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 71 3 APRIL 2013 PAGES 7570 TO 7627

# HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1	Page 7570 [PROCEEDINGS ON 3 APRIL 2013]	1	Page 7572 MR MALINDI SC: The expert witness for
2	[13:14] CHAIRPERSON: The Commission resumes.	2	the HRC, Mr Gary White whose statement I'm sure you have
3	After we adjourned yesterday afternoon I received a visit	3	read, says he will not criticise the SAPS too much for not
4	from the Advocate appearing for the Bapo Ba Mogale	4	holding the debriefing but using the Potchefstroom session
5	Traditional Community and informed me that her client	5	to generate such information but is critical of the fact
6	wishes to oppose the application for removal of the Seat of	6	that that was a deviation from the Standing Orders. Do you
7	the Commission from Rustenburg and that opposing affidavit	7	accept that it was a deviation from a pre-emptory
8	and annexure would be made available to us later in the	8	requirement in the Standing Orders?
9	evening. At quarter to 10 last night I received the	9	GENERAL PHIYEGA: Let me start off by
10	papers, I understand they have been sent to the various	10	saying I haven't seen that report, I haven't read it and
11	parties this morning. When I saw Minister we agreed that	11	unless if you would be reading particular pieces for me to
12	it was in the circumstances not possible for us to decide	12	comment verbally, I don't know if you are comfortable with
13	on the application, that the applicants must be given the	13	that because I haven't seen it. I haven't engaged it.
14	opportunity to file opposing or replying affidavits if they	14	MR MALINDI SC: I will be referring to it
15	so wish and thereafter there should be an occasion for old	15	at a later stage, it is Exhibit WW2.
16	arguments on the matter and only after that would the	16	GENERAL PHIYEGA: May I request to be
17	Minister and I be in a position to consider the	17	preferred with that copy?
18	application. So I would suggest that those parties minded	18	MR MALINDI SC: We shall make proper
19	to file replying affidavits should do so in the course of	19	arrangements with the evidence leaders for a copy to be
20	the next week when we will not be sitting so that the old	20	presented to you. Without reading directly from Mr White's
21	arguments on the matter can be addressed to the Commission.	21	statement he also states that he has studied the Standing
22	In the week thereafter we should be recommencing on the 16th	22	Orders 262 and other prolific documents such as the Public
23	April. Only after that as I said when the addresses have	23	Order Policing on Crowd Management and other prolific
24	been transcribed can the Minister and I meet to consider	24	documents of the SAPS on crowd management and he has come
25	the application. I think in the circumstances it would be	25	to the opinion that South African policy framework on crowd
1	Page 7571	1	Page 7573 management compares favourably with internationally
1	appropriate for me to say at this stage that we expect	1	management compares favourably with internationally
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1	Page 7574	1	Page 7576
1	stakeholders that have never engaged with each other to talk to each other. We had a plan and I believe we had a	1	National Commissioner, you will embrace, you will take into consideration criticisms of this outcome as identified by
2	good plan, I am on record is saying the plan was disrupted,	2	your own expert, Mr De Rover, our expert Mr White and
		4	Counsel for the SAPS in their opening statement, that's
4	the outcome was unintended and regrettable.		
5	MR MALINDI SC: I'm happy with the	5	something you will be prepared to embrace isn't it?
6	admission that the outcome was unintended which means that	6	GENERAL PHIYEGA: I have said already
7	the goals as set out in the prescripts of the SACP of	7	that we're looking to the outcomes of this Commission to
8	managing crowds without loss of life, serious injury were	8	see those things that would help us to continuously improve
9	not matching this operation, do you agree?	9	our offerings as SAPS.
10	MR SEMENYA SC: Maybe my learned	10	[13:34] MR MALINDI SC: Before I deal with Mr
11	colleague is looking for another acronym, not SACP.	11	White I would like us to look at some background
12	CHAIRPERSON: SACP. Society for the	12	information that has been available to you and the
13	Abolition of Capital Punishment.	13	Commanders of the operation to see if you agree with some
14	MR MALINDI SC: My apologies -	14	of the things to see if you agree with some of the things
15	GENERAL PHIYEGA: Advocate Malindi, what	15	that I will suggest to you. In the Standing Order 262,
16	is important for me really is the clarity of meaning. I'm	16	which is exhibit SS2, item 7(2), which reads as follows,
17	saying unintended because you have to take all the	17	"The assessment of the threat level must be based on
18	consequences that I have mentioned into account. I don't	18	available tactical information in terms of level of risk,
19	just want to put words into my mouth that do not take out	19	discussions and arrangements with the convenor, history of
20	the meaning. The meaning is as I've said, I said it was we	20	peaceful or violent protests by the parties involved, past
21	had a good plan, there was a disruption. There were	21	experiences with the party, suitability of vicinity of
22	unintended consequences that are a result of a disruption.	22	venue in terms of alleviating or aggravating risk,
23	It's important to underscore those things from where I'm	23	etcetera, is something that must be taken into account in
24	sitting. I don't know from your side.	24	the threat assessment." Some of that information would be
25	MR MALINDI SC: We will deal with certain	25	to know how big the group that is to be managed is. Do you
1	Page 7575 aspects of Mr White's statement but with the appropriate	1	Page 7577
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2	aspects of Mr White's statement but with the appropriate police officers such as Lieutenant Scott where -	2	agree? GENERAL PHIYEGA: Yes.
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	Page 7578		Page 7580
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2	definite terms with this I do not want to contaminate that	2	present to you into account.
3	space because those that were there would be able to answer	3	MR MALINDI SC: For example if it's in a
4	those questions. They are operational. I'm a strategic	4	built-up area the police may justifiably fear that
5	leader of SAPS.	5	surrounding businesses, onlookers, may be affected by the
6	MR MALINDI SC: Your decision in	6	actions of the police and the reaction of the protesters,
7	discussions with Lieutenant-General Mbombo were on the	7	as opposed to when a protest is taking place at a place
8	basis of acting against a group of 3000 protesters, or	8	such as the koppies at Marikana, there were no businesses,
9	strikers. Am I correct then?	9	shops or other onlookers that may have been affected,
10	GENERAL PHIYEGA: It might help me, Adv	10	especially by the crowd that were to be managed. Do you
11	Malindi, to say what decision are you talking about?	11	agree?
12	MR MALINDI SC: The decision to proceed	12	GENERAL PHIYEGA: The statement you've
13	with the plan up to stage 3, which was encirclement,	12	asked me carries many things. Maybe let's compartmentalise
		14	it.
14	dispersion, and disarmament and arrest.		
15	GENERAL PHIYEGA: You call it a decision.	15	MR MALINDI SC: Do you agree with me that
16	I would be very keen to know what's your source for saying	16	the protesters on the koppies at Marikana, their response
17	I took a decision with General Mbombo to do that, and so	17	to police action would not have affected any onlookers or
18	that I can understand where you're coming from.	18	residents or other people?
19	MR MALINDI SC: Didn't Lieutenant-General	19	GENERAL PHIYEGA: No, I don't, because we
20	Mbombo inform you that the operation has escalated since 11	20	had media people there. We had first-aid people there. So
21	August 2012 and therefore the operation must move to stage	21	we had a number of other people who had nothing to do with
22	3, and did you not agree with that assessment of	22	policing. We also had property there. So when you take
23	Lieutenant-General Mbombo?	23	those circumstances, you take all those issues into
24	GENERAL PHIYEGA: In the statement you've	24	account.
25	just said now you're saying, "Did Lieutenant Mbombo not	25	MR MALINDI SC: And when you talk about
<u> </u>	Page 7579		Page 7581
1	inform you?" I think it's very important, she informed me,	1	property there, do you mean the mine property which - well,
2	and it's different when you inform a person, she didn't	2	let me ask that question first.
3	come to me to ask for a decision. She is fully mandated	3	GENERAL PHIYEGA: You have the police as
4	and has the responsibility to lead this province and to	4	individuals and you have the assets and the equipment that
5	take decisions. She informed me, as you are saying.	5	they use.
6	CHAIRPERSON: I think counsel went	6	MR MALINDI SC: And in this action the
7	further and he suggested to you, or asked you whether you	7	
8	-		only people who would have been affected would have been
	had agreed with what she told you.	8	only people who would have been affected would have been the protesters and the police through their action?
9	had agreed with what she told you. GENERAL PHIYEGA: Judge, that's a better	8 9	
9 10	-		the protesters and the police through their action?
	GENERAL PHIYEGA: Judge, that's a better	9	the protesters and the police through their action? GENERAL PHIYEGA: I've already said to
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10 11 12 13 14 15 16 17 18 19 20 21 22	GENERAL PHIYEGA: Judge, that's a better question, because I think what you are asking me to say did I agree with what she's informing me, and indeed on the 15th I endorsed her information. I did not take a decision on that. MR MALINDI SC: We will put it to the generals who testified that they failed in assessing the situational appropriateness of the actions that they took from 10 August up to 16 August, but you say you don't want to comment on those things because they are operational matters. Lastly on this 7(2), without getting into operational matters again, do you agree that where a protest is taking place, it's important to the decision how	<ul> <li>9</li> <li>10</li> <li>11</li> <li>12</li> <li>13</li> <li>14</li> <li>15</li> <li>16</li> <li>17</li> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> </ul>	the protesters and the police through their action? GENERAL PHIYEGA: I've already said to you that you had media people, you had Netcare911 people there, because when you do such an operation those people must be there. MR MALINDI SC: Well, we will deal with the fact that the media people seemed not to be threatened and they went about their business without hindrance, but we will move from this point. GENERAL PHIYEGA: I need to talk to that. We would also respond to you to say that is not a fact because when things became worse, the reports are telling that the media people were asked to move behind the police. MR MALINDI SC: Okay, may we move to item
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	5		
1	Page 7582 aware that the protesters were using the koppie as their	1	Page 7584 MR MALINDI SC: And similarly that
2	venue, so to speak, where they would gather in the process	2	information would have been necessary to anticipate what
3	of withdrawing their labour from the mine?	3	could have happened when the two security guards were
4	GENERAL PHIYEGA: According to the third-	4	killed and other damage to property was committed?
5	party reports that I received, yes I knew about that, but	5	GENERAL PHIYEGA: For as long as one's
6	I'm sure when the plan is discussed and the authors of the	6	point of departure is that this is a carbon copy, maybe you
7	plan come here, they would intricately answer you on that	7	can say that, but I say from where I see it, it's not a
8	one.	8	carbon copy, it's information that is necessary to inform
9	MR MALINDI SC: And it has to be known	9	you to understand your environment, but what happened at
10	what the likelihood of an outbreak of violence would be.	10	Impala, it is not a carbon copy of what happened in
11	GENERAL PHIYEGA: I'm sure they would	11	Marikana.
12	have taken those issues into account.	12	MR MALINDI SC: What I'm suggesting to
13	MR MALINDI SC: And before these events	13	you, National Commissioner, that the police with the
14	took place, were you briefed about the events prior to 9	14	knowledge that from February to July 2012, 12 incidents
15	August 2012?	15	were reported ranging from public violence, assault, GBH,
16	GENERAL PHIYEGA: Yes, my submission does	16	malicious injury to property, intimidation, attempted
17	talk about the briefings that I read.	17	murder to murder resulting in nine penal cases being
18	MR MALINDI SC: And if you look at	18	opened, would have been information that the police should
19	exhibit L, slide number 10, are you there? Were you aware	19	have taken into account in planning, even for the first day
20	of that preceding history from about January 2012 to July	20	when the protest was announced as going to commence on 10
21	2012 in the same area, including Lonmin Platinum Mine?	21	August 2012, do you agree?
22	GENERAL PHIYEGA: Those geological	22	MR SEMENYA SC: Chairperson, I think the
23	factors were noted.	23	evidence is different, that inconsistent with the dictates
24	[13:54] MR MALINDI SC: And that was information	24	of standing order 262, there was no notice given of this
25	necessary for the police responding to the knowledge that	25	protest, so it was never announced that we are going to
	Page 7583		Page 7585
1	there will be a protest march on 10 August 2012 to put	1	have a protest and this is what we're going to do.
2	there will be a protest march on 10 August 2012 to put appropriate resource is place to deal with the situation	2	have a protest and this is what we're going to do. MR MALINDI SC: Chairperson, I accept
2 3	there will be a protest march on 10 August 2012 to put appropriate resource is place to deal with the situation taking into account this background information, is that	2 3	have a protest and this is what we're going to do. MR MALINDI SC: Chairperson, I accept that there was no compliance with the notices as required
2 3 4	there will be a protest march on 10 August 2012 to put appropriate resource is place to deal with the situation taking into account this background information, is that not so?	2 3 4	have a protest and this is what we're going to do. MR MALINDI SC: Chairperson, I accept that there was no compliance with the notices as required by the law, but –
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## Marikana Commission of Inquiry

Rustenburg

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1	Page 7586 they would have been aware of that and acted to meet any	1	Page 7588 distributed.
2	potential conflict such as I have read out to you?	2	CHAIRPERSON: The point where you're
3	GENERAL PHIYEGA: It is important to note	3	referring to is Exhibit R, there's policy and guidelines,
4	that that was an illegal protest.	4	Policing of Public Protests, Gatherings and Major events,
		4 5	is that the document?
5 6	MR MALINDI SC: It's very important to note that, because it does certain things –	6	MR MALINDI SC: No, it's not that one,
7	MR MALINDI SC: And your obligation as a	7	Chairperson, it's crowd management for section members, POP
8	Public Order Policing organisation is to crowd manage	8	Policy Document on Crowd Management, it's page 730 of the
9	according to the prescript whether a gathering, protest	9	SAPS bundle. I will defer it for now. May we move to 113E
10	strike is protected or unprotected, is that not so?	10	of the standing order?
11	GENERAL PHIYEGA: It is true, and we went	11	MS PILLAY: Chair, if I may just point
12	all over to do exactly that.	12	out to Mr Malindi is that FFF1 is the POP Policy document
13	MR MALINDI SC: Item 4, the information	13	on Crowd Management. I'm not sure if that's the document
14	required is whether any firearms are or will be present, do	14	he wants to refer to.
15	you see that?	15	MR MALINDI SC: I will defer it until
16	GENERAL PHIYEGA: Yes, I do.	16	there's certainty about what it is, Chair. National
17	MR MALINDI SC: Besides the firearms that	17	Commissioner, may we read 11.3E which says that the use of
18	are recorded as having been robbed of the mine security	18	force must be discontinued once the objective has been
19	guards and the police officers, did any information to your	19	achieved? After Scene 1 where, according to the police's
20	knowledge come to the police that any other firearms were	20	version, there was an attack on them. I suggest to you
21	amongst the protestors?	21	that there was no reason to pursue those who had run to
22	GENERAL PHIYEGA: I am sure when the	22	koppie 2 and koppie 3.
23	commanders give information, they will be able to answer	23	CHAIRPERSON: I thought you weren't going
24	those. What I knew was that guns were lost.	24	to deal with various operational matters with this witness,
25	MR MALINDI SC: Mr White's other	25	you'll have to reserve your questions for those who were at
1	Page 7587	1	Page 7589 the scene at the time.
1	criticism, which I will refer to specifically later is that	2	MR MALINDI SC: Yes.
2 3	there was a very poor intelligence gathering effort in this operation and knowledge such as how many firearms are	2	CHAIRPERSON: Because any evidence she
4	likely to be amongst the protestors and what form of	4	can give on the matter will be of a secondary nature based
4 5	firearms would have formed part of that body of knowledge	5	on the briefing she received
6	for the police to know how to react to this matter, do you	6	MR MALINDI SC: I take that point,
7	agree?	7	Chairperson, and we are glad to be reminded even when we
8	GENERAL PHIYEGA: I would not agree and	8	repeat what my learned friends, Mr Bizos and Madlanga have
9	I'll tell you that it would be very, very important for Mr	9	traversed, we don't wish to do that. National
10	White to also share with those that would be responding	10	Commissioner, I hope I won't repeat what Mr Bizos has
11	from an operational perspective how he comes to those	11	traversed, I would like to go back to the statement of
12	conclusions, but what I can say, from where I'm sitting	12	Myburgh. I think it's FFF7. Yes, it is.
13	strategically as the leader of SAPS, peaceful protests we	13	[14:14] Why did you not in the spirit of Standing Order
14	support through and through, but our constitution actually	14	262 and openness mention in your statement, why did you not
15	says people have the right to protest, to march, to express	15	mention in your statement that there was at least one
16	their opinion without being armed. At any given time, we	16	incident, such as the one referred to by Myburgh, which you
17	as SAPS, whether it's one person, whether it's 75, whether	17	consider doubtful?
18	it's 3000, whether it is 300, when they are armed we have	18	GENERAL PHIYEGA: You're starting from a
19	to ensure that law enforcement takes place.	19	judgmental point that says I was not open, and I think
20	MR MALINDI SC: I will move away from	20	again it will be different vantage points. I've answered
21	item 9.5 and go to item 11, sub 3A of the standing orders.	21	that question yesterday by stating that the fact that there
22	My emphasis will be on what a successful operation would	22	is that statement and that it was referred to IPID, in my
23	be and I'd like you to read that together with the Public	23	definition there was openness. In a similar fashion I
24	Order Policing policy, which - National Commissioner, I	24	contrasted that with the investigation that we've had into
25	will skip that have not made arrangements for it to be	25	the one that was done by General Moono. I didn't refer to
Δ.	RCHIVE FOR JUSTICE		

1	Page 7590 it because I thought sufficiently this matter is in the	1	Page 7592 the SAPS case in these proceedings. Could you please look
2	public, it's open, it's known, and how you see it probably	2	at paragraph 57?
3	is different from how I see it.	3	GENERAL PHIYEGA: If you'll give me time;
4	MR MALINDI SC: You do indeed appear to	4	I'm still looking for my documents.
5	be critical of Myburgh's statement because you said in	5	MR MALINDI SC: Certainly, National
6	answer to Mr Bizos yesterday about Myburgh's statement –	6	Commissioner.
7	and I hope we have an accurate record of your answer, "What	7	MR MAHLANGU: You said the reference is?
8	worried me is that this is a warrant-officer talking of a	8	MR MALINDI SC: Paragraph 57 on page 27
9	constable, and why I was asking the question I was asking	9	of the statement.
10	did you see his face, did you see his name badge, and the	10	GENERAL PHIYEGA: We've arrived.
11	warrant-officer was senior to the constable and it worried	11	MR MALINDI SC: Thank you. The second
12	me because he should have shown more responsibility," and	12	sentence of paragraph 57 reads as follows. "The policies
13	you further said, "Every member was required to produce a	13	of crowd control and management have proved inadequate to
14	statement and Myburgh had an opportunity but he didn't say	14	contain this type of situation. The police service will
15	anything in his first statement and waited two months to	15	then have to reconsider its practices, policies, training,
16	say something, and then he gave incomplete evidence because	16	equipment, and additional resources, to better help it
17	he couldn't even name the person." You are critical of the	17	address future events of this kind. A recommendation along
18	fact that he only came two months after the incident to	18	this would therefore be apposite." That's what you
19	report this incident that he alleges. Are you not being	19	recommend to the Commission. Am I correct?
20	critical of his conduct?	20	GENERAL PHIYEGA: Yes, we have said this
21	GENERAL PHIYEGA: I'd rather say I'm	21	was unprecedented.
22	concerned, I'm not critical. I was concerned, and I mean	22	MR MALINDI SC: Now in the spirit of
23	the conversations we've had yesterday was around whether I	23	assisting the Commission and openness, were those
24	considered it very important, and I did say yes, I	24	deficiencies identified to you by the drafters of the
25	considered it important, and I confirmed indeed that, those	25	statement and through consultations with Mr De Rover?
1	Page 7591	1	Page 7593
1	issues that you are raising.	1	GENERAL PHIYEGA: In the statement of De
2	issues that you are raising. MR MALINDI SC: And did I understand your	2	GENERAL PHIYEGA: In the statement of De Rover and the statement of the experts that you're talking
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		1	
1	Page 7594 of operations we have conducted? Are you able to say that	1	Page 7596 Reading paragraph 59, it's clear in the last sentence that
2	to the Commission, what the deficiencies are? Or any of	2	he says that the incident at Marikana on the 16th of August
3	the generals and other senior police officers that will	3	2012 alone caused 34 deaths as a consequence of the crowd
4	testify, do you know if they will be able to be open with	4	management operations implemented by SAPS. Then in the
5	the Commission as to what deficiencies they have identified	5	second line of paragraph 61 he says, "This operation was
6	through debriefing sessions, through the session at	6	one requiring more than incidental use of the firearms."
7	Potchefstroom for nine days, and in preparation of their	7	[14:34] Paragraph 62 he says, "For that reason alone I
8	statements coming to this Commission?	8	place this operation at Marikana at the very end of the
9	GENERAL PHIYEGA: I do believe that that	9	scale of operations SAPS crowd management is capable of
10	type of exercise would be important, but when and how is	10	handling. In fact, I strongly believe that as the events
11	the issue that perhaps at this point in time we haven't	11	
12	sufficiently dealt with. There are snippets of it in the	12	unfolded leading up to scene 1 on the 16th of August 2012, SAPS were out of their depth and sought to act beyond
	submission, in our presentation, in others. We do touch on		
13	·	13	current capability level." Do you agree with your expert,
14	some of those things, but that type of exercise has not	14	and our expert will say the same thing, that because the
15	been entered into precisely because of these deliberations,	15	police were out of their depth, that resulted in the
16	because there are various inputs that are going to shape	16	unnecessary deaths of the 44 people? Do you agree?
17	things. We don't want to come here with preset thoughts.	17 10	GENERAL PHIYEGA: I note what is being
18	MR MALINDI SC: If you turn to De Rover's	18	said there, and I would contextualise my understanding of
19	statement, FFF11, are you there, National Commissioner?	19 20	what I read here, and perhaps just reading through what he
20 21	GENERAL PHIYEGA: Yes, I am. MR MALINDI SC: If you could read	20 21	is saying, because you know, if we take those sentences we lose context. In 59 he says, "When I take this track
	-		-
22	paragraph 37, and read it with 92, you will see that he	22	record I totally understand the frustrations, the emotions,
23	says he was given unfettered access to any and all SAPS	23	and the anger, of SAPS with extensive human force of the
24	information and data related to either directly or	24 25	operation at Marikana." He then goes to where in the 17
25	indirectly to the Marikana public order incident, and in	25	years leading up to Marikana, crowd management operations
	Page 7595		Page 7597
1	fairness at paragraph 92 he also states that he has not	1	were responsible for 47 deaths. The Marikana incident of
2	been able to study all the material, interview all the	2	the 16th alone, alone, caused 34 deaths as a consequence of
3	relevant witnesses, etcetera. Can you see those two	3	the crowd management operations implemented by SAPS, and I
4	paragraphs?	4	
		4	read into that the fact that this is an unprecedented
5	MR MAHLANGU: Counsel is reading from	5	read into that the fact that this is an unprecedented matter. If you then go to 60 where you say, "The basic
5 6	MR MAHLANGU: Counsel is reading from paragraph 37?		
	5	5	matter. If you then go to 60 where you say, "The basic
6	paragraph 37?	5 6	matter. If you then go to 60 where you say, "The basic structure of operations implemented at Marikana is the same
6 7	paragraph 37? MR MALINDI SC: Paragraph 37 and 92.	5 6 7	matter. If you then go to 60 where you say, "The basic structure of operations implemented at Marikana is the same as those implemented at 18 341 operations prior to
6 7 8	paragraph 37? MR MALINDI SC: Paragraph 37 and 92. CHAIRPERSON: Mr Malindi, your thunder	5 6 7 8	matter. If you then go to 60 where you say, "The basic structure of operations implemented at Marikana is the same as those implemented at 18 341 operations prior to Marikana," and this expert asked the question, "So why did
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## Marikana Commission of Inquiry

Rustenburg

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1	Page 7598		Page 7600
1	CROSS-EXAMINATION BY MR MALINDI SC (CONTD.):	1	consider them in preparing its report. If we look at
2	Thank you. National Commissioner, are you frustrated and	2	paragraph 4.2.1 on page 18, his criticism is that you, that
3	angry that the SAPS that Mr De Rover says he considers	3	is the SAPS, refused to engage openly with the Commission
4	probably the most experienced in the world, was involved in	4	and concede points, even those considered in your opening
5	an incident whose consequence was, as he says, the	5	statement and by Mr De Rover. Is that a fair criticism?
6	extensive human cost of the operation?	6	GENERAL PHIYEGA: Perhaps I don't
7	GENERAL PHIYEGA: Being a social society,	7	understand, because you know, I've just been here two
8	those are very strong emotions. Frustrated and angry I am	8	weeks. Is this statement produced this week to say we
9	not, but I note the significance of what he says in his	9	refused to cooperate with the Commission? What is the
10	report as an expert, and as I've said, indeed it is	10	locus standi of what he's saying here? When was it issued?
11	consistent with our view that this was a very unprecedented	11	MR MALINDI SC: The statement was filed
12	matter.	12	in these proceedings on 18 January 2013.
13	MR MALINDI SC: We shall argue that even	13	GENERAL PHIYEGA: And what was the basis
14	on your own expert's evidence and your opening statement in	14 15	of this paragraph? Because we have just started on the first witness of police.
15	these proceedings, the deaths, serious injuries, and damage to, extensive damage to property that is recorded in	16	MR MALINDI SC: The basis of the
16 17	exhibit L, was as a result of poor planning, poor	17	criticism appears partially, halfway through that paragraph
18	execution, with a disastrous outcome. What do you say to	18	with the line that's starting, "On any assessment." Can
19	that?	19	you see that?
20	GENERAL PHIYEGA: My answer remains	20	GENERAL PHIYEGA: Ja, I –
21	consistent; I disagree.	21	MR MALINDI SC: The line starting 16
22	MR MALINDI SC: I would like now to turn	22	August 2012, and then at the end of that one he says, "On
23	to the statement of Mr White, which is WW2. If you are	23	any assessment," and remember I told you he has had access
24	with me, I would like you to read on page 4, paragraph	24	to the evidence that I read out to you, "On any assessment
25	1.2.4, which reads as follows. "In order to facilitate the	25	that represents a failure of Public Order Policing, but
	Page 7599		Page 7601
1	task of preparing my evidence I was provided with a large	1	that is particularly the case when the operations are
2			that is particularly the case when the operations are
<sup>∠</sup>	body of material stored electronically on a hard drive.	2	assessed against paragraphs 11 of Standing Order 262, which
2	body of material stored electronically on a hard drive. That evidence included the police presentation to the	2 3	assessed against paragraphs 11 of Standing Order 262, which states that the success of the operation 'will be measured
	5		assessed against paragraphs 11 of Standing Order 262, which states that the success of the operation 'will be measured by the results of the operation in terms of cost, damage to
3	That evidence included the police presentation to the Commission," which is exhibit L, "videos taken between 9 to 16 August 2012 from a range of sources, relevant policies	3	assessed against paragraphs 11 of Standing Order 262, which states that the success of the operation 'will be measured
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	Page 7602		Page 7604
1	Burger, who I take it isn't going to cover this ground, Mr	1	in view of the seriousness of the Marikana tragedy, that
2	Burger assures me he's got a fairly short cross-examination	2	you treated your preparation to give evidence before the
3	which should be over by the end of the day, if not the end	3	Commission with care and responsibility?
4	of the day, reasonably early tomorrow, and you can then	4	GENERAL PHIYEGA: I have tried to the
5	proceed with your cross-examination. That will give the	5	best of my ability.
6	National Commissioner the opportunity to read the report,	6	MR BURGER SC: As to the statements and
7	in particular the paragraphs that I referred to, and she	7	the affidavit to which I would like to draw your attention,
8	will be better able, I would have thought, to answer your	8	you have at all material times appreciated the importance
9	questions and you will be better able to put the questions	9	of taking the oath in a sworn statement?
10	to her in a way that she readily understands. Would that	10	GENERAL PHIYEGA: It is correct.
11	be a fair way of proceeding?	11	MR BURGER SC: You would also as a
12	MR MALINDI SC: It will be a fair and	12	commissioner of oaths yourself appreciate that if you
13	practical way, Chairperson.	13	depose to an affidavit, one does so in the presence of the
14	CHAIRPERSON: Unless there are other	14	commissioner of oaths?
15	areas you want to cover now, or would you prefer to do it	15	GENERAL PHIYEGA: Yes.
16	the way I've suggested, stand down now, carry on tomorrow	16	MR BURGER SC: And pardon me for debating
17	when she's had an opportunity to read the whole report?	17	something which should be trite between you and I; the
18	MR MALINDI SC: Chairperson, I propose	18	commissioner of oaths himself should have no interest in
19	that we do stand down now and I'll also give notice that	19	the matter addressed in the affidavit?
20	the National Chairperson should read the statement of Prof	20	GENERAL PHIYEGA: I'm not certain of
21	Christof Heyns and I will refer to the paragraphs that I	21	that, but I know that it should be a commissioner of oaths.
22	would like her to read.	22	MR BURGER SC: Let me remind you, and I'm
23	CHAIRPERSON: I haven't seen the	23	sure you'll remember that when I remind you, under the
24	statement of Prof Christof Heyns, but perhaps you can make	24	regulations published under the Justices of the Peace and
25	a copy available to us as well. Oh, they are there. That	25	Commissioners of Oaths Act, and I read to you regulation 7,
	D 7/00		
	Page 7603		Page 7605
1	will be helpful, so we can all do some homework tonight and	1	Page 7605 sub-regulation (1) says, "A commissioner of oaths shall not
1 2		1 2	•
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2	will be helpful, so we can all do some homework tonight and be better able to appreciate the subtleties of your cross-	2	sub-regulation (1) says, "A commissioner of oaths shall not administer an oath or affirmation relating to a matter in
2 3	will be helpful, so we can all do some homework tonight and be better able to appreciate the subtleties of your cross- examination tomorrow. Is that an appropriate way of	2 3	sub-regulation (1) says, "A commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest." You remember that now?
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	Page 7606		Page 7608
1	signing it?	1	don't think you're understanding the point. What Mr Burger
2	GENERAL PHIYEGA: It is true.	2	is putting to you is that 7 doesn't fit in and that appears
3	MR BURGER SC: May I hand up the first	3	from the fact that if you look at 6, paragraph 21 ends with
4	statement that we received this side of the table? It's	4	the line "and thereafter leave the koppie." If you turn to
5	not an exhibit yet; it will become, with the permission of	5	the top of page 7 you will see that the last two lines of
6	the Chair, FFF25. If I may hand up that document to you	6	21, including the line "and thereafter leave the koppie,"
7	and just confirm that this is a document that I believe the	7	are repeated. So the point that – and then if you look at
8	evidence leaders received on the 7th of March this year and	8	the bottom of page 7 - sorry, the foot of page 7, you see
9	we on this side of the table received it on the 8th of	9	paragraph 25 ends -
10	March.	10	GENERAL PHIYEGA: Yes.
10		10	CHAIRPERSON: The last line reading "hold
			-
12	the next exhibit number is FFF24. It may, however, Chair,	12	a press briefing the next day." If you turn over the page
13	make sense if we group it with the other bundle of	13	-
14	statements that have been in, so we may mark it FFF2A for	14	GENERAL PHIYEGA: Yes.
15	example?	15	CHAIRPERSON: - you'll find that page 8
16	[15:27] MR BURGER SC: That may be a better plan,	16	contains at the top –
17	Chair. Do you agree if this may be FFF2A? Now General,	17	GENERAL PHIYEGA: Yes.
18	this is a statement which was prepared to be an affidavit,	18	CHAIRPERSON: - what must be part of
19	but it did not materialise as an affidavit; it's only a	19	paragraph 26, but the first two lines of 26 aren't there
20	statement. You'll see on page 9 you signed it in Pretoria	20	because it starts with the words "address a press
21	on the 7th of March 2013. Is that correct?	21	conference." So it's quite clear that page 7 doesn't fit
22	GENERAL PHIYEGA: Yes, it is.	22	in. That's counsel's point. Is that correct, Mr Burger?
23	MR BURGER SC: From your evidence thus	23	MR BURGER SC: Indeed that is correct,
24	far we know that you drafted it and you would have read it	24	General, but I'd like to go back to a previous question I
25	before you signed it.	25	asked you.
	Page 7607		Page 7609
1	Page 7607 GENERAL PHIYEGA: Yes. I did say yes.	1	Page 7609 GENERAL PHIYEGA: Maybe before you go,
1		1 2	
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2	GENERAL PHIYEGA: Yes. I did say yes. MR BURGER SC: Sorry?	2	GENERAL PHIYEGA: Maybe before you go, let's deal with that.
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<b></b>		1	
1	Page 7610 said when I came to this Commission that what I saw is not	1	Page 7612 CHAIRPERSON: I take it Mr Burger is
1	my statement because when this statement was brought back	2	CHAIRPERSON: I take it Mr Burger is going to deal with that in due course.
3	to me, was that you omitted a page on the statement that	2	MR BURGER SC: Perhaps my learned friend
4	you submitted, and that's a statement you received on the	4	Mr Semenya will allow me to develop my cross-examination
5	8th. You acknowledged that. So if there is any removing of	4 5	and it may become clear to him as it goes on.
6	pages and whatever, would I have removed it when I	6	MS PILLAY: Chair, just for the purposes
7	submitted my original statement? And this is my statement,	7	of the record, I think the exhibit Mr Burger is referring
	by the way, and I stand by it.	7 8	to now is exhibit FFF3.
8	MR BURGER SC: General, I will submit at	0 9	
9			, , , , , , , , , , , , , , , , , , , ,
10	the end of this hearing that this is not your statement.	10 11	document with a commissioner of oaths signing at page 10. MS PILLAY: It's dated, the one dated the
11	You didn't initial this page and I will argue that you		
12	didn't see this page when you signed this statement, for	12	12th is FFF2 and the one dated the 7th is FFF3.
13	obvious reasons. I'll give you an opportunity to deal with	13	MR MPOFU: No, it's the other way around.
14	that argument I will raise, because I want to deal with the	14 15	MR BURGER SC: It's the other way around
15	second, third and fourth statement now. Do you want to	15	in my book, but my FFF2 according to the record as I read
16	answer the argument that I will address at the end of the	16	it, is an affidavit signed in Pretoria on the 7th of March
17 18	day? GENERAL PHIYEGA: You can continue, but	17	2013.
		18	GENERAL PHIYEGA: That's my statement.
19 20	this is my statement. MR BURGER SC: General, I don't	19 20	COMMISSIONER TOKOTA: So is mine, Mr
		20 21	Burger. Mine is also FFF2. That's what I have. CHAIRPERSON: It's the same as you.
21 22	understand your answer for the simple reason, if it's your statement, why didn't you initial this page 7 when you	21	CHAIRPERSON: It's the same as you. MR BURGER SC: General, we can cut across
22	signed the statement?	22	this. The document I'd like to discuss with you is a 10-
23 24	GENERAL PHIYEGA: Do people not make	23 24	page statement by you deposed to before a commissioner of
24 25	mistakes?	24 25	oaths in Pretoria on the 7th of March 2013. Do you have
25	mistakes:	23	
	Page 7611		Page 7613
1	MR BURGER SC: Commissioner, in this	1	that document?
2	Commission I ask the questions and you answer them. So	2	GENERAL PHIYEGA: Yes, I do.
3	it's unhelpful to ask me whether people make mistakes. May	3	CHAIRPERSON: Might I interpose by saying
4	I repeat my question? When you signed the statement, if	4	there is an element of confusion; there has been for some
5	this page 7 was part of it, why didn't you initial page 7?	5	time, as to which is FFF2 and which is FFF3, so let's
6	GENERAL PHIYEGA: I did not initial it,	6	finally and definitively establish which is which so that
7	that's why it was brought back to me and I initialled a	7	such confusion as there has previously been will no longer
8	wrong statement, because I was understanding that my	8	exist, because it's obviously not what they call it that
9	statement is this.	9	matters. What you are referring to, Mr Burger, is a
10	MR BURGER SC: The second version that we	10	statement dated the 7th -
11	have we will find in FFF2, General. If you have a look at	11	MR BURGER SC: Chair, chronologically
	-		
12	that; this is now the document identical to FFF2A, with the	12	this one of the 7th of March comes next, FFF2.
12 13	that; this is now the document identical to FFF2A, with the following difference. It is now purported to be an	12 13	this one of the 7th of March comes next, FFF2. CHAIRPERSON: Yes.
	that; this is now the document identical to FFF2A, with the following difference. It is now purported to be an affidavit. You go to page 10, you'll see it's signed by a		this one of the 7th of March comes next, FFF2. CHAIRPERSON: Yes. MR BURGER SC: So if I may suggest that
13 14 15	that; this is now the document identical to FFF2A, with the following difference. It is now purported to be an affidavit. You go to page 10, you'll see it's signed by a lieutenant-general, who is the deputy national	13	this one of the 7th of March comes next, FFF2. CHAIRPERSON: Yes. MR BURGER SC: So if I may suggest that even if it's for the time being, we call this FFF2 and
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1	Page 7618 GENERAL PHIYEGA: But I'm sorry, I'm	1	Page 7620 GENERAL PHIYEGA: I think my issue still
2	sorry about this, then we don't have a common conversation,	2	remains; I really would like to understand these documents
3	because I have -	3	because the documents you have, the documents I have, even
4	MR BURGER SC: Now we will.	4	if I concentrate on this one, my answer I don't have.
5	GENERAL PHIYEGA: I have statements here.	5	MR BURGER SC: Okay. The third reason
6	You have to say to me why my statements are wrong.	6	why I suggest you weren't with the commissioner when it is
7	CHAIRPERSON: He doesn't have to say	7	suggested you took an oath is I would have thought when you
8	anything to you. He's going to ask you questions and you	8	depose to an affidavit you would read the document before
9	must answer them. So just relax. I understand you've got	9	you take the oath. Now you couldn't have read this
10	a number of statements and that's causing the trouble.	10	document because page 6 doesn't lead on to page 7, and page
11	What Mr Burger says to you is please get hold of the new	11	7 doesn't lead on to page 8. We've got the same old
12	FFF2 that you've been handed, hang on to that; ignore all	12	problem, and we know you read statements before you take an
13	the others for the moment.	13	oath before this Commission because you understand the
14	GENERAL PHIYEGA: Okay.	14	seriousness of the matter.
15	CHAIRPERSON: Concentrate on that while	15	GENERAL PHIYEGA: I do want to say my
16	he asks you questions in what he calls stage 2. Is that	16	statement of the 7th that I submitted I have read, I have
17	what you want to happen, Mr Burger?	17	come to this Commission to say the statement that was
18	MR BURGER SC: Absolutely. General, I'm	18	presented was not my statement, that's why my lawyer
19	going to try again now.	19	corrected it, because I said I submitted the statement on
20	GENERAL PHIYEGA: You can try.	20	the 7th. All I knew is that I hadn't signed page 7, it was
21	MR BURGER SC: If we can have eye	21	brought to me, I signed, and I had read my statement.
22	contact. Do you have the new FFF2 now in front of you, the	22	Whether there were errors or not, it's another story.
23	statement dated 7 June where page 7 – 7 March, where page 7	23	CHAIRPERSON: Mr Burger is busy with
24	only has the initial of the commissioner of oaths? Do you	24	another point. He's suggesting to you that when you signed
25	have that?	25	your statement on the 7th you didn't do so in the presence
	Page 7619		Page 7621
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1	Page 7622	1	Page 7624
1	GENERAL PHIYEGA: Advocate, you are	1	initialling page 7, not reading the document, and using a document which had been providuely signed by you, which is
2	saying that, but I'm saying I took this oath with General	2 3	document which had been previously signed by you, which is
3	Masemola. MR BURGER SC: Why then did you swear	3 4	now supposed to be taken an oath of by a commissioner who
4	5 5		reports to you. I don't have any answer to that.
5	that you read the statement, which you haven't read?	5	GENERAL PHIYEGA: You do have an answer,
6	Because we know the statement doesn't make sense. Any	6	and my answer is my statement is the statement of the 7th.
7	basic reader of English understands there is a page being	7	Whether it was mistakes or whatever, it's another issue,
8	slipped in which doesn't fit.	8	and on the statement of the 7th I omitted to sign page 7,
9	GENERAL PHIYEGA: I had read the	9	and the statement of the 12th, I then say to this Commission
10	statement and if printing or whatever mistake happened,	10	it doesn't represent my statement that I've submitted and
11	it's another thing, but I read the statement and it doesn't	11	we made corrections on the basis of my statement of the 7th.
12	change the meaning in any case.	12	MR BURGER SC: Let us see what you say in
13	MR BURGER SC: And why didn't you initial	13	version 2 on page 7, that page which is troubling us so
14	page 7?	14	much. May I read with you paragraph 23 –
15	GENERAL PHIYEGA: I did say it was an	15	CHAIRPERSON: Mr Burger, you're still
16	omission, that's why it was brought back to me.	16	busy with the 7th of March?
17	MR BURGER SC: No, but the omission was	17	MR BURGER SC: Yes, yes indeed.
18	on FFF2A. Do you suggest to the Commission that you made	18	CHAIRPERSON: The witness has referred to
19	this mistake twice?	19	the 12th of March, but I understand you're going to be
20	GENERAL PHIYEGA: No. On the statement I	20	dealing with that later.
21	have it is signed. That's why I'm saying I don't know	21	MR BURGER SC: I'm going to deal with
22	where this document you are, you bring to me. The	22	that later, Chair.
23	statement I have here that I was given on Monday, it's got	23	CHAIRPERSON: You're concentrating at the
24 25	everything signed. COMMISSIONER HEMRAJ: General, are you	24 25	moment on the two statements dated the 7th – MR BURGER SC: Indeed.
20		20	MIR BURGER SC. Indeed.
	Page 7623		Page 7625
1	Page 7623 saying that you're in possession of a statement signed –	1	Page 7625 CHAIRPERSON: - one which is FFF, which
1 2	0	1 2	
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2	saying that you're in possession of a statement signed – GENERAL PHIYEGA: That was signed, yes,	2	CHAIRPERSON: - one which is FFF, which is now anyway, FFF2, and the other is FFF2A.
2 3	saying that you're in possession of a statement signed – GENERAL PHIYEGA: That was signed, yes, on page 7.	2 3	CHAIRPERSON: - one which is FFF, which is now anyway, FFF2, and the other is FFF2A. MR BURGER SC: Correct.
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1	Page 7626
1	MR BURGER SC: No, if you give me three
2	minutes, I'll finish that, Chair, with your leave. What I
3	want to show you, General, is your version at this stage on
4	page 7 of FFF2, that's the [inaudible] stage now.
5	GENERAL PHIYEGA: Sorry, let me just ask,
6	this is the statement you gave me out now. Can I put it
7	aside and use my statement?
8	MR BURGER SC: No. No, will you stay
9	with the one we've given you, otherwise we're going to run
10	-
11	- GENERAL PHIYEGA: Because you know, you
12	are confusing – I received this one from her, I received
13	this one from you. I have two statements and that's why –
14	
15	because, with great respect, you don't listen to our
16	request. Our request is to put away your statements. They
17	make you "deurmekaar." Use the statement that Ms Pillay
18	put before you. That's the one I'm debating with you now.
19	FFF2, the new one, can I ask you to go to page 7, please?
20	GENERAL PHIYEGA: Let me say, remember
21	the statement that is in my file that is marked 2 was also
22	given to me by this Commission.
23	MR BURGER SC: Can I ask you to turn to
24	the new FFF2, page 7?
25	GENERAL PHIYEGA: That's fine.
	Page 7627
1	Page 7627 MR BURGER SC: Paragraph 23. There you
1 2	0
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RealTime Transcriptions

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