

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 [PROCEEDINGS ON 3 APRIL 2013]
 2 [13:14] CHAIRPERSON: The Commission resumes.
 3 After we adjourned yesterday afternoon I received a visit
 4 from the Advocate appearing for the Bapo Ba Mogale
 5 Traditional Community and informed me that her client
 6 wishes to oppose the application for removal of the Seat of
 7 the Commission from Rustenburg and that opposing affidavit
 8 and annexure would be made available to us later in the
 9 evening. At quarter to 10 last night I received the
 10 papers, I understand they have been sent to the various
 11 parties this morning. When I saw Minister we agreed that
 12 it was in the circumstances not possible for us to decide
 13 on the application, that the applicants must be given the
 14 opportunity to file opposing or replying affidavits if they
 15 so wish and thereafter there should be an occasion for old
 16 arguments on the matter and only after that would the
 17 Minister and I be in a position to consider the
 18 application. So I would suggest that those parties minded
 19 to file replying affidavits should do so in the course of
 20 the next week when we will not be sitting so that the old
 21 arguments on the matter can be addressed to the Commission.
 22 In the week thereafter we should be recommencing on the 16th
 23 April. Only after that as I said when the addresses have
 24 been transcribed can the Minister and I meet to consider
 25 the application. I think in the circumstances it would be

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1 appropriate for me to say at this stage that we expect
 2 argument, oral argument on the matter on the 16th when we
 3 recommence the hearing on the 16th April. National
 4 Commissioner you're still under oath. Mr Malindi.
 5 MR MALINDI SC: Thank you very much,
 6 Chairperson.
 7 CHAIRPERSON: If you care to continue
 8 with your cross-examination.
 9 CROSS-EXAMINATION BY MR MALINDI SC (CONTD.):
 10 I shall. National Commissioner, when we ended yesterday
 11 you and I were in a discussion about the value of
 12 debriefing sessions and as I understood your answer it was
 13 that the preparations that you undertook at Potchefstroom
 14 and in preparation for this Commission fulfilled that
 15 purpose of the debriefing and therefore the information
 16 that would have been generated through the debriefing after
 17 the 16th August last year has now become available. Did I
 18 understand you very well?
 19 GENERAL PHIYEGA: Yes, I have said the
 20 process in terms of dealing with the debriefing, even the
 21 announcement of the Commission, the two processes were
 22 almost collapsed and a part of, a large part of that
 23 information is sitting in the presentations that we're
 24 making here. The conclusivity of that I think would also
 25 be embodied in the outcome of this Commission.

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1 MR MALINDI SC: The expert witness for
 2 the HRC, Mr Gary White whose statement I'm sure you have
 3 read, says he will not criticise the SAPS too much for not
 4 holding the debriefing but using the Potchefstroom session
 5 to generate such information but is critical of the fact
 6 that that was a deviation from the Standing Orders. Do you
 7 accept that it was a deviation from a pre-emptory
 8 requirement in the Standing Orders?
 9 GENERAL PHIYEGA: Let me start off by
 10 saying I haven't seen that report, I haven't read it and
 11 unless if you would be reading particular pieces for me to
 12 comment verbally, I don't know if you are comfortable with
 13 that because I haven't seen it. I haven't engaged it.
 14 MR MALINDI SC: I will be referring to it
 15 at a later stage, it is Exhibit WW2.
 16 GENERAL PHIYEGA: May I request to be
 17 preferred with that copy?
 18 MR MALINDI SC: We shall make proper
 19 arrangements with the evidence leaders for a copy to be
 20 presented to you. Without reading directly from Mr White's
 21 statement he also states that he has studied the Standing
 22 Orders 262 and other prolific documents such as the Public
 23 Order Policing on Crowd Management and other prolific
 24 documents of the SAPS on crowd management and he has come
 25 to the opinion that South African policy framework on crowd

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1 management compares favourably with internationally
 2 accepted norms and standards. He, however characterises
 3 what was witnessed in the police actions at Marikana as
 4 disastrous, a disastrous operational outcome. Do you agree
 5 with that characterisation?
 6 GENERAL PHIYEGA: I would say no
 7 depending on what he means by disastrous outcome.
 8 MR MALINDI SC: He says it was disastrous
 9 because during the period of, the relevant period 9 to 16
 10 August 2012 44 people were killed in circumstances when the
 11 SAPS in particular its POP could have managed the situation
 12 differently and then minimised the number of deaths and
 13 injuries. In view of Standing Order 262 and other prolific
 14 documents that say the goal of crowd management is to
 15 manage the situation with no loss of life or serious
 16 injuries. Do you agree this operation was disastrous?
 17 GENERAL PHIYEGA: I do not agree with the
 18 concept of disastrous but I am on record saying it is
 19 regrettable and I will give my response to what he is
 20 raising. I have said as police in the period from the 8th
 21 through to the 16th we have done exactly what he is saying,
 22 our prescript in terms of public order policing requires us
 23 to do, to negotiate, to engage. We continue to do so
 24 because our thoughts are very similar, we wanted a peaceful
 25 solution. We have managed to create platforms for

<p style="text-align: right;">Page 7574</p> <p>1 stakeholders that have never engaged with each other to 2 talk to each other. We had a plan and I believe we had a 3 good plan, I am on record is saying the plan was disrupted, 4 the outcome was unintended and regrettable.</p> <p>5 MR MALINDI SC: I'm happy with the 6 admission that the outcome was unintended which means that 7 the goals as set out in the prescripts of the SACP of 8 managing crowds without loss of life, serious injury were 9 not matching this operation, do you agree?</p> <p>10 MR SEMENYA SC: Maybe my learned 11 colleague is looking for another acronym, not SACP.</p> <p>12 CHAIRPERSON: SACP. Society for the 13 Abolition of Capital Punishment.</p> <p>14 MR MALINDI SC: My apologies -</p> <p>15 GENERAL PHIYEGA: Advocate Malindi, what 16 is important for me really is the clarity of meaning. I'm 17 saying unintended because you have to take all the 18 consequences that I have mentioned into account. I don't 19 just want to put words into my mouth that do not take out 20 the meaning. The meaning is as I've said, I said it was we 21 had a good plan, there was a disruption. There were 22 unintended consequences that are a result of a disruption. 23 It's important to underscore those things from where I'm 24 sitting. I don't know from your side.</p> <p>25 MR MALINDI SC: We will deal with certain</p>	<p style="text-align: right;">Page 7576</p> <p>1 National Commissioner, you will embrace, you will take into 2 consideration criticisms of this outcome as identified by 3 your own expert, Mr De Rover, our expert Mr White and 4 Counsel for the SAPS in their opening statement, that's 5 something you will be prepared to embrace isn't it?</p> <p>6 GENERAL PHIYEGA: I have said already 7 that we're looking to the outcomes of this Commission to 8 see those things that would help us to continuously improve 9 our offerings as SAPS.</p> <p>10 [13:34] MR MALINDI SC: Before I deal with Mr 11 White I would like us to look at some background 12 information that has been available to you and the 13 Commanders of the operation to see if you agree with some 14 of the things to see if you agree with some of the things 15 that I will suggest to you. In the Standing Order 262, 16 which is exhibit SS2, item 7(2), which reads as follows, 17 "The assessment of the threat level must be based on 18 available tactical information in terms of level of risk, 19 discussions and arrangements with the convenor, history of 20 peaceful or violent protests by the parties involved, past 21 experiences with the party, suitability of vicinity of 22 venue in terms of alleviating or aggravating risk, 23 etcetera, is something that must be taken into account in 24 the threat assessment." Some of that information would be 25 to know how big the group that is to be managed is. Do you</p>
<p style="text-align: right;">Page 7575</p> <p>1 aspects of Mr White's statement but with the appropriate 2 police officers such as Lieutenant Scott where -</p> <p>3 CHAIRPERSON: I think you'll find he's 4 Lieutenant-Colonel.</p> <p>5 MR MALINDI SC: Colonel Scott.</p> <p>6 CHAIRPERSON: Lieutenant-Colonel Scott.</p> <p>7 MR MALINDI SC: Lieutenant-Colonel Scott 8 where Mr White points out that deficiencies in the plan 9 itself which resulted in what he characterises as a 10 disastrous outcome. However, in your statement FFF3, 11 paragraph 4 you do yourself refer to the event of Marikana 12 in August 2012 as of concern to you and then you continue, 13 "the protracted and ever-increasing violent protest at 14 Marikana which culminated in the catastrophic and 15 unprecedented loss of life is to me regrettable." You used 16 the word catastrophic, is it not a synonym for disastrous? 17 GENERAL PHIYEGA: It is important to also 18 read that catastrophic with unprecedented because I'm 19 saying catastrophic in my sense if you go into the 20 statement that I've given at some point I talk about the 21 many, many, many protests that we've handled and I'm saying 22 catastrophic because in the 18 years of our democracy we as 23 SAPS have never experienced a thing such as this and that's 24 I'm using catastrophe, not disastrous.</p> <p>25 MR MALINDI SC: And in that very context,</p>	<p style="text-align: right;">Page 7577</p> <p>1 agree?</p> <p>2 GENERAL PHIYEGA: Yes.</p> <p>3 MR MALINDI SC: Did you know when you 4 were in discussions with amongst others, Lieutenant-General 5 Mbombo, that the crowd over that period had been growing on 6 the koppie from relatively small numbers every morning of 7 about 50, through the mid-morning to a few hundred and by 8 the latter part of the day growing to a few thousand, 2 to 9 3000? Did you know that?</p> <p>10 GENERAL PHIYEGA: Yes, as a third-party 11 report. Remember I was never operational. I had 12 commanders charged with responsibility to be here on a day- 13 to-day basis to deal with the issue, and they are coming to 14 answer and they would be able to do a lot of those, and on 15 a third-party basis those are some of the feedback that I 16 was receiving.</p> <p>17 MR MALINDI SC: And this crowd will also 18 accordingly decrease in the latter parts of the day with 19 people departing to Nkaneng and only a few will be left on 20 the koppie overnight. Did you know that information?</p> <p>21 GENERAL PHIYEGA: I would rather leave 22 that to first-time observation commanders to deal with 23 those issues. I've said on a third-party basis I 24 understood that people were arriving, people were leaving. 25 The sizes of the crowd would, you know, shift with those</p>

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1 arrivals and moving, but I think in order to deal in
2 definite terms with this I do not want to contaminate that
3 space because those that were there would be able to answer
4 those questions. They are operational. I'm a strategic
5 leader of SAPS.

6 MR MALINDI SC: Your decision in
7 discussions with Lieutenant-General Mbombo were on the
8 basis of acting against a group of 3000 protesters, or
9 strikers. Am I correct then?

10 GENERAL PHIYEGA: It might help me, Adv
11 Malindi, to say what decision are you talking about?

12 MR MALINDI SC: The decision to proceed
13 with the plan up to stage 3, which was encirclement,
14 dispersion, and disarmament and arrest.

15 GENERAL PHIYEGA: You call it a decision.
16 I would be very keen to know what's your source for saying
17 I took a decision with General Mbombo to do that, and so
18 that I can understand where you're coming from.

19 MR MALINDI SC: Didn't Lieutenant-General
20 Mbombo inform you that the operation has escalated since 11
21 August 2012 and therefore the operation must move to stage
22 3, and did you not agree with that assessment of
23 Lieutenant-General Mbombo?

24 GENERAL PHIYEGA: In the statement you've
25 just said now you're saying, "Did Lieutenant Mbombo not

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1 inform you?" I think it's very important, she informed me,
2 and it's different when you inform a person, she didn't
3 come to me to ask for a decision. She is fully mandated
4 and has the responsibility to lead this province and to
5 take decisions. She informed me, as you are saying.

6 CHAIRPERSON: I think counsel went
7 further and he suggested to you, or asked you whether you
8 had agreed with what she told you.

9 GENERAL PHIYEGA: Judge, that's a better
10 question, because I think what you are asking me to say did
11 I agree with what she's informing me, and indeed on the 15th
12 I endorsed her information. I did not take a decision on
13 that.

14 MR MALINDI SC: We will put it to the
15 generals who testified that they failed in assessing the
16 situational appropriateness of the actions that they took
17 from 10 August up to 16 August, but you say you don't want
18 to comment on those things because they are operational
19 matters. Lastly on this 7(2), without getting into
20 operational matters again, do you agree that where a
21 protest is taking place, it's important to the decision how
22 to deal with it? If it's in a built-up area you may deal
23 with it differently as when it's in an open area. Do you
24 agree with that?

25 GENERAL PHIYEGA: It is true: policing

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1 can never just be uniformed. You take circumstances that
2 present to you into account.

3 MR MALINDI SC: For example if it's in a
4 built-up area the police may justifiably fear that
5 surrounding businesses, onlookers, may be affected by the
6 actions of the police and the reaction of the protesters,
7 as opposed to when a protest is taking place at a place
8 such as the koppies at Marikana, there were no businesses,
9 shops or other onlookers that may have been affected,
10 especially by the crowd that were to be managed. Do you
11 agree?

12 GENERAL PHIYEGA: The statement you've
13 asked me carries many things. Maybe let's compartmentalise
14 it.

15 MR MALINDI SC: Do you agree with me that
16 the protesters on the koppies at Marikana, their response
17 to police action would not have affected any onlookers or
18 residents or other people?

19 GENERAL PHIYEGA: No, I don't, because we
20 had media people there. We had first-aid people there. So
21 we had a number of other people who had nothing to do with
22 policing. We also had property there. So when you take
23 those circumstances, you take all those issues into
24 account.

25 MR MALINDI SC: And when you talk about

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1 property there, do you mean the mine property which – well,
2 let me ask that question first.

3 GENERAL PHIYEGA: You have the police as
4 individuals and you have the assets and the equipment that
5 they use.

6 MR MALINDI SC: And in this action the
7 only people who would have been affected would have been
8 the protesters and the police through their action?

9 GENERAL PHIYEGA: I've already said to
10 you that you had media people, you had Netcare911 people
11 there, because when you do such an operation those people
12 must be there.

13 MR MALINDI SC: Well, we will deal with
14 the fact that the media people seemed not to be threatened
15 and they went about their business without hindrance, but
16 we will move from this point.

17 GENERAL PHIYEGA: I need to talk to that.
18 We would also respond to you to say that is not a fact
19 because when things became worse, the reports are telling
20 that the media people were asked to move behind the police.

21 MR MALINDI SC: Okay, may we move to item
22 9(5) of the Standing Order. In the planning of any
23 operation 9(5) says the following information should be
24 collected and known. Number 1 is the actual route the
25 participants plan to follow. My question is, were you

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1 aware that the protesters were using the koppie as their
2 venue, so to speak, where they would gather in the process
3 of withdrawing their labour from the mine?
4 GENERAL PHIYEGA: According to the third-
5 party reports that I received, yes I knew about that, but
6 I'm sure when the plan is discussed and the authors of the
7 plan come here, they would intricately answer you on that
8 one.
9 MR MALINDI SC: And it has to be known
10 what the likelihood of an outbreak of violence would be.
11 GENERAL PHIYEGA: I'm sure they would
12 have taken those issues into account.
13 MR MALINDI SC: And before these events
14 took place, were you briefed about the events prior to 9
15 August 2012?
16 GENERAL PHIYEGA: Yes, my submission does
17 talk about the briefings that I read.
18 MR MALINDI SC: And if you look at
19 exhibit L, slide number 10, are you there? Were you aware
20 of that preceding history from about January 2012 to July
21 2012 in the same area, including Lonmin Platinum Mine?
22 GENERAL PHIYEGA: Those geological
23 factors were noted.
24 [13:54] MR MALINDI SC: And that was information
25 necessary for the police responding to the knowledge that

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1 there will be a protest march on 10 August 2012 to put
2 appropriate resource in place to deal with the situation
3 taking into account this background information, is that
4 not so?
5 GENERAL PHIYEGA: Without getting into
6 the minds of those who were operating, I would presume such an
7 environmental scan would have been important.
8 MR MALINDI SC: And they would have put
9 in place a plan that would have met, for example the tragic
10 situation of 11 August 2012 when five people, including
11 policemen were killed in the incident involving – 13 August
12 –
13 CHAIRPERSON: 13.
14 MR MALINDI SC: 13 August, Chairperson.
15 GENERAL PHIYEGA: I think as I respond I
16 begin to say I do not believe that the environmental scan
17 is very important, that is number one. I would presume
18 that that environmental scan would have been taken into
19 account, but secondly I don't think these incidences are a
20 carbon copy of what happened in Marikana, and therefore the
21 value of the history is more to say what area are we
22 dealing with, what are the issues that are presenting, what
23 are the possibilities of meeting those, and I would presume
24 when they talk to you about the plan, they probably would
25 also talk about some of those issues.

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1 MR MALINDI SC: And similarly that
2 information would have been necessary to anticipate what
3 could have happened when the two security guards were
4 killed and other damage to property was committed?
5 GENERAL PHIYEGA: For as long as one's
6 point of departure is that this is a carbon copy, maybe you
7 can say that, but I say from where I see it, it's not a
8 carbon copy, it's information that is necessary to inform
9 you to understand your environment, but what happened at
10 Impala, it is not a carbon copy of what happened in
11 Marikana.
12 MR MALINDI SC: What I'm suggesting to
13 you, National Commissioner, that the police with the
14 knowledge that from February to July 2012, 12 incidents
15 were reported ranging from public violence, assault, GBH,
16 malicious injury to property, intimidation, attempted
17 murder to murder resulting in nine penal cases being
18 opened, would have been information that the police should
19 have taken into account in planning, even for the first day
20 when the protest was announced as going to commence on 10
21 August 2012, do you agree?
22 MR SEMENYA SC: Chairperson, I think the
23 evidence is different, that inconsistent with the dictates
24 of standing order 262, there was no notice given of this
25 protest, so it was never announced that we are going to

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1 have a protest and this is what we're going to do.
2 MR MALINDI SC: Chairperson, I accept
3 that there was no compliance with the notices as required
4 by the law, but –
5 CHAIRPERSON: The point is there was no
6 notice. I mean, this wasn't the kind of public gathering
7 where the organisers go to the authorities beforehand and
8 give notice and then a plan can be put in place. This
9 wasn't one of those at all, was it? So I think you should
10 reformulate the question to make it unnecessary for Mr
11 Semanya to object again.
12 MR MALINDI SC: I will, Chairperson. If
13 my memory serves me well, General Naidoo, General Kalison,
14 General Mpembe who was on leave during the commencement of
15 this protest on the 9th, have given statements that they
16 were informed by Lonmin that there be a protest on 10
17 August 2012. Are you aware of that information?
18 GENERAL PHIYEGA: General Naidoo was not
19 on leave. General Mbombo was on leave.
20 MR MALINDI SC: Are you aware that
21 certain senior police officers were informed by Lonmin that
22 there will be a protest on 10 August 2012?
23 GENERAL PHIYEGA: Yes, I am aware.
24 MR MALINDI SC: And with the background
25 information that I have referred to in Exhibit L, slide 10,

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

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1 it because I thought sufficiently this matter is in the
2 public, it's open, it's known, and how you see it probably
3 is different from how I see it.

4 MR MALINDI SC: You do indeed appear to
5 be critical of Myburgh's statement because you said in
6 answer to Mr Bizos yesterday about Myburgh's statement –
7 and I hope we have an accurate record of your answer, "What
8 worried me is that this is a warrant-officer talking of a
9 constable, and why I was asking the question I was asking
10 did you see his face, did you see his name badge, and the
11 warrant-officer was senior to the constable and it worried
12 me because he should have shown more responsibility," and
13 you further said, "Every member was required to produce a
14 statement and Myburgh had an opportunity but he didn't say
15 anything in his first statement and waited two months to
16 say something, and then he gave incomplete evidence because
17 he couldn't even name the person." You are critical of the
18 fact that he only came two months after the incident to
19 report this incident that he alleges. Are you not being
20 critical of his conduct?

21 GENERAL PHIYEGA: I'd rather say I'm
22 concerned, I'm not critical. I was concerned, and I mean
23 the conversations we've had yesterday was around whether I
24 considered it very important, and I did say yes, I
25 considered it important, and I confirmed indeed that, those

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1 issues that you are raising.

2 MR MALINDI SC: And did I understand your
3 evidence well yesterday that the fact that Myburgh's
4 allegations are now being looked at by the Independent
5 Police Investigative Division, IPID, does not preclude you
6 from initiating internal proceedings such as disciplinary
7 actions against any police officer who is reported to have
8 misconducted themselves?

9 GENERAL PHIYEGA: Let me say even in
10 policing there is justice. I can't prejudice Myburgh. I
11 must wait for IPID to do their investigation, and they do
12 give us recommendations. We as police are policed, and
13 they give us their recommendations. But on top of that,
14 I've said to you I'm concerned about other things. I am
15 hoping that they would not be addressing issues of warrant-
16 officer and constable issues. Those are internal issues.
17 We will look into those.

18 MR MALINDI SC: That will be a process
19 within the SAPS, if I understand you?

20 GENERAL PHIYEGA: Yes, depending on the
21 outcome, because we are seeking to understand it also.

22 MR MALINDI SC: I would like now to move
23 to the opening statement by the SAPS, which is FFF9, a
24 statement which I'm certain, as you testified, that it was
25 drafted in consultation with you for purposes of presenting

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1 the SAPS case in these proceedings. Could you please look
2 at paragraph 57?

3 GENERAL PHIYEGA: If you'll give me time;
4 I'm still looking for my documents.

5 MR MALINDI SC: Certainly, National
6 Commissioner.

7 MR MAHLANGU: You said the reference is?
8 MR MALINDI SC: Paragraph 57 on page 27
9 of the statement.

10 GENERAL PHIYEGA: We've arrived.
11 MR MALINDI SC: Thank you. The second
12 sentence of paragraph 57 reads as follows. "The policies
13 of crowd control and management have proved inadequate to
14 contain this type of situation. The police service will
15 then have to reconsider its practices, policies, training,
16 equipment, and additional resources, to better help it
17 address future events of this kind. A recommendation along
18 this would therefore be apposite." That's what you
19 recommend to the Commission. Am I correct?

20 GENERAL PHIYEGA: Yes, we have said this
21 was unprecedented.

22 MR MALINDI SC: Now in the spirit of
23 assisting the Commission and openness, were those
24 deficiencies identified to you by the drafters of the
25 statement and through consultations with Mr De Rover?

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1 GENERAL PHIYEGA: In the statement of De
2 Rover and the statement of the experts that you're talking
3 about, and the statements of experts that we had yesterday,
4 all of them really are a medley of inputs that we are going
5 to learn from. At this point in time they are inputs and
6 I'm hoping – I've said that yesterday – at the end of this
7 Commission and the recommendations that are going to come
8 there, are really going to help us shape and deal with the
9 issue that you've raised under 57. At this point in time
10 it's isolated pockets of inputs coming from your expert,
11 coming from my expert, coming from others. We haven't as
12 yet sat down to consider those. De Rover is an expert. We
13 are not telling him what to do. He is making his input and
14 we will engage his input, like all the inputs of the
15 various experts that will be coming to this Commission.

16 MR MALINDI SC: It will be unhelpful to
17 the Commission of you say, we recommend that the Commission
18 makes certain recommendations, without stating what
19 problems, difficulties, deficiencies, that you have
20 recognised. As you sit there, are you able to say to the
21 Commission these are the following matters that as SAPS and
22 as National Commissioner I consider important for the
23 Commission to be aware of in order to help us to be able to
24 deal with this situation and similar situations in future,
25 and in relation to the past experience of tens of thousands

<p style="text-align: right;">Page 7594</p> <p>1 of operations we have conducted? Are you able to say that 2 to the Commission, what the deficiencies are? Or any of 3 the generals and other senior police officers that will 4 testify, do you know if they will be able to be open with 5 the Commission as to what deficiencies they have identified 6 through debriefing sessions, through the session at 7 Potchefstroom for nine days, and in preparation of their 8 statements coming to this Commission? 9 GENERAL PHIYEGA: I do believe that that 10 type of exercise would be important, but when and how is 11 the issue that perhaps at this point in time we haven't 12 sufficiently dealt with. There are snippets of it in the 13 submission, in our presentation, in others. We do touch on 14 some of those things, but that type of exercise has not 15 been entered into precisely because of these deliberations, 16 because there are various inputs that are going to shape 17 things. We don't want to come here with preset thoughts. 18 MR MALINDI SC: If you turn to De Rover's 19 statement, FFF11, are you there, National Commissioner? 20 GENERAL PHIYEGA: Yes, I am. 21 MR MALINDI SC: If you could read 22 paragraph 37, and read it with 92, you will see that he 23 says he was given unfettered access to any and all SAPS 24 information and data related to either directly or 25 indirectly to the Marikana public order incident, and in</p>	<p style="text-align: right;">Page 7596</p> <p>1 Reading paragraph 59, it's clear in the last sentence that 2 he says that the incident at Marikana on the 16th of August 3 2012 alone caused 34 deaths as a consequence of the crowd 4 management operations implemented by SAPS. Then in the 5 second line of paragraph 61 he says, "This operation was 6 one requiring more than incidental use of the firearms." 7 [14:34] Paragraph 62 he says, "For that reason alone I 8 place this operation at Marikana at the very end of the 9 scale of operations SAPS crowd management is capable of 10 handling. In fact, I strongly believe that as the events 11 unfolded leading up to scene 1 on the 16th of August 2012, 12 SAPS were out of their depth and sought to act beyond 13 current capability level." Do you agree with your expert, 14 and our expert will say the same thing, that because the 15 police were out of their depth, that resulted in the 16 unnecessary deaths of the 44 people? Do you agree? 17 GENERAL PHIYEGA: I note what is being 18 said there, and I would contextualise my understanding of 19 what I read here, and perhaps just reading through what he 20 is saying, because you know, if we take those sentences we 21 lose context. In 59 he says, "When I take this track 22 record I totally understand the frustrations, the emotions, 23 and the anger, of SAPS with extensive human force of the 24 operation at Marikana." He then goes to where in the 17 25 years leading up to Marikana, crowd management operations</p>
<p style="text-align: right;">Page 7595</p> <p>1 fairness at paragraph 92 he also states that he has not 2 been able to study all the material, interview all the 3 relevant witnesses, etcetera. Can you see those two 4 paragraphs? 5 MR MAHLANGU: Counsel is reading from 6 paragraph 37? 7 MR MALINDI SC: Paragraph 37 and 92. 8 CHAIRPERSON: Mr Malindi, your thunder 9 was being stolen. What paragraphs are you referring to? 10 MR MALINDI SC: 37 and 92. 11 CHAIRPERSON: 92, thank you. 12 MR MALINDI SC: And with all the 13 information that he has as an expert, and he makes certain 14 observations, you would as SAPS embrace those and want the 15 Commission to consider. We have agreed on that. 16 GENERAL PHIYEGA: I have said that those 17 are inputs, similar to the inputs that are going to be made 18 by the other experts, and those are going to, you know, 19 make up a "potjiekos" of issues that we need to take into 20 account as SAPS. So I wouldn't say we would reject, we 21 would accept, but it's, we have to consider everything that 22 is going to be placed here. He's an expert; others are 23 experts. 24 MR MALINDI SC: What do you say to what 25 De Rover says in paragraph 59, and read it with 61 and 62?</p>	<p style="text-align: right;">Page 7597</p> <p>1 were responsible for 47 deaths. The Marikana incident of 2 the 16th alone, alone, caused 34 deaths as a consequence of 3 the crowd management operations implemented by SAPS, and I 4 read into that the fact that this is an unprecedented 5 matter. If you then go to 60 where you say, "The basic 6 structure of operations implemented at Marikana is the same 7 as those implemented at 18 341 operations prior to 8 Marikana," and this expert asked the question, "So why did 9 they not produce the experience-based results SAPS could 10 expect from the previous applications," and that paragraph 11 again says to me it was unprecedented. 12 CHAIRPERSON: We're having great 13 difficulty in hearing because of the intensity of the 14 storm. I think it's appropriate therefore for us to take 15 the tea adjournment at this stage until 3 o'clock in the 16 hope that by then the answers will be more audible than 17 they've been up to now. I'd like to see Mr Burger and Mr 18 Mpofo in our room during the tea adjournment. 19 [COMMISSION ADJOURNS COMMISSION RESUMES] 20 [15:07] CHAIRPERSON: The Commission resumes. I 21 think we will now be able to hear you, Mr Malindi, or at 22 least I hope we can, and National Commissioner, you're 23 still under oath. 24 MANGWASHI VICTORIA PHIYEGA: s.u.o. 25 CHAIRPERSON: Please proceed, Mr Malindi.</p>

<p style="text-align: right;">Page 7598</p> <p>1 CROSS-EXAMINATION BY MR MALINDI SC (CONTD.):</p> <p>2 Thank you. National Commissioner, are you frustrated and</p> <p>3 angry that the SAPS that Mr De Rover says he considers</p> <p>4 probably the most experienced in the world, was involved in</p> <p>5 an incident whose consequence was, as he says, the</p> <p>6 extensive human cost of the operation?</p> <p>7 GENERAL PHIYEGA: Being a social society,</p> <p>8 those are very strong emotions. Frustrated and angry I am</p> <p>9 not, but I note the significance of what he says in his</p> <p>10 report as an expert, and as I've said, indeed it is</p> <p>11 consistent with our view that this was a very unprecedented</p> <p>12 matter.</p> <p>13 MR MALINDI SC: We shall argue that even</p> <p>14 on your own expert's evidence and your opening statement in</p> <p>15 these proceedings, the deaths, serious injuries, and damage</p> <p>16 to, extensive damage to property that is recorded in</p> <p>17 exhibit L, was as a result of poor planning, poor</p> <p>18 execution, with a disastrous outcome. What do you say to</p> <p>19 that?</p> <p>20 GENERAL PHIYEGA: My answer remains</p> <p>21 consistent; I disagree.</p> <p>22 MR MALINDI SC: I would like now to turn</p> <p>23 to the statement of Mr White, which is WW2. If you are</p> <p>24 with me, I would like you to read on page 4, paragraph</p> <p>25 1.2.4, which reads as follows. "In order to facilitate the</p>	<p style="text-align: right;">Page 7600</p> <p>1 consider them in preparing its report. If we look at</p> <p>2 paragraph 4.2.1 on page 18, his criticism is that you, that</p> <p>3 is the SAPS, refused to engage openly with the Commission</p> <p>4 and concede points, even those considered in your opening</p> <p>5 statement and by Mr De Rover. Is that a fair criticism?</p> <p>6 GENERAL PHIYEGA: Perhaps I don't</p> <p>7 understand, because you know, I've just been here two</p> <p>8 weeks. Is this statement produced this week to say we</p> <p>9 refused to cooperate with the Commission? What is the</p> <p>10 locus standi of what he's saying here? When was it issued?</p> <p>11 MR MALINDI SC: The statement was filed</p> <p>12 in these proceedings on 18 January 2013.</p> <p>13 GENERAL PHIYEGA: And what was the basis</p> <p>14 of this paragraph? Because we have just started on the</p> <p>15 first witness of police.</p> <p>16 MR MALINDI SC: The basis of the</p> <p>17 criticism appears partially, halfway through that paragraph</p> <p>18 with the line that's starting, "On any assessment." Can</p> <p>19 you see that?</p> <p>20 GENERAL PHIYEGA: Ja, I –</p> <p>21 MR MALINDI SC: The line starting 16</p> <p>22 August 2012, and then at the end of that one he says, "On</p> <p>23 any assessment," and remember I told you he has had access</p> <p>24 to the evidence that I read out to you, "On any assessment</p> <p>25 that represents a failure of Public Order Policing, but</p>
<p style="text-align: right;">Page 7599</p> <p>1 task of preparing my evidence I was provided with a large</p> <p>2 body of material stored electronically on a hard drive.</p> <p>3 That evidence included the police presentation to the</p> <p>4 Commission," which is exhibit L, "videos taken between 9 to</p> <p>5 16 August 2012 from a range of sources, relevant policies</p> <p>6 on Public Order Policing, police documentation relating to</p> <p>7 the planning and execution of the various operations,</p> <p>8 witness statements of the police and others relating to the</p> <p>9 incidents, transcripts of proceedings before the</p> <p>10 Commission, and other related material," and then at the</p> <p>11 end he says, "I am advised that I have seen the majority of</p> <p>12 that evidence and I am confident that I have seen enough to</p> <p>13 form a judgment on the appropriateness of the strategy and</p> <p>14 tactics of the SAPS," that extract ending on page 5. Have</p> <p>15 you been reading with me?</p> <p>16 GENERAL PHIYEGA: Yes, I have.</p> <p>17 MR MALINDI SC: I would like to deal with</p> <p>18 his criticisms which appear from page 17, part 4 of his</p> <p>19 report, and as we did with the statement of Mr De Rover, I</p> <p>20 would like to identify the head notes of his criticism so</p> <p>21 that we move on quicker and especially in view of your</p> <p>22 responses to some of the issues that they are operational</p> <p>23 matters and you cannot respond thereto, and I take it too</p> <p>24 that similarly with Mr White, you will embrace his valid</p> <p>25 criticism and you accept that the Commission should</p>	<p style="text-align: right;">Page 7601</p> <p>1 that is particularly the case when the operations are</p> <p>2 assessed against paragraphs 11 of Standing Order 262, which</p> <p>3 states that the success of the operation 'will be measured</p> <p>4 by the results of the operation in terms of cost, damage to</p> <p>5 property, injury, and loss of life.'" Do you accept that</p> <p>6 basis?</p> <p>7 GENERAL PHIYEGA: You know, I think the</p> <p>8 way you started this whole thing I would like to say it's a</p> <p>9 prejudgment; I note it.</p> <p>10 CHAIRPERSON: National Commissioner, may</p> <p>11 I ask you, have you had an opportunity to read the</p> <p>12 statement?</p> <p>13 GENERAL PHIYEGA: No, I haven't.</p> <p>14 CHAIRPERSON: That concerns me because in</p> <p>15 the paragraphs that follow, which I take it Mr Malindi is</p> <p>16 going to take you through, 4.2.2 he makes a general point</p> <p>17 about what one would expect from the public service in the</p> <p>18 aftermath of such a failure, and then he deals with a</p> <p>19 number of criticisms, starting at 4.2.4 and it goes on all</p> <p>20 the way down to 4.2.14 on page 22. So there are,</p> <p>21 effectively it looks as if there are six main heads of</p> <p>22 criticism. Now if you haven't read them yet it's very</p> <p>23 unfair I think to expect you to answer at this stage. So</p> <p>24 Mr Malindi, what would you say if I were to suggest that</p> <p>25 you cease your cross-examination at this stage, we allow Mr</p>

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1 Burger, who I take it isn't going to cover this ground, Mr
 2 Burger assures me he's got a fairly short cross-examination
 3 which should be over by the end of the day, if not the end
 4 of the day, reasonably early tomorrow, and you can then
 5 proceed with your cross-examination. That will give the
 6 National Commissioner the opportunity to read the report,
 7 in particular the paragraphs that I referred to, and she
 8 will be better able, I would have thought, to answer your
 9 questions and you will be better able to put the questions
 10 to her in a way that she readily understands. Would that
 11 be a fair way of proceeding?

12 MR MALINDI SC: It will be a fair and
 13 practical way, Chairperson.

14 CHAIRPERSON: Unless there are other
 15 areas you want to cover now, or would you prefer to do it
 16 the way I've suggested, stand down now, carry on tomorrow
 17 when she's had an opportunity to read the whole report?

18 MR MALINDI SC: Chairperson, I propose
 19 that we do stand down now and I'll also give notice that
 20 the National Chairperson should read the statement of Prof
 21 Christof Heyns and I will refer to the paragraphs that I
 22 would like her to read.

23 CHAIRPERSON: I haven't seen the
 24 statement of Prof Christof Heyns, but perhaps you can make
 25 a copy available to us as well. Oh, they are there. That

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1 will be helpful, so we can all do some homework tonight and
 2 be better able to appreciate the subtleties of your cross-
 3 examination tomorrow. Is that an appropriate way of
 4 putting it?

5 MR MALINDI SC: Indeed, Chairperson. We
 6 will distribute it now and it will be entered into evidence
 7 tomorrow when I resume.

8 CHAIRPERSON: Alright. I fear we're
 9 going to have a long evening this evening, National
 10 Commissioner, you and I, reading this material, but I'm
 11 sure we'll be the better for it tomorrow.

12 GENERAL PHIYEGA: Thank you, Judge.

13 CHAIRPERSON: Alright, so you'll stand
 14 down for the moment, Mr Malindi, and we all - you know,
 15 when I said the National Commissioner and I, I was being
 16 inappropriate because obviously we will all read this
 17 material tonight. Mr Burger, are you ready to cross-
 18 examine?

19 CROSS-EXAMINATION BY MR BURGER SC: Thank
 20 you, Chair. Good afternoon, General.

21 GENERAL PHIYEGA: Good afternoon,
 22 Advocate.

23 MR BURGER SC: My team and I represent
 24 Lonmin in these proceedings. May I assume that as
 25 commander-in-chief of the South African Police Service, and

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1 in view of the seriousness of the Marikana tragedy, that
 2 you treated your preparation to give evidence before the
 3 Commission with care and responsibility?

4 GENERAL PHIYEGA: I have tried to the
 5 best of my ability.

6 MR BURGER SC: As to the statements and
 7 the affidavit to which I would like to draw your attention,
 8 you have at all material times appreciated the importance
 9 of taking the oath in a sworn statement?

10 GENERAL PHIYEGA: It is correct.

11 MR BURGER SC: You would also as a
 12 commissioner of oaths yourself appreciate that if you
 13 depose to an affidavit, one does so in the presence of the
 14 commissioner of oaths?

15 GENERAL PHIYEGA: Yes.

16 MR BURGER SC: And pardon me for debating
 17 something which should be trite between you and I; the
 18 commissioner of oaths himself should have no interest in
 19 the matter addressed in the affidavit?

20 GENERAL PHIYEGA: I'm not certain of
 21 that, but I know that it should be a commissioner of oaths.

22 MR BURGER SC: Let me remind you, and I'm
 23 sure you'll remember that when I remind you, under the
 24 regulations published under the Justices of the Peace and
 25 Commissioners of Oaths Act, and I read to you regulation 7,

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1 sub-regulation (1) says, "A commissioner of oaths shall not
 2 administer an oath or affirmation relating to a matter in
 3 which he has an interest." You remember that now?

4 GENERAL PHIYEGA: I don't remember it. I
 5 note it as you read it.

6 MR BURGER SC: I'd like to understand the
 7 various statements that we've seen, but before dealing with
 8 them in the chronology in which they appear, may I ask you
 9 this? Who drafted your witness statements?

10 GENERAL PHIYEGA: I did, and I took input
 11 from various people.

12 MR BURGER SC: But the drafting itself
 13 was then done by you?

14 GENERAL PHIYEGA: I have said I did, and
 15 I took various inputs from various people.

16 MR BURGER SC: Yes, my question isn't
 17 directed at input. My question is directed a drafting, and
 18 as I understand your answer, your answer is you drafted
 19 your own statements, as well as the affidavits you swore.

20 GENERAL PHIYEGA: I am saying I did, and
 21 I took input from people into my statement.

22 MR BURGER SC: And to the extent that you
 23 handed up statements to the Commission as opposed to
 24 affidavits, may I assume that also a statement signed by
 25 you would indicate to the reader that you've read it before

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1 signing it?

2 GENERAL PHIYEGA: It is true.

3 MR BURGER SC: May I hand up the first

4 statement that we received this side of the table? It's

5 not an exhibit yet; it will become, with the permission of

6 the Chair, FFF25. If I may hand up that document to you

7 and just confirm that this is a document that I believe the

8 evidence leaders received on the 7th of March this year and

9 we on this side of the table received it on the 8th of

10 March.

11 MS PILLAY: Chair, if I may indicate that

12 the next exhibit number is FFF24. It may, however, Chair,

13 make sense if we group it with the other bundle of

14 statements that have been in, so we may mark it FFF2A for

15 example?

16 [15:27] MR BURGER SC: That may be a better plan,

17 Chair. Do you agree if this may be FFF2A? Now General,

18 this is a statement which was prepared to be an affidavit,

19 but it did not materialise as an affidavit; it's only a

20 statement. You'll see on page 9 you signed it in Pretoria

21 on the 7th of March 2013. Is that correct?

22 GENERAL PHIYEGA: Yes, it is.

23 MR BURGER SC: From your evidence thus

24 far we know that you drafted it and you would have read it

25 before you signed it.

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1 GENERAL PHIYEGA: Yes. I did say yes.

2 MR BURGER SC: Sorry?

3 GENERAL PHIYEGA: I have said yes.

4 MR BURGER SC: Thank you. You were in

5 fact careful when you signed this statement. You'll see

6 your initial appears at nearly all the pages.

7 GENERAL PHIYEGA: Except one.

8 MR BURGER SC: Page 7.

9 GENERAL PHIYEGA: Yes.

10 MR BURGER SC: Somebody has gone, taken

11 your statement, and put in an odd-fitting page 7. It

12 doesn't contain your initial and it doesn't follow upon

13 page 6 and it doesn't lead on to page 8. Just take your

14 time and let's agree on that.

15 GENERAL PHIYEGA: I don't agree with

16 that, because it was an omission.

17 MR BURGER SC: It was clearly not an

18 omission. I'm trying to understand the riddle, so let's go

19 slowly. Do you see that page 7 is a misfit? It wasn't

20 there, it couldn't have been there when you signed the

21 statement.

22 GENERAL PHIYEGA: That is what you are

23 saying. It is my statement and I'm saying I, there was an

24 omission in page 7 –

25 CHAIRPERSON: National Commissioner, I

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1 don't think you're understanding the point. What Mr Burger

2 is putting to you is that 7 doesn't fit in and that appears

3 from the fact that if you look at 6, paragraph 21 ends with

4 the line "and thereafter leave the koppie." If you turn to

5 the top of page 7 you will see that the last two lines of

6 21, including the line "and thereafter leave the koppie,"

7 are repeated. So the point that – and then if you look at

8 the bottom of page 7 - sorry, the foot of page 7, you see

9 paragraph 25 ends -

10 GENERAL PHIYEGA: Yes.

11 CHAIRPERSON: The last line reading "hold

12 a press briefing the next day." If you turn over the page

13 –

14 GENERAL PHIYEGA: Yes.

15 CHAIRPERSON: - you'll find that page 8

16 contains at the top –

17 GENERAL PHIYEGA: Yes.

18 CHAIRPERSON: - what must be part of

19 paragraph 26, but the first two lines of 26 aren't there

20 because it starts with the words "address a press

21 conference." So it's quite clear that page 7 doesn't fit

22 in. That's counsel's point. Is that correct, Mr Burger?

23 MR BURGER SC: Indeed that is correct,

24 General, but I'd like to go back to a previous question I

25 asked you.

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1 GENERAL PHIYEGA: Maybe before you go,

2 let's deal with that.

3 MR BURGER SC: Yes.

4 GENERAL PHIYEGA: On page 6 you have 21

5 and the last sentence of 21 is repeated on page 7.

6 MR BURGER SC: Yes.

7 GENERAL PHIYEGA: It is nothing new; it

8 is a repetition, and you go to 22, it is not signed, and I

9 can well say it's either that thing has shifted or it's a

10 typographical error. But there's nothing new been

11 introduced to that page.

12 MR BURGER SC: General, I'm sorry, but

13 your answers are wrong. Let me explain to you why. That's

14 just a point I want to come back to. When you signed the

15 statement, this page 7 did not form part of it, and I say

16 that for two reasons. If you had read the statement, you

17 would never have allowed the misfit page 7 to stay in, and

18 secondly, more importantly, you would have initialled it.

19 This is not an initialled page. So your initialled page 7

20 was taken out. Somebody put in a new page 7. I'll suggest

21 to you presently why. The question I want to ask you is,

22 can you explain this to us?

23 GENERAL PHIYEGA: This is my statement

24 which I submitted on the 7th and you received it on the 8th

25 and it is my original and my first statement and I have

<p style="text-align: right;">Page 7610</p> <p>1 said when I came to this Commission that what I saw is not 2 my statement because when this statement was brought back 3 to me, was that you omitted a page on the statement that 4 you submitted, and that's a statement you received on the 5 8th. You acknowledged that. So if there is any removing of 6 pages and whatever, would I have removed it when I 7 submitted my original statement? And this is my statement, 8 by the way, and I stand by it.</p> <p>9 MR BURGER SC: General, I will submit at 10 the end of this hearing that this is not your statement. 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 13 obvious reasons. I'll give you an opportunity to deal with 14 that argument I will raise, because I want to deal with the 15 second, third and fourth statement now. Do you want to 16 answer the argument that I will address at the end of the 17 day?</p> <p>18 GENERAL PHIYEGA: You can continue, but 19 this is my statement.</p> <p>20 MR BURGER SC: General, I don't 21 understand your answer for the simple reason, if it's your 22 statement, why didn't you initial this page 7 when you 23 signed the statement?</p> <p>24 GENERAL PHIYEGA: Do people not make 25 mistakes?</p>	<p style="text-align: right;">Page 7612</p> <p>1 CHAIRPERSON: I take it Mr Burger is 2 going to deal with that in due course.</p> <p>3 MR BURGER SC: Perhaps my learned friend 4 Mr Semenya will allow me to develop my cross-examination 5 and it may become clear to him as it goes on.</p> <p>6 MS PILLAY: Chair, just for the purposes 7 of the record, I think the exhibit Mr Burger is referring 8 to now is exhibit FFF3.</p> <p>9 MR BURGER SC: My FFF2 is a 10-page 10 document with a commissioner of oaths signing at page 10.</p> <p>11 MS PILLAY: It's dated, the one dated the 12 12th is FFF2 and the one dated the 7th is FFF3.</p> <p>13 MR MPOFU: No, it's the other way around.</p> <p>14 MR BURGER SC: It's the other way around 15 in my book, but my FFF2 according to the record as I read 16 it, is an affidavit signed in Pretoria on the 7th of March 17 2013.</p> <p>18 GENERAL PHIYEGA: That's my statement.</p> <p>19 COMMISSIONER TOKOTA: So is mine, Mr 20 Burger. Mine is also FFF2. That's what I have.</p> <p>21 CHAIRPERSON: It's the same as you.</p> <p>22 MR BURGER SC: General, we can cut across 23 this. The document I'd like to discuss with you is a 10- 24 page statement by you deposed to before a commissioner of 25 oaths in Pretoria on the 7th of March 2013. Do you have</p>
<p style="text-align: right;">Page 7611</p> <p>1 MR BURGER SC: Commissioner, in this 2 Commission I ask the questions and you answer them. So 3 it's unhelpful to ask me whether people make mistakes. May 4 I repeat my question? When you signed the statement, if 5 this page 7 was part of it, why didn't you initial page 7?</p> <p>6 GENERAL PHIYEGA: I did not initial it, 7 that's why it was brought back to me and I initialled a 8 wrong statement, because I was understanding that my 9 statement is this.</p> <p>10 MR BURGER SC: The second version that we 11 have we will find in FFF2, General. If you have a look at 12 that; this is now the document identical to FFF2A, with the 13 following difference. It is now purported to be an 14 affidavit. You go to page 10, you'll see it's signed by a 15 lieutenant-general, who is the deputy national 16 commissioner.</p> <p>17 MR SEMENYA SC: Chair –</p> <p>18 MR BURGER SC: Correct?</p> <p>19 GENERAL PHIYEGA: Yes.</p> <p>20 CHAIRPERSON: Mr Semenya wants to say 21 something.</p> <p>22 MR SEMENYA SC: Chair, sorry to interrupt 23 my learned colleague. Whatever the explanation is, there 24 is though another page 7 of the same document which is 25 initialled.</p>	<p style="text-align: right;">Page 7613</p> <p>1 that document?</p> <p>2 GENERAL PHIYEGA: Yes, I do.</p> <p>3 CHAIRPERSON: Might I interpose by saying 4 there is an element of confusion; there has been for some 5 time, as to which is FFF2 and which is FFF3, so let's 6 finally and definitively establish which is which so that 7 such confusion as there has previously been will no longer 8 exist, because it's obviously not what they call it that 9 matters. What you are referring to, Mr Burger, is a 10 statement dated the 7th -</p> <p>11 MR BURGER SC: Chair, chronologically 12 this one of the 7th of March comes next, FFF2.</p> <p>13 CHAIRPERSON: Yes.</p> <p>14 MR BURGER SC: So if I may suggest that 15 even if it's for the time being, we call this FFF2 and 16 hopefully we can agree at the end of the day that it is 17 correct.</p> <p>18 CHAIRPERSON: Some copies of that 19 document have in the meanwhile been marked FFF3. Those who 20 have them can remark them.</p> <p>21 MR BURGER SC: I'm indebted to the Chair. 22 General, FFF2 suggests to be an affidavit, but if you look 23 at your initials on pages 1 to 6 and on page 8, and your 24 signature on page 9, you'll see it is identical to the 25 first document we look at, the one we've called FFF2A.</p>

<p style="text-align: right;">Page 7614</p> <p>1 That is the same document, but what has happened since then 2 is a commissioner has gone and affixed his signature to 3 page 10 and he's initialled all the pages and of course, as 4 we can expect, on page 7 he has now initialled page 7, 5 still the wrong page but he initials it, you not. Do you 6 see that?</p> <p>7 GENERAL PHIYEGA: Yes, I do. 8 MR BURGER SC: From this follows a number 9 of things. Firstly, you and the commissioner of oaths 10 signed this document at different points in time. 11 GENERAL PHIYEGA: No. 12 MR BURGER SC: But clearly, why didn't 13 you initial page 7 of this one, or was it another slip? 14 How on earth can you and the commissioner be in the same 15 room, sign at the same time, and again you forget to 16 initial page 7?</p> <p>17 GENERAL PHIYEGA: Page 7 in my document 18 is initialled. 19 MR BURGER SC: Yes, only by the 20 commissioner, not by you, General. 21 GENERAL PHIYEGA: I don't know which 22 document you're talking about because the FFF2 I have here, 23 I've initialled page 7. The one that I have not initialled 24 is my original statement and that's why a second document 25 was given to me to say you've omitted to initial page 7.</p>	<p style="text-align: right;">Page 7616</p> <p>1 MR BURGER SC: Yes. 2 CHAIRPERSON: - only initialled by the 3 commissioner – 4 MR BURGER SC: Indeed. 5 CHAIRPERSON: - and not initialled by the 6 witness. 7 MR BURGER SC: Yes. Well, we all have 8 that, I'm told. 9 CHAIRPERSON: Yes, and my two 10 Commissioners have also got a document which they regard as 11 FFF2, it's the one dated the 7th of March, which contains a 12 page 7 only initialled by the commissioner and not 13 initialled by the deponent. 14 MR BURGER SC: That is FFF2, and can I 15 debate that with the witness so that we don't lose time? 16 But I'll ask Ms Pillay to put FFF2 before the witness. 17 CHAIRPERSON: She's not listening to you 18 at the moment; she's talking to Ms Pillay. They're trying 19 to sort out the correct document. So wait for that 20 conversation to conclude before you ask your next question. 21 GENERAL PHIYEGA: - okay, because I don't 22 know, the statements I have are certainly different from 23 yours, and I've got them here. 24 MR BURGER SC: Chair, may I ask whether 25 the -</p>
<p style="text-align: right;">Page 7615</p> <p>1 MR BURGER SC: General, no, we must 2 assist you. I suspect you're being shown the wrong 3 document. I'd like you to have a look at the document 4 which was said to be deposed to on the 7th of March 2013. 5 Is that the document you look at? 6 GENERAL PHIYEGA: I have both of them, of 7 the 7th and of the 12th. 8 MR BURGER SC: If you just look at the 9 7th, did you have the document, on page 9 you signed it in 10 Pretoria on the 7th of March? Do you have that one? 11 GENERAL PHIYEGA: I have – 12 MR BURGER SC: Now keep that one before 13 you, please, General, and go to page 10 of that. Is that 14 the one where the commissioner of oaths was Lieutenant- 15 General Masemola? 16 GENERAL PHIYEGA: You are correct. 17 MR BURGER SC: Now if you go to page 7 18 you'll see there's only one initial on page 7 and that's of 19 the lieutenant-general. 20 GENERAL PHIYEGA: Not on my document. 21 MR BURGER SC: Chair, then I've got a 22 riddle here. I've got a document with page 7 without the 23 initials of the witness on it. 24 CHAIRPERSON: You've got a copy, you're 25 saying, of page 7 –</p>	<p style="text-align: right;">Page 7617</p> <p>1 CHAIRPERSON: I would suggest that a copy 2 of FFF2 with – that's the statement dated the 7th of March, 3 which – I understand Ms Pillay has left it on the table. 4 Is that correct? We were going to give you one of ours, 5 but if it's there already we withdraw our offer to give it 6 to her. 7 MR BURGER SC: Thank you. General, I 8 hope you have the correct now because I can't have a 9 meaningful debate with you if you have a wrong document. 10 Can I just now make sure that you have a document, an 11 affidavit by you marked FFF2? 12 GENERAL PHIYEGA: Remember the documents 13 I have, I was given and I marked them FFF2 and whatever, 14 and clearly this document and the documents I'm having, 15 we're not talking about the same documents. 16 MR BURGER SC: General, will you bear 17 with me for a while? Do you have a document in front of 18 you marked FFF2? 19 GENERAL PHIYEGA: It would help you, 20 Advocate, to understand that I have a FFF2; I have a new 21 FFF2 that I've been given now – 22 MR BURGER SC: Please take the new FFF2. 23 Put away all the other FFFs. Just put the new FFF2 before 24 you because that's the second stage of my debate. There 25 are only four stages. Bear with me, let's do stage 2 now.</p>

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1 GENERAL PHUYEGA: But I'm sorry, I'm
 2 sorry about this, then we don't have a common conversation,
 3 because I have -
 4 MR BURGER SC: Now we will.
 5 GENERAL PHUYEGA: I have statements here.
 6 You have to say to me why my statements are wrong.
 7 CHAIRPERSON: He doesn't have to say
 8 anything to you. He's going to ask you questions and you
 9 must answer them. So just relax. I understand you've got
 10 a number of statements and that's causing the trouble.
 11 What Mr Burger says to you is please get hold of the new
 12 FFF2 that you've been handed, hang on to that; ignore all
 13 the others for the moment.
 14 GENERAL PHUYEGA: Okay.
 15 CHAIRPERSON: Concentrate on that while
 16 he asks you questions in what he calls stage 2. Is that
 17 what you want to happen, Mr Burger?
 18 MR BURGER SC: Absolutely. General, I'm
 19 going to try again now.
 20 GENERAL PHUYEGA: You can try.
 21 MR BURGER SC: If we can have eye
 22 contact. Do you have the new FFF2 now in front of you, the
 23 statement dated 7 June where page 7 – 7 March, where page 7
 24 only has the initial of the commissioner of oaths? Do you
 25 have that?

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1 GENERAL PHUYEGA: Yes, I see that.
 2 CHAIRPERSON: National Commissioner,
 3 please forgive me, but I think you've got the other one in
 4 front of you as well. It's only going to confuse you.
 5 Just concentrate on the new FFF2 and then, and you won't be
 6 confused by another document in front of you. I think
 7 that's what you want, Mr Burger. Is that right?
 8 MR BURGER SC: Indeed. I'll be indebted
 9 if the learned General will give effect to that request
 10 because then we can get on. So General, FFF2 is the same
 11 document we have as FFF2A, but it's now suggesting to be an
 12 affidavit and that we see from page 10 where the
 13 lieutenant-general has signed it, and I've put to you that
 14 you and the commissioner were not signing at the same point
 15 in time, for two reasons. The first reason is, we know
 16 that you've signed FFF2A, the statement, because we've
 17 already seen that.
 18 [15:47] That was a statement, and that had been signed
 19 already by the time that the commissioner affixed his
 20 signature and names to page 10, and the second reason why I
 21 say that is he initialled all the pages and he of course
 22 initialled page 7, but we know you never initialled page 7.
 23 That's another reason why we know you weren't there when he
 24 suggests to the outside world he took the oath from you.
 25 Do you want to comment on that?

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1 GENERAL PHUYEGA: I think my issue still
 2 remains; I really would like to understand these documents
 3 because the documents you have, the documents I have, even
 4 if I concentrate on this one, my answer I don't have.
 5 MR BURGER SC: Okay. The third reason
 6 why I suggest you weren't with the commissioner when it is
 7 suggested you took an oath is I would have thought when you
 8 depose to an affidavit you would read the document before
 9 you take the oath. Now you couldn't have read this
 10 document because page 6 doesn't lead on to page 7, and page
 11 7 doesn't lead on to page 8. We've got the same old
 12 problem, and we know you read statements before you take an
 13 oath before this Commission because you understand the
 14 seriousness of the matter.
 15 GENERAL PHUYEGA: I do want to say my
 16 statement of the 7th that I submitted I have read, I have
 17 come to this Commission to say the statement that was
 18 presented was not my statement, that's why my lawyer
 19 corrected it, because I said I submitted the statement on
 20 the 7th. All I knew is that I hadn't signed page 7, it was
 21 brought to me, I signed, and I had read my statement.
 22 Whether there were errors or not, it's another story.
 23 CHAIRPERSON: Mr Burger is busy with
 24 another point. He's suggesting to you that when you signed
 25 your statement on the 7th you didn't do so in the presence

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1 of the commissioner of oaths and you didn't – am I correct?
 2 MR BURGER SC: Indeed.
 3 CHAIRPERSON: And you didn't swear that
 4 the statement was correct before the commissioner of oaths.
 5 That's what he's putting to you.
 6 GENERAL PHUYEGA: In my statement, the
 7 one that I have, and I'm saying I'm very confused by all
 8 this bits and pieces of papers. In my statement there is a
 9 commissioner of oaths.
 10 MR BURGER SC: Yes, and my point is a
 11 different one –
 12 GENERAL PHUYEGA: My statement of the 7th.
 13 MR BURGER SC: My point is a different
 14 once, General. The commissioner of oaths reports to you;
 15 he shouldn't take your oath, and secondly, you weren't in
 16 the same room when he signed and that I've given you three
 17 reasons for and I haven't had a response to it yet.
 18 GENERAL PHUYEGA: If there is an error in
 19 terms of using a commissioner of oaths reporting to me,
 20 I'll accede to that, but he is a commissioner of oaths,
 21 that's why I asked him to do it for me.
 22 MR BURGER SC: General, but when you
 23 signed, he didn't take your oath. That's the more serious
 24 criticism I have of this document, because you weren't
 25 there at the same time.

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1 GENERAL PHIYEGA: Advocate, you are
 2 saying that, but I'm saying I took this oath with General
 3 Masemola.
 4 MR BURGER SC: Why then did you swear
 5 that you read the statement, which you haven't read?
 6 Because we know the statement doesn't make sense. Any
 7 basic reader of English understands there is a page being
 8 slipped in which doesn't fit.
 9 GENERAL PHIYEGA: I had read the
 10 statement and if printing or whatever mistake happened,
 11 it's another thing, but I read the statement and it doesn't
 12 change the meaning in any case.
 13 MR BURGER SC: And why didn't you initial
 14 page 7?
 15 GENERAL PHIYEGA: I did say it was an
 16 omission, that's why it was brought back to me.
 17 MR BURGER SC: No, but the omission was
 18 on FFF2A. Do you suggest to the Commission that you made
 19 this mistake twice?
 20 GENERAL PHIYEGA: No. On the statement I
 21 have it is signed. That's why I'm saying I don't know
 22 where this document you are, you bring to me. The
 23 statement I have here that I was given on Monday, it's got
 24 everything signed.
 25 COMMISSIONER HEMRAJ: General, are you

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1 saying that you're in possession of a statement signed –
 2 GENERAL PHIYEGA: That was signed, yes,
 3 on page 7.
 4 COMMISSIONER HEMRAJ: No, no, signed on
 5 the 7th?
 6 GENERAL PHIYEGA: On the 12th.
 7 MR BURGER SC: Yes.
 8 COMMISSIONER HEMRAJ: Yes, that's the
 9 difference. The debate at the moment revolves around the
 10 statement that's been signed on the 7th, not the 12th.
 11 GENERAL PHIYEGA: And I have said the
 12 statement on the 7th, indeed I did omit signing page 7.
 13 What brings the statement of the 12th, was for me to be able
 14 to sign that, all the pages, and it is where the mistake
 15 then happens, then I come back to this Commission to say my
 16 statement is the statement of the 7th. It is on the basis
 17 of that that then my lawyer corrects the statement of the
 18 12th to say that this statement of the 12th doesn't
 19 represent what I submitted to on the 7th.
 20 MR BURGER SC: General, you're
 21 anticipating the debate. You now refer to versions 3 and
 22 4. I'm going to deal with them carefully and they will
 23 increase the riddle. I'm simply at riddle 2 still. I'm
 24 only at FFF2, and I don't have an explanation - I'm going
 25 to go on now - I don't have an explanation for you not

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1 initialling page 7, not reading the document, and using a
 2 document which had been previously signed by you, which is
 3 now supposed to be taken an oath of by a commissioner who
 4 reports to you. I don't have any answer to that.
 5 GENERAL PHIYEGA: You do have an answer,
 6 and my answer is my statement is the statement of the 7th.
 7 Whether it was mistakes or whatever, it's another issue,
 8 and on the statement of the 7th I omitted to sign page 7,
 9 and the statement of the 12th, I then say to this Commission
 10 it doesn't represent my statement that I've submitted and
 11 we made corrections on the basis of my statement of the 7th.
 12 MR BURGER SC: Let us see what you say in
 13 version 2 on page 7, that page which is troubling us so
 14 much. May I read with you paragraph 23 –
 15 CHAIRPERSON: Mr Burger, you're still
 16 busy with the 7th of March?
 17 MR BURGER SC: Yes, yes indeed.
 18 CHAIRPERSON: The witness has referred to
 19 the 12th of March, but I understand you're going to be
 20 dealing with that later.
 21 MR BURGER SC: I'm going to deal with
 22 that later, Chair.
 23 CHAIRPERSON: You're concentrating at the
 24 moment on the two statements dated the 7th –
 25 MR BURGER SC: Indeed.

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1 CHAIRPERSON: - one which is FFF, which
 2 is now anyway, FFF2, and the other is FFF2A.
 3 MR BURGER SC: Correct.
 4 CHAIRPERSON: And FFF2A is the document
 5 which the witness has signed –
 6 MR BURGER SC: Correct.
 7 CHAIRPERSON: - and initialled, except in
 8 respect of page 7.
 9 MR BURGER SC: Correct.
 10 CHAIRPERSON: And it is not signed by the
 11 commissioner –
 12 MR BURGER SC: Correct.
 13 CHAIRPERSON: - on page 10, and not
 14 initialled by the commissioner on any of the pages.
 15 MR BURGER SC: Correct.
 16 CHAIRPERSON: That's 2A.
 17 MR BURGER SC: That is the document which
 18 is used in FFF2 to become, so we're told, an affidavit, the
 19 identical document, there's just a commissioner, FFF2 is
 20 that document which has now got the imprimatur of a
 21 commissioner, so we're told. He initials all the pages and
 22 he signs on the last page and I've had that debate with the
 23 witness now. That's where we are.
 24 CHAIRPERSON: Have you finished then with
 25 the events of the 7th of March?

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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 MR BURGER SC: No, but General, it's
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.

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1 MR BURGER SC: Paragraph 23. There you
2 say, "On the afternoon of August the 16th, 2012, I received
3 a call from Lieutenant-General Mbombo who informed me of
4 the decision to implement a dispersal operation of the
5 plan." Was that correct?

6 GENERAL PHIYEGA: That is correct.

7 MR BURGER SC: Was that the full truth?

8 GENERAL PHIYEGA: It is the truth. I
9 have said so.

10 MR BURGER SC: And in paragraph 24 on
11 this same page, I just have to read you the last sentence,
12 you say, "I then related the same information," this is now
13 after the tragedy, "I then related the same information to
14 the Minister of Police telephonically and advised him that
15 I shall be attending to the matter personally." Is that
16 true, and is that the whole truth?

17 GENERAL PHIYEGA: Yes, it is.

18 MR BURGER SC: Perhaps we can tomorrow
19 start dealing with version 3, Chair.

20 CHAIRPERSON: The Commission will adjourn
21 until 9:30 tomorrow morning.

22 [COMMISSION ADJOURNED]

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