

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 99 27 MAY 2013 PAGES 10488 TO 10608

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 27 MAY 2013]
 2 [10:07] COMMISSIONER: The Commission resumes.
 3 National Commissioner, you're still under oath. Mr Mpofo,
 4 I believe you have some more cross-examination for the
 5 National Commissioner.
 6 MR MPOFU: Yes, thank you. Thank you,
 7 Chairperson.
 8 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 9 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 10 Good morning, General.
 11 GENERAL PHIYEGA: Good morning, good
 12 morning.
 13 MR MPOFU: Ja, I just want us to quickly
 14 round off the subject we were busy with on Fri – on
 15 Thursday, and then we move to a new topic. Maybe I'll just
 16 do it by putting certain propositions to you emanating from
 17 the discussions we had. Firstly, I wanted to put it to you
 18 that, we are going to argue that your failure either to
 19 refute the statements attributed to you by The Sowetan or
 20 to take any legal action in respect thereof, since we both
 21 agreed that it was damaging both to you as a person and to
 22 the institution, is not consistent with your denial that
 23 you made a statement. What have you got to say about that?
 24 GENERAL PHIYEGA: I have put my position
 25 across on this matter last week and your position I'm sure

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1 I can't influence any further but as I've said last week, I
 2 think my position in this matter is clear, (a) that at the
 3 point when this happened I did not do that because I waited
 4 for this opportunity and I thanked this Commission for
 5 giving me the opportunity to clear a number of things.
 6 It's not the first one that I'm clearing.
 7 MR MPOFU: We will argue in the same
 8 breath that given your failure to take the steps that I've
 9 mentioned, both the victims and, more importantly, members
 10 of the SAPS who saw the statements ascribed to you in The
 11 Sowetan without any refutation thereof, would have been
 12 entitled to believe that that is the official position of
 13 the SAPS.
 14 GENERAL PHIYEGA: I'm against saying a
 15 thing that I haven't done can never be an official position
 16 but at the end of the day it is your own opinion.
 17 MR MPOFU: I don't know, maybe we don't
 18 understand each other. I'm saying to you, and you can
 19 agree or disagree, that I'm going to argue that until last
 20 Thursday when you purportedly cleared the position, it
 21 would be reasonable for both the victims and their families
 22 as well as the members of SAPS who saw that report that
 23 says we are not sorry, to regard that as the official
 24 position seeing that it came from no less than the National
 25 Commissioner and was never refuted.

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1 GENERAL PHIYEGA: Advocate, I disagree
 2 and I just want to recall and maybe remind us that on the
 3 issue of media reports that said I was laughing, you did
 4 not take this stand and I never refuted that and you said
 5 nobody would ever say I had laughed, and I find it – it's
 6 the same principle, it's the same matter where the
 7 newspaper had a position on me and it is yourself, when we
 8 were discussing this, that you actually engaged me in this
 9 very platform and the approach wasn't the same, but I want
 10 to say I disagree with you.
 11 MR MPOFU: Yes. No, General, I think
 12 maybe we don't understand each other. Let me assist you.
 13 If you remember when, and on the matter of laughing, I
 14 specifically said to you at the beginning of the cross-
 15 examination that I, as somebody who knows you, could not
 16 hold the view that you laughed at such a tragedy and I
 17 advised you, I said on the contrary, the family, the
 18 victims and their families who had walked out do not know
 19 you as much as I do and therefore I advised you outside of
 20 the glare of the cameras to take steps to approach them in
 21 order to assure them that that report was incorrect. And
 22 that's why I'm saying now very specifically, I'm not
 23 talking about me, it's irrelevant what I believe or don't
 24 believe. I said to you both the victims and members of
 25 SAPS who saw that statement and realised that in the

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1 following eight or nine months you had not refuted it,
 2 would be entitled to believe that therefore it is what you
 3 said.
 4 GENERAL PHIYEGA: I will again say,
 5 Advocate, I think I've given a lot of explanations on this
 6 matter, I still disagree with your standpoint.
 7 MR MPOFU: And the next point I want to
 8 make that we'll argue is this, in respect of that point,
 9 that whilst you and I have agreed that this was damaging
 10 both to yourself and to the institution – and I will argue
 11 that while you are entitled to ignore damaging publication
 12 that pertains to yourself as a person because it's your
 13 right, whether you accept those rights or not is your
 14 decision, you might want to abandon those rights but you're
 15 entitled to abandon the rights of the institution itself.
 16 You have a legal obligation, you had a legal obligation to
 17 ensure that the negative portrayal of SAPS as an
 18 institution in the sense that its head had said such an
 19 outrageous thing was corrected, (a), or was the subject of
 20 legal action or at the least the subject of the demand from
 21 an apology from the publisher of such damaging information.
 22 What have you got to say to that?
 23 GENERAL PHIYEGA: I do not regard what
 24 you are saying as any form of dereliction because as an
 25 organisation we continued to articulate the facts as we

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1 understood them, speaking about what had happened here from
 2 the perspective of SAPS and that for me and those various
 3 platforms that we used were part of dealing with those
 4 aspects. So it could never have been a dereliction of duty
 5 on my part.
 6 MR MPOFU: Okay. Finally, we'll argue
 7 that your attitude in respect of that matter is typical of
 8 the undesirable behaviour of what I might call generally of
 9 your officialdom, not to acknowledge and apologise even
 10 for, you know, blatant infractions and that even as we are
 11 discussing this matter, you have not said actually that you
 12 are sorry. All you have said is that you did not say that
 13 you are not sorry, which is a different thing and there
 14 seems to be this reluctance, without taking legal
 15 obligations and that kind of thing, simply to say we are
 16 sorry for what happened insofar as we are engaged, rather
 17 we are involved – the loss of life and so on and so on.
 18 Why is it so difficult?
 19 GENERAL PHIYEGA: I'm actually maybe
 20 failing to understand the approach you're taking because
 21 you are talking about a media report which I have said
 22 really I haven't, I can't control The Sowetan, what they
 23 write, I did not say that. So why should I be sorry for a
 24 thing that I said to you I did not do? And when it comes
 25 to lives, my statement, my attestation in this Commission,

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1 I've expressed my issues, my sentiments on that matter in
 2 writing and verbally. So I am concerned when you're saying
 3 I have failed to do that when I've done it in the ears and
 4 eyes of everybody here.
 5 MR MPOFU: The next issue I want to
 6 canvass with you is that, once again based on knowing you
 7 as I do, that whatever your view might have been on the 17th
 8 or even the 20th about thanking the police and ascribing
 9 their actions or rather describing their actions as the
 10 best of responsible policing, you can't be proud of the
 11 actions of the police that I showed you on Thursday which
 12 include the boot incident, the laughing, the dragging of
 13 people, the ignoring of people who are in pain and
 14 statements like, "They deserve to die." Agreed?
 15 GENERAL PHIYEGA: All those issues I've
 16 individually responded to and my responses I think have
 17 been articulated in terms of my opinion.
 18 MR MPOFU: Sorry, does that mean you're
 19 not prepared to say whether I'm correct in saying you can't
 20 be proud - as the head of SAPS, of the material that I
 21 showed you – assuming of course that when you made those
 22 statements originally you may not have seen what I showed
 23 you. I'm talking about right now as you are sitting there.
 24 GENERAL PHIYEGA: As I've said, Advocate,
 25 I've answered you on all those issues and my position

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1 hasn't changed.
 2 MR MPOFU: Maybe I should ask it
 3 differently and then I'll give up if you don't answer.
 4 Given what I showed you on Thursday and the various
 5 instances which I won't go through now, do you still stand
 6 by your statement that whatever happened on the 16th in
 7 particular, represented the best of responsible policing or
 8 would you like to take the opportunity to change that
 9 statement so that we can move on either way?
 10 CHAIRPERSON: Mr Semenya wishes to say
 11 something. Mr Semenya?
 12 MR SEMENYA SC: Mr Mpofo has asked this
 13 question many times and has met with the same response. It
 14 is asked and answered.
 15 CHAIRPERSON: The objection is one of
 16 repetition, Mr Mpofo, what must I do?
 17 MR MPOFU: Well, that's strange. It's
 18 the very first time on F that I'm asking this question
 19 after showing the videos. I've made it very clear that
 20 it's true that I asked at the beginning of my cross-
 21 examination do you still stand by your statement and she
 22 said yes. I'm now asking it in a completely different
 23 context –
 24 CHAIRPERSON: Well, every time you showed
 25 an incident, the climax of that particular part of the

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1 cross-examination was, do you say that represents the best
 2 of professional policing, or words to that effect.
 3 MR MPOFU: Yes.
 4 CHAIRPERSON: And every time she said,
 5 well, that's an answer that must be given by the
 6 commanders, I can't see from what I saw basically.
 7 MR MPOFU: She never said that.
 8 CHAIRPERSON: Isn't that right?
 9 MR MPOFU: No, she said I've dealt with
 10 it before or some statement like that –
 11 CHAIRPERSON: Well, then you're
 12 effectively confirming what Mr Semenya said, that every
 13 time you put it to her she says I've dealt with this
 14 already. She says the same now. I mean the question
 15 you're asking doesn't take the matter any further, it's
 16 just a repetition of what you asked before. You got an
 17 answer which I suspect you will use in argument at the end
 18 of the inquiry, so –
 19 MR MPOFU: Well, Chairperson, that's
 20 fine. I'm simply giving the witness an opportunity to –
 21 which I would have thought would be welcomed by everybody –
 22 to say now that I've seen all these things, this is my
 23 position or whatever she wants to say.
 24 CHAIRPERSON: Counsel –
 25 MR MPOFU: It's fine, if she's denied

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1 that opportunity by her own counsel –

2 CHAIRPERSON: Counsel doesn't seem to

3 want her to be given that opportunity. He says your giving

4 it to her simply constitutes repetition.

5 MR MPOFU: I'm very happy with that.

6 CHAIRPERSON: I must say I think he's

7 right, so I uphold his objection. Please proceed to the

8 next point.

9 [10:27] MR MPOFU: Thank you, Chairperson. I'm

10 happy, as I said. Thank you, Chairperson. Now General, I

11 want to move on to the topic of – well, it's a double

12 topic. It deals with what I call, well, it deals with

13 deployment, let's call it that, General. And one of the

14 things that we put to General Annandale was that there were

15 sufficient indications, there were sufficient indications

16 to show that the operation was hijacked, for lack of a

17 better word, by what we described as the hawks or the

18 hardliners accompanied by the concomitant sidelining of the

19 exemplary approach followed by General Mpembe.

20 MR SEMENYA SC: I don't understand –

21 CHAIRPERSON: You're telling us what you

22 asked General Annandale. May I suggest you concentrate on

23 the questions you're asking this witness? This long

24 preamble just does prolong this matter.

25 MR MPOFU: Well, Chairman, I'm giving

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1 context. Can't I give context to the witness so that when

2 I do put the question, which I'm just about to do, she

3 understands the context?

4 CHAIRPERSON: You've given the context,

5 now put the question.

6 MR MPOFU: Ja, well, that's what I was

7 going to do. I'm going to give you about seven indications

8 of that conclusion. The first one is that – rather,

9 General Mpembe almost as much as complained in his

10 statement about being ignored or sidelined and I would

11 refer you to –

12 CHAIRPERSON: I'm sorry, Mr Mpofo. What

13 knowledge, direct knowledge has this witness got of what

14 General Mpembe said?

15 MR MPOFU: Well, if she doesn't have the

16 knowledge I'm going to tell her.

17 CHAIRPERSON: But then you're going to

18 effectively ask her to comment on material that's before

19 us. Surely the material that you're going to use, your

20 seven points, are points that you should argue at the end

21 of the inquiry to us to try to persuade us –

22 MR MPOFU: No, Mr Chairman.

23 CHAIRPERSON: - that the conclusion you

24 wish to draw is correct.

25 MR MPOFU: No.

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1 CHAIRPERSON: What's the point of asking

2 this witness?

3 MR MPOFU: Chairperson, the point of

4 asking any witness – if I say to a witness I'm going to

5 show you that the robot was red and then I'm going to show

6 you that the car crossed, would you agree that that means

7 that the person did not keep a proper lookout? I can't be

8 disentitled from putting the material which I'm going to

9 argue, the factual material at least which I'm going to

10 argue at the end. She may or may not agree with my

11 conclusion at the end but that's exactly what cross-

12 examination is all about.

13 MR BURGER SC: If my learned friend

14 intends to do that, I formally object on the basis of

15 relevancy. This is argumentative. You should disallow it,

16 Chair. It doesn't advance this Commission.

17 CHAIRPERSON: Mr Mpofo, I'll give you a

18 chance to reply but you know it's not as if we're stopping

19 you from putting this material to the Commission but you're

20 asking this witness to almost usurp the functions of the

21 Commission –

22 MR MPOFU: No.

23 CHAIRPERSON: - and give her finding on

24 the point you're going to argue. At the end of the day

25 you'll have the fullest right to argue these points to us.

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1 If they're good points we'll uphold you, if they're not we

2 won't but I don't think the process is taken forward by

3 putting these points to this witness, but this is my prima

4 facie view. If you wish to say anything further I'll

5 listen to you.

6 MR MPOFU: No, well, as I say – as I say,

7 then I don't know what the point of cross-examination is if

8 I can't put propositions to the witness and then seek for

9 her either to agree or disagree with my conclusion, in

10 which case I move on.

11 CHAIRPERSON: The point –

12 MR MPOFU: But then what are we doing

13 here?

14 CHAIRPERSON: The point of cross-

15 examination is putting questions to witnesses which they

16 can answer meaningfully and that their answers will be of

17 assistance to the Commission in coming to a finding. What

18 this witness thinks about the points you're going to put is

19 – and I intend to show no disrespect to her – a matter of

20 no concern to us. Your point is either good or bad.

21 Please proceed with your cross-examination on some other

22 point.

23 MR MPOFU: When you arrived at Marikana,

24 in the Marikana area on the 13th, one of the people you

25 found there was General Allandale, correct?

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1 CHAIRPERSON: His name is Annandale
 2 actually.
 3 MR MPOFU: Whatever, ja. The one that –
 4 CHAIRPERSON: It's an elementary courtesy
 5 to get people's names right.
 6 MR MPOFU: Yes, well – is that right?
 7 GENERAL PHIYEGA: Yes.
 8 MR MPOFU: Mm?
 9 GENERAL PHIYEGA: Yes.
 10 MR MPOFU: Ja. Were you aware that he
 11 had basically by his own admission deployed himself and
 12 that he was uninvited in Marikana?
 13 MR SEMENYA SC: General Annandale did not
 14 admit to having been uninvited in Marikana, Chair.
 15 MR MPOFU: He did.
 16 CHAIRPERSON: The evidence indicates that
 17 he was invited to come there, my recollection is that he
 18 was obviously contacted and certain –
 19 MR MPOFU: No, Chairperson, with great
 20 respect, I'll look for it on the record. The man admitted
 21 that he was not invited. I even put it to him that
 22 sometimes –
 23 CHAIRPERSON: Mr Mpofo, I'm trying to
 24 explain to Mr Semenya why you're right. If you don't want
 25 me to do so, I won't.

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1 MR MPOFU: No, well I thought you – you
 2 didn't say uninvited.
 3 CHAIRPERSON: I said he didn't say he was
 4 invited. My understanding is he went on his own
 5 initiative. Certain reports were made to him and he
 6 decided that it was appropriate for him to go himself. So
 7 therefore in that sense he was uninvited. I was actually
 8 saying that you were right.
 9 MR MPOFU: Thank you, Chair.
 10 CHAIRPERSON: If you don't want me to
 11 remonstrate with Mr Semenya when he objects to your cross-
 12 examination on an unfounded basis then I won't do so.
 13 MR MPOFU: Please answer the question.
 14 Madam, please answer the question. Were you aware or
 15 unaware that Annandale had invited himself and was not
 16 deployed by anybody?
 17 GENERAL PHIYEGA: The concept of invited
 18 and uninvited in our service is very foreign to me.
 19 MR MPOFU: Yes, and is the concept of
 20 deployment or instructed to do something also foreign to
 21 you and if it is not foreign, were you aware that he had
 22 not been deployed by anybody?
 23 CHAIRPERSON: Two questions, that's two
 24 questions. You must break them up and ask them separately.
 25 The first question was, did you regard it as foreign, the

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1 concept of deployment, did you regard that as being foreign
 2 in this particular case? I think that's the first half of
 3 your question, isn't it, and of course it has to be
 4 answered in the context of a person holding the rank of
 5 Major-General who was the head of the –
 6 MR MPOFU: No, any – no, it doesn't. No,
 7 please Chair, don't explain my question in a manner that I
 8 did not intend. It has no bearing on any rank. In terms
 9 of the Act, the Police Act, a person has to act either on
 10 instruction or orders. It doesn't say anything about the
 11 rank in the Act. I'm asking whether that concept of people
 12 acting on instructions or orders, of whatever rank, is
 13 foreign to you.
 14 CHAIRPERSON: Mr Mpofo, surely there's a
 15 difference between a constable taking it upon himself to go
 16 to Marikana, a constable from Johannesburg taking it upon
 17 himself to go to Marikana to lend a hand, on the one hand,
 18 and a person who is at the national office of the police
 19 service, who holds the rank of major-general, who has
 20 various people and sections under his command? Surely
 21 there's a difference between the two or do you say there's
 22 no difference and if so – if you say there's no difference,
 23 obviously that's the question you ask, then the witness
 24 will answer you –
 25 MR MPOFU: Yes. Well, there may well be

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1 that difference Chairperson, but I'd prefer it to come from
 2 the witness, not from the Chair. I don't want the witness
 3 to be assisted unnecessarily. Let her, she should know it
 4 better than you and I at the very least, Chairperson.
 5 CHAIRPERSON: I'm assisting you in
 6 reformulating your question. Anyway, I will take the
 7 rebuke from whence it comes.
 8 MR MPOFU: Yes. Thank you, Chairperson.
 9 Can you answer my question without, without the – rather,
 10 answer my question without the qualification that was put
 11 by the Chairperson. Do you agree that in the police people
 12 of any rank – at the very least, below you – in terms of
 13 the Police Act should act on instructions and orders? I
 14 think you used the word that it is a regimented institution
 15 which also I think General Annandale agreed to. Would you
 16 agree?
 17 GENERAL PHIYEGA: I don't agree with you
 18 and I'm going to take you to our opening statement because
 19 it explains a number of things of how we function. And
 20 also I think it is important for you recognise that the
 21 operation that was taking place in North-West was already
 22 in a joint issue. General Annandale is very pivotal to
 23 that environment. If you give me time I'm going to go to
 24 our opening statement just to read a portion to explain the
 25 whole issue of deployment.

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1 MR MPOFU: Okay, sorry we got lost in
 2 that debate. The question was really simple, as the
 3 Chairperson –
 4 CHAIRPERSON: No, Mr Mpofu. You asked
 5 her a question, you put a proposition to her. She’s
 6 entitled to answer it as she wishes. She feels that the
 7 best way she can answer it is by quoting something from the
 8 opening statement. She is entitled to do that. I can’t –
 9 just as I can’t stop you asking the question, I can’t stop
 10 her from answering it.
 11 MR MPOFU: Well, let her answer the wrong
 12 question. I’ll ask the real question afterwards. You can
 13 quote whatever you want to quote.
 14 CHAIRPERSON: As to what the statement,
 15 the section from the opening statement is, so you can’t say
 16 whether she’s answering the wrong question now. Let her
 17 answer the question as she wishes and I’ve allowed you to
 18 ask the question as you want to ask it and I must allow her
 19 to answer it the way she wants to.
 20 MR MPOFU: Ja, that’s fine.
 21 CHAIRPERSON: That’s the way these things
 22 work. Fairness operates both in favour of you and in
 23 favour of the witness.
 24 MR MPOFU: Well, okay. Chairperson, you
 25 clarified the question to say is it foreign or is it not

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1 foreign and that’s all I’m asking. If it’s the subject of
 2 a quotation, that’s fine.
 3 CHAIRPERSON: Have you found the passage
 4 now that you wanted to quote?
 5 GENERAL PHIYEGA: I’m just going to
 6 quickly lead up – I’ve found the statement –
 7 CHAIRPERSON: You’ve found the document
 8 in which the –
 9 GENERAL PHIYEGA: Yes –
 10 CHAIRPERSON: Very well.
 11 GENERAL PHIYEGA: Chairperson, I’d like
 12 to read from the opening statement, I think it’s marked
 13 FF9.
 14 CHAIRPERSON: What paragraph number are
 15 you reading?
 16 GENERAL PHIYEGA: Number 15. “In
 17 addition, police services worldwide and in this country
 18 have standard operating procedures, formulated national
 19 instructions and guidelines. Police rely on them for their
 20 operational guidance. These SOPs, instructions and
 21 guidelines are there to ensure that everyone will do an act
 22 in a common way. This within the environment where police
 23 need to be self-disciplined while receiving controlled and
 24 limited supervision. The following are some of the key
 25 benefits of using such an approach in policing.” I think

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1 those we can look into but I think what is important is to
 2 say this has been a NatJoint matter. The instruction for
 3 me was already given and the NatJoint was expected to work
 4 with this province to ensure that this operation does take
 5 place. I did not need to go to General Annandale
 6 individually to say you are invited. I was expecting the
 7 NatJoint, in its fullest form, to actually work with this
 8 province and do what they are supposed to do and they did
 9 so. And this is why I would like to refer you back to the
 10 whole issues of how our SOPs, our instructions and other
 11 things work and that within that environment, police need
 12 to be self-disciplined while receiving controlled and
 13 limited supervision. General Annandale didn’t need me to
 14 come to him and say, General Annandale, go. My instruction
 15 through the NatJOC 06 was sufficient.
 16 MR MPOFU: Okay. Now would you care to
 17 answer my question now, which is as broken down by the
 18 Chairperson, was simply whether the notion of instructions
 19 and orders is as foreign to you as is the notion of
 20 invitations, or not? That’s all I ask you at this stage.
 21 GENERAL PHIYEGA: What I’ve read through
 22 has just underscored the fact that deployment and
 23 invitations are different and deployments are not foreign
 24 to me.
 25 MR MPOFU: Yes and all I’m saying to you

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1 now, now that you’ve answered that, is that General
 2 Annandale at least was candid enough to admit that he had
 3 not been deployed by anybody and the only question I was
 4 asking you was whether you were aware of this or not, not
 5 this whole story.
 6 GENERAL PHIYEGA: The important thing for
 7 you, Advocate, to note is that I had called for a NatJoint
 8 to intervene and he is part of that.
 9 MR MPOFU: Well, firstly, when did you
 10 call for the NatJoint to act and did that call include the
 11 NatJoint, as it were, physically relocating to Marikana?
 12 GENERAL PHIYEGA: I have indicated in my
 13 testimony here, that the moment any operation crosses the
 14 border of that particular province and where I have to
 15 deploy additional members from anywhere else and the
 16 magnitude of any particular operation, calls for me to sit
 17 down and decide whether the NatJoint get involved and you
 18 would see right in some of the statements around the tanks
 19 and all those, it was before we started calling people from
 20 other provinces. When that happens I get involved and when
 21 that happens, NatJoints get involved.
 22 [10:46] MR MPOFU: No, ma’am, I think maybe I
 23 didn’t ask that question properly. You said a few minutes
 24 ago that you called for NatJoints to be involved. I’m
 25 simply asking you when, in what form, if it was a letter or

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1 an e-mail or whatever, when that was done. So the answer
 2 can't be that it automatically happens when you deploy
 3 nationally because you, not me, said that you made that
 4 call. I'm saying – I'm sorry to ask you two questions,
 5 maybe let's do it one at a time. When did you make that
 6 call?
 7 GENERAL PHIYEGA: I have said to you that
 8 the moment I started, we started deploying people from
 9 other provinces in itself, as I've said in my testimony,
 10 any person who comes into North-West from outside this
 11 environment where we had to start backing up the deployment
 12 of North-West, it can only be done by me and when I do that
 13 and I start invoking the services of the NatJoint you spoke
 14 about, whether I wrote a letter, I did not write a letter.
 15 I informed General Mawela that he needs to get involved and
 16 assist General Mbombo.
 17 MR MPOFU: Ja, but that's exactly the
 18 point I'm making, that General Annandale did not report to
 19 you, according to him at least, he reported to General
 20 Mawela and as you correctly put it, in that chain of the
 21 regimented regime, you – I'm going to assume in your favour
 22 – you gave a certain instruction to General Mawela but
 23 General Annandale does not then say that General Mawela
 24 then gave an instruction to him to do anything, which is
 25 how it would work in a hierarchical organisation and that's

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1 exactly what we are busy interrogating, that to your
 2 knowledge, General Mawela had not deployed General
 3 Annandale to physically come to Marikana or not, whether
 4 you were aware of this. This has been established already
 5 through General Annandale.
 6 GENERAL PHIYEGA: The NatJOC had been
 7 called, had been invoked. It was in operation and those
 8 that are in the NatJOC needed to do what they are supposed
 9 to do. So if you want to rewrite how we do things, it's
 10 another story.
 11 MR MPOFU: Alright, well, then we will
 12 never know whether you were aware or not aware. Then –
 13 CHAIRPERSON: I think I understand why
 14 you're asking the question, I think you're entitled to
 15 insist on an answer to that question. I think I know what
 16 you're going to argue at the end of the case and whether
 17 it's a good point or a bad point I don't know but obviously
 18 you need that fact to base an argument on, so I think you
 19 must persist. You mustn't give up so easily, if I may say
 20 so.
 21 MR MPOFU: Thank you, Chairperson, I
 22 appreciate that. Maybe in fairness let me explain why I'm
 23 asking this question, General. One of the suggestions
 24 made, one of the suggestions made at least by General
 25 Annandale or the Chairperson was that since you arrived on

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1 – or rather if, on the 15th, you acquiesced or rather did
 2 not do anything about the non-deployment of Annandale, that
 3 would somehow show the original lack of deployment. Now
 4 I'm asking you – now of course that may or may not be so
 5 but one can, that is clear, that you couldn't have cured
 6 something you were not aware of and that's why I'm asking
 7 you whether you were aware of the non-deployment because if
 8 you were not then your silence can never be read as curing
 9 the defect. You might have thought he was properly
 10 deployed. You understand where I'm going with this? Yes,
 11 because I'm going to argue at the end of the case that
 12 Annandale's presence there was, it kind of fell between two
 13 stools if you know what I mean, that you might have thought
 14 that he was properly deployed by Mawela or invited by
 15 Mbombo and they, in turn, might have thought that he was
 16 properly sent by head office. In other words, what was
 17 going through your mind about this deployment becomes
 18 important, so I'm asking for the last time. Were you aware
 19 or not aware that Annandale's arrival or rather departure
 20 from Pretoria on the 13th was not as a result of a specific
 21 instruction from General Mawela nor a specific invitation
 22 from General Mbombo. You were either aware or you were not
 23 aware.
 24 GENERAL PHIYEGA: I'm aware that it was
 25 necessary and critical for him to be here.

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1 CHAIRPERSON: I think you've taken the
 2 point as far as you can take it.
 3 MR MPOFU: Ja, I have.
 4 CHAIRPERSON: You've got an answer which
 5 you can found an argument on. Whether it's a good argument
 6 or not, we will discover in due course.
 7 MR MPOFU: One day in the future. Thank
 8 you, Chairperson. Well, okay, whether or not he was
 9 properly deployed, were you aware that General Annandale
 10 subsequently played what one might call a pivotal and
 11 decisive part in the events leading up to the tragedy of
 12 the 16th, including (a) determining the time of the
 13 operation, (b) appointing the person who was going to draft
 14 the plan and (c) playing a major role in securing the
 15 services of the person who was going to be the chief
 16 negotiator.
 17 GENERAL PHIYEGA: I take it that,
 18 Advocate, there was sufficient opportunity to actually
 19 engage the men on all those key operational issues that he
 20 had the responsibility to do and execute. I would not be
 21 able to give those nitty-gritty issues that you want me to
 22 respond to but I hope that he has been able to answer those
 23 questions when you posed them to him.
 24 MR MPOFU: Okay. Once again I'm only
 25 asking you about whether you were aware or not, but I'm not

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1 going to go down that road again so I'll just move on like
 2 this. Whether you were aware or not aware, I'll ask these
 3 things that I've listed which play a significant role in
 4 any operation of this kind, not the types of decisions that
 5 should be taken by the C-JOC.

6 GENERAL PHIYEGA: Am I understanding you
 7 to be saying he was not operating with the C-JOC?

8 MR MPOFU: Yes, you are because he used
 9 the word "I." I don't want to go through all those things
 10 but he says "I" – or rather I'm paraphrasing please – "I
 11 asked Scott and Pretorius to go and brief the commanders
 12 because I wanted the operation to start at 15:30." And
 13 then he says, "I, knowing that there's a Scott from STF who
 14 does plans, ensured that his presence is secured" and then
 15 later he says, "I asked somebody else" – I forget the name
 16 now – "to, I phoned somebody to ensure that McIntosh, or
 17 rather a hostage negotiator is secured."

18 CHAIRPERSON: I think it was Strydom,
 19 wasn't it?

20 MR MPOFU: Strydom, that's correct.
 21 Thank you, Chairperson.

22 CHAIRPERSON: He spoke to Dr Strydom and
 23 then –

24 MR MPOFU: That's correct.

25 CHAIRPERSON: - send a top negotiator and

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1 they sent McIntosh. I think that's –

2 MR MPOFU: That's correct. I'm indebted
 3 to the Chairperson, and it is on that basis – and he
 4 candidly admitted that he played those roles. All I was
 5 simply asking is whether you were aware that he played such
 6 a significant role. Sorry – sorry, I'm not asking that
 7 anymore because you didn't answer it. I'm asking whether
 8 those are tasks that would be ordinarily carried out by the
 9 C-JOC or not.

10 GENERAL PHIYEGA: Having not been there
 11 to listen to the testimony, I think I now go to issues of
 12 language. Is it I, as a leader of the JOC, working with
 13 people in that JOC or – because that operation is way too
 14 big for any one person to talk, "I, I." We talk "we" and
 15 "us" when we deal with that type of operation and I think I
 16 contextualise the "I" be - just say as a leader I led the
 17 team to do the following, as a leader I led the people to
 18 do the following, as a leader – there's no way Scott could
 19 do that plan alone because he was not even out there. It's
 20 as – there's no way that any one of them could pull this
 21 operation alone. I don't know, maybe it's the language
 22 issue which is complex to me because I read the "I" very
 23 differently.

24 MR MPOFU: Are you aware that General
 25 Mpmembe has said in his – well, whether in his statement or

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1 to you he might, whatever is in his statement he might have
 2 referred it to you as well, that had he been contacted by
 3 the commanders on the ground – or rather the reason why he
 4 did not give his input was that he had not been contacted
 5 even though he was available and, more importantly, that if
 6 he had been contacted after scene 1 he might, he would have
 7 called for a – I can't remember what he – report for the
 8 purposes of doing an assessment, in which case maybe scene
 9 2 would not have happened. Chair, if you're looking for
 10 those – it's 56 and 51.

11 CHAIRPERSON: Perhaps in fairness we
 12 should read it to her. It's exhibit GGG12, that's the
 13 statement of Major-General Mpmembe, perhaps they could –
 14 those who are assisting you can give it to you. When I say
 15 assisting you, I mean handing you the relevant documents as
 16 and when they're called for, I don't mean anything else.

17 GENERAL PHIYEGA: Yes.

18 CHAIRPERSON: Do you have the document?
 19 Now on page 22 paragraph 51 reads, "At all times while I
 20 was in the helicopter" – he explains that he went up in the
 21 helicopter at some stage to find out what was happening –
 22 "At all times while I was in the helicopter, which is a
 23 period of about 20 minutes or less, I was accessible by
 24 radio both to the operational commander Brigadier Calitz
 25 and to the JOC. As overall commander I could only give

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1 direction when direction was sought, either from the JOC or
 2 from the operational commander. Neither sought direction."
 3 Then in 56, the last paragraph of his statement at page 23
 4 he says, "I wish to state that if I'd been told immediately
 5 after scene 1 but before scene 2 that people had been
 6 killed, I would have directed that police members do a show
 7 of force and contain the situation while attending to the
 8 scene around the kraal. Effectively I would have directed
 9 that we do the same thing I'd done on Monday, 13 August
 10 2012." That's the passage that you're putting to the
 11 witness.

12 MR MPOFU: Thank you, Chairperson.

13 CHAIRPERSON: Now, what do you want her
 14 to say about it or how do you want her to deal with it?

15 MR MPOFU: Well, the question is simply
 16 whether you were aware or not, either from the statement or
 17 from conversation you might have held with the C-JOC, that
 18 he held these views that had he been contacted he would
 19 have halted the operation and that he had not been
 20 contacted, even though available.

21 MR SEMENYA SC: Chair, what do we want
 22 the witness to say on a postulate that General Mbombo,
 23 Mpmembe is saying he would have done had he been contacted?

24 CHAIRPERSON: The question is was she,
 25 is, the question is in the present tense – is she aware of

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1 it? I'm not quite sure how that helps us by itself but I
 2 must assume that Mr Mpofo is going to lead, that forms the
 3 foundation for the next question and he'd like – he
 4 wouldn't want to tell us now what the next question is
 5 before he's asked this one, I suppose. Is that right?
 6 MR MPOFU: Yes, I can even tell you,
 7 Chairperson. If she was aware, I will ask another
 8 question. If she wasn't, I'll move on to something else
 9 because nothing will flow from it if she was not aware.
 10 CHAIRPERSON: You're now changing the
 11 tense. You see, the question you asked was, are you aware?
 12 Now that's what I put to Mr Semenya –
 13 MR MPOFU: Oh, no, I mean –
 14 CHAIRPERSON: If the question is, were
 15 you aware, then of course you mean – you use, if the
 16 question is were you aware, then you've got to say the time
 17 at which, to which the question relates.
 18 MR MPOFU: Yes.
 19 CHAIRPERSON: So if it's were you aware,
 20 say the time to which the question relates and let's hear
 21 what her answer is.
 22 MR MPOFU: Okay.
 23 MR SEMENYA SC: Well, Chair, General
 24 Mpofo then was himself not aware because he is saying this
 25 as a retrospective view, that had I been contacted at that

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1 time – now to then ask this question, are you aware now or
 2 were you aware then –
 3 [11:06] CHAIRPERSON: No – no. No, he hasn't
 4 told us what the "then" is yet. Obviously she wasn't aware
 5 at the time what was going on. He's talking about a
 6 different time of non-awareness, if you know what I mean.
 7 MR MPOFU: Yes.
 8 CHAIRPERSON: Mr Mpofo has got something
 9 up his sleeve and it's not fair to make him tell us what it
 10 is at this stage but he wants to know whether at a
 11 particular time, he hasn't told me what it is yet, was this
 12 witness aware.
 13 MR MPOFU: Yes.
 14 CHAIRPERSON: I don't think – I think I'd
 15 be unfair if I didn't let him as the question.
 16 MR MPOFU: Yes.
 17 CHAIRPERSON: How it's going to help him
 18 is a question you may have something to say about later but
 19 ask the question, let's get the answer.
 20 MR MPOFU: Thanks, Chairperson. Chair –
 21 I'm sorry, General. Sorry, Mr Mahlangu. General, what Mr
 22 Semenya is asking you is fair, about allocating the time
 23 but the time that I'm talking about should be made clear by
 24 the fact that I said, when I asked the question, either as
 25 a result of a conversation you had with Mpofo – in other

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1 words not on the 16th, that conversation you could have had
 2 at any time – or having read his statement or both of those
 3 things happened subsequent to the events and I'll ask the
 4 question again, in fairness to you. Are you aware, either
 5 as a result of a conversation between you and General
 6 Mpofo or having read his statement, that he "complained" –
 7 I'm putting that in quotes – that he had not been contacted
 8 even though he was available and that had he been contacted
 9 or told, I think that's his word, had he been told that
 10 scene 1 had happened he would have acted as the Chairperson
 11 –
 12 CHAIRPERSON: Mr Mpofo, I'm not sure that
 13 you can call that a complaint but I can understand the
 14 relevance of the question –
 15 MR MPOFU: Statement, I'll leave it
 16 neutral.
 17 CHAIRPERSON: Alright.
 18 MR MPOFU: That he made a statement –
 19 CHAIRPERSON: Okay, I can understand the
 20 relevance of the question if you want to know whether, when
 21 she made her statements on say the 17th or the 20th, she was
 22 aware of that statement by Mpofo. I'll allow that
 23 question if that's what you mean by "then" –
 24 MR MPOFU: Yes.
 25 CHAIRPERSON: But I'm not going to allow

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1 any more.
 2 MR MPOFU: Okay. Let's not colour it.
 3 Leave the complaint, say statement. Are you aware of the
 4 statement by Mpofo that he, although he was available, had
 5 not been contacted by either the JOC or the operational
 6 commander and that, had he been contacted after scene 1 at
 7 least, he would have done what the Chairperson read out to
 8 you.
 9 CHAIRPERSON: - added the extra point.
 10 If he, you say were you aware. The question was, when are
 11 you interested in and I suggest that you, if you ask the
 12 question "Were you" i.e. the witness "aware when you made
 13 your statements on the 17th and the 20th, of that statement
 14 that Mpofo made," then I'll allow the question but you
 15 didn't add that last bit in.
 16 MR MPOFU: Yes. Were you aware when you
 17 made the statement and between the time you made the
 18 statement and now?
 19 CHAIRPERSON: There you've undone it, Mr
 20 Mpofo. Concentrate on what she was aware of or not aware
 21 of on the 17th to the 20th. I think that's all you need for
 22 your argument.
 23 MR MPOFU: Okay, fair enough.
 24 GENERAL PHUYEGA: I was not aware on the
 25 17th and 20th of this statement.

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1 MR MPOFU: Were you ever aware at any
 2 stage that Mr, rather General Mpembe told Mr Mathunjwa in
 3 the morning of the 16th that he was no longer in charge of
 4 the operation, which is evidence given by Mr Mathunjwa
 5 which is not disputed?
 6 GENERAL PHIYEGA: I'm not aware.
 7 MR MPOFU: And were you aware that – I'm
 8 sorry, I don't want to fall into the same – were you ever
 9 aware that when General Mpembe needed to go on air to
 10 inspect the operation, he asked General Annandale for the
 11 means to do so and General Annandale told him that all the
 12 SAPS helicopters were gone and he would arrange for him to
 13 go in the Lonmin chopper?
 14 CHAIRPERSON: Well, we've heard several
 15 times, it's not properly described as the Lonmin chopper,
 16 it was the COIN –
 17 MR MPOFU: No, Chairperson, I'm sorry.
 18 The police – I've shown several times as well that the
 19 police referred to it as such.
 20 MR BURGER SC: It's not correct. The
 21 facts are it wasn't a Lonmin helicopter and my learned
 22 friend is snatching a statement from it which is not
 23 supported, which has never been deposed to, whereas the
 24 real facts before the Commission is it was not the Lonmin
 25 helicopter, which he at some stage accepted, in fact.

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1 MR MPOFU: Chairperson, with the greatest
 2 respect, there are two instances – I don't want us to go to
 3 this. Commissioner Tokota kindly took us to the passage in
 4 the – I think it's FFF25 where it's referred to as such.
 5 When we were given the documentation of that video,
 6 remember the very first video I ever played here which was
 7 for Botha last year, it was described as video coming from
 8 the Lonmin chopper.
 9 CHAIRPERSON: No –
 10 MR MPOFU: So let's at least –
 11 CHAIRPERSON: Sorry, Mr Mpofo, let's not
 12 waste time on a point that may be irrelevant.
 13 MR MPOFU: Yes.
 14 CHAIRPERSON: It was described loosely as
 15 the Lonmin chopper. It's been -
 16 MR MPOFU: I don't know –
 17 CHAIRPERSON: It was described, let's
 18 take up - it's described as a Lonmin chopper. We've now
 19 had the explanation that it was actually a COIN chopper,
 20 Protea COIN chopper which was contracted in some way -
 21 MR MPOFU: By –
 22 CHAIRPERSON: To Lonmin.
 23 MR MPOFU: To Lonmin.
 24 CHAIRPERSON: Ja, but I don't know
 25 whether the thrust of your question depends upon it being

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1 the Lonmin chopper or being a non-police chopper which
 2 happened to be made available, which belonged to Protea
 3 COIN. The point as I understood you were making, was that
 4 Mpembe said when he wanted to go up in the air to see what
 5 was happening, none of the police choppers were available.
 6 That's what Annandale told him but he'd arranged for this
 7 other chopper which we've now been talking about to be made
 8 available. If that's all you need, then why not just ask
 9 the question like that, then we won't get involved in these
 10 sideshows which don't really take your point further, I
 11 don't think, unless I'm misunderstanding.
 12 MR MPOFU: No, it won't but I can't be
 13 banned from using the language which was probably used by
 14 Annandale because, as I've shown, that's how the police
 15 referred to that thing. So what are the chances that
 16 Annandale said, oh no, we're going to get the COIN one
 17 that's -
 18 CHAIRPERSON: No – no.
 19 MR MPOFU: - by Lonmin. I mean that's
 20 ridiculous.
 21 CHAIRPERSON: Mr Mpofo, it's a side issue
 22 at the moment. Let's concentrate, just keep an eye on the
 23 ball and with a bit of luck you may get it in the net at
 24 some stage –
 25 MR MPOFU: No, I just wanted to make that

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1 point.
 2 CHAIRPERSON: - and not only in extra
 3 time.
 4 MR MPOFU: Yes, no, no. For progress
 5 I'll –
 6 MR BURGER SC: No, in fairness, Chair,
 7 may I just say something? You're too fair to my learned
 8 friend. He's reading from the Mpembe statement. He's just
 9 read us paragraph 48. In paragraph 49 the good General
 10 says, "The Protea COIN helicopter flew above the three SAP
 11 helicopters." So the very wording of the witness he's
 12 debating referred to a Protea COIN. It's quite wrong now
 13 to superimpose a Lonmin helicopter here.
 14 MR MPOFU: Well, once again Mr Burger is
 15 guilty of not listening. I did not read paragraph 48,
 16 neither did I quote Mpembe. I'm quoting Annandale.
 17 CHAIRPERSON: It seems to me the point in
 18 debate at the moment takes us no further, so let's not –
 19 you know there are so many important points for us to
 20 concentrate on –
 21 MR MPOFU: Ja, I'd rather move on.
 22 CHAIRPERSON: - and the amount of water
 23 in the bucket is getting smaller every day, so let's –
 24 MR MPOFU: Well, it's not by me,
 25 Chairperson –

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1 CHAIRPERSON: Okay, no –
 2 MR MPOFU: This question would have long
 3 been answered now –
 4 CHAIRPERSON: Let's concentrate on the
 5 main point.
 6 MR MPOFU: Ja, okay –
 7 CHAIRPERSON: Put your main question and
 8 let's, when we've got the answer we'll take the tea
 9 adjournment unless you want a few more minutes to round off
 10 a point.
 11 MR MPOFU: Yes. No, I'll -. Were you
 12 aware that, among other things, when General Mzembe wished
 13 to go on air to inspect the operation, he asked General
 14 Annandale who informed him that the SAPS choppers were all
 15 gone and went on to organise another helicopter which is
 16 referred to in the papers variously as the COIN chopper or
 17 the Lonmin chopper?
 18 GENERAL PHIYEGA: I've indicated in my
 19 testimony that I was not involved in operations. Other
 20 than reading the statements as written, I was not part of
 21 the operations and I'm sure the two generals could be able
 22 to answer these questions much more.
 23 MR MPOFU: Okay. Were you aware of the
 24 death threat that had been made to General Mzembe in
 25 respect of how he had handled the operation on the 13th in

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1 which five people were killed, including two policemen?
 2 Sorry, Chairperson, you did say it was about teatime and I
 3 forgot but maybe I can just get this answer.
 4 CHAIRPERSON: I did say if you wanted to
 5 ask a question or two more, you could do.
 6 MR MPOFU: Thank you, I didn't hear.
 7 CHAIRPERSON: So I didn't stop you.
 8 MR MPOFU: Thank you, Chair, thank you.
 9 GENERAL PHIYEGA: I've heard of those
 10 statements.
 11 MR MPOFU: Were you aware that as a
 12 result of those death threats one, Lieutenant-Colonel
 13 Vermaak, says that he, Vermaak, as a result thereof wanted
 14 to remove General Mzembe?
 15 CHAIRPERSON: In the interests of
 16 completeness, in the interests of completeness one should
 17 say he wanted to remove him from the scene where those
 18 threats were being made, which is the area near where the
 19 fatalities occurred on the 13th – he had no power to remove
 20 him in the general sense, it was only to physically remove
 21 him from that scene where the fatalities occurred, or some
 22 of them, on the 13th.
 23 MR MPOFU: Okay, well then I think we
 24 should take the tea so that, in fact the Chair is probably
 25 right but I'll just check it over the tea break.

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1 CHAIRPERSON: - about what Vermaak's
 2 decision to remove him, wherever it's from, then of course
 3 you don't have to check the statement further.
 4 MR MPOFU: Exactly, yes.
 5 CHAIRPERSON: So the question, National
 6 Commissioner, is this, Lieutenant-Colonel Vermaak says he
 7 heard these threats against General Mzembe on the 13th at
 8 the scene where some of the fatalities occurred on that day
 9 and because of the threats, he thought it appropriate for
 10 General Mzembe to be removed by helicopter from that scene.
 11 The question is whether you were aware of that.
 12 GENERAL PHIYEGA: Chair, I think as I've
 13 already stated, those are serious operational issues I
 14 wouldn't have been part of, other than just reading on the
 15 statements that have been given.
 16 CHAIRPERSON: With your permission, Mr
 17 Mpofo, may we take tea now?
 18 MR MPOFU: Yes, I was going to say for
 19 the first time I'll take that answer as a no. Thank you,
 20 Chairperson.
 21 CHAIRPERSON: We'll take the tea
 22 adjournment.
 23 [COMMISSION ADJOURNS COMMISSION RESUMES]
 24 [12:05] COMMISSIONER: The Commission resumes.
 25 National Commissioner, you're still under oath. Mr Mpofo,

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1 do you have any further questions for the witness?
 2 MR MPOFU: Yes, thank you, Chairperson.
 3 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 4 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 5 General, we were still – excuse me – we were still on the
 6 question of whether you were aware that Vermaak had
 7 purported to, or rather at least intended to remove General
 8 Mzembe from the scene as the Chairperson correctly pointed
 9 out. In the Afrikaans version it says, "af die toneel af"
 10 following the death threats that were made against him.
 11 GENERAL PHIYEGA: I'd already responded
 12 that those are intricate operations issues but I'm sure
 13 General Mzembe and Annandale would have been, they'll be
 14 capable to answer.
 15 MR MPOFU: Okay. Yes, thank you – sorry,
 16 Mr Mahlangu. The reason I'm asking you, General - I
 17 appreciate what you're saying – the reason I'm asking you
 18 is that Lieutenant-Colonel Vermaak, well, there are two
 19 reasons. The first one is that Lieutenant-Colonel Vermaak
 20 indicates that he conveyed this to General Mbombo so it's
 21 possible that General Mbombo might have conveyed it to you
 22 but if she didn't, she didn't. So it's not just a question
 23 of Mzembe and Vermaak. It was referred upwards, so to
 24 speak, and so whether the upwards ended with Mbombo or
 25 ended with you, that's what I want to clarify.

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1 GENERAL PHUYEGA: Ja, as I said, I've
 2 already said awareness of those, I don't but I'm sure
 3 General Mbombo will answer those questions.
 4 MR MPOFU: So can I take it that General
 5 Mbombo, from that answer you are saying General Mbombo did
 6 not relay the matter further to you – not the matter, that
 7 particular aspect?
 8 GENERAL PHUYEGA: I've already said to
 9 you that yes, that was an operational matter and I'm sure
 10 that they would be able to answer you on that.
 11 MR MPOFU: No, General, I'm afraid I'm
 12 asking you a very specific question. There are three
 13 possible answers to it. It's either, you were aware
 14 because General Mbombo relayed the matter further to you or
 15 you were not aware because she did not relay to you or you
 16 cannot remember.
 17 GENERAL PHUYEGA: Nothing is inconsistent
 18 with my answer. I have said to you those are operational
 19 issues that I'm not aware of and they will answer you more
 20 appropriately.
 21 MR MPOFU: Okay.
 22 CHAIRPERSON: I didn't hear you clearly.
 23 I understood the second part of your answer to be that the
 24 commanders and so forth would deal with that when they give
 25 evidence but you started off by saying they were

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1 operational issues and then I missed the next few words.
 2 Were you aware of them at the time or not, that's the
 3 point? I understand they'll be dealt with fully by the
 4 commanders and so forth when they give evidence, but the
 5 question that Mr Mpofo wants to know and wants an answer to
 6 is, was this, these threats and what Lieutenant-Colonel
 7 Vermaak wanted to do about them, was that conveyed to you
 8 or were you not aware of it?
 9 GENERAL PHUYEGA: Chair, this is why I
 10 said these are operational issues that I wouldn't have been
 11 aware of and I'm saying the members will answer those.
 12 CHAIRPERSON: That's the part I didn't
 13 hear. You weren't aware of it.
 14 MR MPOFU: Thank you. Now, had you been
 15 made aware of that fact, knowing what you know about the
 16 hierarchical nature of the organisation, would you find it
 17 strange or not strange that a lieutenant-colonel would
 18 remove a general from a particular scene?
 19 MR SEMENYA SC: Chair, can we get
 20 clarity? As I understand the word "remove" was to remove
 21 him from harm's way or is he saying that it was an
 22 instruction given by a junior to a senior?
 23 CHAIRPERSON: Mr Mpofo, the question is
 24 slightly ambiguous. I think Mr Semanya is entitled to ask
 25 you to make it a bit clearer. What is your answer to the

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1 point he raises?
 2 MR MPOFU: Well, at this stage since
 3 Lieutenant-Colonel Vermaak is not here, I will rely simply
 4 on his statement where he says, "Ek" – I can't remember the
 5 Afrikaans but where he says he took the decision to remove
 6 or intended to remove him. So on either formulation that
 7 Mr Semanya has put, the answer, the question is given the
 8 hierarchical nature of the organisation, would a junior
 9 officer as it were, remove or have the capability to remove
 10 – I'm just looking for the correct –
 11 MR SEMENYA SC: Chair, maybe –
 12 MR MPOFU: Okay, here, here. I found it,
 13 Chairperson. Sorry, Mr Semanya, just so that you can
 14 object properly. It's in paragraph 5 of Vermaak, "Ek het
 15 direk na hom toe gegaan en hom meegedeel dat ek hom van die
 16 toneel af gaan verwyder weens die dreigement op sy lewe."
 17 So it's very clear.
 18 MR SEMENYA SC: That's my point
 19 precisely, Chair, that to remove somebody from harm's way
 20 does not require any hierarchy –
 21 GENERAL PHUYEGA: Any direction.
 22 CHAIRPERSON: It does look in the context
 23 as if Lieutenant-Colonel Vermaak means physically remove
 24 out of harm's way –
 25 MR MPOFU: No, I don't –

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1 CHAIRPERSON: - rather than take it upon
 2 myself to issue an order to a superior and tell him just to
 3 leave the scene.
 4 MR MPOFU: No, I'm afraid, Chairperson,
 5 it's not that simple. If a person says, I went to the
 6 person and I said to him I am going to remove you, that's
 7 not the same as –
 8 CHAIRPERSON: Well, let me translate what
 9 is said. He says that, "Ek het direk na hom toe gegaan," I
 10 went directly to him.
 11 MR MPOFU: Yes.
 12 CHAIRPERSON: - "en hom meegedeel,"
 13 informed him.
 14 MR MPOFU: Ja.
 15 CHAIRPERSON: - "dat ek hom van die
 16 toneel af gaan verwyder," that I'm going to remove him from
 17 the scene.
 18 MR MPOFU: Yes.
 19 GENERAL PHUYEGA: Yes.
 20 CHAIRPERSON: - "weens die dreigement op
 21 sy lewe," because of the threat to his life. "Ek het 'n
 22 Nyala-voertuig met twee lede gereël om die generaal weg te
 23 vat na die OPS toe." I arranged a Nyala vehicle with two
 24 members –
 25 MR MPOFU: To take him away –

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1 CHAIRPERSON: - to take the General away
 2 to the OPS. What's the OPS? Is that the Afrikaans for
 3 JOC?
 4 MR MPOFU: Yes.
 5 CHAIRPERSON: "Kaptein Oosthuizen en
 6 Sersant Venter" –
 7 MR MPOFU: It's the JOC.
 8 CHAIRPERSON: "Kaptein Oosthuizen en
 9 Sersant Venter het intussen die een beseerde" – no, that's
 10 something else.
 11 MR MPOFU: It's another matter.
 12 CHAIRPERSON: So that's the passage. So
 13 he says he told him that he was going to remove him because
 14 of the threat to his life and he arranged for the Nyala
 15 vehicle to come with these two members.
 16 MR MPOFU: Ja. Thank you, Chairperson,
 17 so all –
 18 CHAIRPERSON: That's the passage. Now
 19 based on that passage you want to put a question to the
 20 witness.
 21 MR MPOFU: Thank you, Chairperson, yes.
 22 And really the issue, General, here is there's a difference
 23 between saying I went to the man, realising that he was in
 24 danger and suggested to him whether he shouldn't maybe
 25 remove himself from the scene, blah-blah, there's a

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1 difference between that, I went to the man, I told him that
 2 I am removing him and I arranged for him to be taken away,
 3 if you appreciate that difference.
 4 CHAIRPERSON: But the words are, "weens
 5 die dreigement op sy lewe," because of the threat to his
 6 life.
 7 MR MPOFU: Ja, two things that I –
 8 CHAIRPERSON: It appears to be what was
 9 part of what Vermaak said to the General.
 10 MR MPOFU: Yes, yes. Two things that I,
 11 rather the two things that I concede, having read the thing
 12 over tea, is that as the Chair has said it was removal from
 13 the scene because it talks about a "toneel" and also that
 14 it was "weens die dreigement." In other words, it was in
 15 relation to the threat.
 16 GENERAL PHIYEGA: I think, you know, just
 17 listening to what has been read and what is being
 18 interpreted, you are mentioning that there's a scene and
 19 there is a reason that has been – there's a serious
 20 qualification by this statement that has been given, that
 21 "weens die dreigement op sy lewe" I am assisting. There's
 22 no rank issue here. It's a situation and a danger that is
 23 perceived and a member that is being responsible.
 24 MR MPOFU: So can I read from that answer
 25 then that what you're saying is, contrary to what I will

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1 argue, that because (a) it was merely a removal from the
 2 scene and (b) it had to do with the threat, it was
 3 therefore acceptable or, to use my original words, not
 4 strange that a junior, a more junior officer would remove
 5 his senior from a scene? In other words, even if it was a
 6 constable, under those circumstances you would accept it.
 7 GENERAL PHIYEGA: And this is why I said
 8 in my response to you earlier on that rank has no role in
 9 these two issues. It's about the situation –
 10 MR MPOFU: Yes.
 11 GENERAL PHIYEGA: - and the danger in
 12 that situation and acting responsibly.
 13 MR MPOFU: Yes. No, no, we're in
 14 agreement. If rank doesn't come to it, then even a
 15 constable would do it, that's what I was emphasising.
 16 Okay, that's your answer. You and I have agreed and so did
 17 General Annandale, that the police force or police service
 18 as such is a hierarchical organisation, rank and what one
 19 might call the pecking order is something quite important,
 20 correct?
 21 GENERAL PHIYEGA: Yes, it is true.
 22 There's a place for a rank, there's a place for a role.
 23 MR MPOFU: Yes.
 24 GENERAL PHIYEGA: And those two things
 25 are always harmonised but respected in their individuality.

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1 MR MPOFU: If you go to GGG40, GGG40 –
 2 GENERAL PHIYEGA: 4-0?
 3 MR MPOFU: 1-4-0, sorry, for the record.
 4 CHAIRPERSON: Are you referring to this
 5 photograph?
 6 MR MPOFU: That's correct, Chair.
 7 CHAIRPERSON: GGG40 of the JOC. There
 8 are two copies of it, I see it's two photographs stapled
 9 together. The first is the scene of that corner of the
 10 JOC, as it were, and the second is an enlargement
 11 indicating the document that's pinned up on the wall.
 12 MR MPOFU: Okay, Chairperson. Mine is
 13 one page, so it's the second one then. It's the one with
 14 the whiteboard on the wall. Thank you, Chair. Are you
 15 there, General?
 16 GENERAL PHIYEGA: I am having something
 17 like GGG 4-0.
 18 MR MPOFU: 4-0 yes. Now would you, if
 19 you look at the names that are listed on the whiteboard, as
 20 it were, you'll see that once again what I would call the
 21 pecking order is listed there and Major-General Annandale
 22 is on top of the food chain, as it were, followed by
 23 another Major-General and then there's a Brigadier and then
 24 there's a Colonel, as it should and then the – I'm just
 25 dealing with the first set. Would it be that, wouldn't

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1 that indicate that General Annandale was regarded as the
 2 head honcho? And sorry, before you answer, you'll see that
 3 Major-General Mpembe is right at the bottom of the list.
 4 GENERAL PHIYEGA: I see that.
 5 MR MPOFU: Ja. Do you agree with me that
 6 it indicates what I say it indicates, or don't you agree?
 7 GENERAL PHIYEGA: I wouldn't necessarily
 8 agree because I think the person who wrote this can tell
 9 you. If I look at Mpembe C1, somebody C2 at the top, C6 at
 10 the bottom, so how do you explain that to say –
 11 MR MPOFU: No, those are just the call
 12 names. C1 and C2 are Charlie 1 and Charlie 2. P1 is Papa
 13 1, so you can ignore that stuff.
 14 GENERAL PHIYEGA: Yes. I can just tell
 15 you that I'm the wrong person to judge this thing. I won't
 16 be able to help you on it.
 17 MR MPOFU: Can you also go to exhibit EE?
 18 Are you there?
 19 GENERAL PHIYEGA: Yes. Is it exhibit EE,
 20 1611?
 21 MR MPOFU: Yes, 1611.
 22 GENERAL PHIYEGA: I see the copy.
 23 MR MPOFU: Yes. Do you see there as
 24 well, under "Attendance" there once again the pecking order
 25 is written down there. First is Lieutenant-General Mbombo,

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1 then it's Major-General Annandale and only thereafter
 2 Major-General Mpembe.
 3 GENERAL PHIYEGA: Ja, I see and there's a
 4 Lieutenant-General and two Major-Generals following.
 5 MR MPOFU: No, I don't think it – you
 6 know what I'm asking you.
 7 GENERAL PHIYEGA: And four Brigadiers.
 8 [12:25] MR MPOFU: Yes. No, I'm afraid, General,
 9 I'm sure you know what I'm asking you. Of course there's a
 10 Lieutenant-General and two Major-Generals but of the two
 11 Major-Generals, do you see that the first one who is
 12 mentioned and I'm saying in the order of importance in
 13 terms of the hierarchy is – no, you can answer, you can
 14 disagree with me that I have to put to you what I'm going
 15 to –
 16 CHAIRPERSON: I'm sorry, Mr Mpofo, where
 17 do you get it from that they're in order of importance?
 18 MR SEMENYA SC: Importance.
 19 CHAIRPERSON: The pecking order. There's
 20 been no evidence to that effect. You may be right. On the
 21 other hand, the order in which the names appear may be
 22 simply have been taken from an attendance list that they
 23 signed that was passed around the table, I don't know.
 24 MR MPOFU: Ja –
 25 CHAIRPERSON: I don't think you can put –

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1 I don't think you can put as a fact that this was a pecking
 2 order or a list in order of importance.
 3 MR MPOFU: No –
 4 CHAIRPERSON: You can refer to the
 5 document, you can refer to the order in which the names
 6 appear in the document, you can draw attention to the fact
 7 that Annandale was in fact Mpembe's junior as a Major-
 8 General because he'd only become a Major-General a short
 9 time before. You can mention all those facts but I don't
 10 think you can put that the attendance list is necessarily
 11 in the pecking order or order of importance.
 12 MR MPOFU: Well, it might not necessarily
 13 be –
 14 CHAIRPERSON: Well, you've just put it as
 15 if it was, so I suggest you reformulate your question to
 16 meet that point and then proceed.
 17 MR MPOFU: Okay. If you look at that
 18 list you'll see – I think you had already started to answer
 19 the question – that at the top is the Lieutenant-General
 20 and then it's the Major-General, then it's the Brigadiers,
 21 then it's the Colonel and then rightfully it's the advocate
 22 right at the bottom, whom I think was a Captain.
 23 GENERAL PHIYEGA: That I see on the
 24 paper.
 25 MR MPOFU: Now, all I'm putting to you is

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1 that that list is in descending order.
 2 GENERAL PHIYEGA: If you say descending
 3 order you are saying Lieutenant-General, two Major-
 4 Generals, four Brigadiers and one Colonel.
 5 MR MPOFU: Ma'am, I'm putting a
 6 proposition to you which you may accept, disagree with or
 7 say you don't know. Is that list in descending order or
 8 not?
 9 GENERAL PHIYEGA: I have responded to you
 10 to say yes, it is in descending order. There's a
 11 Lieutenant-General, two Major-Generals, four Brigadiers and
 12 one Colonel.
 13 MR MPOFU: Ja. If we accept, therefore,
 14 that the list is in descending order, let's now just deal
 15 with one of the categories you've mentioned. Would a
 16 person who knows that the list is in descending order be
 17 justified in assuming that the person who's in number 3 in
 18 a list that is in descending order is not as important in
 19 that context as the person who is number 2? I mean –
 20 GENERAL PHIYEGA: No, it's not –
 21 MR MPOFU: Nobody would –
 22 GENERAL PHIYEGA: - would not be
 23 justified.
 24 MR MPOFU: So that nobody looking at the
 25 list in descending order would have that notion that number

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1 2 is higher than number 3. That's a strange notion.
 2 GENERAL PHIYEGA: Particularly that
 3 number 2 and number 3 are the same people. Number 3,
 4 number 4, 5, 6, 7 are the same people. There is no ranking
 5 order, there is no importance. It's ranked, it's
 6 Lieutenant-General, two Major-Generals, four Brigadiers,
 7 one Colonel and an Advocate.
 8 MR MPOFU: Well ja, what we do know is
 9 that one of those Major-Generals had only been a General
 10 for 12 days and the other one had been a General for some
 11 time, so would that make any difference?
 12 GENERAL PHIYEGA: It doesn't.
 13 MR MPOFU: Sorry, this is the last one.
 14 Were you aware of General Mpembe's subsequent arrest in
 15 connection with the issues in Marikana?
 16 GENERAL PHIYEGA: Yes.
 17 MR MPOFU: And were you aware that
 18 General Mpembe's – I'm sorry, I'm moving now to the 16th –
 19 General Mpembe's approach from the 15th and the 16th was
 20 that the union leaders should be given an opportunity to
 21 seek a peaceful solution? Were you aware of that fact?
 22 MR NTSONKOTA: May I interpose an
 23 objection, Chair? If I understood the question correctly
 24 it refers to the 16th August. May I just mention that on
 25 the 16th of August –

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1 CHAIRPERSON: You must put your name on
 2 record.
 3 MR NTSONKOTA: Oh, I'm sorry.
 4 CHAIRPERSON: When the transcribers
 5 transcribe what happened, they won't recognise your voice
 6 because you haven't spoken much lately.
 7 MR NTSONKOTA: I'm sorry, Chair. The
 8 name is Thando Ntsonkota on behalf of NUM. I just wanted
 9 to place an objection on record, Chair. On the 16th of
 10 August, the question was put to the National Commissioner
 11 whether she was aware that General Mpembe's approach on the
 12 16th was to get the union leaders to be given an opportunity
 13 to bring about a resolution. We are not aware of that,
 14 Chair, and no such evidence was led before the Commission.
 15 MR MPOFU: Thank you. Yes, no, my
 16 learned friend is correct. Actually the question was
 17 confusing because I said to the witness I'm moving to the
 18 16th but when I asked the question, this is how I put it,
 19 which I forget where I'm moving to –
 20 CHAIRPERSON: Reformulate the question
 21 now in the light of your admission that the objection was
 22 well taken.
 23 MR MPOFU: Well, it's the same question,
 24 I'm just removing the confusing part where I said I'm
 25 moving to the 16th. The question is, were you aware that

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1 between the 15th and the 16th or from the 15th to the 16th, in
 2 that period General Mpembe had favoured an approach where
 3 the union leaders would seek a peaceful solution?
 4 GENERAL PHIYEGA: I think my answer to
 5 what you are asking is, the question of peaceful solution
 6 has been a transversal aspiration since the beginning of
 7 this process. So if Mpembe had on the 15th mentioned that
 8 on the 13th, on the 11th, on the 10th it would have been the
 9 aspiration of SAPS that that should be achieved.
 10 MR MPOFU: Okay. I'm afraid then I'm
 11 going to have to trace it from the 13th without confusion.
 12 We'll come back to this. Were you aware that on the 13th
 13 the point of difference within SAPS, as you put it, that
 14 led to the death threats against Mpembe were the fact that
 15 he favoured a solution whereby the protesters, 100 to 120
 16 of them would be escorted to the koppie and the other
 17 people who wanted to kill him favoured an approach – or a
 18 different approach, let's put it that way.
 19 CHAIRPERSON: Mr Semenya?
 20 MR SEMENYA SC: But I don't think there
 21 were the two different positions that are now articulated
 22 by Mr Mpofo.
 23 CHAIRPERSON: The objection is taken that
 24 your question is factually incorrect. What do you say
 25 about that?

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1 MR MPOFU: Well, the statement of Vermaak
 2 says this, "Van die lede het saam met my teruggeloop en was
 3 baie ontsteld" – I'm sorry, I'm reading from paragraph 5,
 4 Chairperson – "en was baie ontsteld gewees."
 5 CHAIRPERSON: Paragraph 5?
 6 MR MPOFU: 5 yes, towards the end. It
 7 goes to what we're discussing about, the removal from the
 8 scene and so on, just before that.
 9 CHAIRPERSON: Is this, "Van die lede het
 10 saam met my teruggeloop?"
 11 MR MPOFU: Van die lede, yes.
 12 CHAIRPERSON: Yes. "Van die lede het
 13 saam met my teruggeloop." Some of the members walked back
 14 with me. They were very upset – "en was baie ontsteld
 15 gewees," they were very upset, "en aan my gemeld," and
 16 mentioned to me "dat hulle Generaal-Majoor Mpembe kwaik
 17 neem dat hy," that they are angry with, I suppose, Major-
 18 General Mpembe "vir die lede wat dood is," for the members
 19 who are dead "en dat hy verkeerde opdragte gegee het," and
 20 that he gave wrong orders. "Hulle het aan my gesê dat
 21 Majoor-Generaal Mpembe vandag nog saam met daardie lede op
 22 die grond gaan lê." They said to me or they told me that
 23 Major-General Mpembe today would go and lie on the ground
 24 together with the members, "want hulle gaan hom skiet,"
 25 because they're going to shoot him.

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1 MR MPOFU: Yes.

2 CHAIRPERSON: "Ek het dadelik besef dat

3 dit 'n baie plofbare situasie is," I immediately realised

4 that it's a very explosive situation "en het ek die

5 Provinsiale Kommissaris gebel," and I phoned the Provincial

6 Commissioner "en haar meegedeel," and informed her, "van

7 die bedreiging," of the threat, "en haar meegedeel," and

8 informed her that, "dat ek hom van die toneel af gaan

9 verwyder," that I would remove him, I was going to remove

10 him from the scene.

11 MR MPOFU: Yes, now after that excellent

12 translation, Chair, my question was simply whether or not

13 you were aware that the point of difference within members

14 of SAPS that are featured in this discussion we are having,

15 which led to the death threat for them wanting to kill

16 Mpembe was that he was, he had allegedly given a wrong

17 instruction in relation to the incident of the 13th. Were

18 you aware of this, firstly, before I –

19 GENERAL PHIYEGA: I have said I was not

20 in operations, I read it in the statement. That's as far

21 as my level of awareness goes.

22 MR MPOFU: Well, that's fine. As the

23 National Commissioner of Police, what is your attitude to

24 death threats being made by junior officials to their

25 superiors in relation to what they regard as the wrong

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1 instructions when the Act is very clear as to what should

2 be done if a lawful instruction is given and – sorry, I

3 know it's a long answer, it's a long question but I read

4 this to you in April, so it might just sum a long answer

5 where it says that if you don't like the instruction then

6 you can demand it in writing and so on, but you must still

7 carry it out.

8 GENERAL PHIYEGA: Let me deal with your

9 question, which is very long.

10 MR MPOFU: Sorry about that.

11 CHAIRPERSON: I'm sorry, National

12 Commissioner, before you deal with the question perhaps it

13 would help if another passage were put to her so that she

14 can deal fully with the whole thing. In the statements of

15 Lieutenant-Colonel Merafi, which is exhibit GGG15, 1-5, in

16 paragraph 17 – perhaps one should read from paragraph 16

17 first. "The miners sat down while Major-General Mpembe was

18 talking to them." Sorry, I beginning your pardon. I think

19 it's the sixth page and it's paragraph 16, have you got it?

20 GENERAL PHIYEGA: I've got it.

21 CHAIRPERSON: "The miners sat down while

22 Major-General Mpembe was talking to them. They, however,

23 were still very aggressive and demanded the mine management

24 to come and talk to them. Major-General Mpembe was the

25 most senior officer at the scene and in command as the

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1 overall commander. I was the operational commander at that

2 stage." And in para 17 –

3 MR MPOFU: Sorry Chairperson, I just

4 found it now, what paragraph?

5 CHAIRPERSON: 16.

6 MR MPOFU: 1-6, thank you.

7 CHAIRPERSON: I've just read 16. "17.

8 When I saw that the miners were not going to listen to

9 Major-General Mpembe and lay down their weapons I spoke to

10 the General and informed him that we should disarm the

11 miners and stop them from continuing, seeing they were

12 heading to the direction of the informal settlement and

13 they were very aggressive. Major-General Mpembe did not

14 agree with me and other officers and said he doesn't want

15 another Tatane incident, which means he didn't want us to

16 confront the people. I informed Major-General Mpembe that

17 I do not agree with him." Paragraph 18 says, "When the

18 miners saw we are not going to act against them and allow

19 them to proceed, they stood up and continued with the march

20 in the direction of the informal settlement. Major-General

21 Mpembe instructed us to follow the miners on foot" and he

22 was also walking with them. So that's the passage which

23 more fully explains the difference of opinion to which

24 you've referred and I think, in fairness, the witness

25 should be aware of that before she gives the answer.

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1 MR MPOFU: Thank you. I'm indebted to

2 the Chairperson. Yes, thank you General, those are the

3 long passages. I'll repeat the question to you. I asked

4 you if you are aware of the death threats, you said yes.

5 Now what I was busy asking you now was whether you are

6 aware that those death threats related principally to a

7 difference of opinion which has now been described more

8 fully than I did initially, regarding the approach to be

9 taken in respect of the incident of the 13th.

10 [12:44] GENERAL PHIYEGA: I have noted both the

11 issues that are raised in this statement of Vermaak and the

12 one from Merafi but what carries the day for me is that the

13 commander's word was carried.

14 MR MPOFU: So I suppose then that's the

15 answer to my original question, which was what was your

16 attitude as National Commissioner to this. That's all it

17 is, it's simply that at the end of the day the commander's

18 wishes were carried.

19 GENERAL PHIYEGA: Yes.

20 MR MPOFU: Am I correct? Now with that

21 background in mind, I was busy asking you about the events

22 of the 15th and the 16th and what I wanted to say – okay,

23 let me, I've already – I put it to General Annandale and

24 I'm going to canvass it with you in one or two questions,

25 that –

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1 CHAIRPERSON: If that's the call sign or
 2 whatever the word is, the ringtone of a cell phone, it must
 3 please be turned off and everyone here who has a cell phone
 4 that's not turned off must turn it off immediately. That
 5 includes some people at whom I'm looking. We don't want
 6 these disturbances anymore.

7 MR MPOFU: Thank you, Chairperson.
 8 Thanks, Chairperson, I'm sure you'll understand that to
 9 mean, to be directed to those of us who are removable in
 10 these proceedings, thank you. And what I was – I want to
 11 put this in chunks. The logical conclusion, or rather were
 12 you aware that the logical conclusion of what one might
 13 call the Mpenbe strategy which started with the visit by
 14 the union leaders to the koppie, would have been the
 15 further pursuance of SAPS strategy on the 16th insofar as
 16 Mathunjwa's return there at 9 o'clock was a continuation of
 17 the visit. Do you understand it in the same way?

18 GENERAL PHIYEGA: It is complex –

19 MR MPOFU: No, okay, let me do it like
 20 this. Mr Mathunjwa –

21 CHAIRPERSON: Do you want to say
 22 something, Mr Semenya?

23 MR SEMENYA SC: Well, I wanted to say,
 24 Chair, that one, I don't understand, two, I note that
 25 tomorrow is day 100. Three, this witness was not there

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1 when the operation took place. Can we confine ourselves to
 2 matters about which her answers would illuminate the issues
 3 that we are about to, in this Commission?

4 MR MPOFU: No.

5 CHAIRPERSON: What do you say about that,
 6 Mr Mpofo?

7 MR MPOFU: No, Chairperson, no, we can't.
 8 If we were to confine it to those matters then Mr Semenya
 9 should have done that in, when he was examining in chief.
 10 What I'm asking her is her, as the National Commissioner,
 11 she reports that the events were reported to her. Now of
 12 course one cannot assume from that, that every blow by blow
 13 event was reported to her and I'm simply asking whether the
 14 events that we will argue were pivotal or decisive in the
 15 sequence of events were reported to her so that I can
 16 either criticise her for not having acted on those, on what
 17 she knew, or if she didn't know obviously I won't be
 18 entitled in argument to criticise her.

19 CHAIRPERSON: Mr Semenya, that's
 20 obviously a point. If he wants to criticise her for not
 21 giving instructions at particular stages, he can't do it
 22 unless she knew about the events in respect of which he
 23 says she should have given instructions, so I don't think I
 24 can disallow the question but keep it short, Mr Mpofo,
 25 please because –

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1 MR MPOFU: Ja.

2 CHAIRPERSON: You know today, as you
 3 heard, is the 99th day.

4 MR MPOFU: I know, I told Mr Semenya that
 5 during the tea break.

6 CHAIRPERSON: Have you been aware of it
 7 before, earlier, for longer than he was? Yes, alright.
 8 Well, bear that in mind and carry on.

9 MR MPOFU: I have, yes. All I can say is
 10 that 10% of those days are attributable to the four days
 11 and the six days of Mr Ngalwana.

12 CHAIRPERSON: Mr Mpofo, we are not –

13 MR MPOFU: Ja, well –

14 CHAIRPERSON: Ask the question.

15 MR MPOFU: - you raised it, then I must
 16 respond.

17 CHAIRPERSON: You don't have to respond
 18 to everything that –

19 MR MPOFU: Thank you, Chairperson – we
 20 will leave that. Sorry, I've even forgotten the question.
 21 I was saying – due to the distraction – I was saying that
 22 Mr Mathunjwa, I'm sure to your knowledge Mr Mathunjwa was
 23 due to return to the koppie on the 16th at 9 o'clock as part
 24 of the continuation of the visits that had occurred on the
 25 15th. That I'm sure you know, it was reported to you or you

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1 know it.

2 GENERAL PHIYEGA: What I know is that,
 3 what I've been informed is that on the 16th in the morning
 4 there would be a convergence and a laying down of the arms.

5 MR MPOFU: No, General really, I think
 6 you're making it a bit more difficult. Yes, I accept that
 7 but what was conveyed to you as well was that that
 8 convergence and the return of Mr Mathunjwa to the koppie
 9 was, so to speak, a return visit emanating from his first
 10 visit on the 15th, after which he came back to report that
 11 he would go back on the 16th. There's a lot of controversy
 12 as to whether it was a promise or an undertaking and so on,
 13 I'm not there yet. I'm simply saying that it was a return
 14 visit on the 9th and a continuation of the one of the 15th,
 15 that you knew.

16 CHAIRPERSON: Mr Burger?

17 MR BURGER SC: Mr Chair, where are we
 18 going? I've spent a long time with Mr Mathunjwa on these
 19 incidents. We're going to spend days with the Generals on
 20 these incidents and what happened and how it unfolded. I
 21 object to the relevance of whether that was conveyed to
 22 this witness and then what her view was of that. You're,
 23 with great respect to the General, not interested in her ex
 24 post facto view of what should have happened or didn't
 25 happen. So I've listened, very quietly for me, this whole

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1 morning. I don't know where we go on this –

2 CHAIRPERSON: I can't answer the question

3 Mr Burger has put, but can you?

4 MR MPOFU: No, you've already answered

5 it, Chair, so you can't answer it. This is exactly the

6 same objection over which you've just given a ruling. It's

7 the same thing that was raised by Mr Semanya.

8 CHAIRPERSON: His question is, where are

9 we going? Now if you're simply asking about what she knew,

10 what she thought about what she was told, it doesn't really

11 help us, I've already ruled on that but if you are going to

12 suggest that she should have taken action immediately if

13 she received certain information then I suppose you can

14 proceed. That would be the relevant because you're going

15 to – if you get the answers that you think you may get, you

16 want to found an argument criticising her for not giving

17 instructions, as it were. Do I understand you correctly?

18 MR MPOFU: No, you do, Chair.

19 CHAIRPERSON: Okay. Well, let's ask –

20 you asked the question, let's see what answer we get and

21 maybe the point will fall away.

22 MR MPOFU: Thanks.

23 CHAIRPERSON: But it may not.

24 MR MPOFU: Thank you, Chair. Mr

25 Mathunjwa – I'm actually going to ask the question because

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1 that was, I was just laying the basis.

2 CHAIRPERSON: Sorry, forgive me, can I

3 ask a question and make it clear?

4 MR MPOFU: Yes.

5 CHAIRPERSON: You said you were told that

6 arms were going to be laid down at 9 o'clock on the

7 Thursday morning, I think that's in summary what you said.

8 Were you told, did you know that Mr Mathunjwa was scheduled

9 to go back to the koppie on the Thursday morning?

10 GENERAL PHIYEGA: The Thursday was when,

11 the 15 –

12 CHAIRPERSON: The Thursday was the 16th,

13 that's the day of the tragedy.

14 MR MPOFU: No, those things I did not

15 know. As I said in my statement, is that on the 15th I was

16 informed that there seems to be progress in the

17 negotiations and that on the 16th in the morning at 9

18 o'clock that was going to take place. The nitty-gritties

19 of how many times he had been to the koppie, with who,

20 those were part of the operations and I'm sure those –

21 CHAIRPERSON: What you're saying, more

22 particularity than that was not given to you.

23 GENERAL PHIYEGA: No.

24 MR MPOFU: When on the 15th were you told

25 about this?

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1 CHAIRPERSON: She said that already, I

2 understood that she told us that originally she said it was

3 in the morning, in chief, and later on she clarified to say

4 that that evening she was at a workshop or seminar of some

5 kind and she was then told in the early evening about that.

6 We've already got that evidence, you don't have to ask that

7 again.

8 MR MPOFU: Okay, when –

9 CHAIRPERSON: You'll find the information

10 in paragraph 21 of all the versions of her statement FFF2

11 and 3 where she talks about an SAPS National Management

12 Forum meeting in Midrand –

13 MR MPOFU: Well, then –

14 CHAIRPERSON: She told us in chief.

15 Sorry?

16 MR MPOFU: It's not there. I'm open

17 there, that's where I am, there's no information about what

18 time it was but I accept what you say.

19 GENERAL PHIYEGA: It's in my –

20 CHAIRPERSON: No – no, but she then in

21 the course of her oral evidence –

22 MR MPOFU: Which I accept.

23 CHAIRPERSON: - gave the details as to

24 the time, originally said it was earlier in the morning and

25 then later said no, no, it was I think, as far as I

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1 remember, about 7 o'clock or something of that kind.

2 MR MPOFU: Yes, I accept that,

3 Chairperson. What time did the Midrand meeting end?

4 GENERAL PHIYEGA: I've also given that

5 response, Advocate, that –

6 MR MPOFU: Well, give it again.

7 GENERAL PHIYEGA: - there were two parts

8 of that meeting. We had the NMF which finished around

9 18H00 and then 18H00 or much later we had that special

10 engagement.

11 MR MPOFU: I'm more interested in the

12 special engagement, as you call it. I take it from what

13 the Chair has clarified that this information about

14 Mathunjwa's "undertaking" was conveyed to you during the

15 special engagement as opposed to the formal Midrand

16 meeting, correct?

17 GENERAL PHIYEGA: I've indicated that the

18 National Management Forum meeting had nothing to do with

19 this matter, so the engagement around the Marikana issue

20 was, (a) earlier on in the morning when I was given an

21 informal briefing by the Provincial Commissioner and later

22 when we were going to negotiate additional support for her

23 and the special engagement.

24 MR MPOFU: Now I'm even more confused. I

25 think a simple yes will do.

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1 CHAIRPERSON: Let me try to sort it out
 2 for you. So there were two discussions about Marikana, one
 3 in the morning and one later on after the Management Forum
 4 meeting was over.
 5 GENERAL PHIYEGA: In –
 6 CHAIRPERSON: That's when you got further
 7 information from the Provincial Commissioner. What time
 8 was that approximately?
 9 GENERAL PHIYEGA: Which one are you –
 10 CHAIRPERSON: The second one.
 11 GENERAL PHIYEGA: On the second one.
 12 CHAIRPERSON: The one after –
 13 GENERAL PHIYEGA: After 6 o'clock.
 14 CHAIRPERSON: After 6 o'clock. I think
 15 that's the information you wanted, Mr Mpfu, and will you
 16 object too strenuously if I suggest that we take the lunch
 17 adjournment now?
 18 MR MPOFU: No, if you can give me just
 19 one or two, so that I just go to the next topic.
 20 CHAIRPERSON: You're going on to the next
 21 topic, so you can do that after lunch.
 22 MR MPOFU: Yes, I can do that after
 23 lunch, if you'll allow me one or two questions.
 24 CHAIRPERSON: Yes, of course.
 25 MR MPOFU: Thanks, Chair. What we're

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1 going to argue and I'm not going to take you through it
 2 question by question, all I want to know is what your
 3 awareness thereof was, is that on the 16th this, what I've
 4 described as the continuation of the Mpembe strategy
 5 including the visits by Mathunjwa to the workers and the
 6 desired co-operation of Lonmin in that endeavour, that
 7 there is sufficient evidence to indicate that that strategy
 8 was abandoned or ignored in the sense that people were not
 9 even interested to hear what Mathunjwa's report was from
 10 the koppie after the first visit and after the second one,
 11 once again they did not even bother to see the effects or
 12 the results of his appeals and they moved in with so-called
 13 stage 3 without giving any regard to Mathunjwa's
 14 intervention.
 15 CHAIRPERSON: Do you know anything about
 16 that or did you know anything about that at the time,
 17 National Commissioner?
 18 GENERAL PHIYEGA: I know nothing about
 19 what he is saying.
 20 CHAIRPERSON: You're going to have to
 21 address those arguments to other witnesses, it sounds like
 22 to me, Mr Mpfu. She doesn't know about it, she can't help
 23 us but you may be able to put these questions to other
 24 witnesses who were involved on the 16th.
 25 MR MPOFU: No, Chair. Allow me one more

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1 question then, then I'll leave it. I can accept that what
 2 you say to the Chairperson is that you didn't know about
 3 those events or rather about Mathunjwa's interventions and
 4 so on at the time. Do you not know about them now as
 5 you're sitting there?
 6 GENERAL PHIYEGA: As much as I've read
 7 and heard.
 8 MR MPOFU: Okay, so you know now. Thank
 9 you, Chairperson, we can take the lunch break.
 10 CHAIRPERSON: We'll take the lunch
 11 adjournment, we'll resume at 2 o'clock.
 12 MR MPOFU: Thank you.
 13 [COMMISSION ADJOURNS COMMISSION RESUMES]
 14 [14:06] COMMISSIONER: The Commission resumes.
 15 National Commissioner, you're still under oath. Mr Mpfu,
 16 you still have some questions.
 17 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 18 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 19 Thank you, Chairperson. Thank you, General, yes. We left
 20 at the point at which you agreed with me that you were now,
 21 as we are here, aware of the issue of Mathunjwa going to
 22 the koppie more than once and what I'm not sure that you're
 23 aware is the fact that, is the second part of my question
 24 which was that the police proceeded with stage 3
 25 irrespective or without giving any regard to the outcome of

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1 Mathunjwa's second appeal to the strikers.
 2 CHAIRPERSON: Mr Mpfu, she said she
 3 wasn't aware of it at the time –
 4 MR MPOFU: She's aware now.
 5 CHAIRPERSON: She only read the
 6 statements. Once again you're doing what I said you
 7 couldn't do and you're going to ask her questions about
 8 what she thinks, whether in the circumstances the police
 9 acted without having regard to the result of any missions
 10 that Mr Mathunjwa was going to undertake and I understand
 11 this is a point you want to make, I understand it's a point
 12 you could appropriately make to the relevant commanding
 13 officers who were there in the field at the time but any
 14 answer you get from this witness would simply be her
 15 impression as to whether she agrees or disagrees with the
 16 proposition you're putting and frankly, and I say this with
 17 great respect, I'm not interested in what her views are on
 18 the matter. We have to form our own views on that, on the
 19 validity or otherwise of your point based on the evidence.
 20 MR MPOFU: No Chair, sorry. Firstly,
 21 that summary is not correct. What I asked her, with the
 22 assistance of the Chair, was whether she was aware at the
 23 time and she said no. Fair enough. Then before we went to
 24 lunch I asked her if she aware now and she said she is. So
 25 I'm basing my questions now on that answer.

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1 CHAIRPERSON: What is the question going
 2 to be?
 3 MR MPOFU: Well, if I can put the
 4 question then – I was just saying what she said before
 5 lunch.
 6 CHAIRPERSON: No, no, I – but what's the
 7 question going to be? Tell us what, let's hear the
 8 question.
 9 MR MPOFU: Well, okay, I'll repeat it.
 10 You, before lunch, said you were aware of the Mathunjwa
 11 visit. What was not clear, which I'd like you to clarify,
 12 is whether you were also aware that, or rather you are also
 13 aware now that the police did not give the Mathunjwa effort
 14 any opportunity in that they acted instantly as soon as he
 15 had finished talking to the workers.
 16 CHAIRPERSON: I don't know, Mr Burger,
 17 that I can disallow that question. If his point that he's
 18 going to make is correct, that they didn't, weren't
 19 interested in what happened with Mathunjwa, they were going
 20 to go ahead regardless, if that point is true and if she
 21 was told that subsequently by one of the police that that
 22 was correct, then she'd know it now.
 23 MR BURGER SC: Well then, Chair –
 24 CHAIRPERSON: I won't say what I think
 25 her answer is likely to be but let's ask, let him ask the

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1 question. If the answer we get takes the matter any
 2 further then we can review it again but I won't say what I
 3 think the answer is going to be. Carry on for the moment.
 4 MR MPOFU: Please answer my question.
 5 GENERAL PHIYEGA: I must say I'm confused
 6 and I'm going to ask you to again just narrow down this for
 7 me and ask the question and maybe I may be able to
 8 understand what you are asking me to do.
 9 MR MPOFU: Yes. Before lunch I put to
 10 you a broad proposition which, with the intervention of the
 11 Chair, I was forced to make it clear whether I was asking
 12 you about awareness then or now. Your answer to the Chair
 13 is that you were not aware then and then you answered to me
 14 that you are now aware of that proposition. Now in
 15 fairness to you, that proposition contained a whole lot of
 16 things, so I can either assume that you accepted it in
 17 whole, which I would love to do, but in fairness to you I'm
 18 now saying whether your awareness included or did not
 19 include the fact that Mr Mathunjwa's mission, so to speak,
 20 the second one, was so disregarded or not taken into
 21 account that the police acted almost as soon as he left,
 22 without even bothering as to whether it would have, it had
 23 an effect or not on the strikers. Now if it didn't include
 24 that then you'll clarify it. If it did, then I'll be
 25 happy.

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1 GENERAL PHIYEGA: I think I would like to
 2 respond to you by saying, those issues that you are asking
 3 me about, whether there was a change, whether there was an
 4 interpretation, I'd like to leave them to the commanders
 5 that you are still going to question and I'm sure they'll
 6 be able to answer those. I wouldn't be able to give you a
 7 supposed view.
 8 MR MPOFU: Okay. Well, I'll answer that
 9 that answer indicates that you don't want to answer the
 10 clear question. Let me maybe assist you. You see this
 11 issue, General, is going to be –
 12 CHAIRPERSON: - just for this point?
 13 MR MPOFU: No.
 14 CHAIRPERSON: Are you moving on to
 15 something else?
 16 MR MPOFU: No, not this one. It's a
 17 related one but not this one. No, I'm giving up on this
 18 one. The issue, its importance is as follows – or let me
 19 do it by questions. Would you agree that one of the main
 20 reasons that you and maybe Mbombo okayed or gave sanction,
 21 acquiescence, whatever it is, to the movement towards stage
 22 3 was this first, as reported to you, that Mathunjwa had
 23 broken an undertaking which he had made for the laying down
 24 of arms at 9 o'clock. That for you personally and from
 25 statements also from Mbombo, was sufficient trigger to say,

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1 well, let's now move to stage 3.
 2 GENERAL PHIYEGA: I do not agree.
 3 CHAIRPERSON: The question had two limbs
 4 to it. The one was based on the proposition that you gave
 5 approval – it's also about General Mbombo but you can't
 6 answer for her – that you gave approval to the
 7 implementation of stage 3 because you believed that Mr
 8 Mathunjwa had not kept his promise to bring about a laying
 9 down of arms at 9 o'clock. I think that's my summary but I
 10 think it's basically correct. Now, the first question is,
 11 did you at any stage give approval to the implementation of
 12 stage 3?
 13 GENERAL PHIYEGA: No.
 14 MR MPOFU: Did you – alright, let me put
 15 it this way. According to you and Lieutenant-General
 16 Mbombo, she informed you that the "undertaking",
 17 quote/unquote, had not been honoured and therefore they
 18 would move to stage 3 of the plan at some stage, correct?
 19 GENERAL PHIYEGA: I'm lost. I think if
 20 you show me where I've said that because then we can, in
 21 context, read exactly what you're saying because I haven't
 22 seen it anywhere, what you are mentioning.
 23 MR MPOFU: I'm sorry, forget about
 24 reading. I'm asking you what happened. Did General Mbombo
 25 at some stage say to you that the Mathunjwa undertaking had

<p style="text-align: right;">Page 10564</p> <p>1 not been honoured and therefore stage 3 of the plan is 2 going to be implemented or not? 3 GENERAL PHIYEGA: That's why I'm saying 4 to you, Adv Mpofu, I'm not sure what you're referring to 5 because not in my statement, not anywhere does that type of 6 issue that you're mentioning appear except for what I'm 7 saying, what I stated on the 15th and as well as the way I 8 am reporting that on the 16th, what happened on the 16th as 9 it was reported to me. And also I have just answered that 10 I had not given any direction, as the Judge had asked. 11 MR MPOFU: Well, okay. The evidence of 12 Allandale – at least Annandale, General Annandale, is that 13 in his presence the Provincial Commissioner indicated that 14 she had already communicated with the National 15 Commissioner, informing her of the current situation and 16 that a deadlock was reached with negotiations and also that 17 phase 3 of the operational plan will be executed. Do you 18 remember that being communicated to you? 19 GENERAL PHIYEGA: Yes, I do and as you 20 read it, it is not asking for permission. I am being told. 21 MR MPOFU: Yes. Yes, no, what we're 22 going to argue around that is that your mere silence when 23 you were told this, amounts to an agreement. You could 24 have said, no - no, have you made sure that this happens, 25 have you ensured that Mathunjwa goes there for the second</p>	<p style="text-align: right;">Page 10566</p> <p>1 known this, this and this, which you may well be able to 2 establish was correct, what do you say – well, does it 3 matter what she says? We have to decide whether the 4 Provincial Commissioner gave the instructions she gave 5 based upon a misapprehension as to the true facts. That's 6 one of the issues we have to decide, that's the point that 7 you're dealing with, are you not? Now does it matter what 8 this witness thinks about that? And I say that with the 9 greatest respect, I understand she's the National 10 Commissioner but at the end of the day we've got to decide 11 whether it was appropriate to act as the police did, 12 whether it was appropriate to implement phase 3 at the 13 time, whether the decision to do so was based on what we 14 lawyers call a misdirection or a misapprehension of the 15 facts. Now those are the points you're busy with, aren't 16 they? 17 MR MPOFU: Ja. Yes, that's true, 18 Chairperson, and – 19 CHAIRPERSON: But does it matter what 20 this witness says about the matter? 21 MR MPOFU: Yes. 22 CHAIRPERSON: Why? 23 MR MPOFU: Well, because Chairperson it 24 matters a great deal to the victims of the massacre/tragedy 25 –</p>
<p style="text-align: right;">Page 10565</p> <p>1 time and so on? I'm not even there yet. All I'm asking 2 you now, you are running ahead of me, is whether this was 3 said to you as it is reflected in the minutes. If it was 4 said, yes or no or you don't remember? 5 GENERAL PHIYEGA: I have answered that 6 one. I said yes. 7 MR MPOFU: Okay. Now the question is, 8 did you understand from that report that one of the key 9 reasons why stage 3 had to be implemented was the fact that 10 Mathunjwa had allegedly, or rather the so-called 11 undertaking for the laying down of arms at 9 o'clock had 12 not been honoured? 13 GENERAL PHIYEGA: Yes, I did understand. 14 MR MPOFU: Thank you. Now, this is why I 15 say this is crucial. What would you say if I tell you that 16 that information on which such a momentous decision was 17 made, was incorrect and I'll show you how but for now if 18 it's to be demonstrated that, firstly, there was no such 19 undertaking and, two, the police ought to have known that 20 there was no such undertaking. 21 CHAIRPERSON: Mr Mpofu, again this raises 22 a point that we've had out several times. What does it 23 matter what this witness says about that? You're putting 24 facts to her, something that happened beyond her sphere of 25 knowledge at the time. You're saying to her, if you had</p>	<p style="text-align: right;">Page 10567</p> <p>1 CHAIRPERSON: I don't understand that. 2 MR MPOFU: Whether – if I can finish – 3 whether this witness, like Mpembe, would say today here, 4 had I know when I was told and I made this momentous 5 decision and fatal decision or acquiesced in it or whatever 6 we're going to argue, had I known that in actual fact this 7 crucial thing of the undertaking being broken is non- 8 existent, firstly there's no undertaking and secondly, it 9 has not been breached because Mathunjwa is still going up 10 and down – had I known those things I would have certainly 11 said, people, give peace a chance and so on, whatever would 12 follow from that. That can't be irrelevant, Chairperson, 13 with the greatest respect. Inasmuch as Mpembe says, if I 14 had been told that scene 1 had happened, maybe scene 2 15 would not have happened, how can that be irrelevant to a 16 victim who died in scene 2? 17 CHAIRPERSON: Can I have a go at putting 18 the question to the witness myself? You understand the 19 debate. What is said is that the Provincial Commissioner 20 said that promises had been given, had been broken, that 21 arms would be laid down at 9 o'clock. It didn't happen and 22 because these commitments had been given and had been 23 broken, she then instructed that that plan, stage 3 of the 24 plan be implemented. What is being put is that she was 25 misinformed. There wasn't an undertaking, there was no</p>

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1 breach of the undertaking. What Mr Mpofo asks you to
 2 accept for the purposes of his question is that that is so
 3 and I must tell you there is some evidence which goes in
 4 that direction and what he wants to know from you is that
 5 when she phoned you and said, as she did because you say in
 6 your statement that you received a phone call from her, you
 7 were informed of the decision to implement a dispersal
 8 operation of the plan. What Mr Mpofo wants to know is,
 9 when she gave you that information, if you had known – if
 10 this is a fact – that she had decided to implement the
 11 dispersal operation of the plan, what is known as stage 3,
 12 because she wrongly believed that there'd been an
 13 undertaking and that there had been a breach thereof, would
 14 you have said go ahead or would you have said, hang on a
 15 second, are you sure you've got the facts right, shouldn't
 16 you give peace a chance for a couple more days, a day or
 17 so? That's your question, Mr Mpofo? Now what's the
 18 answer?

19 MR MPOFU: That's it, Chairperson.

20 [14:25] GENERAL PHIYEGA: Judge, I'd worry really
 21 about going into those suppositions because it's – this is
 22 a contested fact and General Mbombo is still coming to
 23 testify. She should be given the opportunity to talk about
 24 that. Mathunjwa had been given the opportunity to talk
 25 about it. General Mbombo might be given the opportunity to

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1 talk about this fact. It is contested.

2 MR SEMENYA SC: Chair?

3 CHAIRPERSON: Sorry, Mr Semanya?

4 MR SEMENYA SC: Exhibit EE is the case in
 5 point. What precipitated stage 3 is that a deadlock has
 6 been reached, not that there was an undertaking which was
 7 breached.

8 MR MPOFU: No Chairperson, with the
 9 greatest respect, Mr Semanya must – cannot change the
 10 evidence. I said to the witness exactly, I put exactly
 11 what is there and I said did that include the fact that the
 12 undertaking was broken and the witness said yes, just now
 13 five minutes ago.

14 CHAIRPERSON: You see, what exhibit EE
 15 says on page 3 of it is, "The Provincial Commissioner
 16 indicated that she had already communicated with the
 17 National Commissioner, informing her of the current
 18 situation" –

19 GENERAL PHIYEGA: Exactly.

20 CHAIRPERSON: - "and that a deadlock was
 21 reached with negotiations and also that phase 3 of the
 22 operational plan be executed" and then she goes on. Now
 23 the question is what's covered by informing her of the
 24 current situation. So I put it on the basis which I
 25 understood Mr Mpofo said was his basis, that he asked the

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1 witness to assume – and there will be argument in support
 2 of the assumption but it's not necessary to decide it now –
 3 but to assume that by talking about being informed of the
 4 current situation –

5 GENERAL PHIYEGA: Yes.

6 CHAIRPERSON: - included being informed
 7 that there had been an undertaking that was breached.
 8 Obviously he's not asking her to accept that that's so, but
 9 he's asking her a hypothetical question which I think in
 10 the circumstances is permissible. What would her reaction
 11 have been if that was the case.

12 MR MPOFU: Yes. No Chair, I'm sorry to
 13 cut you. It's more than that.

14 CHAIRPERSON: I'm trying to help you, Mr
 15 Mpofo.

16 MR MPOFU: Yes. No, no, then I'd rather
 17 you help me with the correct information, Chair. It's more
 18 than that, Chair. I appreciate the assistance. I didn't
 19 make a hypothetical assumption. I said, and the record can
 20 be played now to the witness, did that include the fact
 21 that Mathunjwa's undertaking was broken and the witness
 22 said yes. So it's even higher than what the Chair is
 23 putting, where I would have said please assume.

24 MR SEMENYA SC: Chair, maybe let us use
 25 the water in the bucket. I'll drop my objection.

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1 CHAIRPERSON: Be sparing with the water
 2 in the bucket, Mr Mpofo, but –

3 MR MPOFU: Ja, well –

4 CHAIRPERSON: Carry on, as shortly though
 5 as you can on this point. This is effectively the
 6 culminating question of this topic, isn't it?

7 MR MPOFU: It is, it is, Chair.

8 CHAIRPERSON: Alright, okay.

9 MR MPOFU: Ja. Okay, I'll once again in
 10 fairness to you, because of the exchange, I don't want to
 11 spoil the way the Chair had put the question more
 12 appropriately but the nub of the question was simply that
 13 had you known at that time or rather – well, first let me
 14 clarify this. This is not a contested thing as such.
 15 Allandale – Annandale, sorry, General Annandale, I put this
 16 question directly to him and he said there was no promise
 17 or undertaking, so you can accept that that's what General
 18 Annandale said. He was here, he's one of the commanders
 19 and so on and so on. Now I'm saying had you known that
 20 what General Annandale was saying, which was that there was
 21 no such undertaking and therefore it could not have been
 22 breached and therefore it could not be the basis for going
 23 to stage 3, would you have still sanctioned, by silence at
 24 least, the movement to stage 3?

25 MR SEMENYA SC: Chair, I don't want Mr

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1 Mpofu and I to have a debate that there was something
 2 called a sanction by silence. If that's what, is the
 3 proposition, can we have that cleared first?
 4 MR MPOFU: I said I would argue it. I
 5 don't want to debate it with the witness.
 6 CHAIRPERSON: - the issue in this case as
 7 to whether there was a promise or undertaking or a
 8 commitment, there's also been a suggestion from some of the
 9 evidence that that was at least part of the basis for
 10 deciding to proceed in the afternoon. He doesn't want to
 11 have to argue whether those arguments are correct. There's
 12 enough material on the table to justify an argument,
 13 rightly or wrongly, at the end of the hearing. What he's
 14 saying to the witness is very simple. If you had known –
 15 if, if you had known that part of the reasoning for going
 16 ahead with the plan was the belief that there'd been a
 17 breach of an undertaking and you had known that it was
 18 incorrect, would you have said to the Provincial
 19 Commissioner, hold your horses, let's not go ahead now,
 20 let's wait for a day or so? That's the question and she
 21 can answer that question very simply. Let's hear what she
 22 has to say.
 23 MR SEMENYA SC: Chair, wrong in the
 24 question though, wrong in Mr Mpofu's question though was
 25 the assertion that she, the National Commissioner of

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1 Police, had sanctioned stage 3 by her silence.
 2 MR MPOFU: Okay, we can leave that out,
 3 Chair.
 4 CHAIRPERSON: I rephrased the question to
 5 eliminate that. You're quite right, he did say that and I
 6 rephrase the question to eliminate that. So perhaps she
 7 can answer my question. Have you followed the debate
 8 between Mr Semenya and me? You understand the question
 9 that's currently up for answering? Can you give us your
 10 answer please? It's not suggested that you sanctioned
 11 anything, that's not the question. It's not suggested you
 12 gave tacit approval, as I understand it. The simple
 13 question is, if you had known that there hadn't been an
 14 undertaking and there hadn't been a breach and if it's
 15 correct that part of the reasoning for going ahead with the
 16 implementation of the plan was because it was believed
 17 there had been an undertaking to breach, would you have
 18 said to the Provincial Commissioner, hold your horses, your
 19 factual basis may not be entirely correct, let's wait a day
 20 and let's negotiate a bit further and see. That's your
 21 question, right. When the question was put to you before,
 22 you said, quite understandably, General Mbombo must come,
 23 she must talk about that. Of course you're quite right
 24 because these matters should obviously be explored with her
 25 but the question is, what would you have done if the points

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1 that are put to you were correct? Would you have done
 2 nothing or would you have said hold your horses or wait for
 3 a bit, what would you have done? How would you handled
 4 that situation if that had been the situation that
 5 presented itself to you on that Thursday afternoon?
 6 GENERAL PHIYEGA: Judge, I think
 7 particularly for that "if" factor, I would like not to
 8 answer this question.
 9 CHAIRPERSON: The witness is entitled to
 10 decline to answer a hypothetical question.
 11 MR MPOFU: Thank you.
 12 GENERAL PHIYEGA: Yes.
 13 MR MPOFU: Well, thank you, Chairperson.
 14 We'll deal with it in argument. Now, we've already
 15 established that the so-called current situation included
 16 the breaking of the Mathunjwa undertaking. The minute, and
 17 we'll deal with this in another context but for now I'm
 18 asking you, the minute then says "She also," she being
 19 General Mbombo, "She also indicated that the National
 20 Commissioner indicated that she will inform the Minister of
 21 Police on the current situation and actions that will be
 22 taken." Now what I want to ask you is, if and when you
 23 indicate, informed the Minister, did that include the
 24 breaking of the Mathunjwa undertaking?
 25 GENERAL PHIYEGA: I'm on record in this

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1 Commission giving testimony that those types of issues are
 2 not Minister issues.
 3 MR MPOFU: Sorry, you spoke softly. I
 4 didn't hear the last part?
 5 GENERAL PHIYEGA: I have said, I'm on
 6 record and I'm saying it now that those type of issues,
 7 which gun do you use, who shifts where or what happens are
 8 not Minister issues. Even if I had known I would never
 9 have taken those to the Minister.
 10 MR MPOFU: Yes, but General that is
 11 exactly, that is exactly what we are exploring. I readily
 12 accept that, I readily accept that you would be told a
 13 whole lot of things and then you would filter, as it were,
 14 those things into Minister issues before you convey them to
 15 the Minister and leave the chaff out, but that's exactly
 16 the question I'm putting to you. I'm saying when you,
 17 according to this minute, indicated, informed the Minister
 18 on the current situation, this issue about the Mathunjwa
 19 undertaking, was it part of the issues you conveyed or part
 20 of the chaff you left out?
 21 CHAIRPERSON: Mr Mpofu, I think you're
 22 being a little bit unfair, if I may say so, the way the
 23 question is being framed. You're quoting from exhibit EE
 24 which is the minute of the special JOCOM meeting at 1:30 on
 25 the 16th, where what the Provincial Commissioner is alleged

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1 to have said is reported. This witness you will recall, as
 2 far as I can remember her evidence, denies that she said
 3 that to the Provincial Commissioner –
 4 MR MPOFU: No –
 5 CHAIRPERSON: And denies that she
 6 telephoned the Minister, informing him on the current
 7 situation and the action to be taken. Now you're putting
 8 the question on the basis that that's exactly what she said
 9 she –
 10 MR MPOFU: Ja, that's why I said if and
 11 when. Then at least she could have just said what you are
 12 saying.
 13 CHAIRPERSON: Alright, well, rephrase the
 14 question but bear in mind the point I put to you.
 15 MR MPOFU: Well, Chairperson, well – the
 16 witness obviously now knows where I'm going but the reason
 17 why I said to you if and when you conveyed this to the
 18 Minister was exactly to cover the point but let's leave it,
 19 it's lost now. The only issue I want to put now is this,
 20 you and the Minister or rather you conveyed something to
 21 the Minister, you said regularly about the Marikana
 22 situation and so on and so on, your evidence is very clear
 23 on that. I'm saying on this occasion, after you were – if
 24 or when you were told that you will, rather you said you
 25 would inform the Minister on the current situation. Did

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1 that current situation include the fact that phase 3 would
 2 be, among other things, predicated on the Mathunjwa
 3 undertaking, so-called?
 4 GENERAL PHIYEGA: Even if that was the
 5 position, I've answered you, Advocate, to say those are not
 6 the type of conversations I have with the Minister.
 7 MR MPOFU: Well, okay. If you discussed
 8 the so-called current situation with the Minister then what
 9 did you discuss? As I say, I accept that you would have
 10 left out some of the unimportant things but you must have
 11 said something. What was the current situation that you
 12 discussed with him?
 13 GENERAL PHIYEGA: I will go back to some
 14 of the responses that I've given. I've indicated that
 15 issues around our deployment, how many people we have here,
 16 are we progressing well, how many people are dead, those
 17 are the type of things I would report but how operations
 18 are taking place, that's not the Minister's call.
 19 MR MPOFU: Well, was it – would it have
 20 been obvious to you, you yourself, that the movement to
 21 stage 3 which may or may not include loss of life, would,
 22 among other things, have political implications?
 23 GENERAL PHIYEGA: It is not clear to me
 24 and I'm sure maybe you can enlighten me on that.
 25 MR MPOFU: No, General, I don't want us

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1 to go backward. You and I had agreed at the very beginning
 2 on the 5th of April that this matter that we are dealing
 3 with here has three dimensions, political, security and
 4 socio-economic, so that's behind us. All I'm asking you
 5 now is whether the – I'm asking you on a specific thing
 6 now, not the so-called Marikana issue – was it clear to you
 7 at the time or even now that the movement to stage 3, which
 8 possibly included loss of life would have, among other
 9 implications, political implications? If it's not obvious
 10 to you, it's not obvious.
 11 GENERAL PHIYEGA: Let me deal with the
 12 two parts of the question that you've given. You started
 13 on the 5th you spoke about three dimensions. Those aren't
 14 my dimensions. When we started here you told me about the
 15 dimensions, the game changers that you're going to be
 16 focusing on. I noted them. They're not mine, I didn't say
 17 yes or no to them and I can't say that because they are not
 18 mine, those are your game changers. The second part is,
 19 you talk about political ramifications for stage 3. If the
 20 understanding for stage 3 is that you must encircle, disarm
 21 and disperse, I don't see why those things would have
 22 political ramifications because it's pure police
 23 operations.
 24 MR MPOFU: Well then, if nothing had
 25 political implications in all this, what is it that you

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1 discussed with the Minister in these regular interactions
 2 with him?
 3 GENERAL PHIYEGA: And Advocate, this is
 4 why I said to you when you start introducing these
 5 politics, I said clarify me, educate me, what do you mean
 6 by politics, so that I can answer you?
 7 MR MPOFU: No, ma'am. You said to Mr
 8 Madlanga, among other things, that the Minister in respect
 9 of this matter would from time to time give you political
 10 direction – your words, not mine. All I'm saying is that
 11 if, as you are now currently suggesting, nothing in this
 12 operation had political implications, then what is it that
 13 you were discussing regularly with the Minister?
 14 [14:45] GENERAL PHIYEGA: Exactly my point. You
 15 see if you explain your political to me I would understand.
 16 I'm talking about political that is sitting in this
 17 Constitution. Section 206 talks about political
 18 responsibility and it clearly outlines the issues that I
 19 deal with the Minister on in terms of political
 20 responsibility. If there's any other political outside
 21 this, then maybe that's what I would like to understand.
 22 MR MPOFU: No, ma'am. Let's forget about
 23 my political, let's talk about your political.
 24 GENERAL PHIYEGA: It is here.
 25 MR MPOFU: When you – no, when you said

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1 to Mr Madlanga that from time to time the Minister would
 2 give you political direction in relation to this matter,
 3 the Marikana matter, what were you referring to?
 4 MR SEMENYA SC: Chair, no –
 5 COMMISSIONER HEMRAJ: Sorry. Did she –
 6 was the answer political direction or political support
 7 because when I look at the transcript I can't quite find
 8 that. Can you refer me to my – the direction, because I've
 9 got political support in the transcript.
 10 MR MPOFU: Okay, well, I think I can't
 11 find the reference immediately so let's call it political
 12 support but I know for sure, I just can't find it right
 13 now, I'll find it after the break, that you referred to –
 14 I'll go to the passage, but political whatever. When you
 15 discussed the – when the Minister gave you political
 16 support, direction, what-have-you, what is it that you were
 17 discussing with him?
 18 GENERAL PHIYEGA: I think, Advocate, you
 19 would recall that a lot of discussion went around his
 20 policy making, as being consumers of policy, his role is in
 21 Cabinet, his role in Parliament, because I don't have those
 22 roles so it is his responsibility to report on matters of
 23 national significance to those platforms and I have, I
 24 am on record having mentioned and articulated some of those
 25 issues. It's nothing outside what is sitting in 206, which

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1 talks about what we are responsible for and I think unless
 2 there is any other thing untoward, I don't know and the
 3 political support, political responsibility, political
 4 whatever that you're talking about, talks to those type of
 5 roles that are not my remit, that are his remit.
 6 MR MPOFU: Chairperson, if you can just
 7 bear with me for a few seconds. Alright, I'll find it
 8 after tea. Alright, so if you – thank you. You are not
 9 prepared to tell the Commission what the political issues
 10 you discussed with the Minister on those regular
 11 interactions.
 12 GENERAL PHIYEGA: I think, Advocate,
 13 you're not fair with me because I've just answered you.
 14 No, I've been answering you over and over again in the past
 15 five minutes and so on. So I don't know when you say I'm
 16 not prepared to answer the Commission, what are we
 17 referring to?
 18 MR MPOFU: Did you plan with the
 19 Minister, among other things, the day-to-day operations of
 20 SAPS in respect to this operation?
 21 GENERAL PHIYEGA: No.
 22 MR MPOFU: Okay, does – to your knowledge
 23 does the Minister have any role in the day-to-day
 24 operations of SAPS and have you ever discussed those with
 25 him? I'm sorry, with specific reference to the Marikana

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1 incident.
 2 GENERAL PHIYEGA: Not to my knowledge.
 3 MR MPOFU: Well, would you be surprised
 4 that – and I don't know, I'm sure you have this, the
 5 statement of the Minister which was distributed to us this
 6 morning, which I suppose we should give an exhibit –
 7 CHAIRPERSON: Do you want to make it an
 8 exhibit, Mr Mpofu?
 9 MR MPOFU: Exhibit –
 10 CHAIRPERSON: It will be FFF -
 11 MR MPOFU: FFF –
 12 CHAIRPERSON: Ms Pillay always comes to
 13 our aid. I think it's FFF29, am I right?
 14 MS PILLAY: That's correct, Chair.
 15 MR MPOFU: 29, yes. The Minister says,
 16 after outlining involvement that he had with various people
 17 including you, he says, "I may, I point out that the
 18 abovementioned plan that I'm responsible for the policing
 19 function and the National Commissioner, together with
 20 Provincial Commissioners, the day-to-day operations of SAPS
 21 constituting the control and management aspects of this
 22 function." Then he says, "My conduct throughout the
 23 Marikana incident was underpinned by the above principles
 24 of constitutional segregation of the role of the Minister
 25 from that of the National Commissioner as set out above,"

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1 which is in conformity with what, the separation that we
 2 know is from the Constitution. Now I'm asking you,
 3 assuming in your favour that the day-to-day operations,
 4 even though this thing says you – even though this minute
 5 says that you discussed with the Minister the current
 6 situation and actions that will be taken – I am, for now,
 7 not going to use that against you, all I want at this stage
 8 is, assuming that separation is as described by you and
 9 him, then what is it that you discussed with him under the
 10 political direction, political support, whatever heading
 11 which, after the filtering, remains as a subject of your
 12 discussions?
 13 GENERAL PHIYEGA: I think I've answered
 14 you a few minutes ago. I've answered during the time when
 15 I answered Adv Madlanga. Maybe my answers are not
 16 acceptable to you.
 17 MR MPOFU: Okay, I'll ask it differently.
 18 It's common cause that Mr Zokwana telephoned the Minister
 19 and, amongst others, asked him to make sure that there is,
 20 quote/unquote, "adequate deployment of police numbers in
 21 Marikana." Is that a political or an operational issue?
 22 GENERAL PHIYEGA: I don't know because
 23 really, I learnt about this when I was asked and I was
 24 given e-mails here. I don't think this constitutes any of
 25 our operations, the conversation between the Minister and

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1 Zokwana. I really can't talk to that and I'm saying that
 2 because really Zokwana is not part of SAPS.
 3 MR MPOFU: Okay. Once again let's deal
 4 with this systematically. Go to paragraph 15 of the
 5 Minister's statement. He says, "I am advised that Mr
 6 Senzeni Zokwana, the president of the NUM, testified before
 7 this honourable Commission that, 15.1 on 12 August 2012 he
 8 had a telephonic conversation with me concerning the
 9 Marikana incident." Point 2, "During the said conversation
 10 he requested that adequate SAPS members be deployed at
 11 Marikana to avoid a further loss of life." And then number
 12 16 he says, "I also had a telephonic conversation with Mr
 13 Cyril Ramaphosa regarding his concerns about Marikana."
 14 17, "I informed both Mr Zokwana and Mr Ramaphosa in
 15 response that I would convey their requests and concerns to
 16 the National Commissioner and ensure that SAPS was dealing
 17 with the matter. I also informed that I would ensure that
 18 SAPS attends to this matter." Now, now that I've pointed
 19 you out to those passages which show that the requests were
 20 made about the deployment and that not only were they made,
 21 but they were conveyed to you by the Minister, do you still
 22 say that this is not a matter that concerns you –
 23 CHAIRPERSON: Mr Mpofu, I think you
 24 stopped reading at the end of para 17. In fairness to the
 25 witness you've got to, you've got to read up to the end of

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1 20, 18 to 20.
 2 MR MPOFU: Well, I will, Chair, but can I
 3 just ask the question about the parts that I've read, if
 4 you don't mind?
 5 CHAIRPERSON: No, if you put to the
 6 witness something –
 7 MR MPOFU: Well, I was putting another
 8 proposition about Zokwana –
 9 CHAIRPERSON: - which isn't covered by
 10 what you've read but is covered by 18, that's the –
 11 MR MPOFU: Well, okay. I was narrowly
 12 putting the issue about Zokwana but if you want to expand
 13 it to the other issues, that's fine. Let's – 18 says,
 14 "Having been alerted to the situation in Marikana as
 15 indicated above, I discussed the issue with the National" –
 16 sorry, I've read that already. 19, "During my engagement
 17 with the National Commissioner, I sought to validate and
 18 confirm the reports that I had received and to establish
 19 whether SAPS had matters under control in this regard."
 20 20, "The National Commissioner confirmed the reports I had
 21 received and I was given assurances that SAPS was not only
 22 capable of handling Marikana but had in fact already, was
 23 already dealing with the matter so as to ensure the
 24 maintenance of law and order." You'll tell me when to
 25 stop, Chair. "I regularly receive complaints and requests

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1 from members of society regarding policing matters. In
 2 such situations I take these up with the National
 3 Commissioner in order to ensure that these matters are
 4 attended to. My approach is based on the constitutional
 5 segregation of roles of the Minister from that of the
 6 National Commissioner referred to above." Signed EN
 7 Mthethwa. So what flows from what I've read, just going
 8 back initially to what we were discussing, is that
 9 according to the Minister he conveyed both Mr Zokwana's and
 10 Mr Ramaphosa's requests and concerns to you. Do you
 11 remember that conversation?
 12 GENERAL PHIYEGA: No, I've never heard
 13 that conversation of Zokwana and Ramaphosa with the
 14 Minister.
 15 MR MPOFU: Okay, I'm prepared to – the
 16 Minister will speak for himself obviously, so I'm prepared,
 17 from what you're saying, to accept at face value that he
 18 might not have mentioned names but be that as it may, do
 19 you remember the Minister on the 15th – okay, well, we don't
 20 know the date of the Zokwana one so leave the date out – do
 21 you remember the Minister conveying to you as he says, that
 22 he had received requests and concerns from unnamed sources
 23 regarding the matter and conveying those concerns to you?
 24 GENERAL PHIYEGA: I think –
 25 MR MPOFU: Sorry. Sorry, I'm sorry,

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1 ma'am, after which you, according to him, gave the Minister
 2 assurances that the SAPS was able to handle the matter.
 3 GENERAL PHIYEGA: I think the important
 4 thing you should take into account, which I've said in my
 5 statement, which I've said in this Commission, was that I
 6 kept the Minister apprised about developments of what was
 7 happening in Marikana and in that exchange his concern
 8 really was whether we are managing the situation, we have
 9 the necessary resources and at no point did he ever discuss
 10 specific people. Our issue or concern was what was
 11 happening in Marikana and as he says there, he probably
 12 received many, many, many inputs from various people but
 13 there is no point where I had discussed any particular
 14 names with the Minister. We were concerned about Marikana.
 15 CHAIRPERSON: I think this is a
 16 convenient stage to take the tea adjournment, which we will
 17 now take.
 18 MR MPOFU: Yes, Chairperson.
 19 [COMMISSION ADJOURNS COMMISSION RESUMES]
 20 [15:29] COMMISSIONER: The Commission resumes.
 21 National Commissioner, you're still under oath. Mr Mpofu,
 22 you're still cross-examining.
 23 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 24 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 25 Yes, Chair. Commissioner, I don't – I've allowed myself to

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1 run ahead. The issues that we were discussing we are going
 2 to discuss sufficiently, I promise you, when we deal with
 3 the third game changers, the political and all that. So I
 4 don't want to go that way. All I was asking you now is
 5 just one or two questions and then we can put this to bed
 6 and before I do so, I think in fairness to you I need to
 7 refer to the areas in the record that deal with this issue
 8 of political direction, what have you. At page 6871 to
 9 6873 the issue, the words "political direction," those
 10 words came from Mr Madlanga and they were not contested but
 11 I just want to make it clear that they came from him
 12 primarily. He said, "From what you say, you seem to be
 13 talking in general terms" – sorry, I'm quoting now from,
 14 reading from page 6871 line 22, 21, "From what you say, you
 15 seem to be talking in general terms. The Minister gives us
 16 support, the Minister gives us political direction." "Are
 17 you saying on this occasion, on the occasion of the
 18 killings at Marikana, the Minister gave you specific
 19 political direction that related to the killings at
 20 Marikana or are you talking about political direction that
 21 he gives generally" and so on, he goes on. And then you
 22 say, "Let me put it in context." And then later you say
 23 that, you then used a different word, you said "He took, he
 24 gave us political support. He is our political leader, he
 25 gave us that leadership." So that's how you put it. And

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1 then later at 6873 you says, "I said he has given us
 2 leadership, he has given us political support and that
 3 enabled us to do our work." And then at a later stage
 4 again the words "political direction" came from the cross-
 5 examiner. Mr Bizos said –
 6 CHAIRPERSON: Page?
 7 MR MPOFU: Yes, I'm just looking for the
 8 specific passage. I'm reading from 7499, 7499 to 7500,
 9 Chair. What I'm asking you are specific examples of what
 10 you discussed with the Minister before the events occurred,
 11 not afterwards and then you make an example, you say, I
 12 would tell the Minister that, "We are in Marikana, the
 13 matter is, issues are escalating, we are having challenges
 14 with capacity, I'm redeploying more capacity to go to the
 15 area, I will keep you posted on developments." And then he
 16 says later, I'm reading from line 23, "Mr Bizos: Let us
 17 confine to directions or instructions. Did you ask him for
 18 directions or instructions on any other important matter so
 19 that we can compare whatever you should have asked him, for
 20 directions or instructions as to what ought to be done on
 21 the 16th of August." Then you say, "Advocate, I think you
 22 have read section 207 for me. It says I must manage and
 23 control the service. I would seek advice, I suppose,
 24 political advice where I need to seek that type of cabinet,
 25 political advice," - "but in this regard it was manage and

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1 control of the situation by those who were in operation."
 2 In other words the – as I say, I'm putting this, in
 3 fairness to you, in context. Questions were put to you
 4 about political direction, to which you didn't complain but
 5 you yourself from your own mouth, the following different
 6 formulations came, political support, political leadership,
 7 political advice. So which goes back to where we were. I
 8 don't care what the noun is or – I just wanted to say that
 9 political leadership/advice/support that you were given,
 10 you were discussing, whether it included this issue of the
 11 Mathunjwa undertaking. And sorry, before you answer that,
 12 I just wanted to give you that in fairness, paragraph 14 of
 13 the Minister's statement says, "I took steps to ensure that
 14 I was kept informed about the developments that will be
 15 unfolded at Marikana and the concerns raised with me
 16 relating thereto." And once again I'm asking the same
 17 question. Those developments that you discussed with him,
 18 specifically in relation to the 16th, did they include the
 19 fact that stage 3 would be entered into, among other
 20 things, because Mathunjwa had reneged on his undertaking?
 21 GENERAL PHIYEGA: Advocate, may I just be
 22 – ask for some indulgence because I want to go to certain
 23 parts of this note that you've given me. It's going to
 24 help me to answer certain things.
 25 MR MPOFU: Yes.

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1 GENERAL PHIYEGA: On 7499 –
 2 MR MPOFU: Ja.
 3 GENERAL PHIYEGA: Line 4.
 4 MR MPOFU: Line 4?
 5 GENERAL PHIYEGA: Ja. I respond there, I
 6 say "Advocate, I think you have read 207 for me. It says I
 7 must manage and control the service. I would seek advice
 8 where I need to seek that type of cabinet political,"
 9 whatever you've read there.
 10 MR MPOFU: Mm.
 11 GENERAL PHIYEGA: Then Adv Bizos goes on
 12 to say, "Did the Minister from time to time give you
 13 directions or instructions?" And the Chairperson says,
 14 "About Marikana or in general?" And Adv Bizos says,
 15 "Generally." My response is, "The Minister would not give
 16 directions or instructions but he would ask questions
 17 around whether we have sufficient capacity, what we have
 18 done about the capacity. I give feedback and I would share
 19 with him what we have done as operatives." And then Adv
 20 Bizos goes on to say, "You've told us about capacity, which
 21 may be important because he has the final say or may have
 22 the final say, but the question is did he give you any
 23 directions or instructions to what the police ought or
 24 ought not to do in relation to the specific matter?" I
 25 then responded to say, "The operational decisions are not

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1 the remit of the Minister." And then he continues to ask
 2 that question. I'm just trying to say to you, I've
 3 answered a lot of those questions –
 4 MR MPOFU: Yes.
 5 GENERAL PHIYEGA: And I've been very
 6 articulate about the questions that you're still asking me
 7 and they haven't changed.
 8 MR MPOFU: Yes. No, as to whether you've
 9 been very articulate or not, I think we'll leave that for
 10 later but I'm just – or rather you're doing to me what I
 11 did to the Chairperson in the morning. I'm helping you,
 12 I'm not quarrelling with you. I'm saying that in fairness
 13 to you, the words "political direction" in all the passages
 14 that I read, came from the cross-examiners and I'm saying
 15 your words are political advice, as you've just said here,
 16 political support –
 17 GENERAL PHIYEGA: Yes.
 18 MR MPOFU: - political leadership. So
 19 that's why I'm saying let's confine it to that. Let's
 20 leave what was put because Mr Bizos, even after they still
 21 asked you about political direction, which must have been a
 22 slip of the tongue because you had clarified it, I'm
 23 confining it to your words. I'm saying the political
 24 advice/leadership/support that the Minister gave you, what
 25 did it constitute?

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1 GENERAL PHIYEGA: Is that a question or a
 2 statement?
 3 MR MPOFU: No, it's a question. What did
 4 it constitute is a question but, in fairness, the original
 5 question was, did those discussions about those things
 6 include or not include the fact that stage 3 was triggered,
 7 among other things, by Mathunjwa allegedly reneging from
 8 his undertaking?
 9 GENERAL PHIYEGA: My earlier answer
 10 stands, that that is not what I discussed with the
 11 Minister.
 12 MR MPOFU: Okay, the one more question
 13 was, the issue that was discussed between Mr Zokwana and
 14 the Minister where he, Zokwana, requested that adequate
 15 SAPS members be deployed at Marikana to avoid a further
 16 loss of life, was that an operational matter or a political
 17 matter?
 18 GENERAL PHIYEGA: I've also answered that
 19 one, I'd like to retain my answer.
 20 MR MPOFU: Okay. Well, excuse my failing
 21 memory, what was the answer?
 22 GENERAL PHIYEGA: Maybe I'll request that
 23 they replay that because I don't want to –
 24 MR MPOFU: No, the easier way is for you
 25 to just answer it and we move on. In other words, tell me

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1 what your answer was.
 2 GENERAL PHIYEGA: I have said to you that
 3 Mr Zokwana is not a SAPS member. I don't know the context
 4 of his discussion with the Minister and I'm not able to
 5 give that judgment.
 6 MR MPOFU: Alright, okay, I don't want to
 7 belabour the point but effectively what you're saying is
 8 that the National Commissioner is not prepared to tell us
 9 whether a request about the supply of more members in a
 10 particular situation is a political matter, in other words
 11 a matter that she would discuss with the Minister or not a
 12 political matter or the chaff, as I indicated. Is that
 13 your answer?
 14 GENERAL PHIYEGA: Advocate, I have
 15 answered you and you may not like my answer but I've given
 16 you the best of my answer.
 17 MR MPOFU: Okay. Yes, as I said, these
 18 matters we'll deal with tomorrow and by the way, for
 19 tomorrow if you can read the exhibit EE, the exhibit BBB4
 20 and this exhibit GGG29 – or rather FFF29. They are short
 21 but when we deal with the last of the third game changers
 22 we will revisit some of these issues then. Right, now –
 23 sorry. Just honestly the last question before we move to
 24 the next topic. Do you know the reason why General Mbombo,
 25 according to exhibit EE, gave the instruction for the

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1 execution of stage 3 to General Annandale and jumped
 2 General Mpembe who was the C-JOC?
 3 MR SEMENYA SC: That question, Chair, can
 4 be answered only by General Mbombo.
 5 MR MPOFU: Can I respond, Chair? This is
 6 what you call a merry-go-round. I promise you if I put
 7 that question to General Mbombo she would think I'm out of
 8 my mind, if I say to her General Mbombo, do you know
 9 whether General Phiyega knows why –
 10 CHAIRPERSON: - Mr Semenya's objection –
 11 MR MPOFU: Well, that's the question I'm
 12 putting.
 13 CHAIRPERSON: Mr Semenya's point is, the
 14 reason why General Mbombo, as you put it, skipped General
 15 Mpembe – which may itself be controversial but let's stick
 16 to your question – do you know why General Mbombo skipped
 17 General Mpembe and asked General Annandale to proceed with
 18 the implementation, and she would then give the answer why
 19 she did it, why she asked Annandale and not Mpembe.
 20 MR MPOFU: Ja.
 21 CHAIRPERSON: But Mr Semenya is not
 22 suggesting that you should ask her, do you know whether the
 23 National Commissioner knows why you decided to do this.
 24 That would be a fatuous question, wouldn't it?
 25 MR MPOFU: Ja, it would, that's exactly

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1 the point, Chair, because that's a fatuous objection
 2 because all I'm asking this witness is do you, General
 3 Phiyega, know why General - in other words, Mbombo –
 4 CHAIRPERSON: It would probably save more
 5 time just to get an answer.
 6 MR MPOFU: Yes, thank you.
 7 CHAIRPERSON: Do you know why that
 8 happened?
 9 GENERAL PHIYEGA: I don't know.
 10 MR MPOFU: Thank you. Thank you,
 11 Chairperson. And, or rather – okay no, it's fine, I'll
 12 leave it at that. Now let's move to the next issue. Your
 13 evidence is that the statements that you made, insofar as
 14 they pertain to the events, were relayed to you by the
 15 commanders, am I correct?
 16 GENERAL PHIYEGA: Yes, because they were
 17 in charge of the operation.
 18 MR MPOFU: And by that you include all
 19 the people who were in what I call the pecking order,
 20 General Mbombo and those that briefed you.
 21 [15:48] GENERAL PHIYEGA: I include the
 22 collective operation and all the other aspects that you are
 23 mentioning.
 24 MR MPOFU: And are you aware that the
 25 prescripts as you call them, not specifically the Police

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1 Act, prescribed that where members of SAPS are entitled or
 2 rather are to use lethal force that they are confined to
 3 using minimum force.
 4 MR SEMENYA SC: What is that? Lethal
 5 force is equal to minimum force?
 6 MR MPOFU: Okay.
 7 CHAIRPERSON: Repeat the question, Mr
 8 Semenya doesn't believe he's heard you correctly.
 9 MR MPOFU: No, okay.
 10 CHAIRPERSON: Just repeat it again so he
 11 can hear it.
 12 MR MPOFU: Well, Chair, I thought I'd
 13 just read it from the Act to make it easy for Mr Semenya.
 14 CHAIRPERSON: I think his complaint is he
 15 thinks you read it incorrectly in the Act, that's why he'd
 16 like to hear you repeat it.
 17 MR MPOFU: Yes, okay. Are you aware that
 18 –
 19 CHAIRPERSON: - didn't mishear it.
 20 MR MPOFU: Do you know that section
 21 13(3)(b), to be exact, of the South African Police Service
 22 Act 68 of 1995 says that, "Where a member – I'm quoting now
 23 – "Where a member who performs an official duty is
 24 authorised by law to use force, he or she may use only the
 25 minimum force which is reasonable in the circumstances."

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1 GENERAL PHIYEGA: Hm-mm.
 2 MR MPOFU: Sorry, it doesn't record hm-
 3 mm. Are you aware?
 4 CHAIRPERSON: How do you spell hm-mm?
 5 MR MPOFU: Thank you, Chair, my point
 6 exactly.
 7 GENERAL PHIYEGA: Hmmm has got h-m-m-m-
 8 m.
 9 MR MPOFU: Okay. And you are aware that
 10 insofar as this is part of the so-called prescripts, it
 11 imposes a legal obligation to SAPS members to use no more
 12 than minimum force.
 13 GENERAL PHIYEGA: I am aware of what, I'm
 14 aware of what that section says but also there are other
 15 sections that give the additional powers to SAPS members to
 16 use other areas of the law.
 17 MR MPOFU: No.
 18 GENERAL PHIYEGA: Depending on the
 19 situations that are confronting them.
 20 MR MPOFU: Okay, ordinarily if you were
 21 not the National Commissioner I wouldn't pursue this
 22 because I don't want to be arguing issues of legal
 23 interpretation with you but, in fairness, I have to put
 24 this to you because it's a very important point. This
 25 section says, "Where a member who performs an official duty

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1 is authorised by law" – law, not statutory law or common
 2 law but of any law, okay – "to use force," in other words
 3 in any situation where they are entitled to use force, "he
 4 or she may use only" – only – "the minimum force which is
 5 reasonable in the circumstances." So I want to make it
 6 clear that under any circumstances where the use of force
 7 is allowed anywhere else in the prescripts, section
 8 13(3)(b) says you may only use the minimum force.
 9 GENERAL PHIYEGA: But briefly, I'm not
 10 arguing or negating that prescript. I note it but I am
 11 saying to you that, depending on circumstances, there are
 12 certain provisions that allow police to do particular
 13 things.
 14 MR MPOFU: Okay, let me put it simply.
 15 Would you agree with me that there are no provisions in the
 16 prescripts or anywhere else that allow the police to breach
 17 section 13(3)(b)?
 18 GENERAL PHIYEGA: I have said that piece
 19 of legislation is not being disputed. All I've said is
 20 that should you be faced by other extraordinary
 21 circumstances, there are certain provisions that the police
 22 can use.
 23 MR SEMENYA SC: Chair, in fairness, if
 24 this debate should occur with the witness at all, there is
 25 section 13(13) which reads that, "Subject to the

1 Constitution, this section shall not be construed as
 2 derogating from any power conferred upon a member by this
 3 Act or any other law, including the common law, and the
 4 powers conferred upon a member by this section shall not be
 5 limited by any other law, including the common law.”
 6 MR MPOFU: Thank you, that's exactly the
 7 point I'm making. I'm saying any – when the section talks
 8 about any law it must include constitutional law, the
 9 common law, whatever, traditional law, indigenous law, what
 10 have you, but all I'm saying is that where a member is
 11 entitled to use force by any law, any of the ones that I've
 12 listed, common or otherwise, he or she may only use minimum
 13 force and that's why I was making the question easier.
 14 Would you agree, therefore, that all those other bodies of
 15 law or prescripts –
 16 CHAIRPERSON: Are you asking her for her
 17 views on the law? Apart from the fact that I'm not even
 18 sure if she's legally qualified –
 19 MR MPOFU: No, I'm not –
 20 CHAIRPERSON: But even if she were, I'm
 21 not sure that one has witnesses in the witness box or the
 22 witness table telling us what the law is. Mustn't we – I
 23 know we're not a court but the maxim curia novit jus
 24 applies by analogy, surely. You can't lead evidence on
 25 what the law is.

1 MR MPOFU: No –
 2 CHAIRPERSON: It's not foreign law.
 3 MR MPOFU: No, Chairperson –
 4 CHAIRPERSON: And you're trying to get
 5 her views on how various sections of the South African
 6 Police Service Act are to be interpreted. I don't think
 7 that's a proper line for cross-examination.
 8 MR MPOFU: No – no, with the greatest
 9 respect, Chair, I'm sure everyone knows that that's not
 10 what I'm doing. I'm asking the witness a simple question,
 11 whether she knows that members of the police are confined
 12 by law to the use of minimum force in all circumstances.
 13 If she doesn't know, she doesn't know. I mean it's not,
 14 I'm not asking her – that's exactly why I said I don't want
 15 to deal with –
 16 CHAIRPERSON: Well, that's what the law
 17 is. That's what the law is, even if she doesn't know, it
 18 doesn't help anybody. If she doesn't know the law, the
 19 police service would still be liable, would it not?
 20 MR MPOFU: Ja.
 21 CHAIRPERSON: So how does that help?
 22 MR MPOFU: Well, if she doesn't know she
 23 might have a way out but if she does, as she says she does,
 24 then I'm going to put the next proposition to her.
 25 CHAIRPERSON: Mr Burger, you're looking

1 puzzled.
 2 MR BURGER SC: No, I don't know how this
 3 is relevant and my learned friend doesn't get a ruling, so
 4 we're going to go on now, we're going to explore this again
 5 and I'm still lost. I don't know what is being put –
 6 CHAIRPERSON: I haven't had a chance to
 7 give a ruling. I was proposing to give one –
 8 MR BURGER SC: Can I ask for a ruling,
 9 Chair? Then I really ask for a ruling on the relevance of
 10 this.
 11 CHAIRPERSON: Yes. Well, I asked the
 12 question because I was proposing to give a ruling but I
 13 had, in fairness, to give Mr Mpofo a chance to persuade me
 14 that the ruling I was minded to give was not correct. What
 15 do you say, Mr Mpofo?
 16 MR MPOFU: Well, Chairperson, you see
 17 this is the problem. My cross-examination is going to be
 18 rendered ineffective if every time I'm going to have to say
 19 where I'm going. I'm assuring you, Chairperson –
 20 CHAIRPERSON: I'm not asking you – Mr
 21 Mpofo, you've been cross-examining for some –
 22 MR MPOFU: Well, Mr Burger –
 23 CHAIRPERSON: Sorry, don't talk when I'm
 24 talking. I will try not to talk when you talk.
 25 MR MPOFU: Yes, okay.

1 CHAIRPERSON: Let's treat each other with
 2 the courtesy which we each owe each other, alright. I've
 3 allowed you to ask all sorts of questions where I haven't
 4 know precisely where you were going. Sometimes I've
 5 suspected where you were but wasn't sure, but I let you go
 6 there, but when you ask questions about what a witness
 7 knows about the law or thinks the law means then prima
 8 facie such questions are not admissible and that's why I
 9 ask you why those questions are being asked, why they are
 10 relevant. We now have an objection on the table that
 11 they're not relevant. I invite you to tell me why they're
 12 relevant so that I can give a ruling either in your favour
 13 or against you.
 14 MR MPOFU: Yes. Thank you, Chairperson,
 15 sorry for the interruption. What I was saying is that the
 16 objection, as I understand it, is that Mr Burger is lost.
 17 Well, I'm not responsible for that. What I'm –
 18 CHAIRPERSON: No – no, Mr Burger –
 19 MR MPOFU: That's what he said.
 20 CHAIRPERSON: Mr Burger did say that by
 21 way of a rhetorical flourish but the gist, the thrust of
 22 what he's saying was that he contends that the questioning
 23 you were going to ask, the question you were going to ask
 24 will not elicit relevant information because the witness's
 25 opinion as to what the law is or isn't, is not relevant.

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1 That's the objection –

2 MR MPOFU: Ja, that's it.

3 CHAIRPERSON: And that's the objection

4 you have to deal with.

5 MR MPOFU: Thank you, Chairperson. Well,

6 that would be a great objection if I was indeed asking the

7 witness about her opinion of what the law is, I'm not.

8 I've simply asked the witness whether she has knowledge,

9 not opinion, whether she has any knowledge of the fact that

10 police officers are restricted by law in any situation to

11 the use of minimum force. It's a factual issue. If she

12 knows it, she knows it, if she doesn't, she doesn't. It's

13 got nothing to do with opinion.

14 CHAIRPERSON: I must confess that she's

15 answered that several times but let's just put it beyond

16 any doubt. Do you know that police officials in terms of,

17 members of the force in terms of the relevant section of

18 the Act are restricted to minimum force depending upon the

19 circumstances but it always has to be minimum force? Do

20 you know that?

21 GENERAL PHIYEGA: I have said yes,

22 depending on the situation and circumstances.

23 CHAIRPERSON: There you have the answer,

24 Mr Mpofo.

25 MR MPOFU: No, it's not the answer. The

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1 answer – well, it is the answer but it's not –

2 CHAIRPERSON: May I say something to you?

3 MR MPOFU: Yes.

4 CHAIRPERSON: In the years when I was at

5 the bar I always understood it's not appropriate to show

6 dissent when a ruling is given against you. I always try

7 to do that and most of your colleagues do that too. You

8 don't always. It has an unfortunate effect on the members

9 of the public here who don't understand the nuances and

10 finesses of the matter. They come away with the impression

11 that you've been treated badly, that I've been unfair to

12 you because obviously you don't agree with what I've done.

13 Sometimes I'd find in your favour, your colleagues don't

14 behave the way you've done. I'd be grateful if you would

15 desist in future from that.

16 MR MPOFU: Well –

17 CHAIRPERSON: Shall we take the

18 adjournment at this stage?

19 MR MPOFU: Well, can I respond to that?

20 CHAIRPERSON: Yes, you may.

21 MR MPOFU: Well, firstly, it's not meant

22 as that, Chairperson, but whenever I do it is when the

23 witness, either words are put in his or her mouth which

24 they have not said, the record will show that, and it's

25 also my duty to correct. We all make mistakes, sometimes

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1 even the Chair may have misheard the – good as he usually

2 is, more than all of us in hearing, but it does happen and

3 in those situations I have an obligation, a professional

4 obligation to point that out, whoever it is who has made

5 that mistake, whether it's the witness, whether it's one of

6 my colleagues, whether it's the Chair, and it's only in

7 those situations that I do it. In this instance I'm not,

8 I'm not – in fact I didn't even know that there was a

9 ruling. All I'm saying is that the answer that has been

10 given, as far as I'm concerned, does not close the matter,

11 I will ask a further question and that's all I'm saying and

12 I'm entitled to that, but it's certainly not meant as a –

13 CHAIRPERSON: I don't know that you'll

14 find any passages in the record where answers have been put

15 in the witness's mouth. Sometimes attempts have been made

16 to formulate more clearly what the witness seems to be

17 trying to say and this applies again across the board, so

18 that's the first point. Secondly, where mistakes are made

19 counsel of course have the fullest right to draw to the

20 presiding officer's attention that mistakes have been made.

21 MR MPOFU: Thank you.

22 CHAIRPERSON: But the way they do it and

23 their body language and the general air of respect or lack

24 thereof is something that has to be borne in mind, not only

25 for the general rules of decorum for running the Commission

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1 properly and fairly and harmoniously but also because of

2 the effect it has on unenlightened members of the public

3 who sometimes derive a wrong impression.

4 MR MPOFU: Yes. No, Chair –

5 CHAIRPERSON: Is it perhaps – do you want

6 to ask one more question or shall we take the adjournment

7 now?

8 MR MPOFU: Yes, I do, I do, Chairperson.

9 Okay, now I've –

10 CHAIRPERSON: Think about the question

11 and ask it tomorrow –

12 MR MPOFU: I've forgotten the answer.

13 The answer that I was contesting – oh yes, I remember.

14 She, when you correctly reformulated the question,

15 Chairperson, the witness said yes, depending on the

16 circumstances. If I can just put what my reservation was

17 with that.

18 CHAIRPERSON: Put your reservation then

19 we'll adjourn.

20 MR MPOFU: I'm going to argue, General,

21 that the clear meaning of what the Chair and I have put to

22 you is such that under no circumstances – the word "only"

23 in what I read to you – under no circumstances can it ever

24 be allowed by the prescripts that more than minimum force

25 may be used. In other words, your qualification of

1 depending on the circumstances does not apply in this
2 situation. That's what I'm going to argue, you don't have
3 to – because you are not a lawyer. All I just, I don't
4 want to be accused of having accepted that qualification.

5 CHAIRPERSON: Do you wish to reply,
6 National Commissioner?

7 GENERAL PHIYEGA: Chair?

8 CHAIRPERSON: Do you wish to reply to the
9 last point counsel put?

10 GENERAL PHIYEGA: No, I don't wish to.

11 CHAIRPERSON: Alright. We'll adjourn
12 now, reassemble tomorrow morning at 09:30.

13 [COMMISSION ADJOURNED]

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