

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 100 28 MAY 2013 PAGES 10609 TO 10729

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 28 MAY 2013]
 2 [09:54] CHAIRPERSON: The Commission resumes.
 3 National Commissioner, you're still under oath.
 4 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 5 CHAIRPERSON: Mr Mpfu.
 6 MR MPOFU: Thank you, Chairperson, good
 7 morning. Chairperson, before I resume if I could just make
 8 one or two remarks about the discussion that you and I had
 9 before we stopped yesterday.
 10 CHAIRPERSON: Yes.
 11 MR MPOFU: Yes I just wanted to say,
 12 Chairperson, that I know that this Commission is difficult
 13 enough for - especially for you and your fellow
 14 commissioners, I think that one of the most difficult jobs
 15 is to have to adjudicate. It's easier for us who can bat
 16 from our various corners as it were and my own limited
 17 experience having acted on the bench is that it is the most
 18 difficult job under the sun. And so I just wanted to say,
 19 Chair, that although this is obviously an emotional kind of
 20 matter and the clients have various views about how matters
 21 should be conducted, I just wanted to assure you that
 22 nobody has defended the integrity of this Commission more
 23 than myself with my own clients when it has been
 24 questioned. And whatever quibblings or complaints one has
 25 it never crosses that line of the integrity of the

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1 Commission. I have the utmost respect for you and your
 2 commissioners. It is indeed so, Chair, and I'm sure your
 3 being probably the most experienced person in the room that
 4 counsel had to fight fearlessly for and represent the views
 5 of their clients but once again the line has to be drawn at
 6 respecting the decorum of the forum which I'm recommitting
 7 myself to do but mainly to assure you that - and that line
 8 I don't even want to test. I know where it is, I will
 9 unapologetically fight for my clients' interests but that
 10 is not a line that I would wish ever to cross and so I just
 11 wanted to clear the air on that one, Chair.
 12 CHAIRPERSON: Thank you very much, Mr
 13 Mpfu.
 14 MR BURGER SC: Chair, while we're busy
 15 with housekeeping may I know what's happening in the next
 16 week, so that we can plan from my clients' side our own
 17 affairs? I hear in the corridors, I'm not party to it,
 18 that we may not have this witness on Wednesday. Are we
 19 going to have -
 20 CHAIRPERSON: What I can tell you is the
 21 witness is not available tomorrow, Wednesday. We're
 22 discussing with the evidence leaders whether there's
 23 something that can take place tomorrow morning. And
 24 because we're not sitting on Thursday and Friday as I think
 25 you've been told, we were proposing to stop at lunchtime on

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1 Wednesday, tomorrow. We're discussing with the evidence
 2 leaders whether there's something that can be done to use
 3 the time tomorrow morning. But I'll be able to inform you
 4 about that when that's been finalised. The position is
 5 that, well technically the Commission's period for hearing
 6 evidence ends at the end of this month. We have as I think
 7 you've been told, applied to the Presidency for an
 8 extension and I was due to speak to the Minister this
 9 morning where unfortunately I couldn't make contact with
 10 him. Again once I have something positive to communicate I
 11 shall do so. At the same time, but not before we know
 12 officially whether there will be an extension I will give a
 13 ruling on the application for removal of the seat of the
 14 Commission from Rustenburg to Centurion. I take it that
 15 addresses so far as I can at this stage, the points that
 16 you've raised.
 17 MR BURGER SC: Ja, but our problem is
 18 that we have diaries to accommodate. I don't know whether
 19 I'm required on Monday morning and if so, where and if so
 20 for how long. And we have an order of witnesses, I would
 21 very much like to be present when General Mpembe is going
 22 to give evidence. I have no indication of when he's likely
 23 to give evidence.
 24 CHAIRPERSON: The General is the next
 25 witness who is scheduled to give evidence and my

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1 understanding for the moment is that he will go to the
 2 witness table and take the witness chair as soon as this
 3 witness is finished. I had hoped this witness would be
 4 finished tomorrow but I was informed that she is - a matter
 5 over which she has no control, she's not available tomorrow
 6 and therefore the problem arose which I mentioned earlier.
 7 But in answer to the question who is going to be the next
 8 witness, the answer to that is Major Mpembe, is Major-
 9 General Mpembe.
 10 MR BURGER SC: Chair, while I'm
 11 difficult, bear with me for a while.
 12 CHAIRPERSON: Yes.
 13 MR BURGER SC: Bear with me -
 14 CHAIRPERSON: Sorry, can I just add
 15 something else before you put something else to me? I
 16 understand from Mr Mpfu that he anticipates, although it's
 17 obviously difficult to predict, but he anticipates he will
 18 be finished with the General, with the National
 19 Commissioner some time in the course of Monday. Thereafter
 20 Mr Gumbi will cross-examine here and thereafter there'll be
 21 re-examination by Mr Semanya and if the questions that I
 22 would like asked are not asked by anybody by then there are
 23 a few questions I want to ask the National Commissioner
 24 myself. So it sounds as if it's not likely that Major-
 25 General Mpembe will give evidence before Tuesday morning.

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1 I think, that's looking perhaps over confidently into a
2 crystal ball, that's the best that I can do by way of
3 answering your question.

4 MR BURGER SC: Thank you.

5 CHAIRPERSON: But if there's something
6 else you want to raise then perhaps we can invite Mr
7 Budlender on behalf of the evidence leaders to contribute
8 anything that he has to contribute in regards to the points
9 that you raised.

10 MR BURGER SC: No, that is what I wanted
11 to raise and it's awkward for me to raise it in the open
12 Commission. I wonder whether if in future we plan these
13 things it shouldn't be done in committee by everybody
14 concerned so that I don't hear over my shoulder what might
15 be happening on Wednesday and whether there's going to be
16 an inspection or a photo exhibition or whatever. I have
17 all these rumours coming at me and I feel left out and I
18 can't plan my diary and that's the reason why I raise it
19 now and I've said enough. Thank you very much for
20 listening to me, Chair.

21 CHAIRPERSON: The information that the
22 witness would not be available tomorrow was only
23 communicated to me after 4 o'clock yesterday afternoon, so
24 I wasn't able to consult anybody else thereafter. I
25 considered the possibility of an inspection but that we

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1 decided would not be appropriate at this stage and that was
2 why I raised it with the evidence leaders whether there was
3 anything else that could be done. And it was explained
4 that it may well be possible but this is a matter we
5 haven't taken a final decision on, for something to be
6 presented by way of an index and a reconciliation of the
7 videos and working out of a timeline. That's something
8 that I'm not able to make a definite statement about.

9 That'll be decided in the course of the day, but certainly
10 no discourtesy was intended to anybody. It was a
11 logistical problem that arose as I said after 4 o'clock
12 yesterday afternoon when there was nothing else that we
13 could do. Mr Budlender, is there anything that you wish to
14 say?

15 MR BUDLENDER SC: Chair, simply this,
16 that we all labour under the same difficulty. We didn't
17 know until yesterday that Mr Mpofo would not complete his
18 cross-examination of the National Commissioner this week or
19 that he wouldn't complete it yesterday or rather that he
20 could not complete it today. We all didn't know until
21 yesterday afternoon that the National Commissioner is not
22 available tomorrow and neither did she know that she'd be
23 required tomorrow until it became clear that the cross-
24 examination was going to take some time. And so we all
25 labour under the same difficulty and under the same

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1 frustration and we have to make do as best we can. I do
2 hope that the experience we've now had with the National
3 Commissioner and we've now had with General Annandale will
4 lead to - and the fact that we clearly are going to have
5 limited time to complete our work, assuming that an
6 extension is granted, will lead to the parties agreeing to
7 a method of curtailing the cross-examination so that we can
8 expedite the work of the Commission, get on with it. And
9 also try to make more reasonable projections as to how long
10 each witness is going to be in the box. If we know how
11 many cross-examiners there are that at least will give us
12 some basis for making some sort of reasonable prediction
13 but until we have that we are under the same difficulty and
14 we all have the same frustration.

15 CHAIRPERSON: Anything you want to add,
16 Mr Burger?

17 MR BURGER SC: I don't want enter into a
18 debate but let me say this, it is unrealistic to expect the
19 people around this table to discipline themselves on cross-
20 examination. I will be the first one to agree to that, I
21 will not have many takers on that. I'm going to, in due
22 course, if this is extended and if we get another lease on
23 life, I'm going to request you very respectfully, Chair, to
24 direct limits for cross-examination. We cannot go on as
25 we're going on with this General as we're going on with

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1 General Annandale. We're at police general two out of 11.
2 We haven't started on the rest of the case but I'm over
3 stating and don't ask me again to talk, I'm talking too
4 much, I'm sorry for that.

5 MR MPOFU: Chairperson, I think before I
6 address this I think originally you were going to respond
7 to what I had said, so can we get that out of the way? And
8 then I -

9 CHAIRPERSON: I want to thank you for
10 what you said. I personally think that sometimes being an
11 advocate with a difficult case is even more difficult than
12 being a judge but that's a matter that you and I can
13 discuss separately but thank you for what you said. I
14 appreciate it and I'm pleased to think that your clients,
15 whatever misunderstandings they may have sometimes, are
16 received constant assurances that we are really doing our
17 best, the three of us here to impartially and objectively
18 get to the truth of this matter. And it's a very emotional
19 matter, it's a very difficult matter for various reasons
20 but we must all try as harmoniously as we can to work to
21 get the right answer. So I think what you've said this
22 morning will contribute to that.

23 MR MPOFU: Thank you very much. Thank
24 you very much, Chairperson. Now Chairperson, before I
25 resume. Just apropos the other discussion, I just want to

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1 register once again that we share the frustrations, maybe
 2 more than other people for the obvious reasons that include
 3 our lack of resources and so on. So every day that this
 4 goes on is an extra burden to us, however, there are and
 5 I'm just reminding the Chair, there are certain issues
 6 which - of course the issue of the meeting that Mr Burger
 7 mooted last month which I discussed with the Chair and with
 8 Mr Chaskalson and Mr Bradley today, is something that I
 9 think we should use, even this short break to try and do.
 10 Especially when we do know exactly how much time we have
 11 because then at least we'll be working backwards to a
 12 specific timetable.

13 And then just to remind the Chair not to forget
 14 please, the other measures that we did try and suggest
 15 which are the issues of the simultaneous translation,
 16 insofar as it is feasible. I'm quite sure that the reason
 17 why General Annandale took so long was among other things
 18 the triple translation as it were, which as the Chair
 19 correctly pointed out you can't deny the witness their
 20 constitutional right to testify in a language of their
 21 choice. But I'm on record as saying that if that issue can
 22 be addressed it would, in theory at least have halved or
 23 even cut by a third the amount of time that - of course
 24 that's not strictly true but it could have cut by a third
 25 the amount of time that General Annandale had spent. I

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1 think there are various other ways of doing it including
 2 those that have been suggested by my colleagues.

3 CHAIRPERSON: What you've said, you've
 4 suggested that the meeting that was mooted earlier should
 5 take place in the break and I hope that it will be possible
 6 for all the parties concerned to agree. It's far better
 7 for parties to agree to restrictions than for me to impose,
 8 if I have to I will but it would obviously be far better if
 9 parties agree. And there should be ways of speeding up the
 10 process without prejudicing the rights of the various
 11 parties who are appearing but there are matters that we can
 12 discuss possibly outside this auditorium to achieve that.
 13 But anyway the meeting must I think proceed.

14 MR MPOFU: Thank you, Chairperson.

15 CHAIRPERSON: And I think it may well
 16 produce answers to some of the problems at least.

17 MR MPOFU: Thank you, Chairperson,
 18 without belabouring the point I think this goes back to
 19 what I said earlier about the difficulty of your task
 20 because of course, as it was said from day one and I think
 21 people mustn't lose sight of this, there has to be this
 22 delicate balance for speed but at the same time it can be
 23 to the extent that parties feel that they're being
 24 bulldozed and that I think is why you, yourself, Chair,
 25 would rather favour a solution that comes from us, rather

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1 than one that is imposed. Thank you.

2 CHAIRPERSON: Mr Mpofo are you now ready
 3 to proceed with your -

4 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 5 Thank you very much, Chairperson. Good morning, General.

6 GENERAL PHIYEGA: Good morning.

7 MR MPOFU: I'm going to just finish the
 8 topic that we were busy with, about minimum force and so
 9 on. Then I'll clean up some of the issues that we dealt
 10 with yesterday, one or two questions. And then we will
 11 move to the next topic which deals broadly with the issue
 12 of self defence. You remember, or let me put it this way,
 13 is it correct that a key part of the police's version in
 14 this matter is that they were forced, I think is the word,
 15 they were forced to use maximum force to defend themselves,
 16 is that a fair summary?

17 GENERAL PHIYEGA: My recall is that we
 18 spoke about private defence, defending themselves against
 19 the perceived danger.

20 [10:13] MR MPOFU: Yes, no that I understand but
 21 in one of the statements that you have said you stand by,
 22 which is FFF5. Okay, I just took the liberty to number
 23 that three pages, so if you go to page 3 - page 2, sorry,
 24 are you there, General?

25 GENERAL PHIYEGA: Yes, Sir.

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1 MR MPOFU: FFF5 is of course the
 2 statement you made on the 17th of August 2012 to the media,
 3 to the local and international media. You remember that?

4 GENERAL PHIYEGA: Yes.

5 MR MPOFU: At the bottom of the paragraph
 6 preceding the last one you say, I quote, "Police retreated
 7 systematically and were forced to utilise maximum force to
 8 defend themselves." Remember that?

9 GENERAL PHIYEGA: Yes, I do.

10 MR MPOFU: Yes, and all I was saying is
 11 that that statement that you made form the key part of the
 12 police's version. Correct?

13 GENERAL PHIYEGA: It is true.

14 MR MPOFU: And would it be fair to say
 15 that in all the instances where the police unfortunately
 16 caused - I'm using that word loosely, not in the legal
 17 sense - caused loss of life, in other words the 13th and the
 18 two scenes, that was part of the defence; they were forced
 19 by the circumstances to use maximum force. Correct? At
 20 least, that's what you were told.

21 GENERAL PHIYEGA: I think the police will
 22 always assess the dangers facing them, whether it's maximum
 23 or minimum, and they would respond according to that
 24 assessment.

25 MR MPOFU: Yes, no, no, I agree with

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1 that. All I'm asking you is what you were told by the
 2 commanders, is that in the instances where loss of life was
 3 caused, it was because the police had been acting in self-
 4 defence, where they had been forced to use maximum force.
 5 GENERAL PHIYEGA: As I've already
 6 indicated, I was informed that their response was informed
 7 by the assessment they'd made of the situation that
 8 confronted them.
 9 MR MPOFU: Okay, I'm going to move on.
 10 I'll assume you don't want to answer my question, or I'm
 11 asking it in an unclear fashion. So in any event,
 12 yesterday we had gone as far as to agree that section
 13 13(3)(b) prescribes in – well, we hadn't agreed because I
 14 was saying in all situations and you said depending on the
 15 circumstances. So let's agree to disagree on that one, but
 16 that it prescribes the use of minimum force. Correct?
 17 GENERAL PHIYEGA: Yes, my answer remains
 18 the same as yesterday.
 19 MR MPOFU: Okay, as I said, we agree to
 20 disagree because I'm not allowed to argue propositions of
 21 law with you. We'll debate that issue at the end; just so
 22 that you know that my position is that it applies to all
 23 situations. But moving on, you are aware that the
 24 Constitution of this country, among other things protects
 25 the right to life, and the right to bodily integrity, and

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1 the right to human dignity, and those are some of the
 2 constitutional constraints, as it were, under which the
 3 police act in any circumstances. Correct?
 4 GENERAL PHIYEGA: Yes.
 5 MR MPOFU: So we have a Constitution that
 6 imposes those constraints. We have section 13(3)(b) that
 7 prescribes minimum force, with or without the qualification
 8 that you've put, and then of course there is exhibit S,
 9 which was written by you, which generally speaking forms
 10 part of the prescripts, and I'm reading now from – once
 11 again it's unnumbered – from the last page, paragraph 3.4,
 12 "Disciplinary and criminal steps will be taken against
 13 members who act beyond the command or use force than" – or
 14 use, I think the Chairperson had correctly inserted the
 15 word there – "or use more force than what was necessary."
 16 You remember that prescript?
 17 GENERAL PHIYEGA: Yes, I do.
 18 MR MPOFU: And I think in April you and I
 19 had agreed that the formulation, you can't use more force
 20 than is necessary, is synonymous to saying you must use
 21 minimum force. In other words you must use the minimum
 22 force that is necessary. Correct?
 23 GENERAL PHIYEGA: I'd like to read it as
 24 written, because interpretations can take us to wrong
 25 places. I'm happy with what I see here.

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1 MR MPOFU: Ja, no I know you are happy
 2 and so am I. All I'm asking you is whether you and I had
 3 agreed in April – if you can't remember I'll have to look
 4 for the passage – that the usage of the wording "minimum,"
 5 or rather "no more force than is necessary" is synonymous,
 6 the requirement for minimum force. I'm saying we agreed on
 7 that in April. If you don't remember then during the tea
 8 break I'll look it up, and we can move on.
 9 GENERAL PHIYEGA: All I'm saying is that
 10 I think it is well articulated there. I understand it to
 11 be saying what it is saying, and secondly also to say, you
 12 know, when you talk minimum towards, there's a starting
 13 point, there's a baseline, so minimum may be varied, so
 14 that's why I'm comfortable with how it is written here. It
 15 is much more lucid to me.
 16 MR MPOFU: General, if you can please
 17 listen to my question. I'm going to try for the last time,
 18 otherwise I'm going to move on. You have already heard
 19 that time is of the essence. I'm asking you a simple
 20 question. When on the 5th of April I was giving you the 10
 21 general principles, did you or did you not agree that the
 22 formulation of no more force than is necessary is
 23 synonymous with the requirement for minimum force? It's
 24 either you did, or you didn't, or you cannot remember.
 25 GENERAL PHIYEGA: I cannot remember, but

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1 I want to say I'm comfortable with what is written here and
 2 I think the meaning is common in terms of this.
 3 MR MPOFU: Okay, thank you. That's an
 4 answer, you cannot remember. I'll look it up. Alright,
 5 and what you do know is that FFF1, go to FFF1, go to 5.4.2,
 6 which is on page 10 thereof. Actually you can read that
 7 together with 5.4.1.4, which is just above it. It says,
 8 "The use of force must meet the following requirement.
 9 5.4.1.4., minimal to accomplish the goal," and as I'm
 10 saying, if you can read that with 5.4.2, which is a
 11 standalone subsection which says, "No more force should be
 12 used or harm done than is necessary to accomplish the said
 13 goal," and you'll agree that the spirit of those two
 14 provisions is the same as what we are discussing – don't
 15 use anymore force than what is necessary, or use minimal
 16 force to achieve your goals. Correct?
 17 GENERAL PHIYEGA: Yes.
 18 MR MPOFU: Okay, and then finally 5.4.5
 19 across the page, says, "The use of lethal force is only
 20 justified in the conditions laid down in the principles of
 21 criminal law and the Regulation of Gatherings Act," and
 22 putting aside for now the issue of the act, I want to say
 23 to you – and you can accept it, and since you're not a
 24 lawyer I'm just going to say it to you, and if I'm
 25 incorrect your advocate, I'm sure, will definitely correct

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1 me, and the Chair – I want to say to you that one of the
 2 requirements or elements, as we call it as lawyers, for
 3 private defence is similar to what you and I have been
 4 discussing, namely that the force that is used in private
 5 or self-defence must not be more than what is necessary.
 6 Would you just accept that at face value, as it were?
 7 CHAIRPERSON: You can accept that he's
 8 right on that point.
 9 GENERAL PHIYEGA: I've heard him, Judge,
 10 because he said I'm not a lawyer, I can only listen.
 11 MR MPOFU: Now the issue is that if in
 12 the light of what you and I have discussed so far, starting
 13 with the Constitution, the Police Act, the common law, as
 14 we've just discussed now, the FFF1 and your letter, all
 15 those prescripts, as it were, seem to have one thing in
 16 common, which is that they require minimum force or no more
 17 force than is necessary, which I will argue is the same
 18 thing, then would you agree that your statement that
 19 despite all those things the police actually used maximum
 20 force, which is the opposite of minimum force, is the
 21 clearest example that the police breached the prescripts
 22 and the requirements of law and that it is, as it were, it
 23 flies in the face of what you and I have discussed so far?
 24 MR SEMENYA SC: Chair –
 25 CHAIRPERSON: Mr Semenya?

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1 MR SEMENYA SC: Chair, the witness
 2 explained to us in April how she used the word "maximum"
 3 in, as it appears in that statement –
 4 MR MPOFU: Chairperson, I'm sorry to
 5 interrupt Mr Semenya. I really would like the witness to
 6 be left to answer for herself.
 7 CHAIRPERSON: There is an objection. We
 8 must give him chance to say what his objection is.
 9 MR MPOFU: No, of course, but it must not
 10 be in such a way that it suggests –
 11 CHAIRPERSON: No, no, no, he's referring
 12 to what the witness said before. You yourself haven't got
 13 the exact quotation of what she said and he's referring to
 14 it. I'm not sure if he's got the reference. Have you got
 15 the actual reference?
 16 MR SEMENYA SC: We'll find it, Chair, but
 17 the witness did give evidence, did reply to that question,
 18 did explain the context of the use of the word "maximum" as
 19 it appears in that statement.
 20 CHAIRPERSON: Mr Mpofo, I wonder whether
 21 the sensible thing to do is not to hold this over till
 22 after tea when you've got the actual quotation, and it may
 23 well be that the matter can be dealt with satisfactorily
 24 then. At the moment it's a bit in the air. I take it
 25 you've got other cross-examination material to use at the

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1 moment.
 2 MR MPOFU: Subject to Mr Semenya's
 3 position – if he objects I will withdraw the question. I
 4 just want to put one more question, namely, just for my own
 5 understanding, it is your evidence that the statements you
 6 make on the merits, as it were, whether it's FFF4 or FFF5,
 7 are what was reported to you by the commanders on the
 8 ground. Do I understand that correctly?
 9 GENERAL PHIYEGA: I've said so, yes.
 10 MR MPOFU: You do know that –
 11 Chairperson, I'm sorry, I don't want to be, I'm not defying
 12 the ruling, I'm only saying subject, but I'm not pursuing –
 13 CHAIRPERSON: - questions on the same
 14 topic –
 15 MR MPOFU: Of FFF54.
 16 CHAIRPERSON: The point that's standing
 17 over is that sentence at the foot of page –
 18 MR MPOFU: In FFF5, it was put in context
 19 –
 20 CHAIRPERSON: - of FFF5, the context of
 21 that and what she said earlier, and we've got to get the
 22 exact words of what she said earlier so that we can
 23 properly understand the debate in respect of –
 24 MR MPOFU: Yes.
 25 CHAIRPERSON: - of that.

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1 MR MPOFU: Thank you.
 2 CHAIRPERSON: That's standing over, but
 3 you can proceed with the topic for the moment.
 4 [10:33] MR MPOFU: Thank you, Chairperson.
 5 Alright, in any event, irrespective of FFF5, do you know
 6 yourself that it was the intention of the police to use
 7 minimum force? This is now before the actual massacre, the
 8 actual event.
 9 GENERAL PHIYEGA: I'm not sure what you
 10 are actually referring to. Maybe if you could maybe give a
 11 little bit more detail, tell me about that intention that
 12 you're talking about.
 13 MR MPOFU: Fair enough. If you go to
 14 slide 282, L282, sorry, exhibit L282, you'll see there the
 15 first bullet that it says, "SAPS entered into this conflict
 16 situation at Marikana Lonmin Mine with the pure intention
 17 to try their utmost to resolve it peacefully through
 18 negotiation, and if necessary, the absolute minimum force."
 19 You see that?
 20 GENERAL PHIYEGA: Yes, I do.
 21 MR MPOFU: Since we know that you
 22 approved this document, I don't expect you to just know it
 23 off by heart, but do you agree that that was the pure
 24 intention of the police?
 25 GENERAL PHIYEGA: I have already said

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1 yes.

2 MR MPOFU: And once again you being a

3 non-lawyer, I won't bore you with the details, save to say

4 that the expression "absolute minimum force" has a

5 technical meaning in terms of the European Union rules

6 where it's traced to the right to life, as it is traced to

7 the right to life in South Africa, but that's a matter I

8 will deal with in argument, but save to say that the

9 intention, pure intention of the police was to act with

10 absolute minimum force.

11 GENERAL PHIYEGA: Perhaps I could just

12 say, Advocate, that the police may also be having a meaning

13 for that.

14 MR MPOFU: Yes, ja.

15 COMMISSIONER HEMRAJ: Mr Mpofo, to put

16 that into –

17 MR MPOFU: Sorry?

18 COMMISSIONER HEMRAJ: To put that into

19 context, minimum force is described very clearly in the

20 preceding slide, isn't it?

21 MR MPOFU: Sorry Commissioner, I didn't

22 hear the last part.

23 COMMISSIONER HEMRAJ: Just to put that

24 into context, minimum force is described in L281.

25 MR MPOFU: Yes.

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1 COMMISSIONER HEMRAJ: Yes.

2 MR MPOFU: Ja, described, I think it's a

3 different context, but we'll – there is, yes there is

4 another reference to minimum force, but absolute minimum

5 force, as I say is something else, which I can't debate

6 with the witness. I'll debate it with you as a panel at

7 the right time. Then also of course the Commissioner

8 refers to minimum force as, or rather in a particular

9 context, but slide 281 refers to it in terms of phase 3,

10 which sometimes, I must confess, is confusing whether it's

11 the same thing as stage 3 because some of the stages have

12 their own phases, but that's not where we are right now.

13 But maybe just to clarify the point that that has been

14 raised, so that there's no ambiguity, if you go to slide

15 283, the second bullet says, "Even when stage 3 of the

16 operational plan was implemented, the use of live

17 ammunition was never an option and the use of minimum force

18 if negotiation was not successful, was the next

19 alternative." You see that part?

20 GENERAL PHIYEGA: Yes, I do.

21 MR MPOFU: Anyway, the only proposition

22 that I wish to put to you at this stage is that if indeed –

23 and that's a matter that the Commission will make a finding

24 on in due course – if indeed maximum force was used as a

25 matter of fact, forget who said what and so on, if indeed

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1 maximum force was used, in the face of the prescripts that

2 I've read to you, in the face of the pure intention that

3 I've referred you to, that if one of the commanders came

4 here and said look, we used maximum force, that would

5 amount to nothing short of a confession that they breached

6 all the prescripts that you and I have discussed this

7 morning, and it's just simply, it's like to say you may not

8 cross when the robot is red and someone says I crossed when

9 the robot was red, that at that simplistic level, it would

10 amount to the negation of all the prescripts. Correct?

11 GENERAL PHIYEGA: I don't agree with you.

12 MR MPOFU: Why?

13 GENERAL PHIYEGA: For a number of

14 reasons; because that entire context has to be taken into

15 account, instead of by saying the situation we were dealing

16 with there was an illegal gathering and your reference to

17 the Constitution that talks about rights and whatever, it

18 also says people have the right to gather, but gather

19 peacefully and unarmed. You clearly and rightfully show

20 the positive intention of the police. I've shared with

21 this Commission that in the 18 years we have dealt with

22 over 151 000 gatherings and protests and a majority of

23 those, almost 80 to 90% we've dealt with very successfully,

24 and even where we've had to deal with unrest that showed

25 some level of violence, we've been able to use a lot of the

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1 prescripts that you are talking about very successfully.

2 I'm on record in my testimony here that that situation was

3 unprecedented, and this is why I wouldn't agree with you.

4 MR MPOFU: Okay, in fairness I'm going to

5 ask you a question and clarify it more, because the last

6 thing I want to do is to misconstrue what you are saying to

7 the Commission on this crucial point. I'm saying to you

8 that I'm going to argue, which I cannot argue with you

9 because you're a witness – I'm going to argue that these

10 prescripts, this body of prescripts that you and I have

11 discussed, outlaw the use of maximum force. In other words

12 it is prohibited. I may or may not succeed in that

13 argument at the end of the Commission, but I'm begging you

14 to indulge me and assume that that will be accepted, that

15 in terms of the prescripts, without qualification, the use

16 of maximum force is outlawed. It has no place in South

17 Africa; it has no place under any circumstances and so on,

18 whatever it is that I will argue. Now I'm saying to you if

19 in those circumstances one of the commanders were to come

20 here and say Mr Chairman, in actual fact we used maximum

21 force on the 16th, or on the 13th, or whenever, that would

22 be tantamount to the example that I gave to saying Mr

23 Chairman, we broke the law.

24 CHAIRPERSON: Mr Semanya?

25 MR SEMENYA SC: Chair, Mr Bizos spent a

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1 considerable period of time cross-examining on this topic
 2 and the witness has given answers to all those questions
 3 before, and Chair, secondly, there is no basis for this
 4 hypothesis that another general is going to come here and
 5 say we used maximum force. There's no basis for it.
 6 CHAIRPERSON: Mr Mpofu will say that what
 7 he said is that this statement was based on what the
 8 commanders told her. He will therefore say, I imagine,
 9 that this sense comes from one of the commanders, but of
 10 course Mr Mpofu, you leave out the word "forced." What the
 11 statement says, they were forced to use maximum force, and
 12 if maximum force – sorry, if minimum force is not more than
 13 was necessary, then if you are forced to use something,
 14 then can you say that it's more than was necessary if it's
 15 forced?
 16 MR MPOFU: Yes.
 17 CHAIRPERSON: That's really the point,
 18 isn't it?
 19 MR MPOFU: Thank you, yes. No, no –
 20 CHAIRPERSON: Isn't that a matter that we
 21 should debate at the end of the hearing rather than trying
 22 it out on the witness who, whatever other qualifications
 23 she has, hasn't had the advantage – if that's the right
 24 word – of a legal education?
 25 MR MPOFU: Yes. No, no, Chairperson, I

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1 appreciate that point very well, but I just thought it's
 2 something that I need to put in fairness to this witness
 3 since she is the one who used those words. Of course, this
 4 is subject to the, whatever we're going to do at teatime,
 5 whatever context we might have put to it, but it would be
 6 unfair for me to argue anything approximating what I'm
 7 putting now without having given her a chance, but apropos
 8 what you're saying, Chair, with respect, I read the words
 9 literally as they are in FFF5, that they were forced to use
 10 minimum force. So –
 11 CHAIRPERSON: You mean you rephrased –
 12 MR MPOFU: So yes –
 13 CHAIRPERSON: - the word "forced." I'm
 14 not suggesting that it was deliberate or something like
 15 that.
 16 MR MPOFU: Yes.
 17 CHAIRPERSON: But anyway, there are two
 18 points on the table at the moment. The one is repetition,
 19 because Mr Bizos covered that.
 20 MR MPOFU: Well, that we can address –
 21 CHAIRPERSON: That's the first point.
 22 MR MPOFU: Ja.
 23 CHAIRPERSON: The second point is that
 24 can one say that someone used more force than was
 25 necessary, in other words which is the opposite of minimum

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1 force, more force than was necessary, where that person
 2 says I was forced to use maximum force to defend myself?
 3 MR MPOFU: Yes. No, that's an issue that
 4 I'm sure Mr Semenya and I will debate at length at the end.
 5 But as far as Mr Bizos' point is concerned, Chair, with
 6 respect, the mere fact that Mr Bizos covered something
 7 cannot me prohibit me. Mr Bizos covered this from the
 8 point of view of the so-called doctrine and all that. I'm
 9 not talking about any doctrine. I'm simply saying that
 10 from the prescripts which I've read to the witness,
 11 counter-posed against either what she said at the press
 12 conference or the hypothetical general who will come and
 13 say it, that's all I'm dealing with, and I'm almost
 14 finished. I was just really putting the proposition, as I
 15 say, that I will argue, in fairness to the witness.
 16 COMMISSIONER HEMRAJ: Mr Mpofu, that
 17 proposition when you put it to the witness, asking her if
 18 it might be confession, you must also factor that that
 19 statement might be accompanied by an explanation that is
 20 exculpatory.
 21 MR MPOFU: No, of course. Ja, it's
 22 exactly the same as I'm saying; if somebody says the law
 23 says you may not cross a red robot, and then the person
 24 says I crossed a red robot, prima facie that is a
 25 confession of breaking the law, but the person can say

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1 look, there were a thousand lions chasing me, or whatever.
 2 I'm not there yet. I'm just talking about the face value
 3 nature of the statement. Anyway, we'll have this
 4 interesting debate one day.
 5 MR SEMENYA SC: Chair, the reference on
 6 the transcript is page 7282, day 68, and the question was
 7 asked by Mr Bizos in exactly the identical terms now being
 8 used. You'll see it runs from line 10, 11, downwards,
 9 Chair. 7282.
 10 CHAIRPERSON: You say line 11. Yes,
 11 let's read that aloud, because that may put this point away
 12 for the moment at least. Mr Bizos says, "If he did use
 13 maximum force," as you will hear that's [inaudible] in the
 14 sense of the expression, "If he did use maximum force, as
 15 you did, what did you mean by maximum force?" and the
 16 witness says, "I will not be able to talk for the Minister
 17 but I, in my statement, was saying the police had to use
 18 the necessary force to defend themselves." Mr Bizos, "We
 19 were forced to utilised maximum force. What did you mean
 20 by maximum force? You used the words, what did you mean?"
 21 Answer, "I have just answered to say the context I used was
 22 to say they must use the necessary force to defend
 23 themselves. That's what I meant." Now that's the answer
 24 that she gave then, and it doesn't seem to me, with
 25 respect, that you're taking it any further. Her answer is

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1 on record –

2 MR MPOFU: No, no, Chair –

3 CHAIRPERSON: You can argue later what

4 one can infer from that, but I think the necessary material

5 – I mean you're basically cross-examining to get material

6 on which to found arguments later, aren't you?

7 MR MPOFU: Yes, Chairperson.

8 CHAIRPERSON: I would think, if I may say

9 so, I think you've got the material on record to argue.

10 Whether it will be a good argument or not we will find out

11 in due course.

12 MR MPOFU: Yes. No, Chairperson, I

13 appreciate that, and the line may be just too subtle. Let

14 me explain. What Mr Bizos was busy dealing with here was

15 the statement made at FFF14, page 25 - which I'm going to

16 deal with just now - by the Minister of Police, who says,

17 "There must be a good appreciation of the distinction

18 between the need to use maximum force against violent

19 criminals, and minimum force in dealing with fellow

20 citizens."

21 [10:53] That, with the greatest respect, Chair, exactly

22 is the issue I'm dealing with that both this witness, if it

23 was her original idea, or whoever informed her if it was

24 not, and this Minister who says something like this, labour

25 under the apprehension that maximum force is ever, ever,

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1 ever justified.

2 CHAIRPERSON: When the Minister comes you

3 can debate it with him –

4 MR MPOFU: Yes.

5 CHAIRPERSON: - but this witness has said

6 what she meant when she used the expression.

7 MR MPOFU: Well, Chairperson –

8 CHAIRPERSON: Isn't that where we must

9 leave it for the moment, at least?

10 MR MPOFU: Well, Chairperson, but that

11 subject, that's why I asked permission to ask that

12 question. That question that I asked is very, very

13 decisive. I asked her whether the statements she made on

14 the merits were as reported by the commanders, or were her

15 own ideas. If it was as reported by the commanders, then

16 what her own idea might be, or ex post facto interpretation

17 might be, is with the greatest respect, irrelevant. The

18 issue is if she was told by the people who actually killed

19 people, so to speak, that they used maximum force, then it

20 can't be - that she might think that maximum force means

21 the same thing as minimum force, that's irrelevant.

22 CHAIRPERSON: Mr Mpofo, aren't there two

23 points? The first is, there's a passage at page 7277 I

24 want to read to you.

25 MR MPOFU: 77, I'm just there.

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1 CHAIRPERSON: Mr Bizos says, again at

2 line 11, "I asked you whether you knew anything about

3 maximum force. You said you knew nothing about it, and my

4 learned friend, in order to – never mind the in order to -

5 my learned friend objected that the police never used the

6 words 'maximum force' as part of their defence."

7 MR MPOFU: I remember –

8 CHAIRPERSON: "And what I'm telling you

9 now is that in your own statement you used the words

10 'maximum force' and the objection is therefore not

11 supported by the facts. The question to you is, why did

12 you use the term 'maximum force' if it was not part and

13 parcel of the police's defence?"

14 MR MPOFU: Yes.

15 CHAIRPERSON: The witness said,

16 "Advocate, I will still go back to what I said and I think

17 it constitutes my response to you. I have said the police

18 acted in self-defence."

19 MR MPOFU: Ja, I still –

20 CHAIRPERSON: Now the point that I put to

21 you is this; I can understand when you say the police came

22 along and said to her, commanders, we acted in – we used

23 maximum force. You can ask them about that –

24 MR MPOFU: Of course.

25 CHAIRPERSON: - and what they meant, but

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1 when she repeats that in her statement, she's using the

2 expression as she understands it. She may well have

3 understood it to mean one thing. They may have intended it

4 to mean something else, but you're not going to get from

5 her what they meant. All you can get from her is what she

6 understood them to mean and the meaning she attributed to

7 that phrase when she used it. I mean that must be so.

8 Anyway, I've put to you, I think you've got enough on

9 record to argue the point -

10 MR MPOFU: We do.

11 CHAIRPERSON: - and whether it's a good

12 point or a bad point, as I say we'll find out in due

13 course.

14 MR MPOFU: Ja.

15 CHAIRPERSON: So may I suggest to you

16 that you move on to something else? I'm sure you've got a

17 number of other matters you want to –

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

19 It's three minutes until it's teatime, but if necessary

20 I'll give you an extra minute, but have you got a – like an

21 egg, have you got a three-minute point that you can deal

22 with?

23 MR MPOFU: Egg point, Chairperson, yes,

24 I'll bring up so I can get one. Okay, let me put, it's

25 just a bridge to the next point. I'm going to argue,

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1 subject of course to what we've discussed now, that the
 2 police by saying that they used maximum force, they meant
 3 maximum force, and that that negates the common law defence
 4 of self-defence, apart from anything else to do with the
 5 prescripts and so on, but now I'm going to deal with you
 6 after tea with a separate reason why the self-defence
 7 defence is, why we allege that it is baseless, and that is
 8 that there was no attack on the police. Once again I'm
 9 sure Mr Semenya and with the help of the Chair we'll concur
 10 that one of the basic requirements for the invocation of
 11 self-defence or private defence is that there must be an
 12 attack. That's base 1. If there's no attack, you can't be
 13 – even a non-lawyer would understand that. If there's no
 14 attack, there can't be a self-defence, but that's the
 15 topic -
 16 MR SEMENYA SC: As I remember it, Chair,
 17 I –
 18 CHAIRPERSON: Sorry, I think you'll find,
 19 if you look in the cases, what is required is imminent
 20 danger.
 21 MR SEMENYA SC: Yes.
 22 CHAIRPERSON: There doesn't actually have
 23 to be a threat. I suppose there could be an implied threat
 24 in circumstances of imminent danger, but what is required
 25 is imminent danger, as I understand the law.

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1 MR MPOFU: No, it says –
 2 CHAIRPERSON: Mr Semenya, sorry, I was
 3 interrupting you. Forgive my discourtesy. What do you
 4 want to say?
 5 MR SEMENYA SC: No, I was just saying my
 6 understanding of that concept is tangentially different
 7 from that of Mr Mpofo, but we don't need to debate it.
 8 MR MPOFU: Okay, Mr Chairperson, we can –
 9 yes, I'll close-circuit this by saying the following. Once
 10 again we'll park that interesting debate to the end, but
 11 according to Snyman at least the, one of the requirements
 12 is an attack or an imminent attack which the Chair – but
 13 once again, that's not for you. The only point I'm going
 14 to debate with you is that there was no attack on the
 15 police.
 16 CHAIRPERSON: That there was no attack.
 17 I'm not sure how much light she'll be able to throw on it
 18 because she wasn't there, but anyway, we will get there
 19 when we get there. Let's take the tea adjournment now.
 20 MR MPOFU: We will. I'll bear that in
 21 mind.
 22 [COMMISSION ADJOURNS COMMISSION RESUMES]
 23 [11:40] CHAIRPERSON: The Commission resumes.
 24 During the tea adjournment we had discussions in chambers
 25 and there were other discussions thereafter and I want to

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1 announce we will not be sitting tomorrow. What will happen
 2 instead there will be a meeting of the representative's
 3 parties and the evidence leaders to discuss a very
 4 important document that's being prepared by the evidence
 5 leaders to reconcile the times on the various video cameras
 6 and the times at which various photographs were taken. If
 7 agreement can be reached on the correctness of the table or
 8 at least substantial parts of the table, this we believe
 9 will substantially shorten the time that will be taken in
 10 cross-examination. It was appropriate to do it at this
 11 stage because from now on we will have witnesses who were
 12 in the field at the time when various events happened.
 13 Previously, in the case with General Annandale, he was in
 14 the JOC all the time. So that's - we won't be sitting
 15 tomorrow but the members, the parties' representatives and
 16 the evidence leaders will be hard at work discussing the
 17 reconciliation environment as I have mentioned. Those who
 18 do not consider it necessary that they be here for that are
 19 now given timeous notice so that they can arrange their
 20 schedules accordingly. You look as if you wish to say
 21 something.
 22 MR BURGER SC: Chair, thank you very
 23 much, that means we will have a representative here
 24 tomorrow but I for example don't intend to be here. I take
 25 it in due course we'll be informed where we go on, at what

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1 time, where on Monday if we do.
 2 CHAIRPERSON: I'm hoping they'll say
 3 something after the lunch adjournment and one of the
 4 reasons for the time spent over the tea adjournment was
 5 attempts to establish contact with the Minister who is busy
 6 at a public function in Durban at the moment, opening a new
 7 courthouse or courtroom. So I wasn't able to speak to him
 8 but I will speak to him and before we resume after lunch
 9 and I will then be able to give the information that you
 10 request. Whether we'll be carrying on and if so, where.
 11 MR MPOFU: Chairperson, for what it's
 12 worth, in the same vein I've suggested to evidence leaders
 13 that the meeting of the parties should take place at the
 14 new venue on Monday. We are still trying to ascertain
 15 whether the other important people who need to be there
 16 will be available.
 17 CHAIRPERSON: The idea as I understood
 18 it, it's not expected they will get an admission, the hope
 19 is to get an admission that their tabled reconciliation is
 20 correct. As I understand they don't expect necessarily to
 21 get the admission tomorrow but they want an opportunity to
 22 explain it to the parties.
 23 MR MPOFU: No, no, no Chair, I'm talking
 24 about the meeting about -
 25 CHAIRPERSON: I didn't mention that

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1 because I understand that -

2 MR MPOFU: We're targeting to have it at

3 the venue on Monday.

4 CHAIRPERSON: The hope was that it could

5 be done tomorrow but a number of the important actors won't

6 be there. Won't be here tomorrow. The idea is to have it

7 here but the Commission itself won't be sitting but the

8 equipment and so on is here but that meeting will take

9 place and I'm pleased to hear it will take place on Monday.

10 I hope they won't eat into the Commission's sitting time.

11 MR MPOFU: We'll try, Chair.

12 CHAIRPERSON: National Commissioner,

13 you're still under oath. Mr Mpofo, I believe you still

14 have some arrows in your quiver.

15 MR MPOFU: You believe correctly,

16 Chairperson. Commissioner before we go into this issue

17 about the attack and so on which I promise you I'm not

18 going to spend a long time on because as it was correctly

19 pointed out is you were not there. But I'm going to ask

20 you a few questions just to situate what your understanding

21 was. Is it correct that your understanding, or what you

22 were told was that the three principle aims of the

23 operation were to disperse, disarm and arrest the

24 protestors from that broad frame that we get?

25 GENERAL PHIYEGA: Yes, in part but also I

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1 think the whole operation was about to bring stability in

2 Marikana.

3 MR MPOFU: And was it also your

4 understanding that the disarm part of the operation was

5 intended to be done if possible there but in terms of phase

6 6 it could also have been done in the hostels at a later

7 stage? Sorry when I say phase 6 I mean phase 6 of the

8 plan.

9 GENERAL PHIYEGA: As I've said I know

10 that there was disarming, there was dispersing, there was

11 arresting. So those details I'm sure the operational

12 people can assist you more with those.

13 MR MPOFU: Look I can accept that you did

14 not know the intricate details but surely you knew the

15 barebones of the plan, you know the various stages. You

16 had been briefed about that surely.

17 GENERAL PHIYEGA: I'm comfortable in

18 saying I know that they were going to disarm and they used

19 various methods. Going to houses, going to the mountain.

20 So I'm sure those details can be given as I said.

21 MR MPOFU: Okay let me put it this way.

22 You can't dispute that phase 6 of the plan that was

23 outlined by Lieutenant-Colonel Scott was that if necessary

24 the disarmament of the people would happen at a later stage

25 in the hostels and residential areas.

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1 GENERAL PHIYEGA: I don't think it's

2 necessary to dispute or accept but I'm saying to you

3 Colonel Scott and many other people will explain those

4 nitty gritty details. You're taking me to nitty gritty

5 details which I don't think helps the situation. I can't -

6 MR MPOFU: Okay well I also don't want to

7 debate nitty gritties with you. I'm going to put to you

8 that it's common cause in this matter that the last phase

9 of the operation by Colonel Scott which must have been

10 discussed with you involved disarming people at their

11 places of residences. So there's no dispute over that.

12 GENERAL PHIYEGA: Maybe it's also the

13 words you're using, I've never disputed it. I've just said

14 those details can be clearly confirmed by those who were in

15 operations. I'm aware that certain things took place.

16 MR MPOFU: In any event the issue is the

17 objective of the dispersal of the people from the mountain

18 by the time - let me say by the time the first shot was

19 fired at scene 1 the people had already dispersed from the

20 mountain. Can you dispute that?

21 MR SEMENYA SC: Chair, is this reference

22 to shots, ammunition or to rubber?

23 CHAIRPERSON: Mr Mpofo, did you hear what

24 Semenya said?

25 MR MPOFU: Yes, no it's a fair question,

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1 Chairperson. I'm referring to live ammunition.

2 GENERAL PHIYEGA: My answer to you is

3 that I was not on the scene and I'm not able to answer

4 that. I don't know.

5 MR MPOFU: And therefore you can't

6 dispute the fact that by the time the first live ammunition

7 shot was fired people had already dispersed from the

8 koppie.

9 GENERAL PHIYEGA: Neither can I agree.

10 You know I can't dispute, I can't agree. I don't know.

11 MR MPOFU: Thank you. Now would then -

12 if the people had dispersed and they could be disarmed

13 later, of the three things that were mentioned it would

14 leave the outstanding objective, the arrest of the people

15 right?

16 GENERAL PHIYEGA: I think with the roots

17 of the question not being able to be answered I am unable

18 to answer you on that one also.

19 MR MPOFU: Alright I'll try only once.

20 I'm saying to you if you and I agree that there were three

21 principle objectives. Disperse, disarm, arrest and you

22 cannot dispute that disarmament -

23 CHAIRPERSON: So there were three.

24 Disperse, disarm, arrest.

25 MR MPOFU: Yes.

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1 CHAIRPERSON: You've dealt with the
 2 disperse part and -
 3 MR MPOFU: And the disarm.
 4 CHAIRPERSON: And the disarm part so all
 5 that is left is the arrest part.
 6 MR MPOFU: That's all I'm saying. In
 7 other words, General, I'm saying if you can't dispute that
 8 the disarmament could happen later and the dispersal could
 9 have been achieved by the time the first live round was
 10 shot then the only outstanding issue would have been the
 11 arrest. It's that simple.
 12 MR SEMENYA SC: Chair, can I invite my
 13 learned colleague to accept that the witness was not on the
 14 scene? She was not going to be part of the operational
 15 application of that plan. These questions can best be
 16 answered and the witness has told us repeatedly, by those
 17 who were on the scene.
 18 MR MPOFU: Chairperson, with respect my
 19 answer is simply this, there is evidence, or at least a
 20 suggestion in the minute, that this witness was told that
 21 stage 3 of the plan would be implemented. So I'm entitled
 22 to assume that she had a functional - in other words she
 23 would have said stage 3 of what. So that's why I said to
 24 her I accept that she didn't know what she calls the nitty
 25 gritties, that I'm prepared to accept but all I'm saying is

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1 that the -
 2 CHAIRPERSON: Instead of making - sorry
 3 to interrupt. Instead of making assumptions about what she
 4 knew or didn't know why don't you ask her what she knew or
 5 didn't know and then based on what she says she knew you
 6 can ask her further questions?
 7 MR MPOFU: Ja, okay.
 8 CHAIRPERSON: And if she runs up the flag
 9 of nescience well then you may have to retreat.
 10 MR MPOFU: Fair enough. Thank you,
 11 Chairperson. Am I correct in assuming that when you were
 12 told that stage 3 of the plan, I think you even referred
 13 like that in your statement but don't hold me to that, that
 14 stage 3 of the plan was not being implemented, surely you
 15 had a functional understanding of stage 3 of what? Of how
 16 many stages? As I say I accept you wouldn't have known
 17 what you call the nitty gritty and the commas and so on of
 18 the plan but surely you knew the broad framework.
 19 Otherwise you'd have - if someone came to say to you at
 20 stage 3 you would have said what is that.
 21 GENERAL PHIYEGA: You're right Advocate,
 22 that I know the broad framework but you then start talking
 23 about when the first shot was fired and people had left the
 24 mountain. I won't know that, I know the broad framework.
 25 MR MPOFU: Thank you, thank you, that's

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1 good. At least we can start somewhere and in terms of the
 2 broad framework I was saying to you - that's why I'm
 3 leaving it at the high level, I'm saying to you the broad
 4 objectives are disperse, disarm and arrest. So you don't
 5 have to know the nitty gritties of the plan and you and I
 6 have agreed that those were the broad objectives, all I'm
 7 saying now is that those broad objectives, two of them, one
 8 of them had been achieved in the fact that the people were
 9 no longer at the koppie and the other could have been
 10 achieved later and that leaves the third one. What's so
 11 difficult about that?
 12 GENERAL PHIYEGA: We've agreed on the
 13 broad framework and that's what I understood. Now you are
 14 telling me about people being on the koppie, not being on
 15 koppie. I was not there, I'm not able to answer you on
 16 that one.
 17 MR MPOFU: Okay I'll move on. You know
 18 that I said we must assume that the people are not there
 19 and assume that stage 6 said that they arrest - you know
 20 that. So it's got nothing to do with whether you were
 21 there or not. Did you also know that part of the objective
 22 was that or rather that the operation was principally aimed
 23 at protestors that refused to leave would be searched on
 24 the koppie. Did you know that?
 25 GENERAL PHIYEGA: I do not know that.

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1 MR MPOFU: Okay. Did you also know and
 2 this is from EE, did you know that if the protestors
 3 refused to voluntarily lay down their weapons and leave the
 4 koppie stage 3 of the operation would be implemented as a
 5 last resort? In other words there were two requirements,
 6 they must refuse to voluntarily leave to lay down their
 7 koppie and to leave the koppie. Did you know this? This
 8 is on page 1, Chair, of double EE.
 9 GENERAL PHIYEGA: I know that the
 10 protestors needed to be disarmed so therefore they needed
 11 to leave whatever they had because the law requires that
 12 they can protest, they can march in any form and manner but
 13 not being armed. So that would be right to say they should
 14 leave their arms and go wherever they are wanting to go and
 15 disperse.
 16 [12:00] MR MPOFU: Yes, okay. The evidence that
 17 we have at this stage admittedly does not deal with the
 18 issue of the voluntary laying down of weapons, because
 19 nobody asked them to do that. But the evidence that we
 20 have, at least from Mr Magidiwana, is that when the people
 21 were shot, that's exactly what they were doing, was to
 22 leave the koppie and go to Nkaneng.
 23 MR SEMENYA SC: Chair, the witness does
 24 not have information which is being sought from her.
 25 MR MPOFU: That's exactly why I'm giving

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1 that information to the witness, Chair, because I don't
 2 expect that she was here when Mr Magidiwana was testifying.
 3 GENERAL PHIYEGA: I'm sure the other
 4 generals and commanders that are coming here will respond
 5 to that evidence, because they were there.
 6 MR MPOFU: No, Ma'am, there are no
 7 generals who can respond to that evidence because it was
 8 not disputed. I'm saying to you that Mr Magidiwana
 9 testified, undisputed, that Mr Noki said to them let us go
 10 to the residence, let us walk and not run because we have
 11 done nothing wrong, and that that's exactly what they did
 12 and the rest of the people also left the koppie. That's
 13 undisputed, so there's no general -
 14 CHAIRPERSON: I'm sorry, Mr Mpofu, that's
 15 not entirely correct. Of course it was not suggested that
 16 any police person was within earshot and heard what was
 17 said -
 18 MR MPOFU: Yes.
 19 CHAIRPERSON: But what was the subject of
 20 quite a lengthy cross-examination by Mr Ngalwana, who
 21 cross-examined on behalf of the police, was that it was not
 22 correct that they were just walking peacefully back to
 23 their residences, and there's a whole argument about the
 24 paths they followed and the path they would have followed
 25 if they were going to do that, and he suggested, as I

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1 remember it, that effectively, essentially what was
 2 happening was that there was, an attack on the police was
 3 contemplated. Whether that's correct or not of course is a
 4 matter we have to decide, but certainly that, as I recall
 5 it, was the thrust of the cross-examination. So it's not
 6 correct to say that it was not disputed. It's true if it's
 7 not disputed in the sense that it was not suggested that
 8 there will be direct evidence contradicting it, but from a
 9 circumstantial point of view there was quite a lengthy
 10 cross-examination on the point. So I don't think it's
 11 correct to say there wasn't a dispute. But I don't think,
 12 I don't know if you need the fact that it wasn't disputed,
 13 I mean for the purposes of the point that you're making
 14 with the witness.
 15 MR MPOFU: Yes. No, no, Chairperson, I
 16 appreciate and I agree with the Chairperson at that broader
 17 level. All I was putting was simply that a witness came
 18 here and said Mr Noki said this to us and we followed him.
 19 That was certainly not disputed.
 20 CHAIRPERSON: - possible for the cross-
 21 examiner to dispute it, but the point is that's the
 22 evidence he gave certainly, and if that evidence is
 23 accepted, well then things will follow, won't they?
 24 MR MPOFU: Ja, thanks Chairperson. Yes,
 25 and General, to be fair to you, the only issue that I'm

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1 canvassing with you – the Chairperson is right, and so if
 2 Mr Semenya – whether the thing was disputed and so on is a
 3 matter that will be dealt with later, but look at it from
 4 this point of view. If that evidence is accepted that Noki
 5 said let's walk, and they walked as a result of that,
 6 whether because it was not disputed or because I argue
 7 later that it should be accepted and I somehow succeed,
 8 don't worry about the reason why it might be accepted, the
 9 only issue really I want to say to you is that if that
 10 evidence is so, then at least one of the two conjoined
 11 prerequisites that they – the one of voluntarily down their
 12 arms we'll put aside, and leave the koppie, that would have
 13 been achieved by the time they were shot at.
 14 COMMISSIONER HEMRAJ: Mr Mpofu, can you –
 15 CHAIRPERSON: Sorry –
 16 COMMISSIONER HEMRAJ: I just you to
 17 repeat that question because I'm not sure I understand it.
 18 MR MPOFU: Okay, I'll break it down.
 19 There were two, according to the fourth bullet on EE there
 20 are two things that would precipitate stage 3 – if, (a),
 21 the protesters refused to leave, voluntarily lay down their
 22 arms, and (b), they refuse to leave the koppie. Now all
 23 I'm saying is the issue of the voluntary laying down of the
 24 arms is – well according to Magidiwana at least nobody
 25 asked them to do that, but that doesn't concern this

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1 witness. I can't canvass that with her because it's a
 2 matter that we will deal with Calitz and the people who
 3 were there about whether they were told to lay down their
 4 arms. I'm not dealing with that, but I'm saying as far as
 5 (b) is concerned, as far as if they refused to leave the
 6 koppie, that that was not fulfilled because Magidiwana says
 7 they left at the instruction of Noki and – no, and as I
 8 said earlier by the time they were killed there was no-one
 9 at the koppie. So leaving the koppie, there's no doubt
 10 that that condition was not fulfilled. In a way it's the
 11 same point as whether they were dispersed, they had
 12 dispersed. You can either use the word they dispersed, or
 13 you can use the words, left the koppie.
 14 CHAIRPERSON: I just want to say
 15 something before he does. I am not sure the question is
 16 correct. I think it's based on the wrong – prima facie on
 17 the wrong premise. What appears to be the case, as I see
 18 as prima facie, is that stage 3 would not happen if two
 19 things occurred; weapons laid down and people leave. The
 20 mere fact that they leave isn't enough to stop the coming,
 21 the implementation of stage 3. They've got to lay down
 22 their weapons as well, and it's quite clear they didn't lay
 23 down their weapons. It's quite clear that they were
 24 actually on the koppie but that doesn't matter. Those who
 25 were in front of the koppie, area in front of the koppie,

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1 moved forward or sideways, they moved, carrying their
 2 weapons. So the two requisites for the non-implementation
 3 of stage 3 were not present because they had their weapons
 4 and they were marching forth with their weapons. So the
 5 premise on which you put the question prima facie seems to
 6 me to be incorrect.

7 MR MPOFU: Ja –

8 CHAIRPERSON: But perhaps before you deal
 9 with it, if Mr Burger has got another point he wants to
 10 raise, perhaps you can deal with his point as well.

11 MR MPOFU: Maybe if I deal with yours,
 12 Chair, it might not be necessary –

13 CHAIRPERSON: No, don't pre-empt –

14 MR MPOFU: Okay –

15 CHAIRPERSON: I don't know if you can
 16 read his mind. Let's hear what he wants to say.

17 MR MPOFU: He wants to talk.

18 MR BURGER SC: Chair, this is not a
 19 dispute involving my client, so I simply raise it in the
 20 context of the preciousness of time. I wanted to object on
 21 two bases. First is the question is logically incoherent,
 22 but that's the point you've put to my learned friend and I
 23 think he understands it now. But secondly, it's quite
 24 irrelevant what this witness thinks of whether one or two
 25 conditions had been met. She wasn't there. She asked us

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1 to ask the generals who'll come to have this debate. We've
 2 now since teatime explored a point going nowhere because
 3 the witness was not on the scene, and I look to you for
 4 guidance now, Chair, to give me a ruling on the relevance
 5 of this. It's no good to reformulate this question. It's
 6 going nowhere. I object to it and I request a ruling,
 7 please.

8 MR MPOFU: Okay, two points, Chair. The
 9 mere fact that you, Chair, were able to in a way see what I
 10 mean by the conjoined points, which I will address, means
 11 that the question is not illogically incoherent. It might
 12 be incoherent to Mr Burger because of his own capacities,
 13 but the issue –

14 CHAIRPERSON: That kind of comment
 15 doesn't lower the temperate, it raises it.

16 MR MPOFU: Well, that comment doesn't, ja
 17 –

18 CHAIRPERSON: Just concentrate on the
 19 merits.

20 MR MPOFU: Ja.

21 CHAIRPERSON: Keep your eye on the ball –

22 MR MPOFU: Thank you, Chair.

23 CHAIRPERSON: And you may get it into the
 24 net, otherwise it certainly won't.

25 MR MPOFU: Thank you, Chairperson. Well,

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1 I would appreciate if the Chair then intervenes when
 2 comments like that are made about how illogical it is.

3 Okay, now the next point, Chair, is – and I don't know how
 4 many times I must say this to Mr Burger – this witness –

5 CHAIRPERSON: You don't have to make it
 6 to Mr Burger; just talk to me.

7 MR MPOFU: Yes. This witness is a
 8 National Commissioner of Police. We all know she was not
 9 there, but I do not for the life of me understand how I can
 10 be disentitled from saying to her there was an operation –
 11 whether I'm right or wrong in the flow, as the Chair has
 12 pointed out I'll address later – that there was an
 13 operation; A, B, C was supposed to happen to trigger the
 14 operation. A, B happened, and C did not happen. Surely,
 15 surely, Chairperson, with the greatest respect, if somebody
 16 who's the National Commissioner cannot say to the Chair or
 17 to the world, well, in that case, whatever he or she has to
 18 say, so relevance is not, is beyond doubt. The question
 19 really is what –

20 CHAIRPERSON: I'm not sure I understand
 21 the relevance. She says, I wasn't there; there were
 22 commanders on the field who were, you can deal with them,
 23 raise this point with them; I can't throw any light on the
 24 point one way or the other. I can only tell you maybe what
 25 people told me, but even there it seems that she can't even

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1 do that. So aren't we really dealing with questions that
 2 are – you know, we raised this point before. Part of the
 3 problem with the Commission is that strict rules of hearsay
 4 don't apply, but there comes a time when the underlying
 5 sense behind the rules of hearsay operates. Whatever she
 6 says on this point, how is it going to help us, even though
 7 she's the National Commissioner?

8 MR MPOFU: No, I'm afraid, Chair –

9 CHAIRPERSON: Anyway, I don't understand
 10 the relevance, but please take me through it gently.

11 MR MPOFU: Yes, thank you, Chairperson.
 12 All I'm saying is this; any commander surely, I mean, will
 13 think I'm out of my mind if I'm going to say to him when
 14 that commander was in charge of a particular portion of the
 15 operation, then I say to him look, the disarmament had
 16 happened. He says, so what? I was told by my superior to
 17 shoot or whatever. I mean, okay, let's not – to spray
 18 teargas, let's keep it at the low level. So I'm asking a
 19 leadership question. This is what is not being understood.
 20 I'm saying from a leader of the police who knew that there
 21 were three principal objectives, if one of them was not
 22 fulfilled, would he or she, that leader, endorse the
 23 resultant killing of people which may have happened when
 24 the requirements for such killing, if there ever is, is
 25 ever justified, did not exist. If it's not relevant I'll

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1 move on to something else, but –

2 CHAIRPERSON: I'm afraid I can't

3 understand the relevance –

4 MR MPOFU: Fine.

5 CHAIRPERSON: But I want to say this to

6 you, Mr Mpofo, that obviously you can raise – I'm not going

7 to stop you raising these points with the appropriate

8 witnesses. I'm not prejudicing your clients in that way.

9 I'm not prejudicing them at all because I'm simply ruling

10 that this is not relevant. So you don't have to address

11 the other point because it falls away. May I suggest you

12 move on to the next point?

13 MR MPOFU: Right, now let's go to –

14 alright, let me tell you that the other evidence which is,

15 okay, the other evidence is that one of the people who were

16 shot at with live ammunition, at least seven or eight

17 times, was approaching the path that I had referred to you

18 before, and was only carrying a stick, in the middle of

19 that stick –

20 CHAIRPERSON: Mr Mpofo, it sounds to me

21 as if you're going on another irrelevant, on to another

22 irrelevant point. The same point applies. This witness

23 wasn't there. She doesn't know whether your client only

24 had a stick, and whatever comment she may make on the

25 assumption that he did have a stick, isn't going to help us

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1 to answer any of the questions raised in the Terms of

2 Reference.

3 MR MPOFU: Okay –

4 CHAIRPERSON: But prima facie I think

5 that's irrelevant as well, unless you can say –

6 MR MPOFU: Ja, well –

7 CHAIRPERSON: It's covered essentially by

8 the basis of the previous ruling I gave.

9 MR MPOFU: Well, Chairperson, okay, the

10 only issue I want to register before moving on is that once

11 again when these issues were canvassed with this witness

12 and Allandale, both of whom were not – Annandale, sorry,

13 General Annandale – both of whom, it is common cause, were

14 not present over four days and other days, this was – these

15 objections were not raised, and that's all I'm saying, is

16 that –

17 CHAIRPERSON: Alright, we'll be more

18 alert to raise those objections next time Mr Semanya tries

19 to lead evidence of that kind.

20 MR MPOFU: Ja.

21 CHAIRPERSON: But certainly whether – or

22 leads the other witnesses –

23 MR MPOFU: Ja.

24 CHAIRPERSON: But you cannot be

25 prejudiced by not dealing with the evidence led in chief on

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1 these matters –

2 MR MPOFU: That's right.

3 CHAIRPERSON: - and led from this witness

4 –

5 MR MPOFU: Ja.

6 CHAIRPERSON: - because you can take the

7 stance that I suggest you do –

8 MR MPOFU: Yes.

9 CHAIRPERSON: - that the witness doesn't

10 know anything about it; there's no point in asking the

11 witness questions on it and therefore no adverse inference

12 can be drawn against your client and you're not prejudiced.

13 MR MPOFU: Ja.

14 CHAIRPERSON: If you adopt that attitude,

15 you'll be safe.

16 MR MPOFU: I will. I will, thank you,

17 Chairperson. Ja, if a matter is raised in chief, the

18 cross-examination almost naturally follows, but I accept

19 the ruling, Chairperson. Are you -

20 MR SEMENYA SC: Chair, I was going to say

21 I've never really dealt with Magidiwana with the witness

22 and whether Magidiwana was carrying a stick or not, and

23 these are still operational matters better handled by those

24 who were on the field.

25 MR MPOFU: I've accepted that.

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1 CHAIRPERSON: I've given a ruling, which

2 will not prejudice your client on this point, so I suggest

3 we move on.

4 MR MPOFU: And I've accepted the ruling,

5 Chairperson. Are you aware that one of the key aspects of

6 the plan was that the use of force should be given either

7 on, for the purposes of self-defence, or on command, when

8 the plan was unveiled to you?

9 MR SEMENYA SC: Chair, I don't understand

10 the question. I don't understand that question.

11 MR MPOFU: Okay, I can't simplify it any

12 further, but I'll just repeat it. When the plan was

13 unveiled to you, or described to you, or even discussed

14 with you after the incident, were you informed that

15 everyone had been told – everyone, including all the 700 or

16 800 policemen – that the use of force would either be in

17 self-defence or on command?

18 GENERAL PHIYEGA: Let me ask a question.

19 You're saying the plan when?

20 CHAIRPERSON: The question is when you

21 were told about the plan, were you told that the police,

22 the members of the service who were there at the time, were

23 told as part of their briefing before the operation

24 commenced, that they could only shoot either in self-

25 defence – I think he means private or self-defence – or on

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1 command? Were you told that? I think that's the question.
 2 [12:19] GENERAL PHIYEGA: No. I don't remember
 3 having that discussion.
 4 MR MPOFU: Thank you. I was using the
 5 words of the presentation, Chair. It only said self-
 6 defence, but I accept that it must have meant, it must have
 7 also meant private defence.
 8 CHAIRPERSON: Slide 182 actually says
 9 private defence, but let's not spend, waste any drops in
 10 the bucket on that one. Let's move on.
 11 MR MPOFU: Ja, that's ex post facto. I'm
 12 talking about the slides that were given to the police
 13 before the 16th. That's fine; it doesn't matter. From the
 14 footage that we showed you, which came from, I think it's
 15 EEE16, you remember the footage about dragging of people
 16 and all that, I want to ask you something different on the
 17 same footage. Or maybe I should preface it by saying are
 18 you aware that the use of lethal force is something that
 19 should be avoided and only done as a last resort? Or at
 20 least that the police intended to do it that way?
 21 GENERAL PHIYEGA: I thought I've already
 22 answered you on that one earlier on when you asked the same
 23 question.
 24 MR MPOFU: No well, it means I've
 25 forgotten. Can you answer it again?

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1 GENERAL PHIYEGA: I am aware, but I've
 2 also said to you that it depends on the circumstances.
 3 MR MPOFU: In other words there are
 4 circumstances where the use of lethal force should not be
 5 avoided and not used as a last resort?
 6 GENERAL PHIYEGA: You have read the
 7 policy to me this morning and that policy gives you the
 8 continuum and I think I'm talking, I'm giving you the
 9 answer in terms of that.
 10 MR MPOFU: Again only, I'll try once
 11 more. It is either the use of force must be avoided at all
 12 costs, underlined, and be used as a last resort, full stop;
 13 or it must be used, avoided at all costs and as a last
 14 resort, depending on the circumstances. If it depends on
 15 the circumstances, then it means that there are
 16 circumstances, conceivable, where it should not be avoided
 17 or used as a last resort. Is that your answer?
 18 GENERAL PHIYEGA: My response to you
 19 again would go back to say I am comfortable with the
 20 articulation of the use of force as outlined in that
 21 policy. That's the only, you know, prescripts that are
 22 there for us, as well as the prescripts that we are having,
 23 and circumstances play an important role.
 24 MR MPOFU: Okay, well I put it to you
 25 that the prescripts as they stand, and even the common law

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1 demands that the use of force in those circumstances should
 2 be avoided and that it should be almost the only means that
 3 could be used, and that the prescripts at least do not say
 4 anything about the circumstances, but that's, in the
 5 process of doing that, I'm not putting the question again.
 6 I'm giving up and moving on. Do you remember that you said
 7 that you endorsed the plan in Midrand?
 8 GENERAL PHIYEGA: I did not say I
 9 endorsed the plan. I said I, we endorsed what the
 10 Provincial Commissioner told us they were going to do – to
 11 disarm, to encircle, and disperse, and when you talk about
 12 the plan, if you're referring to those three issues, which
 13 is what she articulated to us, yes, because the plan is
 14 something else, as I understand it, unless we are not
 15 talking about the same thing.
 16 MR MPOFU: Did you say – I'm reading from
 17 page 7447 against the lines 9 to 16, "Yes, I was aware,
 18 because I said on our morning of the 15th I did say that we
 19 endorsed her plan to go out to encircle, disperse, and
 20 ensure that those protesters are disarmed. That was
 21 known," and so on. "That was known. The tactical and
 22 operational plans were left to the province, but we knew
 23 that we needed to collect the arms," blah-blah-blah. Did
 24 you use the words that you "endorsed her plan?" I mean I'm
 25 not interested as to who "her," who she is now.

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1 CHAIRPERSON: I wonder if those who are
 2 assisting you with documents can show you that passage in
 3 your evidence. It was read to you, but it's easier to
 4 follow on the printed page.
 5 MR MPOFU: Yes.
 6 CHAIRPERSON: Mr Pretorius, we've got our
 7 copy open, so if Mr Pretorius can hand it to you, you can
 8 see it.
 9 GENERAL PHIYEGA: I think yesterday I
 10 was, I responded to almost a similar "I/we/us/her/his" and
 11 I'd like to clarify it again. General Mbombo is the "her"
 12 that is being referred to there, and it can never be her
 13 plan. She's the leader. She is working with an entire
 14 team. Whatever plan that we are talking about here, and
 15 that is clearly qualified there, we're not talking about
 16 this big plan. We were talking about what she was sharing
 17 with us there, but their plan is to go out and encircle,
 18 disarm, and disperse the crowd. It is clearly qualified in
 19 this paragraph, and that is what is meant there.
 20 MR MPOFU: So once again that means you
 21 did not know the plan – the plan, or what is colloquially
 22 and maybe wrongly referred as the Scott's plan, even in its
 23 rudimentary form in the sense that it had six stages and,
 24 or stages, and stage 1 was this, stage 2 was this, and
 25 stage 3. You didn't know that that plan –

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1 GENERAL PHIYEGA: I was not talking about
2 those things.

3 MR MPOFU: Yes. No, no, I accept that,
4 but I'm saying did you or did you not know what I've just
5 described as the Scott's plan?

6 GENERAL PHIYEGA: On the 15th I did not
7 know.

8 MR MPOFU: When did you know it for the
9 first time?

10 GENERAL PHIYEGA: I have said in this
11 gathering the operation is left with those who do
12 operations.

13 MR MPOFU: No –

14 GENERAL PHIYEGA: It is their plan and I
15 got to know about when we were debriefing and looking at
16 all those things and reviewing and assessing, and then we
17 were doing, you know, it's post event.

18 MR MPOFU: Yes. Good. So you only knew
19 about that plan post the event. So if anyone before the
20 event said to you we're going to implement stage 3, it
21 would have been gobbledygook?

22 GENERAL PHIYEGA: Yes, it couldn't be
23 because I've qualified it in that statement, and even in my
24 statement of the 15th, the minute of my record, you'll see
25 that.

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1 MR MPOFU: No, I'm sorry, I'll have to
2 try once more. I'm saying to you if your answer is correct
3 that you knew the broad framework of the Scott's plan post
4 the event, as you put it –

5 GENERAL PHIYEGA: No, I didn't say that.

6 MR MPOFU: You did, but then the
7 question, or rather if anyone then said to you pre the
8 event, which is on the 15th or before half past 3 on the
9 16th, that we are going to implement stage 3 of "the plan,"
10 that would be meaningless gobbledygook?

11 GENERAL PHIYEGA: Adv Mpofo, I think I've
12 answered on that one, and I am saying to you if you go and
13 look at the minute that we submitted to this Commission
14 around the disarm and dispersing and all those things, that
15 I knew. You're asking me about phase 6 and all this, and
16 I'm saying to you I don't know about phase 6 things; they
17 were sitting in the main plan. In terms of this one and
18 the passage that has just been read, I must stipulate in
19 saying I knew that General Mbombo and her team, one of
20 their broad framework that they were going to address is to
21 do what you've just read. So to say it was "coocoos" and
22 not known, look, that's your own interpretation, not mine.
23 And maybe just to add to say, you know, whether they were
24 going to deploy seven water cannons, use so many hand
25 grenades as type of, hand grenades as part of the plan, I

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1 wouldn't know those things, and I've answered you on the
2 broad framework.

3 CHAIRPERSON: I think the point that
4 counsel is concerned with is the expression "stage 3."
5 Does that mean, at the time – I'm not interested in what
6 happened afterwards – at the time would the expression
7 "stage 3 of the plan" have meant anything to you?

8 GENERAL PHIYEGA: Yes.

9 CHAIRPERSON: What would it have meant?

10 GENERAL PHIYEGA: It would have been to
11 go there, to encircle, to disarm, and to arrest those that
12 were not complying, and to disperse those that needed to be
13 dispersed.

14 MR MPOFU: General, do you expect the
15 Commission to believe that you knew before the shootings
16 what stage 3 entailed, which you've just described now, but
17 that you did not know until post the event, as it says,
18 that this was stage 3 preceded by stage 1 and 2, and
19 succeeded by other stages? In other words you just knew
20 about stage 3 in the air, in vacuo, as lawyers would say.

21 GENERAL PHIYEGA: I'm not sure I
22 understand your question. Are you saying –

23 CHAIRPERSON: Might I help you? There
24 are two legs to it. The first is if one talks about stage
25 3, that implies that there must be a stage 1 and a stage 2.

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1 So he wants to know did you know what stage 1 and stage 2
2 involved? That's the first half of the question, and when
3 you've answered that we can get on to the second half.

4 GENERAL PHIYEGA: I know that stage 3 is
5 what I've just, or the stages that I have just explained
6 involved what. There were negotiations. There were plans
7 to encircle, disarm, and disperse the crowd. That's the
8 broad plan that I understood.

9 CHAIRPERSON: So did you understand the
10 two preceding stages, 1 and 2, to essentially involve
11 negotiations?

12 GENERAL PHIYEGA: I also knew that there
13 were negotiations because I knew that the team had been
14 negotiation, negotiating [inaudible].

15 CHAIRPERSON: Now the second half of Mr
16 Mpofo's question is did you know that after stage 3 there
17 were some more stages, 4, 5, and 6?

18 GENERAL PHIYEGA: I have said no, Judge.

19 CHAIRPERSON: Alright, I think that sorts
20 out that question.

21 MR MPOFU: Sorry, before – I don't know
22 what, I got distracted, but I was referring you to the
23 video that we watched I think on Thursday, and I was going
24 to put something completely different, not those issues
25 about dragging of people and all that. Do you remember in

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1 that footage the discussion that we had about – or rather,
 2 do you remember seeing the TRT members advancing towards a
 3 particular position; some were running, some were walking,
 4 so I'm not there. We dealt with that last week, but do you
 5 remember them advancing towards the same point, as it were,
 6 before the calls of basic line and what have you?
 7 GENERAL PHIYEGA: We've seen a lot of
 8 footage. I will wait for your question.
 9 MR MPOFU: Well, then you don't think
 10 that's a question?
 11 [12:39] GENERAL PHIYEGA: I'm not saying –
 12 MR MPOFU: I'm saying do you remember,
 13 seeing what I've just described to you, or don't you
 14 remember? That's a question.
 15 GENERAL PHIYEGA: Advocate, we spent
 16 almost a day watching a lot of footage. I'm saying maybe
 17 when you asked that question there were many things. I've
 18 seen them, but I don't know [inaudible] –
 19 MR MPOFU: No General, really, really,
 20 really. Really, I'm asking you a simple question. Do you
 21 remember seeing something? Yes, no, I don't remember -
 22 those are the only three options.
 23 GENERAL PHIYEGA: Maybe for me to be that
 24 specific, which one?
 25 MR MPOFU: There's only one –

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1 CHAIRPERSON: - her description of a TRT
 2 member. You didn't say when exactly in the sequence of
 3 events that happened. I think if you gave her that
 4 information she might be able to give you a more focussed
 5 answer.
 6 MR MPOFU: I showed you footage of TRT
 7 members running and I said they were running forward - you
 8 said they were running sideways, but that's another story –
 9 were running towards, I think last week I called a common
 10 destination, before somebody ordered them to do basic line
 11 and so on. We had a discussion about this. It's either
 12 you remember that discussion, or that particular footage,
 13 or you don't remember, or you know. There's no two ways or
 14 three ways about it. If you don't remember it, I can
 15 arrange for it to be played. If you remember it, I'll just
 16 ask you on the basis of your memory.
 17 GENERAL PHIYEGA: That helps, Advocate,
 18 if what we saw is the same. I remember the argument about
 19 are they moving sideways, are they moving forward, and that
 20 explanation helps.
 21 MR MPOFU: Okay. I'm raising this point
 22 to make a different point as to what, where the people were
 23 going or not, and it is simply whether you accept or you
 24 don't accept, but – or rather, whether you know that the
 25 TRT was under instruction to only – well, for two things;

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1 (1), to keep behind the POP and to advance only on command.
 2 If you don't know, you don't know.
 3 GENERAL PHIYEGA: I don't know.
 4 MR MPOFU: Do you know at a general level
 5 that the TRT's role was to be at 100 metres behind the POP,
 6 or forget about the 100 metres, that they were to cover, so
 7 to speak, that they were the next line, as it were, of, the
 8 next line of police intervention. Since you deployed the
 9 various units, did you know their roles at a general level?
 10 GENERAL PHIYEGA: Yes, I have knowledge
 11 of our prescripts in that regard.
 12 MR MPOFU: Thank you. Okay, now maybe I
 13 should ask it this way. To your knowledge was there what –
 14 and this is my wording, so I'm creating it myself. Was
 15 there a central deployment strategy? In other words did
 16 somebody, whether it's you or someone else, know that we
 17 have 800 people, 200 are STF, this one and that one, or was
 18 it just an ad hoc thing where this one will ask for 20 POP
 19 and then tomorrow another one asks for 80 STF, another one
 20 – you know what I mean? As a leader did someone have what
 21 one might call a bird's-eye view on the deployment? And
 22 that's what I call a central deployment strategy, but it's
 23 just a phrase I've made up.
 24 MR SEMENYA SC: Chair, I register an
 25 objection. This witness has told us now I don't know how

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1 many times, and if this is not nitty-gritty then I just
 2 want to know what that word means.
 3 MR MPOFU: No Chair, I'm not asking – if
 4 I was asking nitty-gritty I would say to the witness –
 5 CHAIRPERSON: Let's just get her answer.
 6 MR MPOFU: Yes, thank you, Chair.
 7 CHAIRPERSON: If she says no, well then
 8 that's the end of it, and if she says yes, well then we
 9 can, then it isn't nitty-gritty because she knew. The
 10 question that counsel's put to you about the, what you call
 11 the central –
 12 MR MPOFU: Is there a central deployment
 13 –
 14 CHAIRPERSON: Central deployment
 15 strategy, as it were, did you know, or was it just a
 16 collection almost at random of STF people and TRT people
 17 and NIU people and so on? That's the question. Can you
 18 help us on that or is that something that you don't know
 19 about?
 20 GENERAL PHIYEGA: Judge, I just want to
 21 deal with some of the words that are loosely used here, ad
 22 hoc, random. I mentioned the NAT Joint, and in NAT Joint
 23 responds to the needs as expressed by the province. So the
 24 master plan you can see, I'm going to send 75 Riahs there,
 25 but if 75 Riahs are not needed, it doesn't help. The

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1 environment must inform the NAT Joint. The NAT Joint will
 2 respond appropriately to the needs as they are required.
 3 There would always be a coordinating environment. You've
 4 asked me about Annandale yesterday. I said by mere fact
 5 that it was a cross-provincial deployment, you were
 6 supposed to have the NAT Joints working. So there would be
 7 an intervention of NAT Joints, so the loose, ad hoc,
 8 random, is foreign to my ears and to my understanding.
 9 MR MPOFU: I'm sorry, you didn't answer
 10 my question. I'm asking you simply this, not what would
 11 happen or what was supposed to happen, please. I'm saying
 12 to you in this particular instance was there a person or
 13 persons, whatever their description is, who had what I call
 14 a bird's-eye view on the operation, specifically dealing
 15 with deployments? In other words, whether somebody said,
 16 if you said to that person or that body what have you got
 17 in Marikana, they'll say we have 750 of which 200 are POP,
 18 30 are NIU, and so on, and so on, or was the deployment
 19 done on an ad hoc – it's not an insult; I mean when I say
 20 on an ad hoc basis, I mean somebody, as it was suggested by
 21 General Annandale, you phone your counterpart in another
 22 province and they bring POP and then this one does this and
 23 then – you know what I mean. That's what I mean by ad hoc.
 24 I'm not saying it in a negative sense, whether there was
 25 that button where you could say this is the situation, or

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1 whether it was the alternative.
 2 CHAIRPERSON: - you say you assumed that
 3 that was the case, but I think what Mr Mpofu wants, to ask
 4 the question more specifically, did you know that was the
 5 case?
 6 GENERAL PHIYEGA: The role of our
 7 National Joint is to do that.
 8 MR MPOFU: Sorry, Chairperson, I accept
 9 you might be more successful than me. I don't think the
 10 question has been answered.
 11 CHAIRPERSON: I understood her to say
 12 that the –
 13 MR MPOFU: That's what was supposed to
 14 happen.
 15 CHAIRPERSON: - the people at national
 16 level were supposed to do it.
 17 MR MPOFU: Yes.
 18 CHAIRPERSON: I think that meant in the
 19 circumstances she assumed that they did it, and she feels
 20 she was entitled so to assume. I understood that to be the
 21 thrust of her answer. She was asked in terms whether she
 22 knew directly and she –
 23 MR MPOFU: Ja, that's fine.
 24 CHAIRPERSON: - she didn't say yes to
 25 that, so I think you've, if that's an answer you want to

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1 use for argument later –
 2 MR MPOFU: That's fine.
 3 CHAIRPERSON: - I think you've got it.
 4 MR MPOFU: Thank you, Chair. Thank you.
 5 CHAIRPERSON: Please move on.
 6 MR MPOFU: In other words then NAT Joint
 7 knew, or at least deliberately created a situation where
 8 the majority of the personnel on the ground were those
 9 people carrying what has been described by, I think Haysom,
 10 weapons of war, as opposed to the POP people.
 11 GENERAL PHIYEGA: You know the loaded
 12 question I think is on part of things, all I can say –
 13 MR MPOFU: Well, I just call them R1s and
 14 R5s –
 15 GENERAL PHIYEGA: No, I wouldn't even go
 16 there. I wouldn't even go there. All I can say is that
 17 the deployment was organised and the deployment was, could
 18 be accounted for.
 19 MR MPOFU: Yes. No, I'm with you,
 20 General. You see, what I'm getting at is that if there was
 21 an ad hoc strategy, then nobody would necessarily know how
 22 many R1s and R5s are there. But if there was a central
 23 strategy, as you are saying, then clearly somebody, or some
 24 body knew that the majority of the deployees were those
 25 carrying – I won't use "weapons of war" – were those who

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1 were carrying sharp lethal armed force.
 2 CHAIRPERSON: Mr Mpofu, you know, I don't
 3 understand where this is taking us. If one looks at
 4 exhibit L and the breakdown from slide 136 onwards, it's
 5 more slide 137 onwards, the information is there as to who,
 6 how the breakdown, or how many POP people there were, how
 7 many other people there were. If one looks under personal
 8 equipment, one sees from slide 138 onwards that there were
 9 assault rifles and so on. So all that information is here.
 10 MR MPOFU: Ja.
 11 CHAIRPERSON: I don't see how you asking
 12 questions of the witness in that regard is taking us any
 13 further.
 14 MR MPOFU: No, Chairperson –
 15 CHAIRPERSON: I'll give you the
 16 opportunity to explain, but I must express my puzzlement to
 17 you.
 18 MR MPOFU: Yes. No, that puzzlement
 19 would be immediately removed, Chair, if you take into
 20 account that exhibit L was compiled post the event and that
 21 my questions clearly refer to a deployment strategy which
 22 existed or did not exist at NAT Joint before – NAT Joint I
 23 assume did not meet after the 16th at Potchefstroom.
 24 CHAIRPERSON: It may have been compiled
 25 after the event and you could ask the people who compiled

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1 it about that –

2 MR MPOFU: No.

3 CHAIRPERSON: - and the commanding

4 officers and so forth, but I'd be very surprised frankly if

5 this witness knows anything about the details of that.

6 MR MPOFU: No.

7 CHAIRPERSON: I think that the time

8 available to us could probably be more profitably used, but

9 I put the problem to you –

10 MR MPOFU: Yes.

11 CHAIRPERSON: - so you can deal with it,

12 but you understand where I'm coming from and where I'm

13 going to.

14 MR MPOFU: I do, Chair. But I can deal

15 with it very quickly, Chair, before we break. I think it

16 is a subject of a misunderstanding between you and I. I'm

17 not asking this witness about the information that is in

18 exhibit L, which was subsequently compiled post the event.

19 I'm asking her simply whether before the event somebody had

20 an eye as to how the deployment is to be done, and if so –

21 well, she has said yes. Now what I'm saying is that

22 therefore what is contained here, which shows X, Y, Z and

23 what, was known prior to Potchefstroom, to put it crudely,

24 rather than it only emerged in Potchefstroom.

25 CHAIRPERSON: If the point you're

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1 interested in, whether that person, a sort of central

2 planner or commander – planner is the wrong word, central

3 commander, overall commander, whether that person knew

4 what, how many non-lethal, how many people there were with

5 non-lethal weapons as opposed to how many people with

6 assault rifles. Is that basically the question?

7 MR MPOFU: Yes.

8 CHAIRPERSON: Alright. Well, let's see

9 whether she knew that.

10 MR MPOFU: Thank you.

11 CHAIRPERSON: Can you answer the

12 question?

13 MR MPOFU: No, no, no, I'm sorry,

14 Chairperson, no, I'm sorry, it's my fault for agreeing too

15 readily to you. That's not what I'm asking her, whether

16 she knows whether the person knew. What I'm saying is that

17 from the fact that there was a central think tank, one can

18 therefore deduct that that think tank knew that there's a

19 large number of what I called weapons of war, which the

20 witness did not like, or neutrally lethal weapons. That's

21 the only issue.

22 GENERAL PHIYEGA: I'll take probably

23 four, five points to deal with your issue, and again it's

24 repetitive of what I've already said. A, I have said

25 deployment beyond any province is centralised, because I as

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1 a National Commissioner have to say to the NAT Joint there

2 is a need for us to operate at a national level and deploy

3 our resources wherever they are lying in other provinces.

4 MR MPOFU: Okay.

5 GENERAL PHIYEGA: That's the A part. The

6 B part of it is that you don't deploy without responding to

7 needs of a particular environment, so those circumstances

8 and the needs of that particular environment would inform

9 who you want, whether you need a water cannon from another

10 province, whether you need this from another province, that

11 will follow a response to what the need is in that

12 particular area. Thirdly, there's nothing ad hoc in what

13 we are doing, and whether you are looking at that plan and

14 saying it's post Potchefstroom and whatever, that's the

15 factual data that informed how we deployed.

16 COMMISSIONER HEMRAJ: General, when you

17 speak about NAT Joints, exactly who are you referring to in

18 the case of Marikana?

19 GENERAL PHIYEGA: The NAT Joints is

20 chaired by General Mawela and it takes, it's under our

21 Operational Response Divisions. It's in that environment,

22 ja, and that's where General Annandale comes from, and NAT

23 Joints includes also other departments, so that if you need

24 any other thing outside SAPS, you should be able to deal

25 with those should you need those type of resources in any

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1 situation.

2 [12:59] MR MPOFU: And NAT Joint sits in

3 Pretoria. Am I correct?

4 GENERAL PHIYEGA: It's National, the

5 chair is in Pretoria.

6 MR MPOFU: Yes. No, what I mean is when

7 it meets, it meets in Pretoria?

8 GENERAL PHIYEGA: Anywhere –

9 MR MPOFU: Or rather, it's based in

10 Pretoria. You know what I mean. If it meets, there must

11 be a physical place where it meets. If it doesn't, it

12 doesn't.

13 GENERAL PHIYEGA: It's always like that.

14 MR MPOFU: If it's electronic or

15 whatever.

16 GENERAL PHIYEGA: No, it's only present.

17 I mean you can meet in Cape Town, you can meet in Messina,

18 you can meet wherever.

19 MR MPOFU: And in this case did it meet

20 in Pretoria?

21 GENERAL PHIYEGA: They could have met in

22 Pretoria. They could have met here. I am sure they can

23 check.

24 MR MPOFU: You don't know?

25 GENERAL PHIYEGA: I'm sure they can

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1 check.

2 CHAIRPERSON: We've finished that now.

3 Can we take the lunch adjournment and carry on after lunch?

4 MR MPOFU: Yes, Chair, just that one

5 point, because I don't want to go back to this. Is your

6 answer that the NAT – I know you accept that it can meet

7 anywhere in the country, but do you as you are sitting

8 there not know, (a), whether it met; if you do, where it

9 met; and when? Do you know answers to that question?

10 CHAIRPERSON: You've got a –

11 GENERAL PHIYEGA: No, I don't -

12 CHAIRPERSON: Sorry, you've left

13 something out of the question.

14 MR MPOFU: Sorry, Chair.

15 CHAIRPERSON: Did it meet in relation to

16 the Marikana problem –

17 MR MPOFU: 1.

18 CHAIRPERSON: And if so, where and when?

19 I think that's what you want to know.

20 GENERAL PHIYEGA: I'm sure those details

21 can be obtained. I don't have them.

22 MR MPOFU: Thank you, Chair.

23 CHAIRPERSON: We'll now take the lunch

24 adjournment.

25 [COMMISSION ADJOURNS COMMISSION RESUMES]

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1 [14:14] CHAIRPERSON: The Commission resumes.

2 National Commissioner, you're still under oath.

3 MANGWASHI VICTORIA PHIYEGA: s.u.o.

4 CHAIRPERSON: Mr Mpofo.

5 CROSS-EXAMINATION BY MR MPOFU (CONTD.):

6 Thank you, Chairperson. General, let me just get this

7 straight. Firstly, how do you spell this structure called

8 NATJOINT? I think one of the interpreters said NATJOC, so

9 I'm not sure.

10 GENERAL PHIYEGA: Okay, NATJOC, there's a

11 NATJOINT, there's a PROVJOC and PROVJOINT and VOC, all

12 those things.

13 MR MPOFU: Yes, just spelling please, for

14 now.

15 GENERAL PHIYEGA: N-A-T J-O-C rather,

16 NATJOC.

17 MR MPOFU: That's a different thing, is

18 there also something called NATJOINT?

19 GENERAL PHIYEGA: There's a NATJOINT.

20 MR MPOFU: NATJOINT. N-A-T J-O-I-N-T.

21 Yes.

22 GENERAL PHIYEGA: The same as in the

23 province. Even in the province you'll find duplications of

24 those.

25 MR MPOFU: PROVJOINT, or whatever. Okay,

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1 now this structure that we were discussing before lunch,

2 which one is it? Is it not JOINT?

3 GENERAL PHIYEGA: It's a JOC. JOINT is

4 where you bring, you know the chiefs of the various

5 departments. The JOC is where Mawela is sitting.

6 MR MPOFU: So when I asked you whether

7 there's a person or body, or structure I suppose is a

8 better term, that had, what I call the bird's-eye view over

9 the operation, and I was asking you at that stage

10 specifically in relation to deployment, and you said it was

11 - was it NATJOC or NATJOINT -

12 GENERAL PHIYEGA: NATJOC.

13 MR MPOFU: NATJOC.

14 GENERAL PHIYEGA: Ja, there's a centre

15 and a structural meeting of the heads.

16 MR MPOFU: Ja, okay, and NATJOC, where

17 did it meet in relation to Marikana?

18 GENERAL PHIYEGA: The main centre is at

19 Snake Park.

20 MR MPOFU: Snake Park, which is where?

21 GENERAL PHIYEGA: In Pretoria, and I've

22 said to you that this can also - in the provinces you'll

23 find PROVJOCS and then the JOINTS also.

24 MR MPOFU: The JOINTS also -

25 GENERAL PHIYEGA: Omnipresent.

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1 MR MPOFU: Decentralised. Who are the

2 members of NATJOC?

3 GENERAL PHIYEGA: I've said to you the

4 chairperson thereof, the head is Mawela.

5 MR MPOFU: And?

6 GENERAL PHIYEGA: There would be many

7 other people there, including the Annandales and I'm sure

8 they can - it's a multi-faceted structure, by the way.

9 MR MPOFU: That's what I wanted to get

10 straight. So something that we're discovering now on day

11 100 is that somewhere we refer to a structure called NATJOC

12 which had an overall view, or bird's-eye view over the

13 operation in Marikana.

14 GENERAL PHIYEGA: I understand it in

15 context, Dali - sorry, Advocate, I've said to you that once

16 the request crosses the border, I have to actually give

17 authority and the authority I give to the person who is in

18 charge of the JOCs and whatever and the ORS and all those

19 things, and General Mawela would be responsible for doing

20 that so that he can link up with other provinces. General

21 Mbombo cannot ordinarily just start giving instructions to

22 get people from all over without my permission. It is

23 myself and the President who can do so. But in this regard

24 I did it, so I would ask General Mawela, who's in charge of

25 the JOC and the operations of SAPS, to coordinate

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1 everything.

2 MR MPOFU: Okay. We're going to come to

3 the understanding of what this structure is, but let me

4 just ask you, just ask for an example. General Annandale

5 testified here that he deployed X-number of STF members.

6 GENERAL PHIYEGA: Yes.

7 MR MPOFU: Let's say 20, for argument

8 sake. Now please just take us through how he would do

9 that, given NATJOC, given the provincial command, given the

10 JOC that we know, if you know what I mean.

11 GENERAL PHIYEGA: Okay, I'll repeat what

12 I've already testified here. A, if this matter was just

13 confined to Marikana and General Mbombo had POP members

14 allocated to this province, she can move those people from

15 here to Pampierstad, to Mafikeng, people that are in her

16 province, and she would work with the commanders in

17 operations in her area - the Mpembes, the Calitz, the

18 Naidoos, as an example. But then she is having a situation

19 that requires that she has additional resources and

20 capacity. To cross her borders she needs to talk to me. I

21 am the person who can say we can mobilise people from other

22 provinces to another, and the permission I would have given

23 I would then ask the head of our operations, which is

24 General Mawela, who's responsible for the JOCs and

25 whatever, to say let's operationalise, there's an issue at

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1 hand, let's reach out to other people. Let's make sure

2 that that which needs to be done gets done. The NATJOC

3 that has many other people that are in operations with him,

4 like General Annandale and the others, will then work with

5 the PROVJOC. Yes, so we'll use those structures with the

6 respective commanders that are there, working with the

7 provincial ones. If there's a cluster JOC, they would work

8 with the cluster JOC, but in this regard we were talking

9 about a PROVJOC and a NATJOC. And let's say there is a

10 matter that is much bigger now, requires the chiefs of all

11 these law enforcement agencies to come together, the JOINTS

12 will then play another role. So the role that was played

13 by the Calitz, the Naidoos, the Mpembes, the Annandales,

14 and all the other people who was within that framework.

15 MR MPOFU: Okay. I'm trying to work with

16 you here. So for the purposes of shorthand can we say that

17 the JOC, the one that was situated at Lonmin, in the

18 framework that you've explained was the PROVJOC?

19 GENERAL PHIYEGA: It's true, yes, working

20 within that JOC.

21 MR MPOFU: And this is what is worrying

22 me, or surprising me then. From also what you've described

23 then there would have been coordination, I think is the

24 word you used, between the PROVJOC and the NATJOC.

25 GENERAL PHIYEGA: Absolutely, and what

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1 will be that, Advocate, is that remember, you are no longer

2 just using - they would have a PROVJOC if they were just by

3 themselves as a, province but now that we've crossed the

4 provinces, that's where the role of NATJOC becomes

5 important and the role of Annandale and others.

6 MR MPOFU: I see. So that's the context

7 in which you mentioned this NATJOC in relation to my

8 questions to you yesterday about Annandale's deployment.

9 GENERAL PHIYEGA: Correct. It is true.

10 MR MPOFU: Yes, in other words your

11 understanding is that he was deployed by the NATJOC to the

12 PROVJOC?

13 GENERAL PHIYEGA: He had to be here

14 because we are dealing with resources coming from all over.

15 MR MPOFU: Yes. No, that's not my

16 question. My question is whether your understanding was -

17 and I'm basing it on the fact that you said there were many

18 other members, so there must be a reason why him - your

19 understanding is that he was here, being deployed by the

20 NATJOC, he being Annandale. If not, then why was it him?

21 If you even know what I mean. If you know, if you don't,

22 you don't.

23 GENERAL PHIYEGA: He's a very senior

24 person, he's a major-general who reports to General Mawela,

25 who reports to me, and they're responsible for the

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1 operations of SAPS.

2 MR MPOFU: Yes, but I assume he's not the

3 only person who fits that description. There are - okay

4 others, let me not even hazard a guess. There are other

5 people who fit that description. Senior person reports to

6 Mawela, responsible for operations, and so on and so on.

7 So that doesn't answer my question, why him.

8 GENERAL PHIYEGA: For us he fitted the

9 glove because he's in operations. He's also responsible

10 for all of our special units, POP and others.

11 MR MPOFU: Okay, General. I'll try once

12 more, and if you don't know, which I suspect, you can tell

13 us. Did NATJOC deploy Annandale for the reasons that

14 you've mentioned to physically go to the PROVJOC, to your

15 knowledge?

16 GENERAL PHIYEGA: Remember, and I'll say

17 what I said yesterday, by virtue of mobilising people all

18 over, it was important for me for the NATJOC to come in

19 place and because they direct operations of SAPS, and him

20 being a very important person in terms of operations I

21 couldn't go and say bring Major-General Zuma. Major-

22 General Zuma is responsible for the borders and he is also

23 in ORS, but Annandale is very important because this is

24 particular in terms of his environment.

25 MR MPOFU: Okay. You see, I don't want

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1 to reduce this to Annandale. We can deal with him at some
 2 other point. I'm more interested in this new structure -
 3 new to me, sorry. So, or rather where are the minutes of
 4 the meetings of NATJOC, particularly those that deal with
 5 Marikana?
 6 GENERAL PHIYEGA: I thought you had some
 7 of the minutes here because as I'm saying to you, the JOC,
 8 NATJOC and PROVJOC were collaborating. I saw some of the
 9 minutes that you shared yesterday.
 10 MR MPOFU: Yes. No, I mean as I say
 11 NATJOC is completely new to me. So whatever minutes I took
 12 you through, including EE, were of what we've now agreed
 13 was the PROVJOC.
 14 GENERAL PHIYEGA: I thought, as I'm
 15 explaining the collaboration between the NATJOC and
 16 PROVJOC, I said to you that if the province was working
 17 alone we would not have even participated. We would have
 18 received reports only. But because we were mobilising from
 19 all over the NATJOC had to work with the PROVJOC, and I
 20 thought that the recording and the reports that you've been
 21 receiving resembles that collaboration.
 22 [14:34] And this is why in those minutes you were asking
 23 about, you're talking about Major-General Annandale, Major-
 24 General, whatever. Some are national, some are provincial.
 25 MR MPOFU: No, Ma'am. Let's for now put

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1 aside the joint workings, if any, of these two structures.
 2 I'm asking you - firstly, before we go there, for the
 3 minutes of the meetings of NATJOC itself, before it
 4 coordinates with anybody, where are those insofar as it had
 5 this, what I call the bird's-eye view, because as I
 6 understood it, your answer before lunch was if I wanted to
 7 say before the operation how many NIUs, how many this,
 8 that, the place I would have to go to is NATJOC. Where do
 9 I find that? I mean where do they meet - well, you said
 10 you don't know where they met, but where are their minutes
 11 at least?
 12 GENERAL PHIYEGA: I think you referred me
 13 for instance to this presentation that tells you about how
 14 many people they deployed from where, and everything. It's
 15 sitting in your presentation, and remember that the event
 16 was in this province. The national was supporting the
 17 province in an event that is taking place in here. So
 18 there is support coming from the NATJOC to support an issue
 19 that is taking place here. They are not two different
 20 issues. The NATJOC is supporting the PROVJOC because we
 21 are mobilising resources from other provinces.
 22 MR MPOFU: Yes.
 23 GENERAL PHIYEGA: And I wouldn't
 24 understand why we would have to have two sets of minutes
 25 when the event is here.

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1 MR MPOFU: No, let's take one step back.
 2 Your evidence is that, or at least it's common cause that
 3 PROVJOC was meeting in Marikana at Lonmin. Correct?
 4 GENERAL PHIYEGA: Correct, and the
 5 PROVJOC also had people from NATJOC.
 6 MR MPOFU: Ja, that may well be so. Your
 7 evidence is also that NATJOC met somewhere in South Africa
 8 where you cannot locate. Sorry, I'm -
 9 GENERAL PHIYEGA: No, let me correct
 10 that.
 11 MR MPOFU: Yes, help me.
 12 GENERAL PHIYEGA: Let me correct that,
 13 because you asked me where they meet and I said it's only
 14 present, they can meet anywhere. That's what I said to
 15 you, but I didn't say to you they met somewhere in South
 16 Africa where I did not know. That's not my evidence.
 17 MR MPOFU: Okay, I'm subject to
 18 correction, but I thought my last question to you before
 19 lunch was does that mean you don't know where they met and
 20 you said yes, but that's at this stage neither here nor
 21 there.
 22 GENERAL PHIYEGA: I've just corrected
 23 that for you.
 24 MR MPOFU: Yes. So the NATJOC, obviously
 25 it's a body of many individuals; it's not a one-person

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1 show, correct?
 2 GENERAL PHIYEGA: It's a big centre with
 3 many people and -
 4 MR MPOFU: And - I'm sorry, sorry, I
 5 interrupted you.
 6 GENERAL PHIYEGA: I was just to show
 7 exactly, remember when we were sitting here there were many
 8 other events happening in the country. The NATJOC will
 9 continue being concerned with many, many other things.
 10 MR MPOFU: Yes.
 11 GENERAL PHIYEGA: Whether it's Northern,
 12 whether it was Northern Cape burning, whether it was
 13 Barberton burning, they will be there doing certain things.
 14 MR MPOFU: Yes. Yes, no that I
 15 appreciate. I mean it's like a company that has a head
 16 office and what have you. That I understand. All I'm
 17 saying is assuming exactly what you are saying, to
 18 illustrate how much I understand what you are saying, for
 19 example I would be then saying to you NATJOC met, they
 20 discussion some flare-up in the Northern Cape, another
 21 flare-up in Mpumalanga, Marikana, X, Y, Z. So I would say
 22 on those minutes of that meeting, I'd say scratch out all
 23 those other things because they don't concern this
 24 Commission, but I want the portion of their discussion that
 25 concerned Marikana. Do you understand? I think that's

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1 what you are saying, that they were the –

2 CHAIRPERSON: Sorry, Mr Mpofu, I don't

3 want to interrupt you but you know the practice we followed

4 up to now is that if one party wants documents or anything

5 of that kind from another, they don't debate it on the

6 floor of the auditorium; they go to the representatives of

7 the party concerned and say could we please have these

8 documents. If there's a refusal or an impasse of some kind

9 then I suppose they can raise it with the Commission, but

10 normally these things, the time of the Commission isn't

11 wasted in asking for documents. This is something that's

12 done privately outside the auditorium. That's certainly

13 the practice that's been followed up to now. Is there any

14 reason why it can't be applied as far as the documents

15 you're now seeking?

16 MR MPOFU: No. No, Chairperson, there

17 isn't, but this obviously goes far beyond documents.

18 Forget the minutes. Forget the minutes. Okay, I don't

19 want to –

20 GENERAL PHUYEGA: And maybe –

21 CHAIRPERSON: Do you want the minutes

22 now?

23 MR MPOFU: No, I don't.

24 CHAIRPERSON: You've been asking about

25 the minutes for some time –

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1 MR MPOFU: Yes, I'll ask Mr –

2 CHAIRPERSON: Mr Semenya has turned his

3 light on. Let's see if he can throw some light on that.

4 MR MPOFU: No, this has nothing – this –

5 MR SEMENYA SC: Chair, maybe this may

6 clarify, if we look at GGG40, that's the JOC control and

7 the JOC operational. If you look at that you will see

8 there are individuals from various divisions coming from

9 the province itself, and some coming from national. That

10 would have been a NATJOC in this province, and what we have

11 as minutes would be minutes emanating from this structure,

12 but in tandem with it there may very well be another NATJOC

13 in Nelspruit –

14 GENERAL PHUYEGA: Yes.

15 MR SEMENYA SC: - dealing with matters

16 there and minuting that document there.

17 MR MPOFU: Well, firstly I would prefer

18 the answers to come from the witness. Secondly –

19 CHAIRPERSON: Mr Mpofu, I can understand

20 if matters of credibility and so on are involved. Where

21 you're looking for information, the information you get is

22 –

23 MR MPOFU: No, that's why I've discarded

24 the issue of information. I don't want it. I'm discarding

25 the, because I don't want to reduce this to a question of

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1 minutes. I'll follow your advice and speak to Mr Semenya

2 about minutes at a suitable time. What I want to

3 understand, General Phiyega, is – this can be reduced to an

4 issue of minutes – it is the fact that there was another

5 body called NATJOC or whatever it was called, which

6 concerned itself with the events in Marikana to the extent

7 that it, that body, was the place where one would have to

8 go to if you wanted to understand how many people with

9 lethal force versus those with non-lethal force, and where

10 you'd go to, to understand why a person like Annandale, who

11 played such a significant role in this operation, why they

12 were here. That is a matter of substance, and of grave

13 concern, if I may add. Nothing to do – if they had

14 minutes, that's their business. I don't even want to see

15 them, but I would like to understand what role that

16 structure played in fashioning the events that led to the

17 death and injury of people, including the people I

18 represent. Do you understand? I don't want us to reduce

19 this to a menial matter of minutes.

20 GENERAL PHUYEGA: Okay, I think those

21 issues have long been placed before this Commission and I

22 will try again. General Mbombo as the Provincial

23 Commissioner had the right and the delegated authority to

24 manage and control this province in terms of policing,

25 together with her executives, including responding to

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1 anything that is taking place, like Marikana, and setting

2 up, according to our protocols, any necessary structure

3 that is, that would enable her together with her team to

4 respond to that. Whether they have a venue VOC or a

5 cluster VOC or a PROVJOC or whatever, she has the powers to

6 do so within her province.

7 We've then said to this gathering that at any

8 time when that role has to go outside this province where I

9 have to mobilise, whether from KZN or Eastern Cape or

10 whatever, that permission is going to come from me because

11 our prescripts, the protocol and the legislation requires

12 that that happens. In the leading, when I was, my evidence

13 was led by our lawyer, it was very clear that I also have a

14 full set of executives who take care of various areas to

15 execute operationally. When that request comes to me and

16 it's got to do with operations, I do not go to the

17 executive that is in charge, the commander that is in

18 charge of things. I go to the commander that is

19 responsible for operations, and because of the national

20 nature of the deployment that has to take place, the NATJOC

21 then becomes very critical. They must work with this

22 province. If there's anything in Nelspruit they must work

23 with those. If there's anything in De Doorns they must do

24 those, and the reports that come from there will then

25 inform the activities of the various environments, and you

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1 do have the Marikana report.
 2 MR MPOFU: Well, you know, that's exactly
 3 your last, the sentence you said just before the last one
 4 is exactly what worries me.
 5 GENERAL PHIYEGA: The minutes.
 6 MR MPOFU: I'll quote to you, you say,
 7 "The reports that come from those environments" –
 8 GENERAL PHIYEGA: The minutes, that's
 9 what I mean.
 10 MR MPOFU: - "would inform the activities
 11 of the various operations in those areas," something to
 12 that – now that's exactly my concern. To what extent did
 13 the NATJOC and reports getting to them, quote, "inform the
 14 activities" that led to the Marikana situation?
 15 GENERAL PHIYEGA: I'm not sure where
 16 you're coming from with that question, but I just want to
 17 say yesterday for instance you gave me homework and part of
 18 the homework was where minutes – that's what I'm talking
 19 about.
 20 MR MPOFU: Thank you, General, I'm going
 21 to move from this, but please do work with me. I'm at
 22 pains, that's why I've abandoned the discussion on
 23 Annandale; I've abandoned the issue about minutes, because
 24 I don't want this to be about those things, tempting as it
 25 is. My concern with you is simply the fact that somewhere

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1 in this country there was a body called NATJOC which
 2 concerned itself – let's confine it for now to the issue of
 3 deployment which you and I had discussed before lunch –
 4 with the overall centralisation, or whatever the phrase
 5 that we had devised earlier, of the operation in Marikana,
 6 and that that body or structure is, at least to me,
 7 something that I'm hearing about for the first time,
 8 something that's not mentioned in the opening statement of
 9 the police, something that's not mentioned in exhibit L.
 10 [14:54] Exhibit L was presented – I'm sorry – by
 11 Lieutenant-Colonel Scott, I think. Exhibit L was presented
 12 here over four days - you can take that for granted – and
 13 that until today at least, and I'm speaking for myself; I
 14 missed one or two days, so I – but before today this
 15 structure which played such an important role, at least at
 16 the top of the operation somehow, among other things might
 17 have informed the activities that occurred here. Do you
 18 understand my concern? You don't have to agree with it,
 19 but I just don't want you to reduce it to these little
 20 things. Do you understand where I'm coming from?
 21 GENERAL PHIYEGA: I think, Advocate, I'm
 22 very concerned because I keep on explaining to say if you
 23 could just agree that national deployment is my remedy –
 24 MR MPOFU: No, that –
 25 GENERAL PHIYEGA: And we agreed on that.

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1 MR MPOFU: I accept that.
 2 GENERAL PHIYEGA: Okay, I have –
 3 MR MPOFU: I accept that. I'm sorry –
 4 GENERAL PHIYEGA: Can I just go on so
 5 that we kill this thing? Do you also accept that I work
 6 through a team of executives who do particular things for
 7 me?
 8 MR MPOFU: Listen, Commissioner, I know –
 9 CHAIRPERSON: No, no, Mr Mpofu, you
 10 mustn't interrupt her. She's busy trying to explain
 11 something to you.
 12 MR MPOFU: Oh, no, she's put her question
 13 mark at the end without it being seen. I was just
 14 responding. Okay.
 15 GENERAL PHIYEGA: Because I'm just
 16 repeating what I've said. I've said –
 17 MR MPOFU: Yes, I was just responding to
 18 your question –
 19 GENERAL PHIYEGA: We have crossed the
 20 province –
 21 MR MPOFU: The Chair has been –
 22 GENERAL PHIYEGA: - and the deployment
 23 for provincial, cross provincial, it's my remedy, and
 24 that's what the law expects of me, and I'm saying there is
 25 no way when there is that nature of work that I go to the

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1 CFO of the company; that's not what he does. I would go to
 2 operations and there are clear protocols on how we do that.
 3 There will be a NATJOC, there would be a PROVJOC, there
 4 would be what a, so Mawela is in charge of that, so I would
 5 be saying General Mawela, we need to assist province Y to
 6 deploy people, engage them, establish their needs, ensure
 7 that this happens, and through the NATJOC that will happen.
 8 So there is nothing new about a NATJOC.
 9 MR MPOFU: Okay.
 10 GENERAL PHIYEGA: And that support would
 11 be given to De Doorns, to Marikana, to wherever, to
 12 wherever, and I am saying the records that you are looking
 13 for, we've given what we have.
 14 MR MPOFU: Okay.
 15 CHAIRPERSON: Mr Mpofu, it's now 3
 16 o'clock and we'll take the adjournment.
 17 [COMMISSION ADJOURNS COMMISSION RESUMES]
 18 [15:20] COMMISSIONER: The Commission resumes.
 19 Before we continue, there are some announcements I wish to
 20 make. I have been informed that the President is about to
 21 extend the period of duration of this Commission beyond the
 22 present cut-off date for the hearing of evidence, namely
 23 the 31st May 2013, which means that the Commission will in
 24 fact resume hearings next week.
 25 R U L I N G

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1 I now want to give my ruling on the application
 2 for the removal of the seat of the Commission from
 3 Rustenburg to Centurion.

4 I am satisfied that the applicants for the
 5 removal have succeeded in establishing compelling and
 6 weighty reasons for the order sought. It's unnecessary for
 7 me to set them out because they are fully set forth in the
 8 affidavits filed. It's clear that the state and most of
 9 the parties are obliged to expend large sums of money each
 10 month in respect, inter alia, of accommodation and
 11 transport, which expenditure will not have to be incurred
 12 if the Commission moves to Centurion. In addition, there
 13 is the distinct danger that at least two of the parties
 14 will not be able to continue participating in the
 15 proceedings of the Commission as a result of lack of funds
 16 if the Commission does not move.

17 The application was opposed at the 11th hour by
 18 the Administrator of the Bapo Ba Mogale Traditional
 19 Community purporting to act in his official capacity and
 20 four local authorities in the area supported this
 21 opposition. In what follows I shall refer to the
 22 Administrator and the local authorities as the respondents.

23 I am prepared to assume, without deciding, that
 24 some or all of these respondents have locus standi to
 25 oppose the application. I am satisfied, however, that the

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1 material that the respondents have placed before me does
 2 not detract, to any significant extent, from the powerful
 3 case made out by the applicants in support of the
 4 application. The main concern of the traditional community
 5 is that the local communities will be prejudiced in their
 6 endeavours to place material before the Commission in
 7 relation to some of the issues arising under phase 2 of the
 8 Commission's work. There's no real substance in the fears
 9 expressed in this regard. They are legally represented and
 10 their representatives will be able to put their points
 11 before the Commission, even if it is sitting in Centurion.

12 In addition, Lonmin, who have up to now very
 13 generously provided free transport for persons from
 14 Marikana to attend the sittings of the Commission in
 15 Rustenburg, have indicated that they are willing to
 16 continue to provide such transport to Centurion if the
 17 Commission moves there.

18 A number of preliminary points were also argued,
 19 which I have considered but which it's unnecessary to
 20 address herein in view of the conclusion to which I have
 21 come on the merits of the application. In all the
 22 circumstances, I am satisfied that the applicants have
 23 established reasonable grounds justifying the move sought.

24 The order which I shall make in a moment is made
 25 in consultation with the Minister of Justice and

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1 Constitutional Development, who agrees therewith. The
 2 following order is made:

3 The seat of the Commission is moved to Centurion,
 4 Gauteng, and the sittings of the Commission will
 5 accordingly resume, after the end of today's sitting, in
 6 the Municipal Offices, Centurion, Gauteng at 10AM on the 4th
 7 of June. The premises are not available on the 3rd but I
 8 understand that a meeting will take place on that date at
 9 Centurion or at some other venue which is convenient to the
 10 representatives of the parties to discuss methods of
 11 shortening the proceedings, particularly in relation to
 12 cross-examination. I understand there will be space at
 13 Centurion for the meeting to be held there if the parties
 14 so wish, but clearly they may desire to hold the meeting in
 15 chambers or some other convenient place.

16 I want to thank the counsel who were involved in
 17 moving the application and giving me and the Minister the
 18 benefit of their views thereon and which were of much
 19 assistance in preparing the ruling that I prepared, that I
 20 have just given.

21 I am also reminded that the premises are not
 22 available on the 5th either, so we'll be sitting on the 4th
 23 and then again on the 6th and the 7th, of course.

24 I want to say something else shortly before we
 25 leave this matter and that is that the Rustenburg Local

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1 Municipality have made their facilities at this Civic
 2 Centre where we are sitting, available to the Commission
 3 free of charge and its officials and staff have gone out of
 4 their way to assist the Commission in its work and to make
 5 our stay here as comfortable as possible and it is only
 6 appropriate that we should, on this 100th sitting of the
 7 Commission here in Rustenburg, express our sincere
 8 gratitude to the Municipality, the Council and its staff,
 9 for the generous gesture that they've made, which has
 10 substantially contributed to the work of the Commission and
 11 which I hope will one day be accompanied by a result
 12 beneficial to the country as a whole. As I said, this is
 13 the 100th sitting here. It's perhaps appropriate that we
 14 should resume the 101st sitting and enter into our new
 15 century in Centurion.

16 Major-General, I'm sorry to have eaten into your
 17 time – I mean, sorry, National Commissioner, I'm sorry to
 18 have eaten into your time but you're still under oath and
 19 Mr Mpofo I think is still cross-examining you.

20 MR MPOFU: Yes. Thank you, Chairperson,
 21 but before I do so if I may just say on behalf of the
 22 applicants at least, and I'm sure other people as well who
 23 either did not, rather, oppose the application, to thank
 24 you for the manner in which this matter was handled. I'm
 25 sure that the people that we represent will appreciate all

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1 the difficulties but more importantly just to echo
2 hopefully, without even consulting my colleagues, on their
3 behalf, the gratitude that you've expressed to Rustenburg
4 Municipality. Thank you, Chair. And of course
5 specifically for the people that I represent to thank
6 Lonmin for extending the transport arrangements which was
7 really the only possible impediment to this. Thank you.

8 CHAIRPERSON: Yes, thank you. I trust Mr
9 Burger will convey our gratitude to his clients in that
10 regard.

11 MR BURGER SC: Sir, whilst we talk
12 administration, what is the physical address of the
13 municipal offices in Centurion because we must go there
14 next week? I don't have the faintest idea where to look
15 for it.

16 CHAIRPERSON: The evidence leaders – I've
17 been there but I didn't make a note of the address but Mr
18 Budlender, have you been there? Can you give the – Mr
19 Wesley, or Mr Tokota actually pays his taxes there. Mr
20 Tokota, would you please tell Mr Burger where to go?

21 MR BUDLENDER SC: Chair, can I make a
22 suggestion? We are to have a meeting of the parties on
23 Monday to talk about expediting the process. We'll send
24 out an e-mail either today or tomorrow specifying (a) the
25 time of the meeting on Monday and (b) the venue –

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1 CHAIRPERSON: And if the venue is not the
2 Municipal Offices at Centurion you will also provide a map
3 as to how to get there on Tuesday morning.

4 MR BUDLENDER SC: I can't guarantee a map
5 but we will – sufficient information to enable reasonably
6 competent people to find it.

7 CHAIRPERSON: What about the others, Mr –

8 MR BUDLENDER SC: Bad luck for the rest
9 of them.

10 MR MPOFU: Thank you, Chairperson –

11 MR MAHLANGU: Chair, if I could –

12 MR MPOFU: I have no doubt that the
13 secretariat –

14 MR MAHLANGU: Just before Mr Mpofu –

15 MR MPOFU: So sorry.

16 MR MAHLANGU: Just before Mr Mpofu

17 continues, what has now been said, this decision that has
18 been made unfortunately has not been translated. If I
19 could just very briefly tell the people at the back? Thank
20 you.

21 CHAIRPERSON: Thank you. I am also
22 reminded that we will not be sitting on the 12th of June. I
23 mention that for the benefit of those who want to make
24 arrangements. So just to sum up, we're not sitting as a
25 Commission on the 3rd, although there'll be a meeting in

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1 respect of the way forward with the parties. We're not
2 sitting on the 5th and we're not sitting on the 12th. For
3 the rest of the month we'll be sitting at the venue that I
4 mentioned. I take it you still remember you're under oath,
5 National Commissioner, I don't have to remind you again.
6 Mr Mpofu?

7 MR MPOFU: Yes, thank you, Chairperson.

8 COMMISSIONER HEMRAJ: Mr Mpofu, can I
9 just understand something? Are you suggesting that apart
10 from the JOC that was in Marikana on Lonmin property, that
11 there was some other JOC that met in Pretoria or some other
12 place as regards the events in Marikana? Is that what
13 you're suggesting?

14 MR MPOFU: No, that's what the witness
15 suggested, Chair. All I'm saying if you remember, Madam
16 Commissioner, in my last two questions or so before lunch I
17 wanted to know where this NatJOC met and the witness had
18 said it can meet anywhere but she didn't know where it met,
19 one. Two, after lunch I then asked questions that set to
20 create a distinction between what we would understand as
21 ProvJOC at the Lonmin premises and NatJOC, which is
22 something else and I think to that also she acceded, so –
23 and I'm going to move away from this because my
24 instructions are now, which were communicated to my learned
25 colleagues, to demand the minutes that we had asked for –

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1 CHAIRPERSON: I think "request" might be
2 a more appropriate word.

3 MR MPOFU: Well, okay, request. Thank
4 you, Chair, but the short answer to your question,
5 Commissioner, is yes, because of the reasons I have alluded
6 to I am going to ask one or two questions which make it
7 clearer and then move on, if I may.

8 MANGWASHI VICTORIA PHIYEGA: s.u.o.

9 CROSS-EXAMINATION BY MR MPOFU (CONTD.):

10 Just a clarity question, NatJOC stands for National Joint
11 Operations Centre.

12 GENERAL PHIYEGA: Yes, you're right.

13 MR MPOFU: And PROVJOC is Provincial
14 Joint Operations Centre, okay. And the PROVJOC was headed
15 by General Mpembe, correct?

16 GENERAL PHIYEGA: Yes.

17 MR MPOFU: And the NatJOC is headed by
18 General Mawela?

19 GENERAL PHIYEGA: Yes, the head of the

20 ORS.

21 MR MPOFU: Of this, ja.

22 GENERAL PHIYEGA: General Mpembe. Mawela
23 is the head of ORS. He would, you know, he would work with
24 people who were in the JOC.

25 MR MPOFU: He would probably chair it. I

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1 mean I'm not holding you to it, that's why I'm using a
 2 neutral word, he headed it.
 3 GENERAL PHIYEGA: Let's just use he
 4 headed it.
 5 MR MPOFU: Ja, okay. I think – oh yes,
 6 there's just a last one just so that we are on the same
 7 page. The NatJOC is a body, it's not a person as a human
 8 person, it's a structure if you know what I mean.
 9 GENERAL PHIYEGA: It's a centre.
 10 MR MPOFU: Yes, but it's made up of
 11 individuals. If it meets, it meets in the boardroom or
 12 something, you know what I mean? It's a structure. It's a
 13 centre but it's made up of individuals.
 14 GENERAL PHIYEGA: It's a centre. It
 15 carries a lot of things.
 16 MR MPOFU: Yes. No, no, I understand
 17 that. I mean just like the ProvJOC is a centre, that we
 18 have established and we know where it met and so on and so
 19 on, we even have its minutes and I'm not even canvassing
 20 the issue of minutes. All I'm saying is that it's a
 21 corporate – not a corporate body, it's a persona which is
 22 made up of people.
 23 GENERAL PHIYEGA: Ja, it's a centre.
 24 When you get there you will see what is happening in
 25 Barberton, what is happening in wherever, what is

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1 happening. It's a centre.
 2 MR MPOFU: Okay.
 3 GENERAL PHIYEGA: Just like, you know,
 4 just massify the ProvJOC.
 5 MR MPOFU: Okay, 100%, that's all I need.
 6 Thank you, Chairperson. So it's the national version of
 7 the ProvJOC. Okay, just one – thank you, that's all on
 8 that issue for now, until we get the minutes, if we get
 9 them. A completely unrelated issue - I don't know why we
 10 keep on, I keep on starting this issue and then somehow we
 11 get sidetracked to something else. You remember our
 12 discussion about the need to avoid the use of lethal force,
 13 which you and I had agreed is a requirement?
 14 GENERAL PHIYEGA: Chair, the one where I
 15 said depending on circumstances.
 16 MR MPOFU: Yes.
 17 GENERAL PHIYEGA: Yes, I remember.
 18 MR MPOFU: No, you're quite right, that's
 19 how we got lost into the issue of the circumstances. Now
 20 putting that issue aside, do you know, since you, in chief
 21 you were led as somebody who understands the prescripts
 22 including standing order 262 and for now you can just take
 23 my word on this one, otherwise I'll take you to the
 24 specific section, that somewhere under 11 of 262 it says
 25 that the use of defensive measures must be prioritised.

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1 You can either take my word or you can look it up. It's, I
 2 think 11.4.
 3 GENERAL PHIYEGA: I think I'm just
 4 avoiding – avoiding us getting lost, maybe somebody helping
 5 me, I'd prefer we go there.
 6 MR MPOFU: 11 – ja, 11.2 of standing
 7 order 262 which, Chairperson, I think it's exhibit SS2,
 8 yes.
 9 CHAIRPERSON: We've spent many –
 10 MR MPOFU: Many –
 11 CHAIRPERSON: - happy hours looking at
 12 it.
 13 MR MPOFU: Yes. 2.1 says, "Put defensive
 14 measures in place as a priority." Oh sorry, I'm reading it
 15 out of context. "If negotiations fail and life or property
 16 is in danger, the following procedure must be followed, put
 17 defensive measures in place as a priority." You are aware
 18 of that?
 19 [15:40] GENERAL PHIYEGA: Yes, I'm reading with
 20 you.
 21 MR MPOFU: Yes. And it's also common
 22 cause that one of the defensive measures that were used or
 23 intended to be used in the Marikana operation was the
 24 employment or the deployment, rather, of barbed wire. You
 25 are aware of that?

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1 GENERAL PHIYEGA: Yes, I am.
 2 MR MPOFU: And even if one was not a
 3 policeman or even an advocate, you would agree with the
 4 proposition that reading what I've read to you, if there
 5 was a situation where you needed to stop citizens from
 6 physically entering a particular area, it would be
 7 preferable to bar them by the use of something like barbed
 8 wire defensive measures than by a line of semi-automatic
 9 rifle-wielding people.
 10 CHAIRPERSON: Isn't it a point for
 11 argument, rather than a matter on –
 12 MR MPOFU: No, it's not, Chair. Yes,
 13 because –
 14 CHAIRPERSON: Isn't it a matter for
 15 argument? It's either –
 16 MR MPOFU: No, okay Chair, let's assume
 17 it is but it's a prefix to –
 18 CHAIRPERSON: Oh, I see, alright.
 19 MR MPOFU: - to the next question.
 20 CHAIRPERSON: Alright, I won't –
 21 MR MPOFU: Thank you.
 22 CHAIRPERSON: Mr Burger is looking at me
 23 but he hasn't turned his mike on, so you can carry on. Ask
 24 the question.
 25 MR MPOFU: Thank you, ja, Chair –

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1 CHAIRPERSON: Mr Semenya has got his one
 2 on. Mr Semenya?
 3 MR SEMENYA SC: Chair, the line of police
 4 was not to achieve this purpose. The evidence has been
 5 given by several –
 6 CHAIRPERSON: You say the line of police
 7 was not?
 8 MR SEMENYA SC: The line of police that
 9 my learned colleague is referring to was not there for the
 10 purpose that he's explaining. General Annandale told us
 11 exactly why they were there.
 12 MR MPOFU: He didn't tell me. Alright –
 13 CHAIRPERSON: Well, I think he gave
 14 evidence on the point. If you didn't hear it, that's your
 15 misfortune, isn't it?
 16 MR MPOFU: Well, I'm sure it's the
 17 misfortune of everyone sitting her. He didn't say why they
 18 were lining up there in basic line. That I am 100% sure
 19 of.
 20 CHAIRPERSON: Mr Burger, you look as if
 21 you want to participate in the debate as well.
 22 MR BURGER SC: Chair, again it's not my
 23 issue but this is not an expert on what we're busy with.
 24 We've had this expert for too many days, he's been asked
 25 too many questions on that. Why we now go to expertise

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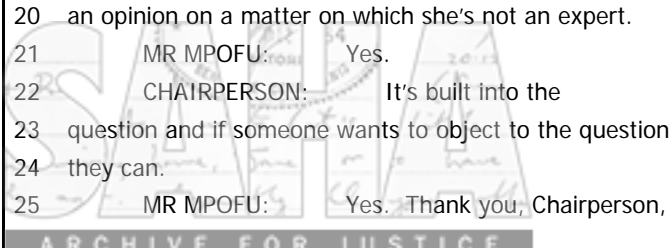
1 from the National Commissioner, I really, on a point of
 2 relevance I object to it.
 3 MR MPOFU: No –
 4 MR BURGER SC: And admissibility as
 5 opinion evidence.
 6 MR MPOFU: Okay Chair, that's an easy
 7 one. The witness was led as somebody who is familiar with
 8 the prescripts, including the one that I just read out to
 9 her. All I'm doing, so to that extent –
 10 CHAIRPERSON: Sorry, can I cut it short?
 11 Can you not reformulate the question –
 12 MR MPOFU: Yes –
 13 CHAIRPERSON: And say inasmuch as it's
 14 obviously better to block people, prevent people from
 15 coming through an area by a fence or barbed wire rather
 16 than a group of, a line of people, and then ask the
 17 question.
 18 MR MPOFU: Okay.
 19 CHAIRPERSON: Then you're not asking for
 20 an opinion on a matter on which she's not an expert.
 21 MR MPOFU: Yes.
 22 CHAIRPERSON: It's built into the
 23 question and if someone wants to object to the question,
 24 they can.
 25 MR MPOFU: Yes. Thank you, Chairperson,

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1 I will ask that question but to make it easier can I refer
 2 you to the SAPS opening statement, which you approved, at
 3 paragraph – I'm sorry – Ms Pillay will help us just now
 4 with the exhibit number.
 5 CHAIRPERSON: Mr Tokota says, and he's
 6 correct, it's FFF9.
 7 MR MPOFU: FFF9, thank you. I am
 8 indebted to Commissioner Tokota. And I'm on page 17, 44.8.
 9 CHAIRPERSON: Might I say if you marked
 10 your exhibits you wouldn't have to ask people what the
 11 exhibit numbers are because when you have the exhibit in
 12 your hand you'd know but anyway, carry on.
 13 MR MPOFU: Well –
 14 CHAIRPERSON: Page 17 you say, paragraph?
 15 MR MPOFU: I have marked them,
 16 Chairperson, but there are too many to handle but the – and
 17 this particular one, page 1 was dislodged. The version of
 18 the police, is the implementation – I'm sorry.
 19 GENERAL PHIYEGA: What paragraph? 44.8?
 20 CHAIRPERSON: 44.8 read with 44.10.
 21 MR MPOFU: 44.8 ja. It's 44.8 but just –
 22 because it is this measure, I just wanted to put it in
 23 context. It says, "It was reported later" – sorry, I'm
 24 reading from 44.7 – "The JOC then took a decision at 13:30
 25 to disperse the protesters, disarm them and, where

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1 necessary, first arrest at 3:30." So that's the context.
 2 44.8 says, "The implementation of this measure was preceded
 3 by the deployment of barbed wire to send a message that
 4 armed protesters may not cross the police line." So all
 5 I'm saying is that even if you just read that, it would
 6 seem that the police accept that the best way to send a
 7 message that people may not cross a police line is by the
 8 deployment of barbed wire. Are we agreed on that? Yes, at
 9 least we agree on that part. I'm going to read on -
 10 GENERAL PHIYEGA: No, you didn't ask me
 11 to respond.
 12 MR MPOFU: Yes, I'm asking you whether –
 13 GENERAL PHIYEGA: Okay –
 14 MR MPOFU: No, no, sorry, I'm just
 15 repeating the question. I'm not asking any –
 16 GENERAL PHIYEGA: I've read that, that
 17 there's the barbed wire that would separate the people and
 18 the police.
 19 MR MPOFU: Yes. Then the next sentence
 20 which is still the version of the police, is that "The
 21 protesters defied this, in other words the deployment of
 22 the barbed wire, and attempted on three occasions to breach
 23 the police barbed wire." Yes. And all I want to know is,
 24 is this in accordance with the version given to you that on
 25 three occasions the protesters tried to breach the barbed



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1 wire?

2 MR BURGER SC: No, but I object to this.

3 This is the opening by the police. The witness has said

4 she has read it and she agreed with it. I don't know where

5 this questioning goes to now.

6 MR MPOFU: You'll find out as soon as I

7 ask the question –

8 MR BURGER SC: No, I object to it on the

9 basis of relevancy, Chair.

10 CHAIRPERSON: The trouble, Mr Mpofu, if I

11 may say so, is she's already said she agrees with it, you

12 see. So then you put it to her and you say do you agree

13 with it? Well, she's already said she agreed with it. You

14 don't have to do that. You can take as a given that she's

15 agreed with it.

16 MR MPOFU: Fair enough.

17 CHAIRPERSON: You don't have to go

18 through that again.

19 MR MPOFU: No.

20 CHAIRPERSON: That's why you can come to

21 the question immediately, you see.

22 MR MPOFU: Ja.

23 CHAIRPERSON: Without all this

24 introduction which she can scarcely deny in view of what

25 she said.

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1 MR MPOFU: Ja, okay Chairperson, really

2 just to avoid wasting more time on this because the

3 objection itself defeats the purpose –

4 CHAIRPERSON: Mr Mpofu, we're not getting

5 anywhere with complaining about objections. Let's just

6 carry on. We've had a harmonious relationship, all of us

7 here, for 100 days. Let's not spoil the –

8 MR MPOFU: The next century.

9 CHAIRPERSON: Carry on.

10 MR MPOFU: Thank you, Chair. Okay,

11 Chairperson, not being one to spoil the atmosphere.

12 General, the version of the protesters, at least those that

13 I represent, as explained by Mr Magidiwana, is that on what

14 the police call the third attempt there was no barbed wire

15 that was employed and that is also one of the criticisms

16 that I placed to General Annandale as to why the gap where

17 they were killed was not protected by barbed wire. Have

18 you got any comment?

19 CHAIRPERSON: Mr Mpofu, I'm sorry, you

20 asked – she wasn't there, Annandale was. You asked General

21 Annandale about it and he gave a reason. I'm not even sure

22 that she knows what the reason was but even if she does,

23 does it really take our case any further to hear what the

24 National Commissioner thinks or comments about the

25 explanation, she wasn't there, the explanation that General

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1 Annandale gave about why there was – I think you can ask

2 better questions than that.

3 MR MPOFU: Yes, okay that's fine. Then

4 I'm going to ask this, if it turns out that a measure which

5 was prescribed in the prescripts and which would have

6 avoided loss of life was not taken, would you as National

7 Commissioner agree that, what I will put in argument, that

8 not everything was done to avoid – remember we are talking

9 about avoiding death.

10 CHAIRPERSON: I'm sorry, Mr Mpofu, but

11 you know that's for us to decide surely? You ask, it's a

12 hypothetical question, if it turns out that's so, what

13 would you say? Well, the answer is whether it turns out

14 that way or not is for us to decide. It's one of the

15 things we'll have to decide –

16 MR MPOFU: okay.

17 CHAIRPERSON: And if we decide it, we

18 will then have to make comments and the comments would be

19 pretty obvious, I would imagine, if they're based upon such

20 a finding but I don't think, with respect, that the

21 National Commissioner will help us one way or the other in

22 giving us the benefit of her comments on that in answer to

23 that hypothetical question.

24 MR MPOFU: Okay, then a final attempt.

25 If it turns out that the people in charge of the operation

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1 failed to take a measure which would avoid death, would you

2 as National Commissioner take the necessary steps to, (a)

3 discipline those people and (b) make sure that it does not

4 happen again, which is the purpose of the Commission.

5 CHAIRPERSON: Sorry to interrupt you

6 there. Surely in regard to the first leg of the question,

7 that's a matter for IPID to decide, it's not for her.

8 She's told us over and over again she doesn't brief the

9 police, the police are policed, if I can use that

10 expression, by IPID. The second part obviously is a

11 legitimate question to ask her but I'll allow you, allow

12 her to answer the second half of the question but not the

13 first.

14 MR MPOFU: I'm happy with that.

15 CHAIRPERSON: It's obvious, it's a matter

16 for IPID, not for her.

17 MR MPOFU: Yes. Thank you, Chairperson.

18 GENERAL PHIYEGA: I've already answered

19 that to this Commission and I've said the outcome, as a

20 result of the outcome we'll look at relevant interventions

21 and relevant remedies.

22 MR MPOFU: Okay, that's fair. Thank you

23 for that. Then you and I – okay, I'll try and use the

24 Chairperson's formulation which is probably more efficient

25 – given the fact that you and I agreed at the beginning of

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1 this cross-examination and the previous one about the
 2 importance or the crucial role that would be played by the
 3 accuracy of information in relation to an operation of this
 4 nature with its potential consequences, would you agree
 5 that a difference of opinion among the decision makers on,
 6 for example, the numbers of people that are to be targeted
 7 – I'm using that in the nicest possible way – would play a
 8 disastrous role in the outcome. And I'm sorry, I know it's
 9 a long question. Maybe the short question is this, if the
 10 assumptions that are made are false, isn't it almost
 11 predictable that the outcome will be disastrous?
 12 CHAIRPERSON: It depends on which way the
 13 mistake works. I understand what you're talking about. If
 14 they had over-provided because they thought they were
 15 dealing with 10X people but in fact they were only – the
 16 others, some of them only thought they were dealing with X
 17 people, the fact that there's an over-provision of people
 18 to deal with 10X would obviously not have caused a problem
 19 because they'll easily deal with X but if it's the other
 20 way around, which is I think where you're going, then the
 21 answer might be self-evident but I'll still let you ask it.
 22 MR MPOFU: Thank you, Chairperson, yes.
 23 Bear in mind my original question. Just the qualification
 24 that the Chairperson is putting is that if the police were,
 25 if they were to provide for 100 people and it turns out

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1 that there's only 10 who are there, they might be over-
 2 providing. If, on the other hand, they provide for 100 and
 3 it turns out – or rather, they might also be accused of
 4 overkill and all sorts of things if it's 10 and they
 5 provide for 100 but if it's the other way around then it
 6 might be just surplus, which does not attract any
 7 criticism. You know what I mean?
 8 CHAIRPERSON: I think what the question
 9 means is this, if in fact they provided enough people to
 10 deal with 100 strikers and it turned out that there were
 11 1 000 strikers, they didn't have enough people, in other
 12 words they were under-manned, then there would've been
 13 problems because they didn't have enough people to deal
 14 with the problem. It wouldn't matter so much the other way
 15 around. If they had enough people to deal with 100 and
 16 there were only 10, then they just had too many people but
 17 that wouldn't have affected the correctness, adequacy of
 18 the operation. What he's putting to you is if they didn't
 19 actually have enough people and it was partly due to the
 20 fact that some of the officers thought they were targeting
 21 100 and others thought they were targeting 1 000, that they
 22 didn't actually have enough people to deal properly with
 23 1 000 – how does the question end?
 24 MR MPOFU: Would you agree that if it was
 25 that situation, that – in other words if you had over-

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1 provided, that one of the valid criticisms for example in
 2 terms of how many guns you've brought there, might be that
 3 you provided for what I call overkill in a certain – when I
 4 say, you know what I mean.
 5 CHAIRPERSON: An unfortunate expression
 6 in this case.
 7 MR MPOFU: Unfortunately yes, but that's
 8 why then I said do you know what I mean. I don't mean it
 9 literally, that it would create a dangerous situation, a
 10 more dangerous situation.
 11 GENERAL PHIYEGA: Advocate, I think it's
 12 a very difficult question that you're asking, very
 13 hypothetical, lends itself to scenario planning and
 14 inconclusive. There's a lot of debates that need to be
 15 held around that, this one's assumptions, that one's
 16 assumptions, I cannot be able to answer you on that one.
 17 [16:00] MR MPOFU: Chair, if I can just wrap this
 18 up. Forget the assumptions then. I'm putting it to you
 19 that there is evidence in this Commission that some of the
 20 police members like Calitz state that there were over 3 000
 21 armed people that were the focus or the target of the
 22 operation. Others like General Annandale state that the
 23 target of the operation was 300 to 400, I think that's what
 24 he said, people. So that's the status quo, forget
 25 assumptions –

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1 MR SEMENYA SC: That is the evidence,
 2 Chair.
 3 MR MPOFU: Sorry, Chair, before the
 4 objection let me just finish the question – and other, some
 5 of the objective evidence suggests that there were 300
 6 armed people who arrived and then there were 600 who
 7 arrived later, that makes it 900. And another version is
 8 that about half of the 3 000 were armed. There are various
 9 versions, that's the situation -
 10 CHAIRPERSON: Mr Mpofo, you know, this is
 11 really getting a little bit out of hand and I'd be rather
 12 sad for us to end it here at Rustenburg on a note like
 13 that. So what I suggest we do is, it's quite a tricky – as
 14 she says correctly, it's a tricky point and what I suggest
 15 is for you to go back to the drawing board, write out a
 16 neat typed question dealing with the problems that you
 17 wanted to raise with her and ask her for it on Tuesday
 18 morning.
 19 MR MPOFU: Okay. Chair, I won't – I
 20 promise you, I just want to move way so that -
 21 CHAIRPERSON: No –
 22 MR MPOFU: Can I ask one general question
 23 –
 24 CHAIRPERSON: No, look, there are people
 25 who have made travel arrangements on the assumption that

1 we're going to stop at 4, so I think do it that way on
2 Tuesday morning and we'll take the adjournment now and
3 we'll bid farewell or possibly au revoir to Rustenburg on a
4 happier –

5 MR MPOFU: Well, then I'll start –

6 MR BUDLENDER SC: Chair, I'm sorry, may I
7 make one brief announcement, that the meeting of the
8 parties will take place not on Monday but on Wednesday, on
9 the closed day of the Commission and an e-mail will go out
10 shortly advising everyone of the arrangements.

11 MR MPOFU: Thank you.

12 [COMMISSION ADJOURNED]

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