

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 73 5 APRIL 2013 PAGES 7773 TO 7848

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 5 APRIL 2013]
 2 [09:33] CHAIRPERSON: The Commission resumes.
 3 You're still under oath, National Commissioner. Mr Mpofo.
 4 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 5 Thank you Chairperson. General, because we have a limited
 6 amount of time today what I propose to do is to just finish
 7 with the topic that we were dealing then I'll go slightly
 8 back to tidy up some of the issues we dealt with yesterday.
 9 Just so that we can put those to bed but when we come back
 10 we deal with other matters and then if we time I'll deal
 11 with one or two short topics before - Now but what I need
 12 to do - oh and before we part I'll then give you a kind of
 13 outline of where I will go with you towards the end of my
 14 cross-examination so that during the break you can apply
 15 your mind to some of the issues. Right, now going back to
 16 the - what I'm going to do is I'm just going to ask that
 17 you look at screen. There'll be a series of photos which
 18 are going to be shown which may require a warning,
 19 Chairperson. It's not going to be long and then I'll ask
 20 you or rather I'll premise some of my questions on those
 21 photos.
 22 CHAIRPERSON: I was warned that certain
 23 video clips are going to be shown which will show pictures
 24 of people who were killed in the events of the 16th August
 25 and if there are members of the family or persons close to

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1 those people in the auditorium they may find that looking
 2 at the pictures causes them distress and unhappiness. In
 3 the second status I'm going to ask that those clips not be
 4 shown until two minutes have elapsed after what I have just
 5 said is translated so that those people who wish to leave
 6 the auditorium while those clips are being shown will have
 7 an opportunity to do so.
 8 MR MPOFU: Yes and Chairperson and
 9 Commissioners these photographs are Exhibit K or form part
 10 of Exhibit K but that's the reference ja.
 11 CHAIRPERSON: I said they relate to the
 12 16th so I take it that's correct because they don't relate
 13 to the 13th or any other day.
 14 MR MPOFU: The 16th and scene two thank
 15 you Chairperson. Okay Ja. I can't see it myself but
 16 insofar as you are able to see, are you able to see, I can
 17 see we are both challenged. Are you able to see this
 18 photograph, General?
 19 GENERAL PHIYEGA: I see an image, not
 20 detail.
 21 MR MPOFU: Okay not detail. Alright in
 22 any event you don't have see the detail. Okay you can play
 23 the next one. Okay that's picture 245 at the bottom, if
 24 you can concentrate on that one. Okay next one.
 25 GENERAL PHIYEGA: This is better.

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1 MR MPOFU: Yes okay thank you. Okay next
 2 one. Okay next one. Okay next one, next one. Next one.
 3 Ja on this one, General, if you just notice specifically
 4 the fact that the - and this was already admitted by
 5 Captain Mohlaki, that the picture at the bottom seems to
 6 have been taken during daylight and the other one in the
 7 evening. Okay next one. Next one. Okay again here you'll
 8 see the picture at the bottom of daylight, clearly in
 9 daylight and the other one in the evening. Okay that's
 10 fine. That's fine. Next one. Another daylight and
 11 evening contrast. Next one, next one. Ja and this one in
 12 particular which is an evening photo, if you can just
 13 observe the, I think the panga with the yellow handle, next
 14 to hand of the person, okay next slide. And that one which
 15 is picture 271 is probably the clearest of what I want to
 16 illustrate. Where you see the daylight photos at the
 17 bottom 270 and 271 and the evening photo above the two
 18 photos, you look at daylight photos without the panga and
 19 the evening photo with the panga. Okay, alright I think
 20 the image that we have now illustrates more clearly the
 21 general point. It was made in more detail by Mr Madlanga
 22 but I don't want to redo that because it was already done
 23 for the Commission. Okay, thank you very much.
 24 CHAIRPERSON: For the sake of the record
 25 and those in the immediate future and possibly the more

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1 distant future who read the transcripts of these
 2 proceedings it might be helpful to say what - give the
 3 photograph numbers. I'm not sure that we've seen all these
 4 but if I'm assured that we have I accept the assurance but
 5 in any event perhaps you could give the photo numbers so
 6 people who, as they read the record will know what exactly
 7 you've shown.
 8 MR MPOFU: Okay. Chairperson, yes. For
 9 the purposes of this part of the record I will use only
 10 this image. So I'll define what it is and then I'll give
 11 references of the other relevant photos
 12 CHAIRPERSON: What you showed were a
 13 number of bodies, each identified by letter, what we saw
 14 first was a picture, it looked like a piece of paper on a
 15 body with a letter written on it and that was followed by a
 16 picture, two pictures essentially. One taken I think by
 17 Warrant Officer Henderson during the day which showed that
 18 the weapons, if there were any, had been removed and the
 19 subsequent picture we saw was a picture taken at night
 20 that's to say subsequently when the weapons had been either
 21 put back or had been put there, it may be a debate exactly
 22 what happened, but that's what we saw so if we could just
 23 run through the pictures and just record what bodies there
 24 were I think is probably the easier way to do it and what
 25 the photograph numbers are then the record will be

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1 complete.

2 MR MPOFU: Thank you, Chairperson.

3 Alright and I'll give more detail again on the last ones

4 because as I said I'm using that to illustrate. Okay can

5 you start again, start it quickly.

6 CHAIRPERSON: The first one is J, body J,

7 also a body I.

8 MR MPOFU: I and J yes.

9 CHAIRPERSON: I and J.

10 MR MPOFU: Yes .

11 CHAIRPERSON: And then we see, the

12 daylight picture is 245.

13 MR MPOFU: 245 ja. Those are the only

14 ones that have picture numbers.

15 CHAIRPERSON: Yes.

16 MR MPOFU: Yes. Okay move on. And then

17 okay that one has no number, Chair.

18 CHAIRPERSON: It's because they're night

19 time pictures. The next one is 268 and the two pictures,

20 the two daytime pictures are 244 and 268.

21 MR MPOFU: That's correct, Chairperson.

22 Next one.

23 CHAIRPERSON: Then we have body K which

24 also is described as body 11.

25 MR MPOFU: And the next picture will be

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1 248, I think that's still body K, Chairperson.

2 CHAIRPERSON: Yes I see, yes alright. 248

3 is a daytime picture.

4 MR MPOFU: That's correct, next one.

5 CHAIRPERSON: The next one is body N,

6 otherwise known as body Four.

7 MR MPOFU: An evening picture.

8 CHAIRPERSON: Yes and there are two

9 daylight pictures 230, that's 230 and 231.

10 MR MPOFU: Thank you, Chairperson. Next

11 one.

12 CHAIRPERSON: Then we have body O,

13 otherwise known as body 30, night time picture first and

14 then -

15 MR MPOFU: Yes next one.

16 CHAIRPERSON: The two daylight pictures

17 278 and 279 and above them the night time picture again.

18 MR MPOFU: Thank you, thank you, Chair.

19 Next one.

20 CHAIRPERSON: Then body M otherwise known

21 as body 13, that's the one where the hand of the deceased

22 is actually on what is described as a yellow handled panga.

23 MR MPOFU: Correct.

24 CHAIRPERSON: That's the night time

25 picture. The daytime pictures below are 270 and 271.

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1 MR MPOFU: Thank you, Chairperson, thank

2 you very much. I'm indebted to the Chairperson. Now,

3 General, effectively the picture, sorry I didn't mean to -

4 the theory, let me put it that way that is being perceived

5 by these pictures is that as the Chairperson summarised,

6 the daylight pictures of the same body would not have

7 weapons and the evening pictures do have weapons and there

8 can only be two explanations. One is the one that we

9 contend for which is that the weapons were planted there on

10 the bodies but obviously another possibility which is that

11 they were removed at some stage and replaced which as I

12 understand is what SAPS - is the theory that SAPS is

13 contending for. So are we together so far?

14 GENERAL PHIYEGA: Yes.

15 MR MPOFU: Thank you. Now as I

16 understand it the report and you'll correct me if I'm

17 wrong, in essence says that at scene two at some stage in

18 order to facilitate the work of the paramedics the weapons

19 were removed and at a later stage they were replaced. I'm

20 obviously cutting some of the detail but that's the essence

21 of the report. Would you agree with that?

22 GENERAL PHIYEGA: Yes, I do.

23 MR MPOFU: Now before I deal with the

24 criticisms of the report I want maybe you and I just to

25 agree on the following issues. That unless there is a

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1 plausible explanation for what we have seen it would

2 represent an unlawful and highly irregular interference

3 with a murder scene, absent an acceptable explanation.

4 Would you at least go along with that? I think even myself

5 as not a policeman would be able to make that statement.

6 GENERAL PHIYEGA: I would go along with

7 that.

8 MR MPOFU: Thank you and that issue which

9 you and I have agreed on is what caused the local and

10 international uproar about the possibility of tampering

11 with evidence. Would you agree?

12 GENERAL PHIYEGA: I haven't followed

13 that, the international uproar, but I know that it is

14 something that also made me request the investigation.

15 MR MPOFU: Correct. Yes of course and

16 you don't have to agree with this one but if that is so at

17 least it gives us room, let me put it that way, to argue

18 which we will, that that activity, absent a plausible

19 explanation would amount to an admission of guilt because

20 innocent people don't usually interfere with the evidence.

21 GENERAL PHIYEGA: You've already answered

22 for me, I would not agree.

23 MR MPOFU: Yes. And that it would also

24 at the very least open the way for us also to argue that at

25 least as far as scene two is concerned is where these

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1 pictures were taken, that the defence, of such defence was
 2 an after thought in a sense that only after the people
 3 would have been killed would someone have thought oh well
 4 we have to make it look like we were defending ourselves by
 5 placing weapons but it would at the very least open the way
 6 for us to argue that absent a plausible explanation.
 7 GENERAL PHIYEGA: I would also not agree
 8 with that.
 9 MR MPOFU: Yes. Okay. Now -
 10 CHAIRPERSON: National Commissioner, do
 11 you say you wouldn't agree with that? He's putting it on
 12 the basis of absence a plausible explanation and there are
 13 two possibilities. One is a policeman came along and he
 14 said look here this is a serious matter, the paramedics are
 15 dealing with the wounded, it's dangerous to expect them to
 16 work among weapons because people could attack them. So
 17 I'll take them away, I'll remember carefully where they are
 18 and when it's all over I'll put them back and providing he
 19 did that, provided we can rely on the fact that he
 20 remembered correctly where they were and put them back in
 21 the same place there's no problem. That's what Mr Mpofo
 22 calls a plausible explanation but absent a plausible
 23 explanation if that isn't the case then it's a
 24 contamination of the murder scene and the question will
 25 arise why is the murder scene contaminated. Now I take it

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1 there are two possibilities, the one is it was done with
 2 evil intent, to create a false case against the people.
 3 The other is just monumental inefficiency. Would you agree
 4 with that? It's either absent a plausible explanation,
 5 it's either monumental inefficiency and stupidity on the
 6 one hand or if it's more sinister it's an attempt to create
 7 a false impression, adverse to the protestors and obviously
 8 favourable to the police, I take it that must be right
 9 surely?
 10 [09:53] GENERAL PHIYEGA: I think, Judge, what
 11 we, the issue that we're discussing, fortunately we're not
 12 starting with, it's not a leading supposition because there
 13 is work, there is reports, there is information and I'm
 14 actually responding based on the information that is, if it
 15 was a Greenfield's matter maybe I could deal with that
 16 supposition in the manner that you are putting. But now
 17 I'm saying I have assistant to look into matters, there are
 18 some facts before me. So on the basis of that I would not
 19 agree.
 20 CHAIRPERSON: Okay. I'm not sure whether
 21 it's as easy as that. But you had people looking into it,
 22 recommended there. They spoke to the participants and they
 23 got an explanation.
 24 GENERAL PHIYEGA: Yes.
 25 CHAIRPERSON: Now the participants aren't

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1 likely to say we did it deliberately to create a false
 2 impression, they won't say that to your investigator, will
 3 they? Then even, and I say, we're inefficient, we, they
 4 will have to say we remembered where they were taken from,
 5 we took them away and we put them back in the same place,
 6 isn't that so? So the correctness or otherwise of the
 7 results of your investigation well in this case you did,
 8 depends upon the credibility of the people who were
 9 interviewed, is that correct?
 10 GENERAL PHIYEGA: I do agree with that.
 11 CHAIRPERSON: Ja.
 12 GENERAL PHIYEGA: And also some of the
 13 expert information that we received and the people who were
 14 doing the examination, because the statements that I saw in
 15 this report that I received from the commission has got all
 16 these statements, has got expert information, has got
 17 information of the paramedics and I'm saying it's not an
 18 area where we are just supposing. There is information and
 19 on the basis of that I am saying there is possibility or
 20 non possibility, it's a judgment issue.
 21 MR MPOFU: Yes, just so that we are
 22 clear. When you refer to experts evidence you're referring
 23 to the fact that some of the medical personnel says that,
 24 in terms of their conventions and all that, they then
 25 prefer to work with injured people when there are arms

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1 around, which is understandable. Is that what you are
 2 referring to?
 3 GENERAL PHIYEGA: Yes there is a report
 4 from the doctor, she doesn't talk about preferences, she
 5 talks about convention.
 6 MR MPOFU: Yes. Yes okay. That, we may
 7 just get that out of the way. I accept that, I accept the
 8 conventions and I think they make sense as I say even to a
 9 lay person. But I'm going to argue that that is not the
 10 reason why the arms were removed, so it's just that you
 11 understand where I'm going with this.
 12 GENERAL PHIYEGA: I accept your argument
 13 but I also, that's why I'm saying, I gave you the response
 14 that I gave you.
 15 MR MPOFU: Ja.
 16 GENERAL PHIYEGA: Based on the body of
 17 the information that is before me to, so I also have others
 18 position.
 19 MR MPOFU: Ja and one of the reasons why
 20 I'm going to demonstrate to you that there's no causal
 21 connection, as we lawyers call it, between those
 22 conventions and the removal of the arms is the, is the fact
 23 that, to show that there's no connection between the two
 24 is, and you can take my word on this, because I don't want
 25 to have to play the videos. Is that the removal of arms

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

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

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

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

17 CHAIRPERSON: Mr Mpofo, there's substance
18 in that point. Mr Mpofo, may I ask you where we're getting
19 with this cross-examination. The witness wasn't there, the
20 witness commissioned a report, she received. You're
21 questioning her about the report, she, I think indicates
22 that she accepts the report. Well that doesn't bind us, we
23 are in as good of a position, with respect, that she is to
24 decide what the fact of the matter were. So I don't want
25 to stop you unduly but I mean you had not helped taking us

1 very much further forward at this point. There are two
2 other points to be borne in mind. The one is that, unless
3 it's suggested the police brought the weapons and planted
4 them afterwards which I take it is not suggested, we have
5 to accept that all those weapons were there and were in the
6 possession of some at least of the strikers. The only
7 relevance would be, I take it, that a particular striker
8 might, on your version, be falsely incriminated as the
9 possessor of a dangerous weapon if in fact a weapon was put
10 in his hands and in fact he didn't have a weapon at the
11 time. But if he didn't have it somebody else did. So I
12 understand the relevance of the point in relation to
13 individual strikers that weapons were in their hands,
14 either before and they weren't removed and replaced again
15 in the same place afterwards or, if they didn't have
16 weapons at all and they were put there afterwards, that the
17 only relevance of the point as I see it.

18 We also have a slide 252 that I want to ask Mr
19 Semenya about, it looks to me like a daytime slide, in
20 other words, and I'd be interested to know whether that was
21 one of Warrant Officer Hendrickson's slides because if it
22 was it does indicate a scene in the day time where there
23 were weapons at koppie 3 in the close vicinity of deceased
24 protestors, but again the fact it would be borne in mind
25 when one assesses this whole question. But at this stage

1 its certainly open to be argued at the end if the evidence,
2 if there's evidential basis for it, that the removal of the
3 weapons and their replacement was possibly not as it should
4 have been because weapons may be put in the hands of people
5 who weren't holding weapons before hand and the other
6 question of course is circumstances in which this removal
7 or replacement was revealed or communicated to the evidence
8 leaders, that would be another aspect of evidence and basis
9 for argument. But I think we mustn't spend to much time on
10 an issue with this witness because with all due deference
11 and respect to her she can't throw very much light on this,
12 herself. Commissioner Hemraj pointed out to me that, this
13 is almost a response to what Mr Semenya said. There is a
14 video showing the police removing a firearm from the scene
15 pretty soon after the events.

16 MR MPOFU: Chairperson, there is and
17 that's, let me start with Mr Semenya's objection. If I'm
18 forced to play that video I will, not now because it's not
19 ready, but I would have thought that Mr Semenya has seen
20 the videos of the police immediately, when we are dealing
21 with Magidiwana's evidence for example, you'll remember his
22 evidence about the removal of the stick, we've seen all
23 that and there's no suggestion at that stage that, that the
24 paramedics were there. But even if there was remember,
25 Chair, that Captain Mohlaki testified that he arrived there

1 and when he arrived the pile was already there and there
2 were certainly no paramedics at that stage. So that's
3 evidence that has been led in this commission, which as I
4 say I can go and dig it up on the record or play the videos
5 I would have thought those are issues that side.

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

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

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

25 MR MPOFU: Okay. Chairperson, can I deal

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

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

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

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1 CHAIRPERSON: And the, he was the one, I
 2 think he's part of the K9 group, so he actually had a dog
 3 with him.
 4 MR MPOFU: From Vereeniging.
 5 CHAIRPERSON: Which he says that's why he
 6 couldn't keep notes because, make notes because he had to
 7 keep his dog under control.
 8 MR MPOFU: Yes.
 9 CHAIRPERSON: And he does say, he doesn't
 10 say, this is para 7 of his statement, he doesn't say when
 11 precisely he removed the weapons, he does say that he then
 12 put them back and in paragraph 10 he says that he puts them
 13 back as well as he could remember.
 14 MR MPOFU: Yes.
 15 CHAIRPERSON: And he says he didn't make
 16 notes because he had to keep his dog under control and he
 17 says he may have made a mistake with the correct or precise
 18 place, position of the weapon, he could also have made the
 19 mistake in relation to the exact weapon that he put down.
 20 MR MPOFU: Yes in one case he says he
 21 put, he put less than what he found.
 22 CHAIRPERSON: We don't have to debate all
 23 that now. The point you're making to a very large extent
 24 depends upon how accurate he was, he already admits that he
 25 may well have not been accurate but, so I'm not quite sure

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1 how much advantage we're going to derive from a detailed
 2 cross-examination on this point with this witness whose
 3 answers are going to be hearsay in any event. But I'm not
 4 going to stop you at this stage but I just indicated to you
 5 that I would be, prefer evidence that we can use later with
 6 profits rather than evidence that we can't, it sounds to me
 7 that we're going to get.

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

18 CHAIRPERSON: No, no I accept that.

19 MR MPOFU: Yes.

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

23 MR MPOFU: No.

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

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1 [10:13] MR MPOFU: Chairperson, it's her as a
 2 National Commissioner, I'm testing the National
 3 Commissioner of this country who has instituted a
 4 particular report into serious allegations as to whether it
 5 is proper or improper for her to accept a particular
 6 report. That's the one. The secondary question of what
 7 the Commission will do with it.

8 CHAIRPERSON: That's a matter you can
 9 deal later.

10 MR MPOFU: Thank you.

11 CHAIRPERSON: Let's just hear your
 12 question again so that if Mr Semenya persists in his
 13 objection, he'd have an opportunity to object and I then
 14 have to make a ruling.

15 MR MPOFU: Yes. And this is what I
 16 wanted to clarify, Chair, before Mr Semenya decides whether
 17 he persists or not. This is what I wanted to - on the
 18 issue, and I think at least between myself and the
 19 chairperson there's one point that has been missed. The
 20 only reason I'm questioning this witness about what
 21 happened at scene 1, when we all know that the report deals
 22 with scene 2, is to make the following simple point, that
 23 the removal of the weapons at scene 1 could not have had
 24 anything to do with whatever the paramedics had asked for,
 25 and therefore if the removal at scene 1 is unconnected to

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

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

8 MR MPOFU: Ja, I promise.

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

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

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

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1 presence?" Captain Mohlaki, "That's correct, Sir."

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

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

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

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

23 MR MPOFU: Ja.

24 CHAIRPERSON: And if the witness,
 25 whatever answer the witness gives, will depend upon whether

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1 firstly, the hypothesis is correct –

2 MR MPOFU: Of course.

3 CHAIRPERSON: And secondly, is her

4 response to the hypothesis going to help us to make

5 findings at the end of the day?

6 MR MPOFU: Yes, Chairperson, it will make

7 you accept or not accept the fact that the report that she

8 has accepted, as National Commissioner, has got the flaws

9 that I'm about to point out, one of which is the one we're

10 exploring now.

11 CHAIRPERSON: I understood you relying on

12 Captain Mohlaki's evidence, and the passages that Mr

13 Semenya has read appear to indicate that Mr Mohlaki doesn't

14 say what you said he said.

15 MR MPOFU: No, Chairperson, I'll just

16 move on to the next point. I was just I think –

17 CHAIRPERSON: I don't want to hamper you

18 from making a point –

19 MR MPOFU: Well, Chairperson, I rely on

20 videos, I've said, I rely also on Captain Mohlaki, if one

21 of them happens to be debatable, I am not in a position now

22 to play the videos or to deal with whether Mr Mohlaki's

23 references were to scene 1 or scene 2 and all that, and

24 that's why I'm putting it as a proposition. If indeed that

25 proposition is wrong, then we would, in two minutes, be out

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1 of this point and whatever I'm going to ask will be

2 superfluous.

3 CHAIRPERSON: The problem that I have, if

4 we're putting a hypothesis as to what Mr Mohlaki said,

5 which Mr Semenya has already shown is not correct, that is

6 my difficulty.

7 MR MPOFU: Alright, well that doesn't

8 deal with the videos, but I'll move on. Thank you, Chair.

9 CHAIRPERSON: I suggest you move on, I

10 also suggest to you that if you are later able to show from

11 the videos that the points you made is correct, you will be

12 able to argue, and very forcibly in support of the argument

13 that wish now to put to the witness, so I suggest you move

14 on.

15 MR MPOFU: Thank you, Chair. You have

16 already been referred to, and let me make this clear again,

17 what I'm dealing with now, is that you, as National

18 Commissioner, in accepting this report did not conform with

19 your duties to decisively deal with a serious matter of

20 alleged interference with the scene.

21 GENERAL PHIYEGA: That, Advocate, sounds

22 like a conclusion, and I appreciate to be taken into what

23 brings you there.

24 MR MPOFU: Okay, yes. Well, the first

25 one is one that I canvassed with you yesterday that even if

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1 we accept what the paramedics are alleged to have said, it

2 relates to injured persons and does not include the dead

3 people who were shown in the pictures.

4 MR SEMENYA SC: Chair, that's also not

5 correct. Breed refers to the dead people as well.

6 MR MPOFU: Well, if that is so, then it

7 makes the matter even worse, because Breed spoke about 84 –

8 not Breed, 84 injured people and we know that on that scene

9 another 14 people died. So that means almost about a 100.

10 Actually 18 people died there, but four died in hospital.

11 That means about 102 people, and I'm putting this to you.

12 We will argue that the chances of arms from a 102 people

13 which have been removed, and replaced in the dark are –

14 makes that exercise of the replacement of those arms,

15 something that you should not have -

16 CHAIRPERSON: I'm not sure it was pitch

17 dark, I think there were searchlights and things on the

18 scene, were there not?

19 MR MPOFU: No, I didn't say pitch dark.

20 CHAIRPERSON: Sure, I know you didn't,

21 but you said in the dark, which could be the expression –

22 MR MPOFU: Ja, skemer. Paragraph 9, "Ek

23 weet nie presies watter tyd nie, maar dit was ongeveer

24 18h15 en dit was after skemer, het 'n swart man wie in

25 privaat klere geklee was, my op die toneel genader. Ek ken

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1 nie die person nie. Ek twyfel of ek kon hom sal herken.

2 Ek het aangesien dat hy 'n lid van die polisie se fotografe

3 by die plaaslike sentraal," and so on. All that – all that

4 suggests the following, that Breed says it was dark –

5 already dark and he saw some private person in clothing

6 that he assumes is a member of LCRC, and that person told

7 him, op versoek, whatever versoek is –

8 MR MAHLANGU: Request.

9 MR MPOFU: Requested him to place the

10 weapons, "min or meer waar ek dit vanaf verskuif of

11 verwyder het." And this is the kind of thing that you

12 accepted as an explanation for the tampering, is it?

13 GENERAL PHIYEGA: I think, Adv Mpofo,

14 what you are giving me is a judgment –

15 MR MPOFU: Yes.

16 GENERAL PHIYEGA: Of my judgement and I

17 would like to say you have right to make that judgment, but

18 I still believe the judgment I made, based on the facts of

19 accepting this report, in my opinion it's rational.

20 MR MPOFU: Okay. And he says – Breed

21 further, "Ek het toe so goed soos ek kon onthou die wapens

22 wat ek verskuif en verwyder het terug geplaas." In other

23 words, he's saying, well as far as I could remember I put

24 wherever I remembered – do you also accept that as a

25 reasonable explanation of how the weapons were removed and

Page 7801

1 replaced?

2 GENERAL PHIYEGA: Yes.

3 MR MPOFU: And then just one more, on

4 paragraph 13 he's talking about a spear that he removed.

5 He says, "Ek mag miskien die spies in die verkeerde rigting

6 geplaas het, maar dit was in 'n vertikale posisie langs die

7 liggaam." And then on paragraph 14 he says, "Ek het,"

8 this from another body now, "Ek het die panga en ander

9 wapens wat daar naby gelê het opgetel en bo op die rots

10 langs die liggaam geplaas." Then this is the highlight,

11 "Ek het later net die panga met die geel hand - wat ek

12 langs die liggaam gekry het terug langs die liggaam

13 geplaas."

14 Okay, this is the key person who seems to have

15 done this. He is a warrant officer, he's not a senior

16 officer. He takes instructions from some unknown person in

17 private clothes. He puts weapons, as far as he can

18 remember, and we are dealing with about a 100 people.

19 Remember when he removed those weapons, he didn't know that

20 he was going to have to replace them. It's because someone

21 else said that he must replace them about two hours later.

22 I mean really would you say that this adequately and

23 satisfactorily, according to you, explains this serious

24 matter?

25 GENERAL PHIYEGA: Advocate, the important

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1 thing is to say lives had to be saved. The paramedics were

2 there. The paramedics are indicating in their statement,

3 they also refer to the conventions, to say is the place

4 safe, is it not safe, and it is in accordance with their

5 conventions that those weapons be removed so that they can

6 focus – the actual report also talks about focussing on

7 saving lives. And Breed and whoever else that was there do

8 that really to assist those paramedics to do what they're

9 supposed to be doing. And I think that maybe it's an

10 acknowledgement, even in some of the statements that I've

11 read through, that – let me step back and say you talk

12 about somebody in private clothes. Our detectives do not

13 wear uniform, and the LCRC people were not in uniform. And

14 I think he didn't just see it as a person not wearing

15 uniform. He saw some authority in that, and I'm sure he

16 will be questioned on that, that's what I read in that, and

17 that's why understand the broader stakeholders that are

18 participating there, and I think there's also some

19 acknowledgement that some of the weapons could have been

20 placed, maybe not correctly and that type of thing, but the

21 spirit of doing that was to assist those who were there to

22 save lives, and we as police also do not use our eyes to

23 decide that somebody is dead. I presume the paramedics

24 also did that type of test, because you don't just look at

25 a body and say this is person is dead. They would have

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1 checked and saved this body using their expertise, and all

2 that, and it is all those things that informs me as I read

3 this report, and I read the diverse input to take a

4 decision.

5 MR MPOFU: Okay, I'm going to move away

6 from there. All I want to say to you is that this is not

7 at this stage so much a criticism of Breed, that will

8 happen if and when, as the Chairperson says, he comes here.

9 This is a criticism of you in accepting this kind of thing

10 and now rationalising it without taking that extra step of

11 saying, "Ja, but really, if it was dark, if this guy put it

12 maybe next to," and so on. That's your duty, as the

13 National Commissioner, who is facing a serious allegation

14 which has created international and local uproar of this

15 magnitude should not accept this kind of wishy-washy

16 report, and that you have neglected your duty, not Breed,

17 in telling us, as you did yesterday, that the matter is now

18 closed. You have accepted this and life must carry on.

19 CHAIRPERSON: - Mr Semenya, I didn't hear

20 – sorry, I didn't hear the National Commissioner say the

21 matter is closed. Certainly as far as this Commission is

22 concerned, the matter is definitely not closed, and

23 whatever – and even though the National Commissioner may

24 accept the correctness of the report, as I've said, that

25 doesn't bind us. I have no doubt we'll have argument on

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1 the matter. We'll keep an open mind – the three of us, on

2 the whole matter until the very end. So it's certainly not

3 closed as far as we're concerned, but I didn't hear her say

4 it was closed either, but let's hear what Mr Semenya has to

5 say.

6 MR MPOFU: Maybe you didn't hear her,

7 Chair, but she did say it. We can play the tape.

8 CHAIRPERSON: - first. Maybe the

9 commission will say she does – anyway let's anyway let's

10 hear Mr Semenya first.

11 MR SEMENYA SC: Chair, it is precisely

12 what the Chair raises, but also too that the witness says I

13 think the decision which I hold to be rational. Mr Mpofu

14 can differ. I don't know where this is taking us to. I

15 can't see any legal predicate on which Mr Mpofu says there

16 is a duty on the National Commissioner not to accept

17 statements which he rationally says to her, are rational.

18 [10:33] CHAIRPERSON: I suppose his point would

19 be he's going to argue though at the end of the matter and

20 he wants to give her a chance to reply. I suppose - let's

21 see what she has to say. What do you say about this, do

22 you regard the matter as closed National Commissioner?

23 GENERAL PHIYEGA: Judge I have no powers

24 to close any matter of this Commission that's number one

25 but let me start off by saying to what Advocate Mpofu is

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1 saying the fact that, without being prompted, I saw a
 2 program and I commissioned people to do investigation for
 3 me. I didn't just want to rely on the statements that were
 4 sitting in there. That in itself shows the
 5 responsibilities, the seriousness with which I treated this
 6 matter, that's fact number one. The second issue is that I
 7 have looked into all these facts has been given to me and I
 8 am saying, given what I have made out of this fact I do
 9 think there is rational explanation of what has happened
 10 and indeed you know it doesn't stop anyone to judge my
 11 judgement and I would say it is your right to judge my
 12 judgement but where I'm sitting I'm saying I have had at
 13 least some insight into what has happened and in my view it
 14 is rational and my standpoint remains. And that is my
 15 input into the Commission, the judgement of the Commission
 16 remains.

17 MR MPOFU: Okay. Alright thank you.
 18 Firstly let me tell you that you are changing your
 19 evidence. On the 16th when we come back I'll play the tape
 20 for you and you'll hear that I after even apologised for
 21 asking you a double question. Are you satisfied with the
 22 report and the matter closed and you said yes and I sorry
 23 those are two questions in one. But that will be a matter
 24 - it's either I'm right or you're right. That's what you
 25 said yesterday and I will show that. Secondly, yes both

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1 you and Mr Semenya are quite correct by introducing the
 2 element of rationality into it because that's exactly what
 3 I've said to you I'm going to argue that a reasonable
 4 National Commissioner in your position presented with this
 5 kind of thing would not be satisfied and say and that's
 6 what I will argue, so rationality is definitely going to be
 7 part of it and that's the only issue I'm going to argue on
 8 this.

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

12 MR MPOFU: Thank you Chairperson.

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

15 MR MPOFU: Yes thank you.

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

18 CHAIRPERSON: Yes.

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

25 MR MPOFU: Yes. No that was not me, that

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1 was Mr Madlanga. That was Mr Madlanga and on the basis of
 2 that answer you presented us with the latest report. What
 3 I asked you, was yesterday I said is the matter now,
 4 meaning yesterday, is the matter now, are you now satisfied
 5 and is the matter now closed? But let's not quibble about
 6 such -

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

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

17 CHAIRPERSON: It does matter, it does
 18 matter in relation to the particular person in whose hand
 19 the weapon was placed if he didn't have the weapon there
 20 before. It does matter to that extent but in the overall
 21 picture as to whether the people on the koppie had
 22 dangerous weapons it isn't necessarily so important who had
 23 what but it is a fact. You can't ignore the fact that if a
 24 weapon was put in the hand of somebody who didn't have the
 25 weapon beforehand that is contamination and tampering and

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1 that's a serious matter.

2 MR MPOFU: Thank you Chairperson. Yes
 3 with that background in mind, would you accept that there's
 4 the additional and more important point given that our
 5 constitution recognises, among others, the values of ubuntu
 6 and respect and human dignity that the idea of a dead body
 7 being manipulated and placed with weapons that were not
 8 there, I'm using that theory now assuming again that
 9 there's no rational explanation, that that is something
 10 that is offensive to our culture, to the respect that is
 11 given to a dead person who after all is God's temple and
 12 more importantly to the families of those people who will
 13 see the last picture of their loved one with a panga which
 14 may not have been there?

15 GENERAL PHIYEGA: I think that's a very
 16 emotionally laden statement.

17 MR MPOFU: Yes.

18 GENERAL PHIYEGA: I'd rather stick with
 19 the facts to say the weapons were removed to assist those
 20 who were there, to assist those who were injured, I'd
 21 rather remain with that.

22 MR MPOFU: Okay thank you. We'll take
 23 that then as the last word on that issue from our National
 24 Commissioner. Now the next issue is you've said that you
 25 instituted an investigation. Do you remember saying to one

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1 of my learned colleagues in relation to the Myburgh matter
2 that you referred it to IPID because you did not want to
3 investigate yourselves? Why was this serious matter of the
4 tampering report treated differently and you investigated
5 yourselves?

6 GENERAL PHIYEGA: The main reason is that
7 in this incident there was no person killing another
8 person, police killing another person. When those types of
9 issues, it's categorical it's clear, I can't even touch
10 that. If a policeman kills another person IPID must come
11 in. In this regard I wanted to understand these pictures
12 to say why are our pictures daylight ones and why are the
13 LCRC ones that we got here yellow or whatever but I wasn't
14 dealing with life being taken, I was looking at pictures.
15 And it is within my limits to do so.

16 MR MPOFU: Well I understand from that
17 answer that you are making a distinction between cases
18 where there's an allegation or a possibility
19 of a policeman having caused a death in which
20 case it gets referred to IPID or other forms of serious
21 allegations against sorry, of serious misconduct on the
22 part of the police, which according to that answer should
23 not be referred to IPID but should be investigated by
24 yourselves.

25 GENERAL PHIYEGA: I'm saying to you I saw

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1 pictures that are different. I had pictures that we
2 submitted to this Commission, I saw pictures that were with
3 the evidence leaders that were different from ours and I
4 wanted to understand and I asked this investigation and I
5 understand now.

6 MR MPOFU: Okay you didn't answer my
7 question but I'll ask another one. Should I also
8 understand from that answer you gave before this one that
9 you regarded the Myburgh allegations as involving a
10 policeman killing somebody?

11 GENERAL PHIYEGA: There was an allegation
12 by Myburgh that he saw - that he heard a shot and that shot
13 he saw somebody dead and he made a statement also, the
14 statement that he has made alerted to those types of
15 allegations.

16 MR MPOFU: Okay that also is not an
17 answer to my question but, Chair, just in case I get this
18 right - you know there are allegations about a sangoma was
19 killed recently with an R5.

20 GENERAL PHIYEGA: I don't know about the
21 allegation, I know about a sangoma who is dead.

22 MR MPOFU: But all I'm asking you, Madam,
23 is whether you are aware that that dead sangoma, around his
24 death there are allegations that he was killed with R5
25 which is police issue?

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1 GENERAL PHIYEGA: I have heard that.
2 MR MPOFU: Now that raises a possibility,
3 no higher than that, that sangoma was killed by a policeman
4 has that not then been referred to IPID? You didn't refer
5 it to IPID. That's not an objection.

6 MR SEMENYA SC: Chair I object -
7 CHAIRPERSON: Mr Semenya, I reprove
8 members of the audience if they laugh and the same reproof
9 has to be administered to you. Please behave yourself,
10 don't laugh when questions are asked. You may think that
11 they're ridiculous, keep your thoughts to yourself. Carry
12 on, Mr Mpfu.

13 MR SEMENYA SC: But I still make the
14 objection, Chair. I'm still making the objection. I
15 apologise for my conduct, I'm objecting to the question.

16 CHAIRPERSON: You object.

17 MR SEMENYA SC: There is no premise for
18 Mr Mpfu to say that shooting was done by a policeman.

19 CHAIRPERSON: I didn't understand him to
20 say that, repeat your question again?

21 MR MPOFU: Yes thank you, Chairperson.
22 Firstly let me remind the Commission of the question that I
23 asked.

24 CHAIRPERSON: Well that's what I asked
25 you, repeat the question.

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1 MR MPOFU: No not this one, not the one
2 that's being objected to, I have to -

3 CHAIRPERSON: I remember the question
4 before that but this question, so I can deal with the
5 objection.

6 MR MPOFU: Okay it was in view of your
7 answer then to the previous question which I'm not allowed
8 to repeat. Yes she'd heard of the allegation that the
9 person had been killed with an R5 which is police issue and
10 the question was this given that answer and given the - I
11 said the possibility, I won't place it higher than that,
12 that if the person was killed with an R5, which is police
13 issue, that they may have been killed by a policeman has
14 she referred that matter to IPID, well not she, had the
15 matter been referred to -

16 CHAIRPERSON: I don't think there's
17 anything wrong with that question, please proceed.

18 MR SEMENYA SC: It's now qualified as a
19 may.

20 CHAIRPERSON: I thought it was originally
21 but I may have been wrong whereas it's now qualified.
22 Carry on, Mr Mpfu.

23 MR MPOFU: So please answer the question.

24 GENERAL PHIYEGA: Unfortunately those
25 allegations that you're talking about I don't know, I just

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1 know that there is somebody who died, shot with an R5, a
 2 case number has been opened and it's being investigated and
 3 let me put it on record to say if there is a policeman that
 4 has shot any other person it doesn't matter where it is
 5 IPID will be involved.
 6 MR MPOFU: Okay thank you. Commissioner,
 7 just bear with me one second, Chairperson. Just in the
 8 same vein I'm just going to touch on the Myburgh case and I
 9 promise you it will be one or two questions because I don't
 10 want to spoil the good work that Mr Madlanga did on it.
 11 Well firstly on that subject would you agree that the
 12 identification or the process to identify the people
 13 involved was demonstrated by Mr Madlanga in a few minutes
 14 and Mr Madlanga is an advocate from the Transkei so he's
 15 not a detective but he was able to crack the case in a few
 16 minutes and left us with at least two people, two
 17 constables from NIU that would be the suspects.
 18 CHAIRPERSON: What exactly is the
 19 question. You put certain factual statements to the
 20 witness, what is the question -
 21 MR MPOFU: The question is what I said,
 22 which is would you agree that this - it wouldn't take much
 23 effort as was demonstrated here to narrow the suspects at
 24 least to two people as was done by Mr Madlanga.
 25 GENERAL PHIYEGA: Maybe let me enlighten

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1 this, I'm also from the Limpopo initially.
 2 MR MPOFU: Okay then I should rely on the
 3 altitude.
 4 GENERAL PHIYEGA: I think the important
 5 thing is that when IPID is investigating that would be the
 6 role of the IPID to do that, I can't interfere with their
 7 investigation.
 8 MR MPOFU: Fair enough. The real
 9 question that I wanted to ask you is this and you or may
 10 not agree with me because some of it is speculative. On
 11 FFF8 and as I said I'm not going to repeat that whole
 12 exercise, okay I'll help you with it. In FFF8 Mr Madlanga
 13 had reduced this possible person who killed, as you agreed,
 14 the other person to a Constable Hallam or a Constable
 15 Thafeni, number 3 and 23.
 16 [10:53] CHAIRPERSON: I don't think you can say
 17 that either of those persons necessarily killed somebody
 18 else, but it either killed probably, or attempted to kill,
 19 because all that Myburgh says is, a shot was fired. He
 20 doesn't, he heard a shot fired - been fired. He doesn't
 21 say that someone died as a result of that. That is an
 22 inference that may be drawn. The other inference is, it
 23 may have been an attempted murder. But anyway, but it's
 24 not really material for the question you are asking, but I
 25 am just doing it for the purposes of making the record

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1 correct.
 2 MR MPOFU: Chairperson, also for the same
 3 purposes, I must say that it's not Myburgh, it's the
 4 witness who said this involves a killing, which is why it
 5 was referred to IPID. 2) Myburgh says that the killer,
 6 alleged killer said, when he asked, "what are you doing?
 7 They deserve to die."
 8 CHAIRPERSON: Again that's consistent
 9 with an attempt to kill, but again, I assume that a
 10 policeman who attempts to kill somebody else, his case is
 11 also referred to IPID, so we don't have to spend extra time
 12 on that.
 13 MR MPOFU: I would assume so. For the
 14 sake of progress, I'll say "alleged killing." The real
 15 point is that Mr Madlanga had reduced it to a Constable
 16 Halam and a Constable Thafeni, remember that.
 17 GENERAL PHIYEGA: The matter has been
 18 dealt with, what's the question?
 19 MR MPOFU: That is the question, do you
 20 remember that?
 21 GENERAL PHIYEGA: I remember that.
 22 MR MPOFU: Ja, okay. Now, the - Halam,
 23 and maybe you can assist there, Halam doesn't sound like an
 24 African surname, does it?
 25 GENERALL PHIYEGA: I don't know.

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1 CHAIRPERSON: Mr Tokota tells there's an
 2 Adv Halam, he is a Xhosa gentleman. So I am not sure that
 3 the inference that you are seeking to draw is fact.
 4 MR MPOFU: I also know of an Adv Peter,
 5 who is a Xhosa, but that's by the way - the point I am
 6 making is that it doesn't sound -
 7 CHAIRPERSON: - investigation, thank you,
 8 Mr Mpofo.
 9 MR MPOFU: Thank you, anyway the only
 10 point I am making is that actually it's not even just
 11 about, it's not about race as such, it could have been the
 12 other one is tall, the other one is short, the other one is
 13 fat, the other one is thin, it doesn't matter. All, I am,
 14 the point I am making is that once it's been reduced to two
 15 people, it would be easy, either using their race, their
 16 height or whatever it is, to say to Myburgh, it's now
 17 between these two, and that might have jolted his memory,
 18 that's all. Would you agree? If you don't, you don't, and
 19 we'll move on.
 20 GENERAL PHIYEGA: I said that type of
 21 information is going to help IPID - referred to IPID.
 22 MR MPOFU: Thank you, Chairperson, I am
 23 going to move to another topic, maybe it might be a
 24 convenient stage.
 25 CHAIRPERSON: Very well. We will take

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1 the adjournment until 11:30 this morning.
 2 MR MPOFU: Thanks, Chair.
 3 [COMMISSION ADJOURNS COMMISSION RESUMES]
 4 [11:35] CHAIRPERSON: The commission resumes.
 5 National Commissioner, you're still under oath. Mr Mpofu?
 6 MR MPOFU: Thank you, Chairperson.
 7 General, now I'm going to, as I said in the morning, just
 8 step a little bit back and deal with some of the
 9 preliminary issues that – or rather complete some of the
 10 issues we dealt with yesterday which I'm sure you and I are
 11 going to agree on, at least initially. Now, what I propose
 12 to do is to outline for you – you know, there's this body
 13 of what I call the regulatory and policy framework and so
 14 on and which is a lot of documents and legislation. And
 15 what I've done is I've extracted some of what I think are
 16 the key principles and philosophies from those documents
 17 which I will be questioning you about, but I first want us
 18 to agree that those are – those can be distilled from the
 19 framework. Are we together?
 20 GENERAL PHIYEGA: I'm listening.
 21 MR MPOFU: Right. And we had started
 22 with some of this yesterday. In terms of the philosophical
 23 background of the policies and principles around crowd
 24 management which are mainly contained in FFF1, but also in
 25 other documents, you would agree with me as it is indicated

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1 in the very first line of FF1, that those policies are
 2 deeply rooted in the socio-political changes that occurred
 3 in 1994. Agreed?
 4 GENERAL PHIYEGA: I'm working with you.
 5 MR MPOFU: Okay, I prefer instead of
 6 working with me, if you agree or not agree.
 7 GENERAL PHIYEGA: Perhaps my use of
 8 working with you is that it's a process. You are going to
 9 come to a point where you say this are this. So I am safer
 10 saying I am working with you.
 11 MR MPOFU: No, you are right, but for the
 12 sake of progress I think let's do it one by one, because
 13 then you might agree with three and the other two you
 14 don't, so let's rather do it one by one. So would you
 15 agree – okay, let me – I'll read it out. It says, the very
 16 first line of FF1, "As a result of the vast socio-political
 17 changes that have occurred in South Africa over the past
 18 few years many approaches, tactics, techniques must be
 19 developed", and so on and so on.
 20 GENERAL PHIYEGA: That helps.
 21 MR MPOFU: Okay, okay. So that's one of
 22 the principles. Oh, ja. And then another principle of the
 23 Foundation that can be distilled from this body of document
 24 is that it is steeped in the culture of fundamental rights
 25 and the constitutional principles, correct?

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1 GENERAL PHIYEGA: Correct.
 2 MR MPOFU: And is it also correct that
 3 what it seeks to do, in a nutshell, it moves from a culture
 4 of crowd control to a culture of crowd management?
 5 GENERAL PHIYEGA: That is the spirit,
 6 yes.
 7 MR MPOFU: And would you also agree that
 8 very clearly what comes out of this and in particular even
 9 from the Act, the Regulation of Gatherings Act, is what one
 10 might call a new participatory spirit or ethos, in other
 11 words involving all stakeholders?
 12 GENERAL PHIYEGA: I would agree.
 13 MR MPOFU: And that another fundamental
 14 principle is the prevention, and I use that word advisably,
 15 the prevention of violence.
 16 GENERAL PHIYEGA: Just repeat that again.
 17 I didn't get it.
 18 MR MPOFU: Another key principle that we
 19 can distil from this body of policies and regulations is
 20 the prevention of violence.
 21 GENERAL PHIYEGA: The prevention of
 22 violence or management – or public, but I'm a little bit
 23 lost on that one, to say you prevent violence or do you
 24 manage violence what are you doing?
 25 CHAIRPERSON: Well, you try as far as you

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1 can to ensure that there isn't violence, but that's if you
 2 can, obviously if you can't you then got to manage it, but
 3 you – but your first objective, perhaps one of the primary
 4 objectives is to prevent violence insofar as you can do so.
 5 That must be right, sorry.
 6 GENERAL PHIYEGA: Okay. Let's agree and
 7 continue.
 8 MR MPOFU: Sorry?
 9 GENERAL PHIYEGA: I agree, let's
 10 continue.
 11 MR MPOFU: We are agreed? Okay. And
 12 just to assist you in total you may be hesitant, the – 2.3
 13 –
 14 GENERAL PHIYEGA: Ja, it's fine. We can
 15 continue.
 16 MR MPOFU: Page – no, well, I want to
 17 emphasise it. 2.3 says, "To accomplish the following
 18 ideals for crowd management situations", and then it says,
 19 "1. No loss of life", no loss of life. "2.3.1 No damage
 20 to property, 2.3.3 No injuries." And as the chairperson
 21 says obviously that's the goal. It doesn't mean it will
 22 always happen. Agreed?
 23 GENERAL PHIYEGA: Mm.
 24 MR MPOFU: Okay. And those are what I
 25 would call the foundational principles of the new approach.

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

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

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1 etcetera should be tolerated in order to defuse the
 2 situation". So it expects more from the police. Agreed?
 3 GENERAL PHIYEGA: Hm-hm.
 4 MR MPOFU: Sorry, it doesn't record hm-
 5 hm.
 6 GENERAL PHIYEGA: Yes.
 7 MR MPOFU: Okay, and also that the – and
 8 we are going down to the last two or three now, very
 9 important - that these principles promote what they say is
 10 a gradualist approach from negotiation to defensive
 11 measures through to offensive measures.
 12 GENERAL PHIYEGA: Yes.
 13 MR MPOFU: In that order – I'm sorry, I
 14 forgot to say that, in that order, in other words
 15 negotiation, defensive measures, offensive measures,
 16 escalating from negotiating to offensive measures. Agreed?
 17 GENERAL PHIYEGA: I note what you are
 18 saying.
 19 MR MPOFU: Okay. Ja. Alright, look,
 20 okay. When you say that I sense some reluctance, you'll
 21 forgive me. So then I'll read it out to you. At 5.2 it
 22 says, "The sub/POP policy towards crowd management will be
 23 one of a gradual build up from negotiation through to the
 24 implementation of defensive measures to the undertaking of
 25 offensive operations". Do you confirm that's the approach?

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1 GENERAL PHIYEGA: Yes, I do note, it's
 2 policy.
 3 MR MPOFU: Do you agree that that is what
 4 comes out of this policy? It's one of the principles that
 5 one can extract from this policy.
 6 GENERAL PHIYEGA: I have confirmed.
 7 MR MPOFU: Thank you. And lastly that
 8 this body of regulatory and policy principles prescribes
 9 the use of minimum force at various parts, or I think as
 10 you've put it, which I think is synonymous, no more force
 11 than is necessary. Would you agree with that?
 12 GENERAL PHIYEGA: Yes.
 13 MR MPOFU: Right. Now, if as you have
 14 agreed I've put to those about ten of those principles and
 15 philosophies, if – and this is a big if – if it can be
 16 shown that the police breached any of these principles and
 17 philosophies that you and I have agreed on, you would agree
 18 that it would mean they have acted unlawfully or
 19 irregularly, at least against the spirit and letter of this
 20 – of the framework. Agreed?
 21 GENERAL PHIYEGA: I think it would be a
 22 very difficult question to answer in a very definite cut
 23 and dry manner, because you've referred to a lot of things.
 24 And for each of those it would be helpful to take an issue,
 25 relate it to the matter, look at the circumstances around

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1 in that one, and then deal with an outcome for that. It
 2 can't just be a blanket thing. I think it would be very
 3 not fair for both me and you to approach it that way.
 4 MR MPOFU: Okay. Okay, I'll put it even
 5 more clearly or at least try to assist you. You and I have
 6 agreed on ten principles that symbolise crowd management in
 7 the – in democratic South Africa.
 8 GENERAL PHIYEGA: Yes.
 9 MR MPOFU: I'm saying now, you can pick
 10 any one, if one, so that we don't have this blanket thing
 11 about the ten, if the police have breached one of those
 12 principles, would you agree that that would be acting
 13 unlawfully or at the very worst against –
 14 CHAIRPERSON: I don't think you can ask
 15 the witness for her opinion of the law.
 16 MR MPOFU: Okay.
 17 CHAIRPERSON: You can ask, I suppose,
 18 whether it's contrary to the spirit of the –
 19 MR MPOFU: Indeed.
 20 CHAIRPERSON: - or something of that
 21 nature, but it's not for her to testify to what the law is,
 22 and it's not appropriate for you to put questions of law to
 23 her. That will be a matter for argument.
 24 MR MPOFU: I accept that, Chairperson.
 25 If one of those principles can be shown to have been

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1 breached by the police, would you agree that certain steps
 2 and remedial action would have to be taken?
 3 GENERAL PHIYEGA: Of those ten principles
 4 that you have mentioned I have said to you just in my
 5 previous answer that they would need to be tested and then
 6 we would – I'd make –
 7 MR MPOFU: I accept that.
 8 GENERAL PHIYEGA: Okay, and the one who's
 9 alleging makes their own principles – their own input. And
 10 in most of the instances it would be circumstances from
 11 both sides, and somebody who is as neutral as the judge
 12 probably will then say, looking at this debate, which way
 13 is it going? And if he is fair and rational, that both
 14 parties, whatever the outcome, remedies would have to be
 15 looked into.
 16 MR MPOFU: Yes, I think you've answered
 17 the question at the end, ja. I was just going to say, yes,
 18 assume all that has happened, the input, the what have you,
 19 both sides, all that has happened, and then it is – but
 20 you've answered, which I'll take as a yes.
 21 GENERAL PHIYEGA: Advocate, I think just
 22 take my answer as it is. Don't try and narrow it. I think
 23 that explanation is important to me.
 24 MR MPOFU: Okay, well, then I have no
 25 option but to ask you the question again. If after all the

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1 things you have said the input from both sides, the, this
 2 one has put their side and they've been evaluated and so on
 3 and so on, if it is found that the police have breached one
 4 of these principles then such remedial action would be in
 5 order. Correct?
 6 CHAIRPERSON: Mr Semenya.
 7 [11:55] MR SEMENYA SC: One has allowed all these
 8 hypothetical questions, but if the commissioner were to
 9 make a finding, what would then happen? One, the witness
 10 has answered to it, but secondly surely it depends on
 11 whether that finding is correct on the evidence and I don't
 12 know whether we should necessarily at this point, one, make
 13 a contemplation and the finding will be made, one.
 14 Secondly, that it will be a finding that is consistent with
 15 the evidence, thirdly, that is one that will be embraced
 16 necessarily as corrective in its nature.
 17 CHAIRPERSON: I thought you answered
 18 yesterday, that if we were to find – there are various
 19 possibilities we could find in favour of the police,
 20 alternatively we could find against the police on certain
 21 aspects. In that event, I think she indicated they would
 22 consider, she and her colleagues, would consider our
 23 findings. If they agreed with them, they would accept
 24 them. If they didn't agree, they couldn't appeal. And if
 25 there civil litigation thereafter, in effect based on our

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1 findings, and they thought our findings were wrong, they
 2 would defend the civil litigation, I understood that to be
 3 the argument. She also said she can't say at this stage
 4 what she'd do, before she's seen our report, she won't know
 5 whether she agrees with it, and whether there's a basis for
 6 departing from it or accepting it. That was the evidence
 7 she gave yesterday. I don't understand Mr Mpofu quite to
 8 be dealing with that at this stage –
 9 MR MPOFU: Then you understand me
 10 correctly, Chair.
 11 CHAIRPERSON: Perhaps you could rephrase
 12 it. I mean basically your point is that if it appears,
 13 after a full investigation, that the standing orders and
 14 the applicable principle has not been applied, if that
 15 appears, I presume you would have to accept, to the police,
 16 not just because we say so, because we may be wrong.
 17 Obviously we'll try not to be, but we may be, but if they
 18 are satisfied that prima facie there'd been a breach of the
 19 relevant prescripts, they will take some action. I think
 20 that's your question, and I'd be surprised if she said they
 21 wouldn't, but anyway let's see whether I'm in for a
 22 surprise or not.
 23 MR MPOFU: Yes, I have been surprised
 24 before, Chair.
 25 CHAIRPERSON: Do you understand, National

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

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

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

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

25 MR MPOFU: No, I'm happy with that.

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

4 GENERAL PHIYEGA: You are right and being
5 a lawyer, that's why talk about circumstantial evidence and
6 all those issues, all those aspects are taken into account.

7 MR MPOFU: Alright. And therefore
8 bearing now what I've read to you in mind, and going back
9 to what we said earlier, if any member of the police is
10 found to have breached the standing orders, then
11 consequences should follow, including but not limited to
12 the rolling of heads, given the magnitude of what happened
13 here.

14 GENERAL PHIYEGA: I'll again exclude the
15 rolling of heads –

16 MR MPOFU: Exclude?

17 GENERAL PHIYEGA: Because I don't want to
18 talk to – I said relevant remedies, I don't want to use
19 your words of rolling of heads. And my acceptance of what
20 you are saying is also taking into account to say, indeed,
21 they have to follow standing orders, but when you charge
22 any person and have a hearing, all circumstances are taken
23 into account. It's not just a straight line, and that's
24 why I'm saying you, as lawyer, would understand better when
25 you talk about circumstantial evidence.

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

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

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

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

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

1 MR MPOFU: Okay, that's good, that's good
2 enough. So at the very least those people would be
3 charged, and as you are trying to say now, there may or may
4 not be found to have been guilty, but if they are would
5 heads roll, given the magnitude of this.

6 GENERAL PHIYEGA: I think I've answered
7 that question, I can't answer it further.

8 CHAIRPERSON: Mr Semenya.

9 MR SEMENYA SC: Chair, the witness has
10 repeatedly said she's not going to use that phrase, which
11 are sound byte phrases, she says the relevant remedial
12 interventions will follow.

13 CHAIRPERSON: Even if a member is found
14 guilty, in a disciplinary hearing, of failing to comply
15 with an order, be it a standing order or any other kind of
16 order, I take it there are no compulsory or minimum
17 sentences which are applicable, and in each case would be
18 the appropriate penalty, if there's a conviction at a
19 disciplinary hearing, would dependant on all the
20 circumstances. Is that effectively what you're saying?

21 GENERAL PHIYEGA: I'm absolutely saying
22 that, and I'm saying those remedial – relevant remedial
23 steps would, you know, sentence or whatever, would be
24 taken, relevant, I want to keep to that.

25 CHAIRPERSON: I think what Mr Mpofu is

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1 saying that obviously, depending on the seriousness of the
2 matter, if it was very serious, those steps might well
3 include the dismissal of the appointment of the member. In
4 other words, the member would effectively be ejected from
5 the police service, if the case was serious enough to
6 justify that, and I think that's just the point he's
7 putting, and I take it you'd agree with that, because in
8 other words, the appropriate penalty would vary from I'm
9 presuming something like a caution all the way up to
10 dismissal from the service. And he uses – discharge is the
11 correct word, he uses the unhappy phrase rolling of heads,
12 which connotes aspects of capital punishment that we turned
13 our back on, but he's really talking about a whole range of
14 sentences from a caution all the way up to a discharge.
15 That must be so, and it would always depend upon a thorough
16 consideration of all the relevant circumstances, is that
17 correct?

18 GENERAL PHIYEGA: Judge, I'd like to keep
19 – you know, with all the things that you said, I'd like to
20 – particularly that you talk of a range, being the leader
21 that I am, I'm comfortable in just saying relevant
22 remedial, whether it's low or high, it covers whatever else
23 that has to be there. I'm comfortable in saying that.

24 CHAIRPERSON: As Mr Mpofo would say, I
25 think we can take that as a yes, albeit a qualified one.

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1 satisfactorily with the issue of the internal disciplinary
2 proceedings that have been postulated by the Chairperson.
3 Now, I'm asking you a different question, which is if, as a
4 result of the same breaches, members are found guilty in a
5 court of law in criminal proceedings, then those members
6 would be discharged. Let's put it nicely, correct?

7 CHAIRPERSON: Wouldn't it depend on what
8 they were found guilty of? You can't – merely because they
9 were found guilty of riding a bicycle without a light after
10 sunset, that wouldn't mean they would be discharged, it
11 would surely depend on the nature of the charge.

12 MR MPOFU: Funnily enough, that is not
13 the law, Chairperson, but the part that I've left out is if
14 they're found guilty and they - and sentenced to a term of
15 imprisonment without the option of fine, for whatever, then
16 they would be discharged, correct?

17 GENERAL PHIYEGA: In terms of the
18 agreements that we have also, I do have the capacity to
19 condone certain things.

20 MR MPOFU: No, you don't. Okay, let me
21 tell you, under Section 36.1 of the Police Act, "a member
22 who is convicted of an offense and is sentenced to a term
23 of imprisonment without the option of a fine shall be
24 deemed to have been discharged from the service, with
25 effect from the date, following the date upon such

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1 MR MPOFU: Yes, thank you. I think that
2 deals with the situation of the internal disciplinary
3 issues. Now, if, as a result of such breach –

4 GENERAL PHIYEGA: Can I just say
5 something here?

6 MR MPOFU: Yes, Ma'am.

7 GENERAL PHIYEGA: You just spoke about
8 the significance of my role and the image I portray. I
9 don't want to be seen with look like someone who's having
10 an axe and hacking everyone who is alive.

11 MR MPOFU: Yes, but if there has been a
12 due process and the hacking is justified, I'm sure you
13 won't hesitate –

14 CHAIRPERSON: No, no, Mr Mpofo, the point
15 is that whole expression of rolling of heads is actually
16 inappropriate in this context. I know you're speaking
17 metaphorically –

18 MR MPOFU: It's a figure of speech.

19 CHAIRPERSON: I know it's a figure of
20 speech, but the witness is uncomfortable with it, and I
21 think we must respect that. Anyway, but on points of
22 substance, I don't understand there to be a significant
23 difference between the two of you.

24 MR MPOFU: No, actually we are agreeing,
25 Chairperson, and I was just saying that that deals

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1 sentence, provided that if such a term of imprisonment is
2 wholly substandard, the member concerned shall not be
3 deemed to have been so discharged –

4 CHAIRPERSON: Do you understand the
5 point? If somebody is convicted in court and given a jail
6 sentence which is not suspended, he or she can't continue
7 to be a member of the police service in the prison cell,
8 and there's an automatic discharge from the imposition of
9 the sentence. That's what this Section says.

10 GENERAL PHIYEGA: Yes.

11 CHAIRPERSON: It doesn't appear, unless
12 there's another section that counsel hasn't quoted, that
13 there's a section that says that notwithstanding all of
14 that, you can undo that by administrative - from your
15 office.

16 GENERAL PHIYEGA: I understand that, but
17 I was starting from what you mentioned earlier on, to say
18 it depends on what has happened to that person. If I'm
19 found guilty of maybe reckless driving, and I'm charged,
20 and I don't have those things, I can condone it, even if
21 there's a criminal charge, there are certain things that
22 allows me to look at the nature of the crime, and I can
23 condone some things, but the one that you are talking about
24 it's probably different, I was starting from where the
25 Judge was starting and linking to what you are saying to

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1 say, in terms of certain agreements for disciplinary, there
 2 are things that can be condoned, but the one, if the
 3 condition is like that, indeed it's the law, we'll have to
 4 go with it.

5 CHAIRPERSON: You can't be member of the
 6 police service and in the police service a prisoner at the
 7 same time? Those two things are incompatible.

8 GENERAL PHIYEGA: Yes, but I'm saying,
 9 Judge, and I'm found –

10 CHAIRPERSON: If you're driving and
 11 you're charged with reckless driving and you're convicted
 12 and the Magistrate sentences you to a year without
 13 suspension at all, and no fine, then I'm afraid your
 14 position as Commissioner of Police will come to an end from
 15 the time the sentence is imposed, because you can't be
 16 commissioner of police and in a cell in Pollsmoor.

17 GENERAL PHIYEGA: I think you are missing
 18 my input. Can I try and put it again? The law as it
 19 stands, as he reads it, if it is true, but I'm saying if I
 20 am criminally charged and there is maybe a file given to
 21 me, some of the prescripts would say you should not have a
 22 criminal charge, but as a commissioner, I can look at that
 23 to say, oh he didn't have a fine, and what did he do?
 24 These type of things. What else? He's been a good police
 25 person. Actually there are certain provisions that I can

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1 condone, that's all what I'm saying.

2 CHAIRPERSON: Pity, the Section doesn't
 3 deal with situation. Even if a person is given a prison
 4 sentence which is totally suspended, presumably you would
 5 have the power to do that in an appropriate case, depending
 6 on all the circumstances.

7 GENERAL PHIYEGA: I agree. I'm not
 8 arguing this section, Judge, I'm saying he asked the
 9 question, I went back to your question earlier on to say it
 10 depends on what the charge is, and I was talking to that it
 11 depends on what the charge is, and I'm talking to say some
 12 of the charges I can condone.

13 MR MPOFU: Okay, I'll move on, but do
 14 remember that I prefaced my question by saying we've now
 15 finished with the disciplinary issue that the Chair talk
 16 about, let's talk about something else, remember that?
 17 Sorry, do you remember that?

18 GENERAL PHIYEGA: That we have – we are
 19 finished with the things that I can condone.

20 [12:15] MR MPOFU: No, do you remember that I had
 21 said to preface my question after the discussion in which
 22 the Judge had participated. Let's now put that aside and
 23 deal with something else about criminal charges. Alright,
 24 now I just want to ask you about whether you agree with the
 25 approach that is favoured in, I think it's FFF13, FFF13

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1 which is the National Planning Committee report which was
 2 that was referred to earlier by Mr Mahlanga, but I'm going
 3 to refer you to a different section. It's FFF13, page 293.
 4 For the sake of saving time, I will just read it out
 5 quickly, and if you forgive me I will jump around because
 6 it's quite a long section, so I will jump certain parts but
 7 I will tell you when I do so.

8 CHAIRPERSON: I'm sure the witness has
 9 the relevant page in front of her.

10 MR MPOFU: Yes, okay let me first say
 11 this -

12 CHAIRPERSON: The interpreter is looking
 13 for the page.

14 MR MPOFU: Yes.

15 CHAIRPERSON: When he has found it -

16 MR MPOFU: Yes, I just wanted to assist,
 17 Chair, in that exercise. The odd numbers –

18 CHAIRPERSON: 192 has a picture two
 19 ladies, one member of the force and a civilian I take it at
 20 the foot of the page, and the following page 393 who hasn't
 21 got a page number on it, but it's got a reference on the
 22 right hand side to an integrated approach to building
 23 safety. Have you got that page in front of you? Right,
 24 now you can carry on, Mr Mpofu.

25 MR MPOFU: Thank you, now it's a long

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1 page which is 393, I'm going to start reading parts of, the
 2 heading an integrated approach to building safety. Then I
 3 will tell you when I jump. The second sentence there or
 4 the first one, "in discussing crime, the danger is to focus
 5 on policing as the only solution it is necessary to move
 6 from a narrow law enforcement approach to crime and safety,
 7 to identifying and resolving the root causes of crime. To
 8 achieve this, South Africa will have to mobilise state and
 9 non-state capacities at all levels which requires an
 10 integrated approach with active citizen involvement and
 11 core responsibility."

12 Then I jump to a quotation of the World Bank
 13 study that is in the next paragraph, which starts "a study
 14 by the World Bank in 2010 confirmed that quote. There has
 15 been a growing consensus amongst policy makers that
 16 violence is not simply a security issue but that it has
 17 deep social and economic roots and consequences. An
 18 effective and efficient response to violent crime requires
 19 a holistic approach to community safety that takes causes
 20 of crime into consideration and response to specific causal
 21 factors", and then I'm just jumping to the next page. The
 22 first bullet where it says, "underlying the root causes
 23 such as poverty, inequality, unemployment and a variety of
 24 temptations and motivations to engage in criminal activity
 25 should be addressed. Although research have shown the

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1 complex relationships among these sectors, it is clear that
 2 the higher their confluence, the more motivated people are
 3 to commit criminal offences." Yes, I'm sure you can read
 4 it with your own time, but you get the gist that this seems
 5 to promote an approach that deals with root causes, rather
 6 than simply viewing something as a security matter, so to
 7 speak. Agreed?
 8 GENERAL PHIYEGA: Yes, I do.
 9 MR MPOFU: Now in view of that approach
 10 which you and I agree with, would you agree that this
 11 conflict that we are dealing with here, the conflict that
 12 happened in Marikana before the massacre, that it also was
 13 not uni-dimensional and as I have said to you yesterday,
 14 there is no point denying that it had a law enforcement
 15 element to it. But to view solely as a law enforcement
 16 issue, would be missing the approach that seems to be
 17 advanced by the National Planning Commission. Agreed?
 18 MR SEMENYA SC: Chair, Mr Mpofu, uses
 19 very long sentences, embedded in them are words like
 20 massacre and it would be pitiful if the answer to the
 21 question is reinterpreted to say the commission agreed to
 22 the massacre component of the question.
 23 MR MPOFU: Okay, Chairperson, fair
 24 enough. Yes I know, well everyone else refers it like
 25 that, but I know in SAPS it's called the tragedy. The

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

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

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

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1 which we cannot deny but also the other aspects. That's
 2 all. Agreed?
 3 GENERAL PHIYEGA: I will try again
 4 because I think we are not agreeing.
 5 MR MPOFU: Oh.
 6 GENERAL PHIYEGA: I have said to you,
 7 that what I see here is an aspirational thing indeed. At
 8 the end of the pipeline, I said it's a here and now issue,
 9 what is happening now. We have an illegal march. We have
 10 people who are having work problems. There is all this
 11 commotion between police and the people. What contributes
 12 to that could have been a ten year issue, a 15 year issue
 13 and that's the problem I'm talking about. To say what you
 14 deal with as the police, is the here and now. When I get
 15 to a home and somebody's shack is beaten up, I don't know
 16 how this relationship has gone for many years. The end of
 17 the pipeline for the police is that an issue is happening,
 18 you are called to intervene. Those last days, Advocate
 19 Mpofo, could not have taken all these issues that you are
 20 talking about into account. They will form the backdrop of
 21 your thinking but your intervention as a police person is
 22 what is happening at that point in time. It's very
 23 reactive. It's not proactive at all, and maybe if I may
 24 just also say, there is very little that you can do about
 25 all those things that contributed towards that, you can

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1 understand them but as a police person there isn't much you
 2 can do.
 3 MR MPOFU: Okay, we will deal with that
 4 issue on the 16th because you haven't answered my question,
 5 as you correctly say, maybe there is a misunderstanding.
 6 Maybe there is, maybe there isn't, we will see. Can I just
 7 ask you, because we don't have time now, whether you have
 8 read the IPID reports and statements which were taken
 9 principally from the victims and also from police
 10 officials?
 11 GENERAL PHIYEGA: No -
 12 MR MPOFU: In the course of your trying
 13 to understand this matter, sorry.
 14 CHAIRPERSON: I thought she said no, is
 15 that correct?
 16 GENERAL PHIYEGA: Yes.
 17 MR MPOFU: Sorry, I interrupted her.
 18 CHAIRPERSON: I think that is a
 19 convenient point for us to take the adjournment.
 20 MR MPOFU: No, Chair, just one please,
 21 just one more flowing from that. The reason why I'm asking
 22 that question is when we come back on the 16th I'm going to
 23 be dealing with some of the issues that comes from those
 24 statements. So if you can take advantage of the ten days
 25 that, between now and then, it's a little bit of homework,

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1 I know you are busy. But could you kindly have a look at
 2 the IPID documentation in the period?
 3 CHAIRPERSON: You did say you would tell
 4 her things that you were dealing with next time. So she
 5 could prepare which you have now done. Of course, on the
 6 morning of the 16th as I see it, we will probably, no we
 7 won't probably, we will return to the question of your
 8 application for removal of the seat of the commission, and
 9 as far as I know, no replying affidavits have yet been
 10 filed in answer to the opposing affidavits filed by the
 11 royal family and the neighbouring municipalities but I take
 12 it that will all be done, so we will be able to deal
 13 promptly on the morning of the 16th with a resumption of the
 14 argument in respect of the proposed move.
 15 MR MPOFU: Yes. Yes, Chairperson.
 16 Chairperson, okay I'm going to ask for one indulgence which
 17 I'm not very optimistic I'm going to get, but before I do
 18 that can I just address the issue you have raised. Yes,
 19 Chairperson, at this stage the position is that on the 16th
 20 we will start with that argument and at this stage our
 21 instructions are to draft such an affidavit. However,
 22 there still remains a possibility that we might take the
 23 view that the matter can be argued on the papers as they
 24 stand, but should that be the case we will talk to the
 25 other colleagues. But the indulgence I was seeking, Chair,

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1 please if I could just read out to the witness -
 2 CHAIRPERSON: I indicated that there were
 3 reasons why we had to stop at half 12.
 4 MR MPOFU: Yes.
 5 CHAIRPERSON: And did give ample warning
 6 of that.
 7 MR MPOFU: Yes.
 8 CHAIRPERSON: And it's now beyond half
 9 part 12. So anything you want -
 10 MR MPOFU: No, it's for the benefit of
 11 the witness not for me.
 12 CHAIRPERSON: You can give it privately
 13 to the witness between now and the 16th. We will now take
 14 the adjournment until 10 o'clock on the morning of the 16th.
 15 MR MPOFU: I will do so.
 16 [COMMISSION ADJOURNED]
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 24 .
 25 .

<p style="text-align: center;">A</p> <p>aangesien 7800:2 able 7774:16,16,17 7780:5 7789:5,23 7796:15 7798:10,12 7813:15 7847:12 absence 7781:12 absent 7780:3,18 7781:6,22 7782:4 absolutely 7832:21 abuse 7822:25 accept 7776:4 7784:7,7 7784:12 7785:5 7786:5 7789:9,17 7793:14,18,21 7794:5 7797:7,7 7799:1 7800:24 7803:15,24 7804:16 7808:3 7825:24 7826:7 7827:23 7828:15 acceptable 7780:3 acceptance 7793:21 7831:19 accepted 7793:17 7797:8 7800:12 7803:18 accepting 7798:18 7800:19 7803:9 7828:6 accepts 7785:22 7793:20 accommodation 7842:18 accomplish 7820:17 account 7831:6,20,23 7845:20 accuracy 7821:2,18 accurate 7792:24,25 7844:4 achieve 7821:1 7840:8 acknowledgement 7802:10,19 act 7819:9,9 7830:19 7835:21 7842:22 acted 7824:18 acting 7825:12 action 7826:2 7827:4 7828:19 7829:7 active 7795:17 7840:10 activity 7780:18 7840:24 actual 7802:6 additional 7808:4 address 7847:18 addressed 7840:25 adequately 7801:22 adjective 7830:9 adjourn 7844:5 ADJOURNED 7848:16 adjournment 7817:1 7846:19 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