS SC: Which part don't you
5 understand?

6 GENERAL PHIYEGA: Totality of it.

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

10 GENERAL PHIYEGA: No.

11 CHAIRPERSON: I'm not quite sure I
12 understand your question. I don't understand what's meant
13 by responsible in this context. A person can be
14 vicariously responsible for things done by his or her
15 subordinates, without any personal blame for what was done.
16 A person can also be personally responsible for things that
17 happened, if one has, the person has blame of some sort.
18 Now you said, "Do you take responsibility in your personal
19 capacity and in your official capacity?" Now
20 responsibility in her official capacity would, I take it,
21 be probably vicarious responsibility, or vicarious
22 liability. Responsibility in her personal capacity would
23 of course be something else. That's the way you introduced
24 this topic. Now you're talking about responsible, so
25 perhaps I think – I don't know whether the witness needs

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1 explanation, but I would like it, what you mean by
 2 responsible, because there are different forms of
 3 responsibility. I think to be fair one should know what
 4 form you're busy with in the question.
 5 MR BIZOS SC: Well, there is a third type
 6 of joint responsibility together with others. Do you feel
 7 that in view of your participation in authorising, in
 8 making yourself, identifying yourself with your commanders
 9 with what happened, makes you responsible for what
 10 happened, if indeed any wrongful act was committed?
 11 MR SEMENYA SC: Chair, the question
 12 assumes a fact not in evidence. There was never any –
 13 CHAIRPERSON: There are two problems with
 14 the question. The first is, it assumes a fact not in
 15 evidence, and secondly it still doesn't explain what's
 16 meant by responsible. But anyway, I suppose I shouldn't
 17 have said that without giving Mr Bizos a chance to reply.
 18 I'm not sure that she's ever admitted she authorised
 19 anything. That's the point Mr Semenya makes. You stated
 20 it is something that was self-evident on the table already.
 21 I'm not sure that that assumption is necessarily justified.
 22 The second point is you still haven't explained what you
 23 mean by responsible. Do you mean in asking her the
 24 question, "Do you think you're personally responsible
 25 because of what you did?" or "Do you think you're

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1 responsible because your subordinates did it and in the
 2 course and scope of their duties and you're the head of the
 3 organisation, and in that sense you are vicariously
 4 responsible?" So I think you should deal with those two
 5 points, if I may say so, before you proceed with the
 6 question.
 7 MR BIZOS SC: May I try and explain, Mr
 8 Chairman? We have in mind to argue to the Commission who
 9 are the people who are responsible for any wrongdoing at
 10 Marikana on the 16th. I wanted to give an opportunity to
 11 say I am responsible or I am not responsible.
 12 CHAIRPERSON: Is that what you –
 13 MR BIZOS SC: Whether –
 14 CHAIRPERSON: I'm sorry, Mr Bizos –
 15 MR BIZOS SC: Whether it's vicarious –
 16 CHAIRPERSON: No, no, I think to be fair
 17 –
 18 MR BIZOS SC: Whether it's joint, or any
 19 other responsibility, responsibility is a responsibility.
 20 CHAIRPERSON: You know, I understand
 21 that, but I think to be fair to the witness you should
 22 indicate what kind of responsibility you're asking her
 23 about because obviously if the police acted in the course
 24 and scope of their duties, and acted wrongly, she will be –
 25 well, not necessarily in her personal capacity but she as

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1 the police force, the police – no, I mustn't use military
 2 terms – the police service will be, insofar as it's a legal
 3 entity, will be responsible for that, even if she's free of
 4 any personal blame at all. If of course she was somehow
 5 involved personally and was involved in conduct which
 6 attracts personally liability to her, she would be of
 7 course responsible, legally responsible in her own right,
 8 not only in her official capacity. Now that's a
 9 distinction which is blurred by the way you ask the
 10 question. That's the first point.
 11 The second point Mr Semenya makes is that you put
 12 to her on the basis of what she authorised. I've listened
 13 very carefully to her. I haven't heard her admit that she
 14 herself authorised anything. I may have missed something,
 15 but Mr Semenya's objection I think is that the assertion by
 16 you that she authorised something is not in accordance with
 17 the evidence as we have it so far. So perhaps you can deal
 18 with those two points.
 19 MR BIZOS SC: Thank you, Mr Chairman.
 20 May I ask a couple of preliminary questions? Did you
 21 authorise the actions that were taken by the police force
 22 on the 16th of August?
 23 GENERAL PHIYEGA: I'll go back and answer
 24 in the elaborate manner.
 25 CHAIRPERSON: - saying it, but you know,

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1 there's nothing wrong with yes or no as an answer.
 2 Obviously you'll be entitled to expand on that, but the
 3 direct question, you know, it's a, what we called earlier
 4 an Oprah Winfrey question, the answer is yes or no and then
 5 of course obviously depending on whatever answer you give,
 6 you're entitled to expand and explain.
 7 GENERAL PHIYEGA: Judge, the problem is
 8 that statement is very loaded and I worry about that to say
 9 –
 10 CHAIRPERSON: Answer the question in your
 11 own way.
 12 GENERAL PHIYEGA: Ja, I'd love to answer
 13 that, Judge, and I'm saying, I've explained that and it's
 14 coming back again, because I've spoken about my role, I've
 15 spoken about the delegation of authority, I've spoken about
 16 all that, but this is coming back again and I'm going to go
 17 back exactly there to say there are levels of
 18 responsibility, and I've also spoken about the fact that
 19 I'm not talking about a monolithic block. There are
 20 individuals in this and there are levels, that whole issue
 21 of cascading responsibilities and whatever, I'm overall
 22 responsible and in charge, but inside that there are
 23 certain processes, and I've already answered and
 24 articulated those. That's why I say the question is
 25 loaded.

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1 [14:43] MR BIZOS SC: I must ask you this
 2 question, because I don't know precisely what you mean by
 3 what you have said. Did you know of the plan and its
 4 strategy, and did you approve it?
 5 GENERAL PHIYEGA: I have answered that
 6 the plan I did not participate in. Those that had the
 7 responsibility to do so did it. I do not know it.
 8 MR BIZOS SC: You plead ignorance?
 9 GENERAL PHIYEGA: That's a deep word.
 10 No.
 11 MR BIZOS SC: Please speak up.
 12 GENERAL PHIYEGA: Advocate, when you say
 13 I plead ignorance, is it the same as do I know, did I
 14 participate in the plan?
 15 MR BIZOS SC: No, I'm asking in answer to
 16 your previous answer –
 17 CHAIRPERSON: No, no, no, that's a fair
 18 question by her. When you say, "Do you plead ignorance?"
 19 do you mean, do you say you did not know? That's the
 20 question she asks and I think she's entitled to an answer
 21 before she gives you her own answer.
 22 MR BIZOS SC: That's precisely what I
 23 mean, and the question was that she knew of the plan and
 24 strategy and approved it. It's a simple question which
 25 requires a simple answer.

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1 GENERAL PHIYEGA: I know that there are
 2 people who must do the plan and know the intricacies of
 3 that, and these are the people who were in the JOC. I do
 4 not have to know those details.
 5 MR BIZOS SC: Did you know what the plan
 6 said and what the strategy was to be followed in pursuance
 7 of that plan?
 8 GENERAL PHIYEGA: I know that whatever
 9 plan they have to do, they will do it within the prescripts
 10 that they are supposed to do it.
 11 MR BIZOS SC: And if they fail to do it,
 12 do you feel that you are responsible? If they fail to do
 13 it, even though you may have approved of it, do you say
 14 that you are not responsible?
 15 MR SEMENYA SC: Again, Chair, there's no
 16 evidence of the Commissioner approving any plan, and she
 17 has repeatedly given that answer.
 18 MR BIZOS SC: Are you saying that you
 19 didn't know what the plan was?
 20 GENERAL PHIYEGA: In my job I do not need
 21 to know that.
 22 CHAIRPERSON: That's not an answer. I
 23 know that you don't need to know. The question is, did you
 24 know?
 25 GENERAL PHIYEGA: I said, I have answered

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1 to say on the 14th when the plan was done I was not there
 2 and I don't know what was sitting in the plan, because I
 3 don't need to know.
 4 MR BIZOS SC: Did you hear that your
 5 colleagues, or your commanders say that the 16th was D-day?
 6 GENERAL PHIYEGA: I've never heard that.
 7 MR BIZOS SC: We'll take it up with you
 8 later on certain other documents that we will produce. In
 9 your statement in paragraph 7 to 11, includes a number of
 10 facts and figures about the SAPS in general. It's entirely
 11 unclear to us why you have included police population
 12 ratios, but I wish to deal specifically with paragraph 11,
 13 which deals with the significant prevalence of police
 14 attacks in killings. Providing figures on attacks of
 15 police in 2010 and 2012, 907, together with fatalities,
 16 174. You then mentioned the support structures in place
 17 for the members and their families. Have I summarised your
 18 statement correctly?
 19 GENERAL PHIYEGA: Yes.
 20 MR BIZOS SC: Why did you include this
 21 information in your statement?
 22 GENERAL PHIYEGA: It made logical sense
 23 for me to talk about it.
 24 MR BIZOS SC: What was its relevance to
 25 what you were speaking about?

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1 GENERAL PHIYEGA: As a strategic head of
 2 police, as you said from 9, 8, 10, I was talking about the
 3 capacity, what we have, how we are, comparing with others,
 4 because even the experts that are presenting here are doing
 5 similar comparisons. That's what I was talking about.
 6 MR BIZOS SC: Did you believe that if you
 7 brought to the Commission's attention the troubles that the
 8 police had, that that may be a reason for justifying what
 9 they did at Marikana?
 10 GENERAL PHIYEGA: That is not true.
 11 MR BIZOS SC: Well, according to the
 12 Independent Police Investigation Directorate, in 2011 to
 13 2012 financial year there were some 720 deaths as a result
 14 of police action. You included the figures of the police
 15 fatalities. Why did you not include figures of deaths and
 16 injuries caused by police actions in the same period?
 17 GENERAL PHIYEGA: For my understanding,
 18 are these deaths in cells or deaths where?
 19 MR BIZOS SC: It includes the deaths,
 20 including the deaths of people in police custody.
 21 GENERAL PHIYEGA: I think what would also
 22 help us is whether the 720, just for my understanding to be
 23 able to respond, were these people dying of natural causes,
 24 death because of police, illnesses, and all those. What's
 25 the breakdown?

<p style="text-align: right;">Page 7333</p> <p>1 MR BIZOS SC: The term used by the 2 organisation is "the result of police action." I don't 3 think they included illness or other natural causes. 4 GENERAL PHIYEGA: What my memory serves 5 me, which may not be the best memories, that that type of 6 figure, when I saw it in IPID, it talks about deaths in 7 cells and there is a breakdown of some of those numbers. I 8 just don't have my numbers with me now. 9 MR BIZOS SC: The question is this. Why 10 did you not mention it if you wanted to give a balanced 11 view of what the attitude of people was towards the police, 12 and what the attitude of the police was towards the people 13 of South Africa? Why didn't you give both figures? 14 GENERAL PHIYEGA: Advocate, why I have 15 that really is to talk about police and their work, and 16 this is why I even added EHW, which is our employee health 17 and wellbeing, to say under this strenuous task, how do we 18 help police to continue to be able to do their work. I 19 wasn't comparing deaths, and that's the true reason why I 20 added that paragraph. What you're raising is a completely 21 new dimension. 22 MR BIZOS SC: Did you mention the number 23 of police deaths, which are regrettable and we don't want 24 to be understood that we consider deaths of policemen of 25 any lesser sadness or importance than deaths of other</p>	<p style="text-align: right;">Page 7335</p> <p>1 CHAIRPERSON: What I'm asking you, is 2 that from scene 1 or scene 2 – 3 MR BIZOS SC: I'm not promising that 4 there will be, because we are not acting for the people who 5 have told, or that we heard from – 6 CHAIRPERSON: Okay, so you can't answer 7 my question. 8 MR BIZOS SC: Yes. 9 CHAIRPERSON: So I can understand on the 10 basis of material we already have before us that that may 11 well be argued very strongly in the case of, some anyway, 12 of the deaths at scene 2. Whether that's correct or not of 13 course is another matter, but I was interested to know 14 whether the evidence that's going to be led will also 15 relate to scene 1, or can't you tell me at this stage? 16 MR BIZOS SC: Not from us. This is why I 17 cautiously – 18 CHAIRPERSON: Oh, okay. 19 MR BIZOS SC: I cautiously said – 20 CHAIRPERSON: Yes, thank you. 21 MR BIZOS SC: - it's what I have been 22 informed by other parties here that they have evidence of 23 this. If it's there, they will lead it and we will argue 24 it. According to paragraph 75 of Colonel De Rover's 25 affidavit – Mr De Rover, FFF11, Chairman –</p>
<p style="text-align: right;">Page 7334</p> <p>1 citizens, but what I am concerned about in your statement, 2 that it may give the impression that what happened at 3 Marikana, and more particularly what happened a few days 4 before with the death of two policemen, as regrettable as 5 it may be, that Marikana may be considered as an act of 6 revenge again people protesting and not being compliant 7 with police directions. 8 GENERAL PHIYEGA: No, that was never in 9 my thoughts. 10 MR BIZOS SC: Yes well, there may be 11 evidence before the Commission which may suggest that there 12 was an element of it, but we won't take it any further with 13 you at this stage. You know that – 14 CHAIRPERSON: Mr Bizos, this evidence 15 you're talking about, does that relate to scene 1 or scene 16 2 or both? Because I can understand – 17 MR BIZOS SC: No, the – 18 CHAIRPERSON: I can understand – 19 MR BIZOS SC: The two police deaths. 20 CHAIRPERSON: No, no, no, no, I 21 understand the killing on the 13th. The question is whether 22 what happened on the 16th was somehow in revenge for that. 23 I'm saying, or you're saying there's going to be evidence 24 about that, or may be. 25 MR BIZOS SC: There is. I –</p>	<p style="text-align: right;">Page 7336</p> <p>1 CHAIRPERSON: What paragraph are you 2 referring to? 3 MR BIZOS SC: 75. TRT stands for what? 4 GENERAL PHIYEGA: Tactical Response. 5 MR BIZOS SC: Tactical Response. NIU 6 stands for? 7 GENERAL PHIYEGA: National Intervention 8 Unit. 9 MR BIZOS SC: STF stands for? 10 GENERAL PHIYEGA: Task Force. 11 MR BIZOS SC: Special? 12 GENERAL PHIYEGA: Task Force. 13 MR BIZOS SC: Are they all under your 14 command? 15 GENERAL PHIYEGA: Yes, they are under my 16 command under ORS, that is a division of SAPS. 17 MR BIZOS SC: He makes a statement, which 18 I want to read to you. "These three units have no 19 responsibility or equipment for frontline handling of crowd 20 management situation, neither is that their task." Is Mr 21 De Rover correct or not? 22 GENERAL PHIYEGA: Yes, he's right. 23 CHAIRPERSON: Mr Bizos, I see you're 24 looking for something. 25 MR BIZOS SC: Yes.</p>

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1 CHAIRPERSON: I also see it's 3 o'clock.
 2 So I see you're busy with the point; I take it you want to
 3 finish that point first before we take the adjournment?
 4 MR BIZOS SC: Yes, I'm just asking for
 5 the relevant documents from my colleagues, yes. Was that a
 6 question as to whether we should –
 7 CHAIRPERSON: I'm in your hands. I'm
 8 saying you're busy with the point; perhaps you want to
 9 round off the point or finish it off before we take the
 10 adjournment.
 11 MR BIZOS SC: No, if –
 12 CHAIRPERSON: So I'm in your hands, you
 13 tell me what you want to do.
 14 MR BIZOS SC: I'll appreciate it if I
 15 have an opportunity to get the two documents that I asked
 16 for before putting the question.
 17 CHAIRPERSON: Right, we'll take the tea
 18 adjournment. We hope to resume at quarter past.
 19 [COMMISSION ADJOURNS COMMISSION RESUMES]
 20 [15:29] CHAIRPERSON: The Commission resumes.
 21 You're still under oath, National Commissioner. Mr Bizos.
 22 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 23 CROSS-EXAMINATION BY MR BIZOS SC (CONTD.):
 24 National Commissioner, in your capacity as such were you
 25 responsible in the final result to get reinforcements from

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1 other places and to a particular place?
 2 GENERAL PHIYEGA: Yes, as the head I do
 3 have to talk to other heads to assist the head that is
 4 responsible for this province.
 5 MR BIZOS SC: Were you asked to arrange
 6 for a number of units to come to Marikana on the 16th?
 7 GENERAL PHIYEGA: I do not arrange, but I
 8 give permission for provinces to support.
 9 MR BIZOS SC: Did you give permission and
 10 support –
 11 GENERAL PHIYEGA: Yes, I did.
 12 MR BIZOS SC: - for units from other
 13 areas and the –
 14 GENERAL PHIYEGA: Yes, I did.
 15 MR BIZOS SC: - the units that eventually
 16 finished up were done on your recommendation?
 17 GENERAL PHIYEGA: Yes, I gave permission
 18 for mobilisation of capacity.
 19 MR BIZOS SC: Was it your decision to
 20 second the Tactical Response Units, TRT, NIU and STF, to
 21 Marikana?
 22 GENERAL PHIYEGA: Under the broad
 23 permission that I've given, the various people would do so,
 24 the divisional commissioners, the provincial commissioners.
 25 So that is tactically done by those people.

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1 MR BIZOS SC: But they required your
 2 authority, you direction, for those units to –
 3 GENERAL PHIYEGA: To say mobilise
 4 capacity and give support. I do not specify what type of
 5 capacity.
 6 MR BIZOS SC: So the fact that there were
 7 units, TRT, NIU and STF, with your initiative or
 8 participation?
 9 GENERAL PHIYEGA: It is true that I have
 10 said to those who are responsible for various – whether
 11 it's uniform police, TRT, to say assist with capacity.
 12 They would use their expertise to say who and what
 13 capacity.
 14 MR BIZOS SC: The three units that I
 15 mentioned, are they special units?
 16 GENERAL PHIYEGA: Yes, they are special
 17 units under our ORS division.
 18 MR BIZOS SC: Under who?
 19 GENERAL PHIYEGA: Operational Response
 20 Unit.
 21 MR BIZOS SC: Are they responsible for
 22 Public Order Policing?
 23 GENERAL PHIYEGA: Just before we
 24 adjourned we've read a paragraph that talks about the
 25 responsibility of those units. They are not responsible –

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1 there is Public Order Policing.
 2 MR BIZOS SC: Is the management of crowd
 3 control the primary responsibility of the Public Order
 4 Policing?
 5 GENERAL PHIYEGA: In a primary sense,
 6 yes, but as you've read 75 it does tell you how else public
 7 order is supported.
 8 MR BIZOS SC: We're not talking about the
 9 support; we are talking about the primary responsibility.
 10 GENERAL PHIYEGA: I've already said yes.
 11 MR BIZOS SC: Yes. Now you have read
 12 paragraph 75 of FFF11, Mr De Rover's affidavit.
 13 GENERAL PHIYEGA: Mmm.
 14 MR BIZOS SC: Have you got it in front of
 15 you?
 16 GENERAL PHIYEGA: Yes, I do.
 17 MR BIZOS SC: Please read out aloud for
 18 everyone to hear what that paragraph says.
 19 GENERAL PHIYEGA: "TRT, NIU and STF have
 20 no responsibility or equipment from frontline handling of
 21 crowd management situations, neither is that their task.
 22 They are there to support POP personnel in situations where
 23 high-risk confrontation with individual crowd members
 24 occur. Their typical task is one of isolation,
 25 containment, and arrest of such individuals in assistance

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1 of POP personnel.”

2 MR BIZOS SC: Their speciality is to deal

3 with bank robberies. Yes?

4 GENERAL PHIYEGA: It is one of their

5 specialities.

6 MR BIZOS SC: Cash in heist, transit –

7 CHAIRPERSON: Cash in transit heists, I

8 think you –

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

10 GENERAL PHIYEGA: Yes.

11 MR BIZOS SC: Terrorists.

12 GENERAL PHIYEGA: Yes.

13 MR BIZOS SC: And hostage situations.

14 GENERAL PHIYEGA: Yes.

15 MR BIZOS SC: They may be, the

16 specialised units may be called to support the Public Order

17 Police if considered necessary.

18 GENERAL PHIYEGA: Yes.

19 MR BIZOS SC: And they of necessity have

20 to play a secondary role in relation to the management of

21 gatherings.

22 GENERAL PHIYEGA: Yes.

23 MR BIZOS SC: They also have very high

24 velocity and deathly guns, deathly weapons, deadly weapons.

25 GENERAL PHIYEGA: Yes.

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1 MR BIZOS SC: Have you got any examples

2 anywhere in South Africa where these specialist units were

3 in the majority of the police officers present in any

4 situation where there was a gathering? I put it another

5 way. Is their support to be there in case of need in order

6 to assist, if needs be, the main body that has to control

7 the gathering, and that is the Public Order Policing?

8 GENERAL PHIYEGA: Advocate, I'd like to

9 leave that to the expert to come and answer to this

10 Commission.

11 MR BIZOS SC: Are you prepared to accept

12 the opinion of the expert that has been filed by you, the

13 police?

14 GENERAL PHIYEGA: I would like the expert

15 to actually answer those issues. I do not, I am not in a

16 position to cast judgment on that.

17 MR BIZOS SC: You are non-committal. You

18 don't want to commit yourself to anything, do you, National

19 Commissioner?

20 GENERAL PHIYEGA: I do not agree.

21 MR BIZOS SC: You don't agree?

22 GENERAL PHIYEGA: That I'm non-committal?

23 MR BIZOS SC: According to exhibit L

24 there were 176 POP members in Marikana on the 16th, and 337

25 specialised unit members, and in case anyone wants to check

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1 on us, these numbers were calculated by adding up the

2 personnel figures reflected in slides 136 to 147 of exhibit

3 L, which is a police document. You see that? You accept

4 that?

5 GENERAL PHIYEGA: I accept the numbers

6 you've given. I didn't see it.

7 MR BIZOS SC: I beg your pardon?

8 GENERAL PHIYEGA: I trust that it is

9 sitting there.

10 MR BIZOS SC: You're prepared to accept

11 that they are correct? They come from your documents.

12 GENERAL PHIYEGA: I do. That's why I'm

13 saying I trust that it is sitting there. We didn't open

14 the presentation now.

15 MR BIZOS SC: Yes. Subject to your

16 qualification it is clear, if the figures are correct, that

17 the tactical unit members outnumbered the POPs members at

18 the rate of nearly two to one. Would you accept that?

19 GENERAL PHIYEGA: I know we are dealing

20 with statistics, but I still would request that those that

21 were on the field on that day, those that were responsible

22 for actually commissioning these people, because they're

23 coming here, I would like them to answer those questions so

24 that I do not confuse this august gathering.

25 MR BIZOS SC: Well, you have to oversee

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1 their actions as the leader of the police. You have to

2 oversee their actions, don't you?

3 GENERAL PHIYEGA: I do, but I think it is

4 also responsible of me to say I know that they are

5 responsible for all those tactical operational issues and I

6 know they are coming here to answer.

7 MR BIZOS SC: Would not the leader of the

8 police have been well advised to ask why are there twice as

9 many policemen that are usually used in war-like

10 situations, twice as many as people who are used, who are

11 trained to control crowds? Wouldn't it have been an

12 important question? Are you declaring war on this crowd,

13 or do you want to control it? Why are all these war-like

14 and killing people being invited in such large numbers to

15 Marikana?

16 MR SEMENYA SC: Chair –

17 CHAIRPERSON: Yes, Mr Semanya?

18 MR SEMENYA SC: My learned colleague's

19 hyperbole is not warranted. NIU, STF and the other unit

20 are not war-like units that are killing people.

21 MR BIZOS SC: Trained to kill people, if

22 that –

23 CHAIRPERSON: You accept that they're

24 trained to kill people?

25 MR SEMENYA SC: No, they're not trained

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1 to kill people. They're trained for law enforcement. If
 2 death is a result of their duty, it's unfortunate, but
 3 they're not trained to kill people.
 4 CHAIRPERSON: If they're trained to kill
 5 people, if it's necessary for the purpose of law
 6 enforcement –
 7 MR BIZOS SC: If necessary –
 8 CHAIRPERSON: Alright, okay, put it like
 9 that.
 10 MR BIZOS SC: I don't mind putting "if
 11 necessary." But why are there, when we have a crowd
 12 situation, why do we have twice as many people who's
 13 training is to arrest terrorists, or to arrest hijackers,
 14 to arrest people who are likely to put up resistance and it
 15 may become necessary for them to be killed? The question
 16 is a legitimate one and I appeal that –
 17 CHAIRPERSON: I've already, I said you
 18 can carry on, so carry on. Don't argue this, already
 19 you've won on that point –
 20 MR BIZOS SC: Well, I'll expect an
 21 answer.
 22 CHAIRPERSON: Carry on.
 23 GENERAL PHIYEGA: Talking from prescripts
 24 I'd again say they are there to support personnel in
 25 situation where high-risk confrontation with individual

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1 crowd members occurs, or where crowd situations are
 2 requiring their support.
 3 MR BIZOS SC: I'm going to put to you
 4 that the figures obviously suggest that there was
 5 preparation not for crowd control, but rather for
 6 confrontation, we will put an end to this day, today is D-
 7 day. If you take those facts together, this was going to
 8 be equivalent to a declaration of war to about 3000 people
 9 of South African citizens.
 10 GENERAL PHIYEGA: I certainly do not
 11 agree with that.
 12 MR BIZOS SC: You don't agree?
 13 GENERAL PHIYEGA: Yes.
 14 MR BIZOS SC: Well, could we put to you
 15 what some of your colleagues said, that they were short of
 16 POP members and it would have taken longer to bring POP
 17 members than this tactical specialist force. Do you know
 18 about that?
 19 GENERAL PHIYEGA: I do not know about
 20 that, and I guess this is why precisely I said those who
 21 are tasked with the responsibility of it will answer those
 22 questions.
 23 MR BIZOS SC: But you as the leader play
 24 a leading role in suggesting or authorising transfers of
 25 troops from one part of the country to the other and you

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1 must have been the person that should have been asked, or
 2 was asked, give us more POP members in order to control
 3 this crowd.
 4 [15:49] GENERAL PHIYEGA: I guess I'll have to go
 5 back again to say my strategic and national leadership, I
 6 have spoken about delegating authority to my divisional
 7 commissioners, to my provincial commissioners, who also
 8 have the responsibility to look tactically and closely at
 9 the isolated and local environment that they are dealing
 10 with, and in this regard what you have seen is the whole
 11 issue of devolvement of authority and delegation of
 12 authority to those who are responsible. The commanders
 13 that are going to answer here had the right delegation and
 14 authority to do what they did.
 15 MR BIZOS SC: Were you called upon before
 16 the 16th to make more POP members available for the Marikana
 17 problem?
 18 GENERAL PHIYEGA: I was called upon to
 19 deal with overall issues of capacity, to say we need more
 20 capacity. I spoke to the other provincial commissioners to
 21 say please collaborate with those that are at Marikana and
 22 General Mbombo, and assist her with capacity. As to what
 23 nature of capacity, they, the JOC people had to say what
 24 type of capacity they were looking for.
 25 MR BIZOS SC: I asked you were you asked

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1 to make more POP members available for the Marikana
 2 incident. You were the head of the police. Were you
 3 asked, yes or no?
 4 GENERAL PHIYEGA: If the answer is yes or
 5 no, it makes it difficult. I was asked about capacity –
 6 MR BIZOS SC: What is so difficult about
 7 yes or no? Were you asked, or were you not asked?
 8 GENERAL PHIYEGA: I think I've answered.
 9 MR SEMENYA SC: Chairperson, the witness
 10 has to be given an opportunity to give an answer. My
 11 learned colleague doesn't need to shout at her.
 12 CHAIRPERSON: Mr Bizos, I think she was
 13 still busy with her answer and you did raise your voice. I
 14 know sometimes as the afternoon goes on, one gets a bit
 15 excited, but –
 16 MR BIZOS SC: Yes, I'll try and control
 17 myself.
 18 CHAIRPERSON: Yes, please. Thank you.
 19 MR BIZOS SC: What is so difficult about
 20 yes or no? Were you or were you not?
 21 GENERAL PHIYEGA: The answer I'm supposed
 22 to give you, you may be looking for another answer, but I
 23 must give you the answer that is true and fact. I was
 24 asked to give authority for the province to get more
 25 capacity from all over, from other provinces, and that more

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1 capacity is not only POP, it's also other things, and it is
 2 important for me to give that answer in a comprehensive
 3 fashion.
 4 CHAIRPERSON: Sorry, National
 5 Commissioner, may I ask you a question on this topic? I'd
 6 like to understand how it worked. Is what happened that
 7 you were asked to authorise the mobilisation of the
 8 capacity, and did you phone the, or somehow contact the
 9 provincial commissioners and say, look here, there's a
 10 problem in North West province, the provincial commissioner
 11 in North West province needs extra capacity, would you
 12 please help her out, without specifying send POP people or
 13 send NIU people or whatever, so that what would then happen
 14 would be the provincial commissioner in the North West
 15 would have then, as it were, carte blanche to phone her
 16 colleagues and say send me so many POPs or send me as many
 17 POPs as you can, send me NIUs, send me TRTs, STFs, and so
 18 on? In other words, was the decision as to which units to
 19 send for in effect delegated to her with corresponding
 20 authorisation to her colleagues to comply with her request?
 21 Is that how it worked, or was it more detailed than that in
 22 the way that Mr Bizos suggests?
 23 GENERAL PHIYEGA: It is not detailed,
 24 Judge. On the 15th of August at a meeting that I had with
 25 the National Management Forum, after that meeting I saw

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1 with the national, with the provincial commissioners and I
 2 asked in a generic term, sense, that assist General Mbombo
 3 with capacity. She would then precisely together with the
 4 JOC indicate what capacity they want, and this is why I am
 5 at pains to answer in this manner.
 6 CHAIRPERSON: So that meeting that you
 7 spoke about on the 15th, that's the Wednesday night,
 8 Wednesday –
 9 GENERAL PHIYEGA: Yes.
 10 CHAIRPERSON: - was that the SAPS
 11 National Management Forum meeting?
 12 GENERAL PHIYEGA: That's exactly that
 13 meeting.
 14 CHAIRPERSON: At Midrand?
 15 GENERAL PHIYEGA: And after I have
 16 finished, because the provincial commissioners were there,
 17 I quickly spoke to them.
 18 CHAIRPERSON: That's what I wanted to
 19 ascertain.
 20 GENERAL PHIYEGA: Yes.
 21 CHAIRPERSON: As it happened, you had all
 22 the provincial commissioners under one roof, as it were –
 23 GENERAL PHIYEGA: Yes.
 24 CHAIRPERSON: - face to face.
 25 GENERAL PHIYEGA: They are part - yes.

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1 CHAIRPERSON: So you were then able to
 2 deal with the matter in the way you've suggested.
 3 GENERAL PHIYEGA: Yes.
 4 CHAIRPERSON: Thank you.
 5 MR BIZOS SC: Was there any urgency about
 6 the selection of the training or balance of the people that
 7 were required to be considered?
 8 GENERAL PHIYEGA: Can you repeat your
 9 question?
 10 MR BIZOS SC: At this meeting, was it
 11 conveyed to you that it was urgent for you to send people
 12 in support?
 13 GENERAL PHIYEGA: There wasn't that sense
 14 of urgency. There was a process of addressing capacity.
 15 MR BIZOS SC: Was there any reason given
 16 for the urgency?
 17 GENERAL PHIYEGA: The reason for
 18 increasing capacity has always been as the issue escalates
 19 you would, if you look at our records, where this whole
 20 thing started, we started with a very small number, but as
 21 escalation came, it always became a need for the JOC to
 22 increase capacity.
 23 MR BIZOS SC: Did anybody at that meeting
 24 suggest that the reinforcements were needed as a matter of
 25 urgency by the following day, the 16th?

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1 GENERAL PHIYEGA: No.
 2 MR BIZOS SC: So the identity of the
 3 people chosen had nothing to do with you. Is that what you
 4 are telling us?
 5 GENERAL PHIYEGA: No, my concern was
 6 capacity.
 7 MR BIZOS SC: I'm sorry, I didn't
 8 understand the answer. Please speak up.
 9 GENERAL PHIYEGA: I said no, my concern,
 10 as I've already mentioned, was capacity.
 11 MR BIZOS SC: Now the choice of weapons
 12 that were going to be used at Marikana on the 16th, whose
 13 decision was that?
 14 GENERAL PHIYEGA: The commanders that
 15 were there that have the responsibility to do so, would
 16 have done so.
 17 MR BIZOS SC: If they had asked you, or
 18 if it had come to your notice that they were going to use
 19 R1s or R4s and R5s in order to control the crowd – not to
 20 manage, to control the crowd – would you have allowed it?
 21 GENERAL PHIYEGA: I think it's important
 22 for me as a leader to respect the expertise and the
 23 responsibilities that the commanders have.
 24 MR BIZOS SC: You would not exercise any
 25 judgment or make inquiries as to what sort of weapons were

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1 going to be used?

2 GENERAL PHIYEGA: I do not ordinarily do

3 that, and that did not present itself.

4 MR BIZOS SC: I want to refer you to

5 paragraph 89 of the affidavit of Mr Cees De Rover,

6 paragraph 89, which reads, "In my discussions with SAPS we

7 arrived at the conclusion that following Marikana the re-

8 assessment of the employment of 5.56 calibre weapons in

9 crowd management situations is urgent and must be effected

10 without delay." Did that agreement, or that came between

11 the, in discussions of SAPS and Mr De Rover come to your

12 notice?

13 GENERAL PHIYEGA: This report is not an

14 agreement between SAPS and De Rover. De Rover is an expert

15 and De Rover is not being fed by us to regurgitate what we

16 want him to say. He has assessed the situation; he has

17 required information from us, which we have given. He has

18 put his expert knowledge in this document and I think we

19 would read it with a lot of keenness as we go forward, and

20 it's some of the things that we'll look into.

21 MR BIZOS SC: Has this come to your

22 notice?

23 GENERAL PHIYEGA: I note it in his

24 statement.

25 CHAIRPERSON: Mr Bizos, I think it seems

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1 to be 4 o'clock. It would appear from para 94 of Mr De

2 Rover's affidavit that he is of the view, I think, that a

3 number of areas, there are a number of areas where SAPS may

4 want to consider alterations to, amongst other things, its

5 equipment, which presumably includes the weapons it uses,

6 and he says, "I've been made aware of the fact that a

7 number of deliberations have been put in motion immediately

8 following Marikana. I will at a later stage when my

9 personal position permits, also offer my observations on

10 these areas." So it would appear that this process isn't

11 very far advanced at this stage.

12 MR BIZOS SC: No, that's right.

13 CHAIRPERSON: But perhaps insofar as it's

14 necessary to explore it a little bit further, that may

15 appropriately be done tomorrow morning at half past 9.

16 MR BIZOS SC: May I just finish, because

17 I'm going to go on to a new topic tomorrow.

18 CHAIRPERSON: Yes, of course.

19 MR BIZOS SC: And it will not take more

20 than a few minutes, Mr Chairman.

21 CHAIRPERSON: Alright, well try to do it

22 as briefly as you can.

23 MR BIZOS SC: Yes. The expert says that

24 they arrived at a conclusion. Did that conclusion come to

25 your notice?

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1 GENERAL PHIYEGA: I say I'm noting it in

2 his report.

3 MR BIZOS SC: You mean you see it now?

4 The question was, had it come to your notice before you

5 came into the witness box?

6 GENERAL PHIYEGA: In the report, I'm

7 saying I saw the report before it came here, but I noted it

8 in the report.

9 MR BIZOS SC: Have you done anything

10 about it?

11 GENERAL PHIYEGA: Our focus is on this

12 Commission, and when this Commission finishes we will

13 consolidate all the inputs, the recommendations, the

14 observations that come out of here, as SAPS and consider

15 all those.

16 MR BIZOS SC: Yes, finally on this issue,

17 I want to read to you – sorry, Mr Interpreter, I

18 interrupted you.

19 MR HANABE: Thank you, Senior Counsel.

20 MR BIZOS SC: You have a document by, as

21 you indicated, Mr Chairman, from Nicholas Haysom, titled,

22 "Licence to kill, Part 1. The South African Police and the

23 use of deadly force," and published in the South African

24 Journal of Human Rights –

25 CHAIRPERSON: Mr Bizos, I'm sorry to

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1 interrupt you. It's quite a lengthy document, it's an

2 article, as you say, in the South African Journal of Human

3 Rights, published in 1987.

4 MR BIZOS SC: Yes.

5 CHAIRPERSON: Dealing with the Kannemeyer

6 Commission and various related topics –

7 MR BIZOS SC: Another matter.

8 CHAIRPERSON: I would think you might be

9 able to do more justice to it if you start it again

10 tomorrow morning.

11 MR BIZOS SC: Until tomorrow.

12 CHAIRPERSON: Otherwise you're going to

13 rush through it and –

14 MR BIZOS SC: Thank you very much.

15 CHAIRPERSON: It seems to be quite an

16 important article, as far as I can see.

17 MR BIZOS SC: It is, or we consider it an

18 important article on the issue.

19 CHAIRPERSON: Alright, so let's deal with

20 it – let's give it the respect that's due to it and look at

21 it tomorrow morning at 9:30. The Commission will adjourn

22 until 9:30. I want to say we're going to adjourn at 1

23 o'clock tomorrow afternoon for the Easter weekend. We

24 adjourn now until 9:30 tomorrow morning.

25 [COMMISSION ADJOURNED]

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