

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 65 19 MARCH 2013 PAGES 6855 TO 6972

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 19 MARCH 2013]
 2 [10:01] CHAIRPERSON: The Commission resumes.
 3 National Commissioner, you're still under oath.
 4 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 5 CHAIRPERSON: Mr Madlanga, I understand
 6 you're going to be the first cross-examiner.
 7 CROSS-EXAMINATION BY MR MADLANGA SC:
 8 Yes, Mr Chairman, thank you. General Phiyega, I want to
 9 start by making an example relating to a minister
 10 responsible for a department other than yours. Let us
 11 posit a situation where three out of the more than 20
 12 universities in South Africa have a complete stoppage of
 13 tuition for a whole year. Would you say that the Minister
 14 of Higher Education would not be concerned at all about
 15 that?
 16 GENERAL PHIYEGA: I think he would be
 17 concerned.
 18 MR MADLANGA SC: Let's come closer home
 19 to the Minister of Police. First I want to get an idea of
 20 what the nature of the reporting, if any, that you do to
 21 the Minister of Police in the normal performance of your
 22 duties. Do you do any such reporting at all, or not?
 23 GENERAL PHIYEGA: Yes, I do.
 24 MR MADLANGA SC: I'm interested in the
 25 nature of those reports. On what sort of matters do you

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1 report to the Minister?
 2 GENERAL PHIYEGA: I report to him as a
 3 political head of the environment that we're in.
 4 MR MADLANGA SC: Perhaps be more
 5 specific. Would you find it necessary to report to the
 6 Minister killings of human beings that are of an unusually
 7 high scale? Would you find it necessary to report such
 8 killings? Let me remove from the equation all or any type
 9 of killing that happens throughout the country. My
 10 emphasis is on killings that are of an unusually high
 11 scale. Would you find it necessary to report that to the
 12 Minister?
 13 GENERAL PHIYEGA: Yes.
 14 MR MADLANGA SC: You must have seen
 15 visuals of the charred or burnt bodies of the Lonmin
 16 security guards. Did you?
 17 GENERAL PHIYEGA: Yes.
 18 MR MADLANGA SC: And from your evidence,
 19 and indeed even the content of the statements of other
 20 police officers, the killings kept escalating after the
 21 protest, or strike action had commenced, not so?
 22 GENERAL PHIYEGA: Yes.
 23 MR MADLANGA SC: And on the 13th of August
 24 no less than five people were killed, including two police
 25 officers. Correct?

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1 GENERAL PHIYEGA: Yes.
 2 MR MADLANGA SC: Within one, or the same
 3 environment there is the Marikana area and related to
 4 Lonmin Mine. Wouldn't you say that this was an unusually
 5 high scale of killings within that small environment?
 6 GENERAL PHIYEGA: I would say so.
 7 MR MADLANGA SC: So you agree with me? I
 8 want to be sure.
 9 GENERAL PHIYEGA: I do agree that it was
 10 significant.
 11 MR MADLANGA SC: Now take note that thus
 12 far I've taken you up to the 13th of August 2012, and you
 13 agree that as at that date the killings were of an
 14 unusually high scale, and also take note that you have said
 15 that you would find it necessary to report killings of an
 16 unusually high scale to the Minister. As at 12 midnight on
 17 13th August 2012, had you made any report to the Minister
 18 about the killings at Marikana?
 19 GENERAL PHIYEGA: Yes, I did in my normal
 20 reporting to him.
 21 MR MADLANGA SC: When had you done this?
 22 GENERAL PHIYEGA: I do say in my normal
 23 reporting to him when incidences happen, I do inform him.
 24 MR MADLANGA SC: What I'm interested to
 25 establish is whether you would have done this at a normal

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1 scheduled reporting, or did you specially seek the
 2 attention of the Minister and make a report in this regard?
 3 GENERAL PHIYEGA: I use a multiplicity of
 4 platforms to report to the media – to the Minister.
 5 MR MADLANGA SC: Sorry, General, that is
 6 not answering my question. Did you, once you became aware
 7 of this unusually high scale of killings, specially, and
 8 not in the normal course as you would ordinarily from time
 9 to time report to the Minister, specially make a report
 10 relating to these killings at Marikana? That is what I'm
 11 asking. I'm not asking you about the means that you use in
 12 reporting to him.
 13 GENERAL PHIYEGA: Perhaps I should ask
 14 that you explain to me so that I can answer, word
 15 "specially."
 16 MR MADLANGA SC: Maybe I should ask you
 17 this question, General. When you make the reports that you
 18 have said you make in the normal performance of your
 19 duties, the reports that you make to the Minister, do you
 20 make them on an ad hoc basis, or do you have a schedule in
 21 terms of which you make them? Do they get scheduled;
 22 quarterly I make reports, weekly I make reports, or are
 23 they ad hoc?
 24 GENERAL PHIYEGA: It is a combination of
 25 all the issues you've raised.

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1 MR MADLANGA SC: So it may be scheduled
 2 or it may be ad hoc. That is the reporting. Is that what
 3 you're saying?
 4 GENERAL PHIYEGA: As I have indicated,
 5 multiple means I used to report that.
 6 MR MADLANGA SC: Maybe what will take us
 7 forward, let me hear what those are, the multiple – I don't
 8 know, I'll just use means. Let's hear what those are.
 9 GENERAL PHIYEGA: One of those, in my
 10 statement I mentioned that I phoned the Minister. I also
 11 mentioned that we issued an internal communication which we
 12 gave to the Minister of International Affairs, as well as
 13 our Minister. I also when we have forums to meet, use
 14 those forums to give feedback, and at any given time the
 15 situation that may be presenting may require any one or
 16 many of those platforms.
 17 MR MADLANGA SC: You mention as part of
 18 what you are saying, making a telephone call to the
 19 Minister, and in that regard you say that you do mention in
 20 your statement. What I see in your statement are
 21 references to 16 August 2012 in paragraphs 23 and 24. Is
 22 that what you are talking about when you say you made a
 23 telephone call to the Minister?
 24 GENERAL PHIYEGA: I will start off by
 25 saying yes to those statements that I gave, but on a

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1 continuous basis I talk to the Minister.
 2 MR MADLANGA SC: What I find confusing
 3 with that response, General, is that I emphasised a few
 4 questions back that thus far I'm only on the 13th of August
 5 2012, and you have said as at midnight on 13 August 2012
 6 you had told the Minister about the killings that have
 7 taken place at Marikana as at that date. Now what I want
 8 to establish from you is this; when you told the Minister
 9 this, did you call him? Did you make a telephone call?
 10 GENERAL PHIYEGA: Yes, I did phone him.
 11 MR MADLANGA SC: When was this, General?
 12 When did you make that telephone call? Let's not talk
 13 about other means now. When did you make that telephone
 14 call, alerting the Minister to the killings that had taken
 15 place at Marikana as at 13 August 2012? When did you make
 16 that telephone call?
 17 GENERAL PHIYEGA: Maybe to be able to
 18 answer appropriately, are you asking me when from a time
 19 point of view; are you asking me when from a date point of
 20 view?
 21 MR MADLANGA SC: I'm happy with a date,
 22 General.
 23 GENERAL PHIYEGA: I will start off by
 24 saying in my statement I mention dates on which I called,
 25 and I'm also now saying to you that continuously I

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1 continued to give progressive reports. This matter started
 2 on the 9th and progressively I gave reports to internal
 3 stakeholders, including the Minister, on what was happening
 4 in Marikana.
 5 MR MADLANGA SC: Remember, General, my
 6 question is focussing only on a telephone call regarding
 7 the killings as at the 13th. Now you say as part of your
 8 response that you do mention or touch on this in your
 9 statement. Can you take me to a paragraph or to paragraphs
 10 in your statement where you say that you told the Minister
 11 about the killings that had taken place at Marikana as at
 12 13 August 2012? I'm not saying it is not there, but please
 13 just take me there.
 14 MR SEMENYA SC: No, Chair, the witness
 15 did not say she made a statement, she made a report in her
 16 statement that she made a telephone call on the 13th.
 17 CHAIRPERSON: I don't know that's what Mr
 18 Madlanga's putting out, but let's get his response. Mr
 19 Madlanga, you heard what Mr Semanya says.
 20 MR MADLANGA SC: Mr Chairman, in context,
 21 my learned friend cannot disregard context. I inquired
 22 from the witness whether she had made a telephone call to
 23 the Minister regarding the killings at Marikana as at 13th
 24 August 2012, and she said she had. I then asked her for,
 25 or rather I asked her when she had done so, and she said,

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1 "Are you asking for time or are you asking for a date?" I
 2 said I am happy with a date, and it was thereafter that she
 3 gave the long response that touched on her statement, even
 4 dealing with the subject that I was asking her about. So
 5 my question flows naturally from that. If that is not what
 6 she was responding to or saying, what then, and what on
 7 earth was she saying about her statement in that context?
 8 CHAIRPERSON: Repeat your question.
 9 Repeat your question, Mr Madlanga.
 10 MR MADLANGA SC: Thank you, Mr Chairman.
 11 General, you remember that I asked you whether you had made
 12 a telephone call to the Minister, advising him of the
 13 killings at Marikana as at 13th, midnight on 13 August 2012,
 14 and you said you had. Do you remember saying so?
 15 GENERAL PHIYEGA: My response to the
 16 multiple questions you've been giving me is that I am in
 17 continuous communication with the Minister. I have also
 18 said in my statement there are areas where I indicate where
 19 I've spoken to the Minister telephonically.
 20 MR MADLANGA SC: General, I'm not asking
 21 you a multiplicity of questions now, and indeed all that
 22 I'm doing for now is just to recap on what you and I, or
 23 rather the ground that you and I have covered, and all that
 24 I'm doing is to try to establish whether you are
 25 contradicting me in what I am suggesting you said.

<p style="text-align: right;">Page 6863</p> <p>1 [10:21] Do you remember me asking you the question, did 2 you make a telephone call to the Minister, reporting to him 3 the killings that had taken place at Marikana as at 4 midnight on the 13th of August 2012? Do you remember me 5 asking you that question? 6 GENERAL PHIYEGA: You've asked me a lot 7 of questions. It could have been one of those. 8 MR MADLANGA SC: General, this is a 9 simple question and it's less than five minutes ago. Are 10 you suggesting that you do not remember, for a fact you do 11 not remember me asking you that question? 12 GENERAL PHIYEGA: I'm not suggesting 13 that. 14 MR MADLANGA SC: Do you remember me 15 asking you that question then? Do you remember? 16 GENERAL PHIYEGA: I have had a number of 17 questions from you, and that could have been one of those. 18 MR MADLANGA SC: Alright, perhaps let me 19 be content with the "maybe" or "it might have been" type of 20 approach, and do you remember that your response to that 21 question was that yes, you had made such a call to the 22 Minister? 23 GENERAL PHIYEGA: I have answered you, 24 saying I communicate with the Minister continuously. I 25 have mentioned that I use multiplicity of platforms. I</p>	<p style="text-align: right;">Page 6865</p> <p>1 Marikana on several occasions. 2 MR MADLANGA SC: In your statement you, 3 I've already indicated in my earlier questions, you refer 4 to the Minister in paragraphs 23 and 24 of your statement. 5 This is exhibit FFF3, Mr Chairman, Commissioners. You 6 confirm that? 7 GENERAL PHIYEGA: In the statement I have 8 I talk about the Minister in paragraph 24. 9 MR MADLANGA SC: 23 as well. Just look 10 at the very last word of paragraph 23. 11 GENERAL PHIYEGA: I think I need to be 12 guided, because there's a statement to be corrected and I'm 13 just wanting to check if we are talking about the same 14 statement. 15 MR MADLANGA SC: I'm referring to the one 16 dated 12 March 2013, Commissioner, which was handed in as 17 exhibit FFF3. That's F for Freddie. 18 GENERAL PHIYEGA: That is the statement 19 that was corrected. 20 MR MADLANGA SC: I'm sorry? 21 GENERAL PHIYEGA: I am referring to the 22 one of the 7th, because the correction was reverting to my 23 statement, which is the one of the 7th. 24 MR SEMENYA SC: Chair, just to avoid 25 confusion –</p>
<p style="text-align: right;">Page 6864</p> <p>1 have indicated that in some instances I do call, and in 2 that context I would say yes. 3 CHAIRPERSON: General, I'm not sure I 4 understand your answer to the specific question which Mr 5 Madlanga asked you, whether as of midnight on the 13th of 6 August you had previously, as it were, informed the 7 Minister telephonically of these five killings that had 8 taken place on the 13th. 9 GENERAL PHIYEGA: No, that is not in my 10 statement. 11 CHAIRPERSON: No, I know that is not in 12 your statement, but I'm asking you whether you did tell the 13 Minister telephonically before midnight on the 13th of 14 August that those killings had taken place? I know it's 15 not in your statement, but I'm not interested whether it's 16 in your statement or not. I'm interested in whether you 17 had informed the Minister as of midnight, whether you had 18 informed him as at midnight on the 13th that those killings 19 had taken place. That, as I understand, is Mr Madlanga's 20 question. 21 GENERAL PHIYEGA: I informed the Minister 22 about what was happening in Marikana since the 9th. I am 23 not sure whether I had done that by 12 midnight on the 13th, 24 but I do not remember calling him by 12 midnight on the 25 13th, but I did inform him about what was happening in</p>	<p style="text-align: right;">Page 6866</p> <p>1 CHAIRPERSON: Yes, Mr Semanya? 2 MR SEMENYA SC: Just to avoid confusion, 3 I think Mr Madlanga is referring to a statement that was 4 corrected. That's the error that was in the first 5 statement of 23. The statement of 12th, with which we went 6 with the witness there is no reference to Minister in 7 paragraph 23. 8 MR MADLANGA SC: Thanks to my learned 9 friend, Mr Semanya. I'll just try to get the correct one 10 then. May I – 11 CHAIRPERSON: Sorry, National 12 Commissioner, I have in my hand the statement of the 7th and 13 the statement of the 12th. The statement of the 7th in 14 paragraph 23 doesn't refer to your relaying any information 15 to the Minister. The statement of the 12th, which was 16 handed in as exhibit FFF3, contains the following as 17 paragraph 23. "On the afternoon of August 16th, 2012, I 18 received a call from Lieutenant-General Mbombo who informed 19 me of the decision to implement stage 3 of the plan, which 20 information I relayed to the Minister." But I think that 21 when you gave evidence, you actually said that the words 22 were omitted and so we've added in on the copy I have 23 before me, some words so that it now reads as follows. "On 24 the afternoon of August 16th, 2012, I received a call from 25 Lieutenant-General Mbombo who informed me of the decision</p>

<p style="text-align: right;">Page 6867</p> <p>1 to implement a dispersal operation plan, which information 2 I relayed to the Minister." I'm not quite sure what the 3 final status is of paragraph 23, but what is clear is that 4 on the statement which we have, dated the 12th of March, you 5 did state that you had relayed to the Minister the 6 information which you'd received from General Mbombo 7 regarding the decision to implement the plan. 8 MR SEMENYA SC: Chairperson, the 9 correction that was one in the evidence is that the 10 statement of 12th should have a full stop after the word 11 "plan" and that's the correction the witness brought to our 12 attention in her evidence-in-chief. After the word "plan" 13 it must be full stop. 14 CHAIRPERSON: As I say, there was an 15 element of confusion last Thursday on it. If you're now 16 satisfied that you have what one can describe as the final 17 version, perhaps you can proceed with your cross- 18 examination. 19 MR MADLANGA SC: Mr Chairman, all my 20 colleagues around me in the evidence leading team are 21 contradicting my learned friend Mr Semenya, but perhaps the 22 best is for me to leave the reference to paragraph 23 in my 23 cross-examination thus far. I may come back there later. 24 So according to you then mention of the Minister in your 25 statement is only in paragraph 24.</p>	<p style="text-align: right;">Page 6869</p> <p>1 GENERAL PHIYEGA: No, no, I'm trying to 2 understand what I mean by saying any role, any initiative. 3 If I say yes, not understanding, I think it will be remiss 4 of me. I must actually seek to understand – 5 MR MADLANGA SC: Thank you. Thank you, 6 General. Let me take you back to the example I made about 7 the Minister of Higher Education, but now let me bring it 8 by way of analogy to your Minister. Killings on such a 9 large scale, would that have been a matter of concern to 10 your Minister? 11 GENERAL PHIYEGA: I said yes. 12 MR MADLANGA SC: If it was, or would have 13 been, what, if anything, did the Minister of Police do in 14 connection with the killings at Marikana, save for merely 15 receiving reports from you? What did the Minister do, if 16 anything? 17 GENERAL PHIYEGA: My Minister was 18 personally here. The Minister was part of the inter- 19 ministerial committee that did a lot of work in this 20 region, and in my phoning him on our behalf as the 200 21 members of SAPS to give feedback to him, his political role 22 - we don't play the political role – his political role, 23 his political support to us as our Minister was always 24 there. 25 MR MADLANGA SC: The inter-ministerial</p>
<p style="text-align: right;">Page 6868</p> <p>1 GENERAL PHIYEGA: Yes. 2 MR MADLANGA SC: And there you say, "I 3 then related the same information to the Minister of Police 4 telephonically and advised him that I shall attend to the 5 matter personally so that I can have a first account of the 6 incident." Give or take, that's roughly the substance of 7 it, not so? 8 MR SEMENYA SC: No, Chair, again that 9 paragraph must end, "I then related the same information to 10 the Minister of Police telephonically and advised him that 11 I shall be attending to the matter personally," full stop. 12 MR MADLANGA SC: Thank you, Mr Semenya, 13 I'm still very happy with that. So that's all that you 14 said in your entire statement about the Minister? 15 GENERAL PHIYEGA: Yes. 16 MR MADLANGA SC: It was according to your 17 statement, and indeed even your evidence here, just 18 relaying reports to him. Your statement and your evidence 19 do not suggest any role that the Minister himself played, 20 or any initiative that the Minister himself took. That is 21 what your evidence and your statement suggests. 22 GENERAL PHIYEGA: I think I would need to 23 understand to answer you properly, any role, any initiative 24 played by the Minister, because it sounds – 25 MR MADLANGA SC: Vague? It sounds vague?</p>	<p style="text-align: right;">Page 6870</p> <p>1 committee was post the killings of 16 August 2012, not so? 2 GENERAL PHIYEGA: Yes. 3 MR MADLANGA SC: And when you say the 4 Minister of Police was here in Marikana, I take it that you 5 are referring to him coming to Marikana again post the 6 killings of 16 August 2012, not so? 7 GENERAL PHIYEGA: Yes. 8 MR MADLANGA SC: Now I'm interested to 9 know what the Minister did prior to the killings of 16 10 August 2012. 11 GENERAL PHIYEGA: I would like to take 12 you back to the statement I've made in terms of the role I 13 play. I indicated in my statement that I'm the National 14 Commissioner of Police. I indicated in the statement that 15 my appointment requires of me to manage and control 16 policing. I also indicated that I work with a team of 17 policemen and women in operations, in management, and our 18 responsibility is to manage the operations of the police. 19 I've also said to you in responding to one of your earlier 20 questions, that our political leader is the Minister. I 21 indicated that I continuously report to him using a 22 multiplicity of platforms, and one of the primary roles in 23 doing so is him giving us support, because he is not in 24 operations. 25 MR MADLANGA SC: I'm not sure that I</p>

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1 follow that, Commissioner, regarding the direct question
2 that I put to you. The question is, what did the Minister
3 do, if anything at all? I'm not asking you about reporting
4 lines and so on, who controls what, who's concerned with
5 policy, who's concerned with management and control and all
6 of those things. I'm asking you a specific question.

7 What, if anything, did the Minister do, concerned as he was
8 – because you said he was concerned, or would have been
9 concerned – what, if anything, did he do prior to the
10 killings of 16 August 2012? Bear in mind, bear in mind
11 that as at 15 August 2012 the killings had escalated and no
12 less than 10 people had been killed as at that date. What,
13 if anything, did the Minister do?

14 [10:41] GENERAL PHIYEGA: I have already given my
15 response to this one. He's a political leader. He gives
16 us leadership in that space and support. If I have failed
17 maybe to answer in a manner that is appreciated, maybe I'm
18 short of answering your question.

19 MR MADLANGA SC: General, it's probably
20 not a lack of articulation on your part; it's probably a
21 lack of comprehension on mine. From what you say, you seem
22 to be talking in general terms – the Minister gives us
23 support, the Minister gives political direction. Are you
24 saying on this occasion, on the occasion of the killings at
25 Marikana, the Minister gave you specific political

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1 direction that related to the killings at Marikana, or are
2 you talking about political direction that he gives
3 generally and in the normal course of performance of his
4 duties, that had nothing to do with, or rather that did not
5 have specific reference to the killings at Marikana? Is
6 that what you are saying?

7 GENERAL PHIYEGA: Maybe let me start off
8 by saying all the answers that I've been giving you were
9 contextualised to the question you were asking me about
10 Marikana.

11 MR MADLANGA SC: And what specific – not
12 that I understand that response, but I'll move on – and
13 what specific support did the Minister give you in relation
14 to the killings at Marikana, before those of 16 August
15 2012? What support did he give you?

16 GENERAL PHIYEGA: I have answered to say
17 in all my reporting and my feedback to him he is our
18 political leader. He took, gave us politic support. He
19 gave us that leadership, because I do not have the
20 responsibility of communicating in that space or dealing
21 with issues in that regard, and that is the best answer I
22 can give you.

23 MR MADLANGA SC: So must I take your last
24 answer to be that you cannot be specific on the political
25 direction, nor can you be specific on the support that the

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1 Minister gave you?

2 GENERAL PHIYEGA: I have said he has
3 given us leadership, he has given us political support, and
4 that enabled us to do our work.

5 MR MADLANGA SC: Mr Chairman,
6 Commissioners, just give me a moment. I'm just looking at
7 something in the transcript. I have in my hand the
8 transcript of the evidence led before this Commission, and
9 I refer my colleagues to day 41, commencing line 6 all the
10 way down to line 20, I will read. Page 4434, let me read
11 what appears there. It's Mr Zokwana speaking. "I spoke to
12 an official in the offices," and he was being cross-
13 examined by my learned friend Mr Tip. "I spoke to an
14 official in the offices" –

15 CHAIRPERSON: I think he might have been
16 examined by –

17 MR MADLANGA SC: I'm sorry. I'm sorry.
18 I'm sorry, Mr Chairman. My apologies to Mr Tip as well.
19 There's no way he could have cross-examined his own
20 witness. "I spoke to an official in the offices of the
21 provincial commissioner and I was not satisfied with the
22 response" –

23 MR SEMENYA SC: Chair, can I ask maybe we
24 place the transcript before the witness so that she can
25 have an appreciation of what is being read out?

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1 CHAIRPERSON: It does sound like a fair,
2 reasonable request.

3 MR MADLANGA SC: It's the highlighted
4 part, General. Thank you. "I spoke to an official in the
5 offices of the provincial commissioner and I was not
6 satisfied with the response I was given, they didn't have
7 enough manpower in the SAPS. Then I tried to get the
8 number of the Minister's office and I was able to talk to
9 somebody in his office and they left a message on his cell.
10 He called me back when I was on the way to Johannesburg and
11 I raised my concern to the fact that unless there were
12 enough number of SAPS personnel to restore law and order on
13 the mine, many lives will be lost." And then Mr Tip, "And
14 what was the response of the Minister to your approach?"
15 Mr Zokwana, "The Minister promised to make all possible to
16 ensure that there was a deployment of SAPS on the mine to
17 prevent further deaths to the people." You see that?

18 GENERAL PHIYEGA: Yes, I do.

19 MR MADLANGA SC: Please bear with me, Mr
20 Chairman, Commissioners. For the Minister to be able to
21 have more members of SAPS deployed at Marikana, I take it
22 that he would have had to make contact with you, not so?

23 GENERAL PHIYEGA: First let me say I see
24 what is being said here, and it talks about the provincial
25 commissioner, and as I've indicated that I am a National

<p style="text-align: right;">Page 6875</p> <p>1 Commissioner; I work through nine national commissioners. 2 I delegate powers to them. The provincial commissioner has 3 a responsibility of running the province. 4 MR MADLANGA SC: Does that - 5 CHAIRPERSON: Sorry to interrupt you. 6 You said you have nine national commissioners. That as, I 7 take it, a slip of the tongue; you mean nine provincial 8 commissioners? 9 GENERAL PHIYEGA: Nine provincial 10 commissioners. 11 MR MADLANGA SC: Do you mean by that, 12 that for the Minister to be able to carry out his promise 13 to Mr Zokwana, he would have had to contact the provincial 14 commissioner of the North West? 15 GENERAL PHIYEGA: The Minister can 16 contact the provincial commissioner. The Minister can 17 contact me. 18 MR MADLANGA SC: Did he contact you? 19 GENERAL PHIYEGA: No. 20 MR MADLANGA SC: To your knowledge, did 21 he contact the provincial commissioner? 22 GENERAL PHIYEGA: I am not aware. She 23 can answer that. 24 MR MADLANGA SC: Mr Chairman, 25 Commissioners, I'm going to move to a totally different</p>	<p style="text-align: right;">Page 6877</p> <p>1 MR MADLANGA SC: The distinction I was 2 just seeking to draw, Commissioner, is there was, we are 3 also in possession of a transcript, what you said, what you 4 actually said orally there was then transcribed. So what I 5 wanted to make sure is whether what you have in front of 6 you is what was typed before you actually went to - 7 MR SEMENYA SC: No, Chair, Mr Madlanga 8 again is mistaken. What is transcribed is the happenings 9 of the 20th, not the media statement of the 17th. 10 CHAIRPERSON: This is the document that 11 was put on our table this morning. That's a transcript of 12 the video clip, I think, that we saw. I suspect it's WW6 13 actually. Is that right? 14 MR SEMENYA SC: Indeed, Chair. 15 CHAIRPERSON: Yes, Mr Madlanga, the 16 document that we found on our tables this morning, which 17 begins "Alright, good morning," that is a transcript of the 18 speech which the National Commissioner made on the 20th of 19 August, which features in exhibit WW6, the clip of the 20 address given on that date. 21 MR MADLANGA SC: I actually - 22 CHAIRPERSON: - 5 is the media statement 23 issued on the 17th of August. 24 MR MADLANGA SC: Thank you, Mr Chair. 25 May I indicate, I understand - and I apologise to my</p>
<p style="text-align: right;">Page 6876</p> <p>1 subject. 2 CHAIRPERSON: Mr Madlanga, we did start 3 just after 10 today, so we would normally take the tea 4 adjournment at quarter past 11, but if there's some reason 5 why you want an early adjournment now, I'll be prepared to 6 grant it to you if it was a good reason. 7 MR MADLANGA SC: I can continue, thank 8 you, Mr Chairman. Totally different subject, Commissioner. 9 As you sit before this Commission today, do you stand by 10 what you said in your media statement of 17 August 2012? 11 Every little bit of what you said, without any 12 qualification, do you stand by it? 13 GENERAL PHIYEGA: Yes, to be best of my 14 ability, unless there is any other new information that 15 presents. 16 CHAIRPERSON: You're referring to exhibit 17 FFF5, I take it. 18 MR MADLANGA SC: Yes, I am, Mr Chairman, 19 thank you. Do you have a copy of the typed one, not the 20 transcript from what you actually said before the media, 21 your typed statement with the SAPS logo at the top? 22 GENERAL PHIYEGA: I presume you refer to 23 the media statement we issued on the 17th of - 24 MR MADLANGA SC: Yes. Yes, yes. 25 GENERAL PHIYEGA: Yes, I do have.</p>	<p style="text-align: right;">Page 6878</p> <p>1 learned friend - I understand the confusion fully. The 2 evidence leaders have actually been working on a transcript 3 of the media statement itself and I was not aware that what 4 I was given by my colleagues is not the final document. I 5 am advised that the final document is now to hand and that 6 it will be distributed. So that is what, I was actually 7 referring to the correct document. It's just that it has 8 not been distributed, and I apologise to Mr Semenya for the 9 confusion. 10 CHAIRPERSON: Just to make sure I 11 understand, the document that you're going to distribute in 12 due course is a transcript of what the National 13 Commissioner said at the, on the 17th of August at a press 14 conference, or media conference. Is that correct? 15 MR MADLANGA SC: Exactly. 16 CHAIRPERSON: I see. So what we have 17 here is a document which is FFF5, is a document which I 18 take it was distributed at the media conference. 19 MR MADLANGA SC: Yes, yes, yes, and that 20 is what I want to deal with. Thank you very much, Mr 21 Chairman. In exhibit FFF5, I will refer you to page 2, 22 unmarked page 2, the penultimate paragraph of that page - 23 CHAIRPERSON: I take it you have that 24 document before you, National Commissioner. Is that 25 correct?</p>

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1 GENERAL PHIYEGA: Yes, Judge.
 2 MR MADLANGA SC: Go to the penultimate
 3 paragraph. Are you there? It starts, "The dispersion
 4 action had commenced." Do you see that?
 5 GENERAL PHIYEGA: Yes, I do.
 6 MR MADLANGA SC: If you look at that
 7 paragraph in relation to the preceding paragraphs, in
 8 particular the one just above the penultimate paragraph,
 9 would you agree with me that the penultimate paragraph is
 10 dealing with scene 2?
 11 GENERAL PHIYEGA: I would have to read
 12 this paragraph and then I'll give you my response.
 13 MR MADLANGA SC: Please do, General.
 14 GENERAL PHIYEGA: I've looked at both
 15 paragraphs. My response would be paraphrased as follows.
 16 What is represented in this statement are facts presented
 17 to me by my operational commanders and I read on behalf of
 18 the police facts as they were presented to me by my
 19 operational commanders, and as I said, I lead a team of
 20 very experienced professionals whose bona fides I believe
 21 in and some of them will be answering later, and I'm sure
 22 they would be able to articulately address those.
 23 [11:01] MR MADLANGA SC: But Commissioner, you
 24 are aware that there were killings at what has come to be
 25 known as scene 1, and there were killings at what has come

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1 to be known as scene 2, both on 16 August 2012. Are you
 2 aware of that?
 3 GENERAL PHIYEGA: Yes.
 4 MR MADLANGA SC: You say in your
 5 statement and in your evidence that this was an
 6 unprecedented tragedy in our nation, not so?
 7 GENERAL PHIYEGA: Yes.
 8 MR MADLANGA SC: And this is something
 9 that would have required of you to fully inform yourself,
 10 if not on the 16th or the 17th, even later, but to fully
 11 inform yourself of the facts of what actually happened on
 12 the day, not so?
 13 GENERAL PHIYEGA: Yes.
 14 MR MADLANGA SC: And I take it that you
 15 did inform yourself, didn't you?
 16 GENERAL PHIYEGA: In an environment that
 17 is not absolute, I shall say yes.
 18 CHAIRPERSON: National Commissioner, I
 19 don't understand that answer. It's either yes or no, or
 20 you don't know. I don't understand the introductory
 21 qualification, "in an environment that's not absolute."
 22 Perhaps you could explain it to me?
 23 GENERAL PHIYEGA: That's what I'm saying,
 24 Chairperson, I'm saying yes, but a person is just not
 25 absolute.

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1 MR MADLANGA SC: And what do you mean by
 2 that? What do you mean by a person not being absolute? Or
 3 what do you mean when you qualify a yes by saying a person
 4 is not absolute? Just what do you mean by that?
 5 GENERAL PHIYEGA: I say yes, except I
 6 would lend it to being on absolute.
 7 CHAIRPERSON: I still don't understand
 8 that –
 9 MR SEMENYA SC: Chair –
 10 CHAIRPERSON: You'll have to be patient
 11 with me. I could understand you saying the answer is yes
 12 to the best of my knowledge. That caters for the situation
 13 that there may be things you don't know which would
 14 ultimately render your unequivocal yes to be slightly
 15 incorrect. But the way you put it doesn't quite convey
 16 that to me. If what I'm putting to you "yes to the best of
 17 my knowledge" is the same as what you mean by the answer
 18 you gave, then I can understand you.
 19 MR SEMENYA SC: Chair, perhaps even the –
 20 GENERAL PHIYEGA: I hear that –
 21 MR SEMENYA SC: Perhaps the word used by
 22 Mr Madlanga, you fully informed, may connote something to
 23 you as may connote something different to me what he
 24 contemplates by "fully," and the witness is saying –
 25 CHAIRPERSON: That will be catered for by

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1 what I suggested, "yes, to the best of my knowledge" would
 2 indicate as far as I know yes, but there may be something I
 3 don't know which alters the situation. Wouldn't that be a
 4 fair answer? Or no, I shouldn't say fair; that implies
 5 something that I don't intend to imply. That would perhaps
 6 be a clearer answer.
 7 MR SEMENYA SC: That's what she means by
 8 absolute in vernacular.
 9 CHAIRPERSON: Alright, Commissioner, you
 10 heard the exchange between me and Mr Semenya. Do you wish
 11 to comment on it?
 12 GENERAL PHIYEGA: I want to say yes, to
 13 the best of my knowledge.
 14 MR MADLANGA SC: Now bearing in mind that
 15 you are aware that there is what is referred to as scene 1,
 16 there is what is referred to as scene 2, and with the
 17 qualification of not being absolute, you fully informed
 18 yourself of the events that had taken place. Are you now
 19 in a position to answer a question that I asked earlier,
 20 which was that do you agree that in the context of the
 21 arrangement of the paragraphs of your statement, and indeed
 22 even the content thereof, that in the penultimate paragraph
 23 of page 2 of your media statement you are dealing with
 24 scene 2?
 25 GENERAL PHIYEGA: Perhaps I should say I

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1 am not able to answer you on that one.

2 MR MADLANGA SC: Are you aware that

3 during the – I'll loosely refer to it as commotion – during

4 the commotion that resulted in the killings at scene 1, the

5 protesters who were involved in that moved away from the

6 koppie, which is referred to as koppie 1, towards the flat

7 ground and ended up next to the kraal where they were shot

8 dead? Are you aware of that? That is according to what

9 you were informed by those who brief you, are you aware of

10 that?

11 GENERAL PHIYEGA: That part of the

12 question will better be answered by those who were at the

13 scene. I am not qualified to talk about those because I am

14 not aware of those specifics.

15 MR MADLANGA SC: Besides the briefing

16 that you got in preparation for the media statement, what

17 more were you told about scene 1 when you were going about

18 informing yourself fully, albeit not absolutely?

19 GENERAL PHIYEGA: My statement, as well

20 as this media statement, the internal briefing, carries the

21 high level strategic feedback that I was given.

22 COMMISSIONER HEMRAJ: General, from where

23 would this statement have emanated, this media statement?

24 GENERAL PHIYEGA: I was – this statement

25 was done by the team that was operating in this province,

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1 that was in charge of the operation of Marikana.

2 COMMISSIONER HEMRAJ: And who would have

3 been the author of this statement, General?

4 GENERAL PHIYEGA: That team that was

5 operating, the commanders that were in charge of this

6 process, because as you can see it's a multiplicity of

7 days, factors, and all that, and all these are the facts

8 that were constituted, that were put together by the team

9 for us to be able to account for what we were doing here.

10 MR MADLANGA SC: And in paragraph 25 of

11 your statement you say that you were briefed by General

12 Mbombo, who was assisted by General Annandale, General

13 Naidoo, Brigadier Calitz, and Lieutenant-Colonel Scott, and

14 that at the close of the briefing you agreed to hold a

15 press briefing the next day, which was 17 August 2012. You

16 see that?

17 GENERAL PHIYEGA: Yes, I do.

18 MR MADLANGA SC: General, when you

19 received this briefing from the people that you mentioned,

20 were you aware that of the lot of them, only Generals

21 Naidoo – or rather, General Naidoo and Brigadier Calitz

22 were actually on the ground where the killings took place?

23 Were you aware of that?

24 GENERAL PHIYEGA: No, I wasn't aware.

25 MR MADLANGA SC: You did not even

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1 interrogate what roles each one of the people that briefed

2 you played on the day and at the time the killings took

3 place?

4 GENERAL PHIYEGA: I had said the joint

5 operation centre is made up of many, many people, including

6 the ones that you mentioned, and my understanding was that

7 these reports that I'm given was of the total operation,

8 and that would include any other thing, whether it was

9 negotiations, whether it was the scene, whether it was

10 those who were doing whatever, that was my understanding.

11 MR MADLANGA SC: Mr Chairman, perhaps it

12 is now appropriate?

13 CHAIRPERSON: Yes, the Commission will

14 now take the tea adjournment.

15 [COMMISSION ADJOURNS COMMISSION RESUMES]

16 [11:34] CHAIRPERSON: National Commissioner,

17 you're still under oath. Mr Madlanga?

18 MANGWASHI VICTORIA PHIYEGA: s.u.o.

19 CROSS-EXAMINATION BY MR MADLANGA SC (CONTD.):

20 Thank you. General, you said that you are aware that there

21 is scene 1 and scene 2 at the scene of the killings of the

22 16th August 2012. What I would like to find out is whether

23 you have any idea where exactly, on the ground that is,

24 scene 1 is and where on the ground scene 2 is. Do you have

25 any idea of that?

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1 GENERAL PHIYEGA: I have seen it on the

2 pictures.

3 MR MADLANGA SC: Besides the briefing

4 that you received from the senior police officials referred

5 in paragraph 25 of your statement leading up to your - to

6 the media conference of 17 August 2012, did you ever

7 receive any other briefing, and if so, when? And of course

8 I'm referring to a briefing on the killings of 16 August

9 2012.

10 GENERAL PHIYEGA: Since this process

11 started on the 9th, I have indicated earlier on that I have

12 been getting updates from the provincial commissioner. I

13 also referred in my statement to the 13th. I also referred

14 in my statement to the 15th. In leading the evidence, my

15 lawyer also asked about the 14th, which I've referred to,

16 and the 16th.

17 MR MADLANGA SC: I referred to the

18 killings of 16 August 2012, and I said according to your

19 statement on 25, in paragraph 25 rather, you do refer to

20 the people that briefed you during the night of 16 August

21 2012, and I may also just take you to paragraph 26 as well,

22 and which reads, "On the 17th August I again visited

23 Marikana. I joined the SAPS team for a further update, as

24 well as to finalise preparations for the press announcement

25 that was planned for that morning. I later proceeded to

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1 address a press conference with regards to the events of
 2 the 16th August 2012, as I understood them, given the
 3 information I had received from my commanders." Now
 4 perhaps let me ask this question first. The further update
 5 that you received according to what you say in paragraph
 6 26, was that additional information as part of your
 7 preparation for the press conference?
 8 GENERAL PHIYEGA: I think I'm just asking
 9 for assistance, because I thought we were working on the
 10 statement of the 7th.
 11 MR MADLANGA SC: Perhaps you should
 12 assist me, Commissioner; I'm totally getting confused. As
 13 you started testifying on Thursday last week, what did you
 14 consider to be your final, final statement in terms of
 15 dating, what is the date of what you consider to be your
 16 final statement? Is it the statement of the 7th March 2012,
 17 or is the statement of 12th March 2012?
 18 COMMISSIONER HEMRAJ: 2013, Mr Madlanga.
 19 MR MADLANGA SC: I'm a year late,
 20 Commissioner, I'm sorry, my apologies. Read 2013 for, yes,
 21 my reference to 2012.
 22 GENERAL PHIYEGA: I'm going to request to
 23 be guided on this one because I'm also confused to say what
 24 are we using and I'd like the Commissioner to guide me on
 25 this one, to say what are we working on.

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1 MR MADLANGA SC: It is your statements,
 2 it is your evidence, Commissioner. You should be in a
 3 position to tell us on the basis of what statement are you
 4 giving your testimony before this Commission? I do
 5 realise, I do realise that as you testified, you even made
 6 further corrections even to what I understood to be your
 7 final statement; I will grant you that, but the simple
 8 point I'm making and which I would like to establish from
 9 you is, as you sit there what do you consider to be your
 10 final statement? Can it be the earlier statement of the 7th
 11 or is it the later statement of the 12th?
 12 CHAIRPERSON: Mr Semenya, I think it
 13 would be helpful if you intervened at this point because
 14 even when she was giving evidence-in-chief there was a bit
 15 of confusion about what exactly the exhibit FFF2 is. Is it
 16 the statement of the 7th, is it the statement of the 12th,
 17 because there were other pages that were handed in, and
 18 that she herself made what amounted to an oral correction
 19 at one point in her evidence. So can you - you want to say
 20 something. What exactly do you want to say on that point?
 21 MR SEMENYA SC: I can say with the
 22 attention of the Commissioner, the statement we're working
 23 from, Chair, is the statement of the 12th, as corrected, the
 24 corrections made from the statement of the 7th into the
 25 statement of the 12th, but the witness is testifying through

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1 the statement dated the 12th, as corrected.
 2 CHAIRPERSON: I have not got a copy of
 3 that myself, and I don't know whether the witness has
 4 either, so it would be helpful perhaps if copies of what
 5 one can describe as the final version of exhibit FFF2 are
 6 made available so that there won't be any further confusion
 7 and -
 8 I want the final version of FFF - is it 3? I'm
 9 corrected, FFF3, so we don't waste any further time with
 10 confusion as to what is the actual document that we're busy
 11 with.
 12 MR SEMENYA SC: We'll certainly do that,
 13 Chair.
 14 MR MADLANGA SC: Thank you, thank you Mr
 15 Chairman, thank you Mr Semenya. So to be able to move
 16 forward, General, look at both paragraphs 26 of your
 17 statements.
 18 GENERAL PHIYEGA: Okay.
 19 MR MADLANGA SC: Is there any difference
 20 between the two? Take your time, take your time and read
 21 both.
 22 GENERAL PHIYEGA: The difference I see is
 23 that there is a numbering problem that was also I think
 24 part of the corrections, because, Sir, it doesn't have a
 25 number. So let's go to this one.

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1 MR MADLANGA SC: Perhaps let me ask my
 2 question this way; let's forget about the statements,
 3 because there's a lot of confusion around them.
 4 CHAIRPERSON: In order to move forward
 5 I'd like her to be agreed that the final version of - I
 6 understand the correct description is FFF3, so that we
 7 won't have to spend any time on that -
 8 MR MADLANGA SC: Yes, that's why I'm
 9 saying let's forget about them for now because it may be
 10 difficult to clarify any issue around them, Mr Chairman. I
 11 will now ask the evidence about what - rather the witness
 12 about what her evidence is. She must know that, certainly.
 13 As you sit there, General, is it your evidence that on 17
 14 August you again visited Marikana? Is that so?
 15 GENERAL PHIYEGA: It is true.
 16 MR MADLANGA SC: That there you joined
 17 the SAPS team for a further update?
 18 GENERAL PHIYEGA: It is correct.
 19 MR MADLANGA SC: As well as to finalise
 20 preparations for the press announcement that was planned
 21 for that morning?
 22 GENERAL PHIYEGA: Yes.
 23 MR MADLANGA SC: You later proceeded to
 24 address a press conference with regards to the events of
 25 the 16th of August 2012?

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1 GENERAL PHIYEGA: Yes, it is correct.
 2 MR MADLANGA SC: And this you did as you
 3 understood the events, given the information you had
 4 received from your commanders, not so?
 5 GENERAL PHIYEGA: Yes.
 6 MR MADLANGA SC: I will go back to the
 7 question I was asking when Mr Semenya quite correctly
 8 raised the issue of the confusion. What was the update
 9 that you received on 17 August 2012?
 10 GENERAL PHIYEGA: The update I received
 11 is articulated in the statement that you referred to
 12 earlier.
 13 MR MADLANGA SC: Please help me with
 14 that.
 15 GENERAL PHIYEGA: It is that media
 16 statement that you were referring to, that you said had the
 17 emblem of the police.
 18 CHAIRPERSON: I take it you're referring
 19 to FFF5?
 20 GENERAL PHIYEGA: Yes.
 21 MR MADLANGA SC: That is so, Mr Chairman.
 22 So what update you received on 17 August 2012 found its way
 23 to your press statement. Is that what you mean?
 24 GENERAL PHIYEGA: Yes.
 25 MR MADLANGA SC: Who gave you this

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1 update?
 2 GENERAL PHIYEGA: I have indicated that
 3 in my statement and I will try and look for it and go to
 4 the specific paragraph.
 5 MR MADLANGA SC: I am aware - I'm quite
 6 apprehensive now to refer to paragraph numbers, but I am
 7 aware that according to your admission here now - I will
 8 avoid a reference to paragraphs - you were briefed on the
 9 16th, that is night of the 16th, you were briefed by General
 10 Mbombo, who was assisted by General Annandale, General
 11 Naidoo, Brigadier Calitz and Lieutenant-Colonel Scott. Now
 12 on the 17th, would it have been a different set of people
 13 that gave you this update?
 14 GENERAL PHIYEGA: Yes, they were part of
 15 the people that gave the update, and when I led my evidence
 16 the lawyer asked me and I said there were others. I may
 17 not recall all their names.
 18 MR MADLANGA SC: I just want to make
 19 sure, I'm not referring to people that might have attended
 20 the press conference with you. I'm addressing myself to
 21 people who gave you the update. Are you saying that it was
 22 more people than those whose names I just gave to you?
 23 GENERAL PHIYEGA: I would say yes because
 24 remember, these people were part of the joint operations
 25 centre and the joint operations centre, as I've said, had

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1 many people, but primarily I can say those people did brief
 2 me.
 3 MR MADLANGA SC: You have already told
 4 the Commission that you did not even get to establish who
 5 of the people that briefed you during the night of the 16
 6 August had actually been on the ground when the killings
 7 took place. Did you establish on the 17th whether the
 8 additional people that gave you the update, additional to
 9 the others that had been at the briefing of the 16th, did
 10 you establish that the additional ones had actually been on
 11 the ground when the killings took place?
 12 GENERAL PHIYEGA: I did not, because I
 13 had my commanders who were feeding back to me and I took it
 14 that they understood who they are working with.
 15 MR MADLANGA SC: Much as we know that
 16 General Naidoo and Brigadier Calitz were on the ground, you
 17 yourself did not know that.
 18 GENERAL PHIYEGA: I knew that there were
 19 commanders, part of the commanders' team that were
 20 responsible for the operation.
 21 MR MADLANGA SC: That was not my
 22 question. Perhaps let me be more specific. Based on what
 23 you have said, you did not know that Brigadier Calitz and
 24 General Naidoo had actually been at the scene of the
 25 killings at the time the killings took place. That you did

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1 not know?
 2 [11:54] GENERAL PHIYEGA: Part of the information
 3 that is sitting in that statement comes from them because
 4 they were out there.
 5 MR MADLANGA SC: Your statement doesn't
 6 assist me in this regard, nor does the answer. General, my
 7 question is about your knowledge. Did you or did you not
 8 know as they were briefing you, that they had actually been
 9 at the scene/scenes of the killings? Did you or did you
 10 not know that?
 11 GENERAL PHIYEGA: I do know.
 12 MR MADLANGA SC: You do know now.
 13 GENERAL PHIYEGA: I do know.
 14 MR MADLANGA SC: That's still not
 15 answering my question. My question is, did you know? At
 16 the time of the briefing, did you know?
 17 GENERAL PHIYEGA: Yes, I did know.
 18 MR MADLANGA SC: I might be mistaken on
 19 this, but the record will bear us out, you and me. My
 20 recollection seems to be that you, of the people, all the
 21 people mentioned as having participated in the briefing on
 22 16 August 2012, you said that you did not know whether or
 23 not they had been at the scene of the killings. Did you
 24 not say that? Perhaps before you respond, I will rely on
 25 my learned colleague, Ms Pillay, who has a record. Thank

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1 you. This is what she has typed out as my question. "When
2 you received," serious gremlins here. Please bear with me,
3 Commissioners. Thank you. It's probably "ntelezi,"
4 Commissioners, and Mr Mpofu has everything to do with it.
5 COMMISSIONER HEMRAJ: Can I perhaps
6 assist you, Mr Madlanga, from my note? My note reads,
7 "When you received the briefing, were you aware that only
8 Generals Naidoo and Calitz were on the ground when the
9 killings took place?" And the answer was, "I was not
10 aware."
11 MR MADLANGA SC: Thank you. Thank you
12 very much, Commissioner. Does that not contradict your
13 last answer? Are you not contradicting yourself now,
14 Commissioner?
15 GENERAL PHIYEGA: I'd like to go back to
16 one of the answers, if maybe I could be helped, of what I
17 said about the JOC and the people that reported me. I did
18 say to you that the joint operations centre has a lot of
19 people and these could be included, and this that I
20 represented, because I was not there when this happened,
21 represented every other person that was there, that was
22 responsible for what was happening in Marikana. If I have
23 at some point maybe not crossed some of the responses, but
24 I want to say what I represented in this media statement
25 was a collaborative product of the people who were

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1 responsible for the entire operation.
2 MR MADLANGA SC: Just to be sure and to
3 avoid any confusion, and in particular because I saw my
4 learned friend Mr Semenya shake his head, I want to make
5 sure what your response to this question is.
6 MR SEMENYA SC: Chair -
7 GENERAL PHIYEGA: I've answered.
8 MR MADLANGA SC: May I just re-ask the
9 question again, Mr Semenya, please?
10 CHAIRPERSON: He wants to say something.
11 Do you want to say it before he asks the question or
12 afterwards?
13 MR MADLANGA SC: My worry is the
14 possible, perhaps inadvertently but a possible suggestion
15 of - I just go back to the original question that
16 Commissioner Hemraj asked -
17 CHAIRPERSON: Mr Semenya, I think a
18 sensible way to proceed, let Mr Madlanga ask his question.
19 If you still have an objection, then you can raise it, and
20 if you haven't, you won't.
21 MR MADLANGA SC: Thank you, Mr Chairman.
22 When you received the briefing of the night of 16 August
23 2012, were you aware that only General Naidoo and Brigadier
24 Calitz were on the ground where the killings took place?
25 Were you aware of that as at the time you were given the

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1 briefing?
2 GENERAL PHIYEGA: I have answered that
3 question.
4 CHAIRPERSON: I think that you're being
5 invited to answer it again, and I suggest you do so.
6 GENERAL PHIYEGA: I will say yes.
7 MR MADLANGA SC: Now this takes me back
8 to what I referred to as self-contradiction. According to
9 what my learned colleague, Ms Pillay, has recorded, your
10 response was that you were not aware - and Commissioner
11 Hemraj as well - your response was that you were not aware.
12 Do you accept that you are now contradicting yourself?
13 GENERAL PHIYEGA: I have said that the
14 JOC is made up of a multiplicity of stakeholders, including
15 the ones that are there, and in that regard I would then
16 say I am not self-contradicting.
17 CHAIRPERSON: It may be a question for
18 argument later as to whether the witness contradicted
19 herself, but what I think is now clear, whether there was a
20 contradiction earlier or not, she now says that she was
21 aware of the point that you put to her, and I think we must
22 proceed from there. As I say, whether it's a contradiction
23 or not can be argued later on the record. I don't think
24 it's any point in debating it with her. She made clear
25 what she now says on that point and if that's what she said

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1 before, so be it, and if it wasn't, well, we now know what
2 she says on the point.
3 MR MADLANGA SC: Thank you very much, Mr
4 Chair, but could you please - I won't ask this question, I
5 won't follow this very same line, but could you allow me to
6 ask this one though? It still leads to the same point.
7 CHAIRPERSON: If you want me to allow it,
8 then carry on and [inaudible] -
9 MR MADLANGA SC: Thank you, Mr Chairman.
10 Can you at least - the Chairman is quite correct, this now
11 is matter for argument, but can you at least tell the
12 Commission why you gave the earlier contradicting answer?
13 CHAIRPERSON: I don't want the witness to
14 admit that she gave a earlier contradictory answer, so I
15 don't see how she can answer the question.
16 MR MADLANGA SC: With respect, I do not
17 understand that, Mr Chairman. I do not understand what the
18 Chairman is saying. If I say something and I later say
19 something else, I may well be in a position to explain why
20 I'm saying different things. So let's hear the witness say
21 "I cannot explain that."
22 CHAIRPERSON: I don't think that's a fair
23 way of putting it either. It's open to her to say that "As
24 far as I'm concerned I didn't contradict myself." If she
25 says that, that's a matter of argument whether she did or

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1 she didn't. If she says that, then as far as she's
 2 concerned she didn't contradict herself. You can't go and
 3 ask her to explain why she contradicted herself because
 4 that would be an impermissible question in the
 5 circumstances. So I think that this particular line you're
 6 following at the moment isn't helpful, and in fact it's
 7 unfair to the witness.

8 MR MADLANGA SC: Thank you, Mr Chairman.
 9 And now that you had some awareness, were you - or rather,
 10 as at the time of the briefing what was your awareness
 11 regarding where General Mbombo had been at the exact time
 12 the killings took place at both scenes?

13 GENERAL PHIYEGA: At the present moment I
 14 won't be able to say I had asked that question because -

15 MR MADLANGA SC: General Annandale?

16 GENERAL PHIYEGA: My answer would be the
 17 same one.

18 MR MADLANGA SC: Lieutenant-Colonel
 19 Scott?

20 GENERAL PHIYEGA: My answer will be the
 21 same.

22 MR MADLANGA SC: So these three you did
 23 not have any awareness of, that is in terms of their
 24 whereabouts at the time of the killings?

25 GENERAL PHIYEGA: My focus, I was not

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1 aware, but my focus was on the report back that I was being
 2 given.

3 MR MADLANGA SC: Earlier you indicated
 4 that at the update of 17 August 2012 there were additional
 5 people. Were all the others whose names you and I have
 6 dealt with, were all of them still present during the
 7 update of 17 August 2012?

8 GENERAL PHIYEGA: Most of them were
 9 there, even though I may not recall specific names because
 10 they were very primary to the statement.

11 MR MADLANGA SC: The additional people on
 12 the 17th, did you at the time of the update, did you get to
 13 establish where they had been at the exact time that the
 14 killings took place?

15 GENERAL PHIYEGA: No.

16 MR MADLANGA SC: At the beginning of your
 17 testimony you gave quite an impressive résumé as a manager,
 18 and I would say it appears quite an accomplished manager.
 19 Am I not misrepresenting your earlier professional life?

20 GENERAL PHIYEGA: I have said - I have
 21 shared my qualifications, I have shared my experience.

22 MR MADLANGA SC: Let me test something
 23 with you, based on your experience as a manager. If you
 24 are to take a decision, or if you were to take a decision
 25 on something that you either knew for a fact was a

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1 contentious issue in a sense that there were opposing views
 2 that bore relevance to that issue, or if you did not know
 3 for a fact, you realised there might well be such opposing
 4 facts and that the issue might well be a contentious one,
 5 would you take a decision without giving serious
 6 consideration to the opposing sides to the issue, or
 7 possible opposing sides to the issue? Would you do that?

8 GENERAL PHIYEGA: The question you've
 9 asked me is long and loaded. Let me try and deal with part
 10 of it.

11 MR MADLANGA SC: Yes.

12 GENERAL PHIYEGA: Firstly, what we were
 13 preparing for was to account to the nation from a SAPS
 14 perspective what happened on the 17th.

15 MR MADLANGA SC: Commissioner, I will
 16 accept I was not clear enough in my question. May I
 17 preface it by saying that I am now stepping off Marikana,
 18 put it aside for a moment and focus on you at a time when
 19 you were a manager at the various places that were
 20 mentioned during your evidence-in-chief. So my question
 21 is, in that scenario that I posited, would you in such
 22 contentious circumstances or circumstances that were in all
 23 likelihood contentious, would you take a decision without
 24 giving at least consideration, if not serious
 25 consideration, to those contentious issues?

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1 GENERAL PHIYEGA: I would say that would
 2 depend on circumstances of the response I have to give at a
 3 particular time.

4 [11:54] MR MADLANGA SC: Alright, thank you.
 5 Okay let me come back to Marikana. I did not get much
 6 assistance with my example. Now you receive, and let's not
 7 forget the context, we started this line of cross-
 8 examination with me asking you whether, as you sit there
 9 today, you stand by what you said in the media release and
 10 whether you do so without any qualification, and you said
 11 you do. These were two scenes of killings where 16 people
 12 were killed at the one scene, scene 1, and 18 people,
 13 although four of them died in hospital, 18 people were
 14 killed at the other scene, scene 2. You accept that?

15 GENERAL PHIYEGA: Yes, I understand.

16 MR MADLANGA SC: And you were aware prior
 17 to your media statement that there was a very large number
 18 of participants at the scene immediately prior to and
 19 during the killings, not so?

20 CHAIRPERSON: Many participants on the
 21 police side, or participants on the strikers' side, or
 22 both?

23 MR MADLANGA SC: Both sides, Mr Chairman,
 24 thank you.

25 GENERAL PHIYEGA: Yes, I do.

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1 MR MADLANGA SC: The evidence says, or at
 2 least some of the statements say that the protesters
 3 themselves were in the order of 3 000, not so?
 4 GENERAL PHIYEGA: Yes, I've noted those
 5 reports.
 6 MR MADLANGA SC: And quite a large number
 7 of police – I don't have the exact number, plus-minus 600?
 8 GENERAL PHIYEGA: Yes, could have been.
 9 MR MADLANGA SC: And after a request by
 10 us, evidence leaders, the South African Police Service has
 11 indicated to us that police officers in excess of 160 fired
 12 shots on the day. Do you accept that as well?
 13 GENERAL PHIYEGA: I'm not able to put my
 14 finger on that, an I'm sure my commanders would be able to
 15 respond to that.
 16 MR MADLANGA SC: I assume that you must
 17 at least have perused the presentation by SAPS, did you
 18 not?
 19 GENERAL PHIYEGA: I have.
 20 MR MADLANGA SC: And you must have seen
 21 from that that a very large number of rounds of ammunition
 22 were fired, not so?
 23 GENERAL PHIYEGA: Yes.
 24 MR MADLANGA SC: From that and the large
 25 number of deaths, I'm sure you'd accept at least, even if

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1 you do not know the number, that there must have been a
 2 fairly large number of police officers who fired shots at
 3 the protesters, wouldn't you?
 4 GENERAL PHIYEGA: The reports, the data
 5 as represented as facts, I noted in our presentation.
 6 MR MADLANGA SC: No, no, no, I'm asking
 7 about your own take, based on the facts that I have put to
 8 you, so many rounds, a large number in fact, very large
 9 number of rounds of sharp ammunition were fired, a total of
 10 34 people were killed, and plus-minus, or even in excess of
 11 70 people were injured, and all that I'm putting to you is
 12 would you accept that cumulatively those facts indicate
 13 that a relatively large number of police officials must
 14 have fired shots at the protesters? Will you accept that?
 15 GENERAL PHIYEGA: Perhaps what would
 16 assist me to be able to deal with an appropriate response
 17 to this matter, given the fact that I've already said that
 18 the commanders who were in operations are better fit to
 19 understand that and to answer that. When you say
 20 "maningi," there are many, what context should I use?
 21 MR MADLANGA SC: Do you have a copy of
 22 the presentation, exhibit L there, General?
 23 GENERAL PHIYEGA: Yes, I have.
 24 MR MADLANGA SC: Before I go there, or
 25 before I take you there, let me ask this question.

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1 General, you repeatedly say that the commanders, your
 2 commanders are the people best placed to respond to my
 3 questions. You yourself have said that this was not only a
 4 tragedy, but that it is one that was unprecedented, not so?
 5 And in this regard I refer you to paragraph 4 of your
 6 statement. I hope there is no difference in the contents
 7 of that paragraph. Do you want to look at that?
 8 GENERAL PHIYEGA: You are correct.
 9 MR MADLANGA SC: It must have been quite
 10 crucial, if not important, for you to establish for
 11 yourself as the National Commissioner of the South African
 12 Police, what actually happened at Marikana. Is that not
 13 so?
 14 GENERAL PHIYEGA: Yes, and I have
 15 established and that is the statement I gave on the 17th.
 16 MR MADLANGA SC: From the responses that
 17 you give, the distinct impression I get, National
 18 Commissioner, is that you do not have any detail at all on
 19 what actually happened. What is your comment to that?
 20 MR SEMENYA SC: That proposition –
 21 MR MADLANGA SC: What is your comment?
 22 MR SEMENYA SC: No, Chair, that
 23 proposition cannot be correct -
 24 CHAIRPERSON: He's putting his impression
 25 and he's asking whether she agrees. I think there's

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1 nothing wrong with that.
 2 MR SEMENYA SC: Any detail, Chair.
 3 CHAIRPERSON: He's putting that's his
 4 impression. If she doesn't agree, she can say so. If she
 5 does agree, she can also say so. It may not be an
 6 impression that you have, it may not be the correct one,
 7 but any way, let her comment.
 8 MR MADLANGA SC: My learned friend seems
 9 to quarrel with "any." Let me excise "any" from what I
 10 said.
 11 CHAIRPERSON: Maybe "any detail" is too
 12 wide. Perhaps something like "finer detail" would be a
 13 more accurate way of stating your impression, if that is
 14 your impression.
 15 MR MADLANGA SC: Thank you, Mr Chair.
 16 CHAIRPERSON: She can comment as to
 17 whether that's an impression which is justified.
 18 MR MADLANGA SC: Thank you. Thank you.
 19 Perhaps let me do it this way. Let me take you back to
 20 page 2 of exhibit FFF5, the press statement. You remember
 21 that in response to a question that I asked, you were not
 22 in a position to tell me whether what you say in the
 23 penultimate paragraph of page 2 happened at scene 2 or not?
 24 You remember that?
 25 GENERAL PHIYEGA: I remember that.

<p style="text-align: right;">Page 6907</p> <p>1 MR MADLANGA SC: And do you remember that 2 either in response to that question or some other question 3 that sought to elicit detail from you, you said that you 4 are not in a position to answer that question and that your 5 commanders are best suited or placed to answer? 6 GENERAL PHIYEGA: Yes, I did say so. 7 MR MADLANGA SC: And do you remember that 8 you gave that same response when I asked you whether you 9 would accept, based on facts that I put to you and 10 suggested that cumulatively they suggest that there must 11 have been a large number of police officers who fired 12 shots, do you remember that in response to that question as 13 well you said that it is your commanders who are best 14 placed to respond to that question? 15 GENERAL PHIYEGA: I'm not sure whether my 16 response to you to say when we say large, in which context, 17 because you were talking to your colleague. I didn't, and 18 then you were going to go to the, to this thing, because I 19 started asking when we talk about large police and those 20 finer details, I asked in what context are we saying large. 21 MR MADLANGA SC: Please bear with me, Mr 22 Chairman, Commissioners. And in response to a question 23 that is recorded by Ms Pillay as follows, "SAPS has 24 indicated to us, the evidence leaders, that police officers 25 fired in excess of 160 shots on the day," you said, "I am</p>	<p style="text-align: right;">Page 6909</p> <p>1 one sees that it's well over 500. That's essentially the 2 point you're making, and then if you look at the listing of 3 the various people who were there at the time, which is a 4 reference I gave earlier, which is, it really starts at 5 136, but in subsequent slides you get the number of TRT 6 people, NIU people, STF people, and so on, all of whom 7 obviously were armed, one can pretty clearly see that there 8 were several hundred armed policemen on the scene, able to 9 fire off sharp ammunition, and then when one looks at 10 slides 211 and 257 one sees that it was well over 500 11 bullets that were fired. That's the point, isn't it? I 12 think in fairness to the witness, if one gives her those 13 references she can see and then she should be able to give 14 an answer, certainly at this stage, based on the 15 information available. 16 MR MADLANGA SC: Thank you, Mr Chairman. 17 General, look at slide 212 in exhibit L. 18 MR MAHLANGU: Slide 212, Sir? 19 MR MADLANGA SC: 211. 2-1-1. Do you see 20 there that it's headed "Munitions expended at scene 1?" 21 You see that? 22 GENERAL PHIYEGA: Yes. 23 MR MADLANGA SC: And it gives the total 24 numbers of the police officers who fired the shots and 25 against TRT the slide gives the total 45. Do you see that?</p>
<p style="text-align: right;">Page 6908</p> <p>1 not able to put my finger on that. My commanders can 2 comment." Do you remember saying so? 3 CHAIRPERSON: I think that's not right, 4 Mr Madlanga. I think it's 160, at least, policemen fired 5 shots. The number of shots were substantially in excess of 6 that, as appears inter alia from slide 211 of exhibit L. 7 MR MADLANGA SC: That's where I was 8 referring the witness, thank you, when I said she must 9 please take out this. I was to refer her to slides 211 and 10 - 11 CHAIRPERSON: I'm sorry, another way to 12 do it - 13 MR MADLANGA SC: - and 257. 14 CHAIRPERSON: Another way to do it is to 15 look at the various groups that are summarised in slides, 16 it's effectively 138 and following, where one can see the 17 numbers of TRT members and NIU members and so on, all of 18 whom I take it were armed. 19 MR MADLANGA SC: Thank you, Mr Chairman, 20 but in any event, I'll step off that, Mr Chairman. 21 CHAIRPERSON: Maybe you should bring this 22 point to a conclusion. Seeing you're busy with slide 211 23 and 257, what they indicate is that well over 500 bullets 24 were fire, that 284 sharp point ammunition were expended at 25 scene 1 and 268 at scene 2. If one adds the two together,</p>	<p style="text-align: right;">Page 6910</p> <p>1 [12:34] GENERAL PHIYEGA: Yes, I do. 2 MR MADLANGA SC: And in the next entry, 3 Public Order Police, you see the total, 55. 4 GENERAL PHIYEGA: Yes, I do. 5 MR MADLANGA SC: And at the bottom 6 against total, in respect of sharp point ammunition there's 7 a total, 284. 8 GENERAL PHIYEGA: Yes, I see that. 9 MR MADLANGA SC: Now let us go to slide 10 257, and this slide is headed, "Munitions expended at scene 11 2." Against NIU there's a total 24 police officers, Dog 12 Unit, or K9, total of 13, 1-3, the TRT, 11, Public Order 13 Police, 15, 1-5, and then the total given in respect of 14 sharp point ammunition is 268. Do you see that? You see 15 all of that? 16 GENERAL PHIYEGA: Yes, I've seen it. 17 MR MADLANGA SC: And my question was, if 18 you look at that, but of course as I realise that as at the 19 time of the briefing you would probably not have known 20 these exact numbers that are being given here, can I just 21 take one step back and again try to put the proposition 22 that I put to you, which was that looking at - just a 23 minute. Please bear with me, Commissioners. Okay, looking 24 at the large number of people that were killed, 16 at scene 25 1, 18 at scene 2, in excess of 70 injured, and the fact</p>

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1 that as we know there was a large number of police that
 2 were armed with firearms, would you not accept, looking at
 3 those facts, or what I'm putting to you cumulatively, would
 4 you not have realised, at the time you received your
 5 briefing would you not have realised that there must have
 6 been a large number of police officers who fired shots at
 7 scenes 1 and 2 on the 16th of August?
 8 GENERAL PHIYEGA: If the 17th is the point
 9 of context, I would have known the number of police that
 10 were there in the operation, but on the morning of the 17th
 11 I would not have known the statistics that you're sharing
 12 with me now.
 13 MR MADLANGA SC: Please just repeat what
 14 it is that you say you would have known as at the 17th of
 15 August.
 16 GENERAL PHIYEGA: We would know that
 17 there were over 600 police that were in the Marikana
 18 operation.
 19 MR MADLANGA SC: And of them you had no
 20 idea how many fired shots?
 21 GENERAL PHIYEGA: On the morning of the
 22 17th the joint operation centre would still be calculating
 23 and taking statistics. I do not think that we would have
 24 had this finer finite detail.
 25 MR MADLANGA SC: And you had no idea what

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1 story or version each one of the police officers who fired
 2 shots would give, once they had been identified, did you?
 3 GENERAL PHIYEGA: Yes.
 4 MR MADLANGA SC: You also had no idea
 5 what story or version each and every one of the
 6 participants who were there and who witnessed the killings
 7 would give, did you?
 8 GENERAL PHIYEGA: I would know what the
 9 members of the joint operation centre would tell me, but
 10 when you talk about individuals, it's a different
 11 situation.
 12 MR MADLANGA SC: Are you saying that
 13 police at the joint operation centre would have known what
 14 version each and every one of the protesters who had
 15 witnessed the killings would give? Are you saying that the
 16 people at the JOC would know that?
 17 GENERAL PHIYEGA: No, I was understanding
 18 your question to say would they know what the police had
 19 done. If I misunderstood you about the protesters, they
 20 would not know.
 21 MR MADLANGA SC: And if the people at the
 22 JOC did not know that version, that is the version of the
 23 protesters, needless to say there is no way that you would
 24 know that version, not so?
 25 GENERAL PHIYEGA: Yes.

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1 MR MADLANGA SC: Do you, as you sit there
 2 now, do you know what the versions of the several
 3 protesters are? Do you know what those versions are, as of
 4 today?
 5 GENERAL PHIYEGA: Can you repeat your
 6 question?
 7 MR MADLANGA SC: Earlier I was asking you
 8 about the position as at the time of the briefings that you
 9 received on 16 and 17 August, and I was asking whether your
 10 commanders knew what the versions of each one of the
 11 protesters was regarding the killings, and you said not,
 12 and I then asked you whether you agreed that it was obvious
 13 that you yourself then would not have known what that
 14 version is, and still I was focussing at the 16th and 17th
 15 of August, and again you accepted that you would not have
 16 known that version. You accept that that is the evidence?
 17 GENERAL PHIYEGA: Maybe let me
 18 understand, are we talking about the versions of the
 19 protesters?
 20 MR MADLANGA SC: Yes, protesters. I
 21 started with the police, but now I've moved from the
 22 police, and police specifically, my last question or
 23 questions related to those who fired shots. I've moved
 24 from that and I'm now dealing with the versions of the
 25 protesters who witnessed the killings. Am I correct in

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1 saying that your evidence is that your commanders did not
 2 know as at 16 and 17 August what the versions of those
 3 protesters were?
 4 GENERAL PHIYEGA: I should not answer for
 5 those commanders. They would answer for themselves, but I
 6 did not know.
 7 MR MADLANGA SC: Did they suggest to you
 8 that they knew? That is, that they knew those versions.
 9 Did they suggest to you as at 16 and 17 August 2012?
 10 GENERAL PHIYEGA: No, they did not, and I
 11 did not ask them.
 12 MR MADLANGA SC: General, the distinct
 13 impression that I get – and this is what we will submit at
 14 the end of the Commission proceedings – is that you rushed
 15 to issue a press statement that absolved the South African
 16 Police Service from any wrongdoing, without having taken
 17 steps to consider possible opposing versions. You rushed
 18 headlong – I'm saying this with all due respect, but you
 19 rushed headlong and issued that statement in such
 20 circumstances. What's your comment to that?
 21 GENERAL PHIYEGA: I cannot vouch for, or
 22 dispute what you see as your judgment of this, but I shall
 23 say to you that I did not rush and what I did was based on
 24 the information given by my commanders who were in the JOC
 25 and on the ground, the bona fides of which I believed,

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1 unless I am proven otherwise I believed that and I made the
 2 statement on the basis of that.
 3 MR MADLANGA SC: And if there is evidence
 4 suggesting that the content of your press statement was in
 5 fact incorrect, will you accept that that is indeed so?
 6 That is, your press statement is not containing the true
 7 facts.
 8 GENERAL PHIYEGA: I would still say at
 9 the time when I did this, the bona fides of the information
 10 that I was given by the commanders that were out there.
 11 MR MADLANGA SC: General, I'm not
 12 quarrelling with the bona fides of the generals and
 13 commanders that briefed or updated you. The issue that I'm
 14 raising relates to you as the person who had to relay
 15 information not only to the nation, but to the world at
 16 large, as to what had happened at Marikana when 34 people
 17 were killed on 16 August 2012. That is what I am talking
 18 about. Bona fides aside, did you not think that on a
 19 matter of such gravity, unprecedented, as you call it, you
 20 should have taken time – I'm not saying take forever, but
 21 you should have taken time to consider what others that had
 22 knowledge of what had taken place had to say on the
 23 subject. Did you not consider that the proper course to
 24 take?
 25 GENERAL PHIYEGA: Our statement and the

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1 facts at hand were well considered and it was important for
 2 us from the South African Police Service to give an account
 3 as at the 17th of what we have observed had happened, and
 4 that is the statement we gave on the 17th.
 5 MR MADLANGA SC: Well considered, but
 6 based on information received by you from only two people
 7 that you know to have been at the scene of the killings,
 8 and the rest being people who might well not have been at
 9 the scene of the killings, and you say the information was
 10 well considered?
 11 GENERAL PHIYEGA: I'm on record saying
 12 the statement of the 17th is a collaborative product of the
 13 joint operation centre. The joint operation centre is a
 14 centre that was responsible for the entire operation, which
 15 involves everything that we as SAPS were doing in Marikana.
 16 [12:54] MR MADLANGA SC: Correct me if I'm wrong.
 17 In response to, not to my last question, but to the one
 18 before, you mentioned the 17th. The impression I got was
 19 that you were saying that as at 17 August 2012, what you
 20 said in your press statement was what the facts were, or
 21 what you understood the facts to be. I'm paraphrasing and
 22 I'm saying please correct me if I'm wrong.
 23 GENERAL PHIYEGA: Yes, I did say.
 24 MR MADLANGA SC: Is that a recognition of
 25 the possibility that post 17 August 2012 the picture might

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1 have changed, and you might have come to understand the
 2 position differently?
 3 GENERAL PHIYEGA: I would like you to ask
 4 that question again.
 5 MR MADLANGA SC: If you say that as at 17
 6 August 2012 you understood the true facts to be what you
 7 said in your press statement on 17 August 2012, is that
 8 suggestive of an acceptance that post 17 August 2012 the
 9 picture might well have changed, picture in the sense of
 10 your understanding of the facts?
 11 GENERAL PHIYEGA: I would prefer for
 12 those facts to be presented to me to be able to say whether
 13 I accept or I don't.
 14 MR MADLANGA SC: Must I take that to mean
 15 that you are saying even as of today, according to you, the
 16 facts, the true facts are exactly as you stated them in
 17 your press statement of 17 August 2012? Is that what you
 18 mean by your last answer?
 19 GENERAL PHIYEGA: I shall try again to
 20 answer the way you have asked me. You've asked me about
 21 the statement of the 17th. I have said you have asked me
 22 whether I have changed or I am still saying the statement
 23 of the 17th remains the same; I have answered that, and what
 24 I'm understanding you to say to me now, if there are new
 25 facts, would I still stand by my statement of the 17th, and

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1 I'm just saying if I'm presented with those then I will
 2 then be able to answer you appropriately.
 3 MR MADLANGA SC: It is more your own
 4 understanding of the facts that I am interested in,
 5 General.
 6 CHAIRPERSON: I think there may be a
 7 misunderstanding between the two of you. You are talking,
 8 as I understand you, about facts that haven't been
 9 disclosed to you previously, and you were saying that if
 10 new facts come to your attention now you may well say
 11 something about what you said on the 17th of August because
 12 it may have to be changed, but what Mr Madlanga is
 13 concerned with is not facts that you may learn about in the
 14 future later, but about facts that you have already learned
 15 about since the 17th. Is that correct? So what he's asking
 16 you, as I understand it, is have you become aware, or have
 17 you had drawn to your attention since you issued that
 18 statement on the 17th of August, facts which cast a
 19 different light upon what you said? Is that a fair summary
 20 of the question?
 21 MR MADLANGA SC: Yes, it is, Mr Chairman.
 22 May I perhaps just try to abbreviate it this way?
 23 Commissioner, I do realise that the press statement is
 24 shorn-off detail. That I realise, but broad as it may be,
 25 are you saying as of today the facts of what happened at

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1 Marikana are as you have represented them in your media
 2 statement? That is what I'm trying to get at.
 3 CHAIRPERSON: I don't think you can ask
 4 her that. You can ask her to her knowledge is that the
 5 position.
 6 MR MADLANGA SC: Yes, let's add that, Mr
 7 Chairman. Thanks, Chairman.
 8 GENERAL PHIYEGA: To the best of my
 9 knowledge and information, what I presented on the 17th were
 10 the facts.
 11 MR MADLANGA SC: And it is for that
 12 reason that in response to an earlier question you said
 13 that you are not moving an inch from what you said in your
 14 press statement; you are not qualifying it a bit. Is that
 15 the reason?
 16 GENERAL PHIYEGA: I responded to you to
 17 say if there are facts that are put forward to me, that
 18 would help me to respond to your question appositely
 19 because just now to say I am changing, based on what?
 20 MR MADLANGA SC: No, I'm not suggesting
 21 that you are changing, General, quite the opposite. I am
 22 saying you are actually not changing from what you said in
 23 your press statement because you are still of the view that
 24 on your own knowledge, based on your own knowledge, the
 25 facts remain the same, the same as they were stated in and

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1 contained in your press statement.
 2 GENERAL PHIYEGA: I'll try again. To the
 3 best of my knowledge and to the best of the information I
 4 was given there, the facts that were sitting in the
 5 statement were informed by that information, and that
 6 represents the facts as I understood them by the 17th.
 7 MR MADLANGA SC: And that understanding
 8 has never changed, remains the same today?
 9 GENERAL PHIYEGA: I have then said I
 10 would appreciate knowledge of new facts because that then
 11 would then say there are other facts that you didn't know
 12 on the 17th which are this and this, because then I would be
 13 able to respond appropriately.
 14 MR MADLANGA SC: No, General –
 15 GENERAL PHIYEGA: To say to you I accept
 16 and not accepting in a vacuum makes it difficult for me.
 17 MR MADLANGA SC: No, General, nothing
 18 takes us to any vacuum. I am asking you about your own
 19 knowledge. What I am debating with you is whether you say
 20 even as of today the knowledge that you had as at 17 August
 21 2012 remains the same. That is the question. It has
 22 nothing to do with possible new facts.
 23 GENERAL PHIYEGA: Let me say I have tried
 24 to answer this question to the best of my understanding.
 25 If I have missed that understanding, it means I'm failing

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1 to answer that.
 2 CHAIRPERSON: Can I put the question as I
 3 understand what Mr Madlanga is trying to convey to you? If
 4 I'm wrong, he'll correct me. Have you since the 17th of
 5 August had facts brought to your attention which cause you
 6 to think that what you said on the 17th was not accurate in
 7 some respects, and that you would not have said what you
 8 did say on the 17th if those facts had been brought to your
 9 attention? Has anything of that kind been brought to your
 10 attention between the 17th and now? That's your question,
 11 is it?
 12 MR MADLANGA SC: Exactly, and thank you
 13 very much, Mr Chairman.
 14 GENERAL PHIYEGA: I do stand by the
 15 statement that I gave by the 17th.
 16 CHAIRPERSON: So that's the answer, is
 17 it? I think it's appropriate for us to take the
 18 adjournment. Until when do you suggest we take the
 19 adjournment?
 20 MR MADLANGA SC: Can we just deal with
 21 this little statement which we handed up –
 22 CHAIRPERSON: You want to do it now?
 23 We'll have to bear that in mind when we fix the resumption
 24 time.
 25 MR MADLANGA SC: Yes, thank you very

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1 much. Thank you very much, Mr Chairman. I want to lay
 2 emphasis to –
 3 CHAIRPERSON: I take it this is FFF6, or
 4 it will be.
 5 MS PILLAY: Chair, it will be FFF7.
 6 CHAIRPERSON: What is FFF6?
 7 MS PILLAY: It's the tribute read at the
 8 funeral of Warrant-Officer Lepaaku.
 9 CHAIRPERSON: I see. Alright, thank you.
 10 MR MADLANGA SC: I will preface the
 11 questions that I'm going to ask by laying emphasis on what
 12 the Chairman said in articulating my last question. The
 13 Chairman referred to the issue of whether new facts ever
 14 came to your attention. You remember that?
 15 GENERAL PHIYEGA: Apologies. I was just
 16 looking for my paper.
 17 CHAIRPERSON: Has the witness got a copy
 18 of exhibit FFF7?
 19 MR MADLANGA SC: I'm advised so, Mr
 20 Chairman. Thank you.
 21 MR MAHLANGU: We do have it.
 22 MR MADLANGA SC: I was saying, General, I
 23 will preface the questions that I'm going to ask by making
 24 reference to a point that was made by the Chairman in
 25 articulating my last question. The Chairman referred to

<p style="text-align: right;">Page 6923</p> <p>1 the question whether any new facts had come to your 2 attention post 17 August 2012. You remember that? 3 GENERAL PHIYEGA: Yes, I do. 4 MR MADLANGA SC: Now before you, you have 5 the statement of Mr Hendrich Wouter Myburgh – the Hendrich 6 ends with a C-H – and he says that he was one of the police 7 officers that were posted at Marikana on 16 August 2012. 8 You see that? 9 GENERAL PHIYEGA: Mmm. 10 MR MADLANGA SC: And he is with the K9 11 Unit. You see that? 12 GENERAL PHIYEGA: I note that. 13 MR MADLANGA SC: And in the second 14 paragraph of paragraph 2 he says, “We were briefed by 15 Major-General Naidoo for our duties at the koppies, 16 searching for firearms and weapons, and as we approached 17 the scene at the koppies from the southern side, there were 18 miners shooting at us.” See that? “I emerged from the 19 vehicle and took cover behind the driver and passenger 20 doors as I moved to see clearly who is shooting at us.” 21 And then in paragraph 3 he says, “After most of the 22 shooting had stopped,” of course he says “has,” “I entered 23 into koppies searching for suspects to arrest. I found 24 about three injured people lying down and turned away from 25 them, searching for other suspects. I suddenly heard a</p>	<p style="text-align: right;">Page 6925</p> <p>1 just happened there? 2 GENERAL PHIYEGA: Not being a lawyer and 3 being asked these type of questions, and using things as 4 allegations, suggestions, it makes it very difficult for me 5 at a serious occasion like this when we are dealing with 6 such a very emotional and sensitive matter. I would be 7 very cautious to use the allegations to express my opinion. 8 MR MADLANGA SC: Do the allegations, even 9 at their lowest, do the allegations not tend to indicate 10 that the NIU constable might well have shot at one of the 11 injured protesters? 12 GENERAL PHIYEGA: I do not know. 13 MR MADLANGA SC: If allegations like 14 these were to be brought to your attention, would you not 15 consider that at the very least they warranted 16 investigation, if they were to be brought to your 17 attention? 18 GENERAL PHIYEGA: They would warrant an 19 investigation. 20 MR MADLANGA SC: Let us go to paragraph 4 21 – 22 CHAIRPERSON: - paragraph 5 on the second 23 page. 24 MR MADLANGA SC: Yes. 25 CHAIRPERSON: 5 at the foot of the first</p>
<p style="text-align: right;">Page 6924</p> <p>1 gunshot behind me. As I turned, I saw an NIU constable, 2 who is unknown to me, putting his side firearm in his leg 3 holster while he was standing next to the injured I first 4 met, was having a jersey wrapped around his arm. I asked 5 the NIU constable what is going on. He replied by saying, 6 ‘They deserve to die,’ and he moved away. I cannot 7 identify him facially and I could not read his surname on 8 his name tag.” Assuming the facts stated by Mr Myburgh to 9 be correct or true – 10 MR SEMENYA SC: Objection, Chair. 11 CHAIRPERSON: What was the objection? 12 MR SEMENYA SC: What appears in the 13 statement are allegations, are not facts. 14 CHAIRPERSON: Well he asked her to make 15 an assumption about them, but anyway, let him reformulate 16 the question to avoid your objection. Mr Madlanga, would 17 you like to rephrase your question so that Mr Semanya won’t 18 object – 19 [13:14] MR MADLANGA SC: Assuming the allegations 20 – thanks to Mr Semanya for the English lecture – assuming 21 the allegations contained in paragraph 3 of this statement 22 to be correct, I want to get an idea of the inference that 23 you draw from them. What, if anything, do you think the 24 NIU constable had done? Looking at those allegations in 25 their totality, what is your own inference as to what had</p>	<p style="text-align: right;">Page 6926</p> <p>1 page and the text of the paragraph – 2 MR MADLANGA SC: Yes, thank you. Thank 3 you. Thank you, Mr Chairman. Paragraph 5 at the top of 4 the next page, “On the same date, 1 October 2012, I once 5 again narrated the same story to Major-General Naidoo. 6 Major-General Naidoo was the second person I reported this 7 shooting incident to ever since it happened, whereafter 8 Lieutenant-General Mbombo and National Commissioner were 9 informed by myself as per an arrangement on 2 October 10 2012.” You see that? Is it correct that on 2 October 2012 11 Mr Myburgh informed you, or advised you of the allegations 12 contained in paragraph 3 of the statement? 13 GENERAL PHIYEGA: Yes, he did. 14 MR MADLANGA SC: And what did you do 15 about that? 16 GENERAL PHIYEGA: In the very paragraph 17 that you referred to, the earlier one where he was talking 18 about a person he could not identify, a person whose name 19 tag he didn’t know, we as SAPS were completely stunted and 20 could not do anything. If we wanted to understand, the 21 very person could not help us. 22 MR MADLANGA SC: Who is the “we?” 23 GENERAL PHIYEGA: In the paragraph that 24 you’ve read you mentioned General Mbombo, you mentioned 25 myself.</p>

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1 MR MADLANGA SC: You never referred the
2 matter to anybody else? It ended just with you? You in
3 plural.

4 GENERAL PHIYEGA: General Naidoo as the
5 commander, if there was anything emerging he would pursue
6 the matter because he's the commander of those people.

7 MR MADLANGA SC: Did you yourself
8 instruct anybody to do something about these allegations?

9 GENERAL PHIYEGA: I am saying General
10 Naidoo as the commander had to go, get to the bottom of
11 this matter, if there was anything.

12 CHAIRPERSON: The question is whether you
13 gave any instructions, not leaving it to Lieutenant-General
14 Naidoo to something if he felt like doing it or considered
15 it necessary, but did you yourself give any instructions?

16 GENERAL PHIYEGA: Judge, I am saying when
17 the matter was brought to us it was brought by a commander
18 who is in charge of people. In our engagement with the
19 commander we sought to understand the route and the merits
20 of the matter, and I also say the same problems that are
21 being stated in the statement, to say "I cannot identify
22 the person, I do not know the name," confronted us.

23 MR MADLANGA SC: General, I will use
24 something that you yourself did to try to get an answer to
25 this very same question. Do you remember the tampering

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1 with the scene at scene 2 in the sense that weapons were
2 moved from next to protesters who were lying on the ground
3 either dead or injured? Do you remember that there was
4 such tampering?

5 GENERAL PHIYEGA: Yes, I do.

6 MR MADLANGA SC: And do you remember that
7 once you were advised of this, you instituted an
8 investigation?

9 GENERAL PHIYEGA: Yes, I do.

10 MR MADLANGA SC: And you assigned it to
11 somebody quite senior, a major-general, was it Major-
12 General Johnson [inaudible].

13 GENERAL PHIYEGA: Yes, I did.

14 MR MADLANGA SC: Now what I'm trying to
15 understand, General, is this; I do not understand why you
16 would have wanted to leave this to the decision of General
17 Naidoo. Why is it that in respect of these allegations you
18 did not institute investigations?

19 GENERAL PHIYEGA: The important thing
20 that you're mentioning is that a major-general was engaged
21 to look into the scene that you allude to, and on this
22 matter that you're questioning me on, a major-general who
23 is responsible for that environment, if there was more
24 information coming out, would have assisted us in this
25 regard.

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1 CHAIRPERSON: Mr Madlanga, is this
2 perhaps an appropriate stage for which to take the
3 adjournment?

4 MR MADLANGA SC: Thank you very much.

5 CHAIRPERSON: Till when do you suggest we
6 adjourn? 2 o'clock?

7 MR MADLANGA SC: It's being whispered to
8 me that quarter past 2, Mr Chairman.

9 CHAIRPERSON: Very well. We will take
10 the adjournment until quarter past 2.

11 [COMMISSION ADJOURNS COMMISSION RESUMES]

12 [14:16] CHAIRPERSON: The Commission resumes.
13 National Commissioner, you're still under oath. Mr
14 Madlanga, do you have anymore questions?

15 MANGWASHI VICTORIA PHIYEGA: s.u.o.

16 CROSS-EXAMINATION BY MR MADLANGA SC (CONTD.):
17 Yes, Mr Chairman, thank you. Let me take you back to your
18 evidence to the effect that at the time you received your
19 briefing on 16 August 2012 you were aware that General
20 Naidoo had been on the ground at the scene of the killings.
21 Now the question that I want to ask you is this; the
22 response that you gave to my last question, are you
23 suggesting thereby that you were willing to leave the
24 decision on whether to investigate the allegations by Mr
25 Myburgh to somebody who had been at the scene during the

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1 shooting by the police officers?

2 MR HANABE: I didn't get the question.

3 MR MADLANGA SC: Perhaps let me take a
4 step back. Let me take a step back. I want to add
5 something that perhaps you may not be aware of, but if
6 you're aware of it you will tell us. I would like to refer
7 you – may I ask the indulgence of the Commissioners and
8 offer to present them with a copy of General Naidoo's
9 statement during the course of this afternoon still. I
10 unfortunately – but I will read –

11 CHAIRPERSON: It is an exhibit, is it
12 not?

13 MR MADLANGA SC: I do not think that it
14 is, Mr Chairman.

15 CHAIRPERSON: Well, there are so many
16 exhibits; I thought it was, but –

17 MR MADLANGA SC: Yes, I might be
18 mistaken.

19 MS PILLAY: Chair, it's exhibit DD. D
20 for donkey, D for donkey.

21 CHAIRPERSON: It is an exhibit?

22 MS PILLAY: Yes.

23 CHAIRPERSON: For a moment I thought that
24 I was losing it. I'm pleased to think that in this respect
25 at least I'm not.

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1 MR MADLANGA SC: Thank you. Thank you
 2 very much, Mr Chairman. Unfortunately the copy that I have
 3 does not have any page numbering. I will just count the
 4 pages, 1, 2, 3, 4, and bottom of page 4 and then to the top
 5 of page – no, no, no, bottom of page 5 to the top of page
 6 6 –
 7 CHAIRPERSON: Yes, it's more appropriate
 8 to talk of pages as having feet. It's more appropriate to
 9 speak of pages as having feet. We talk about a footnote on
 10 a page, not a bottom note. Are you going to make copies of
 11 the statement available to us in the course of the
 12 afternoon? But presumably you've given a copy already to
 13 the witness. Presumably we don't have to have copies yet,
 14 but if you want to question her about it, to be fair, she
 15 has to have a copy before her.
 16 MR MADLANGA SC: I apologise,
 17 Commissioner. Some of these things arise from the cross-
 18 examination. It is not matters that one had pre-planned.
 19 CHAIRPERSON: All I'm saying is you –
 20 MR MADLANGA SC: I understand. I
 21 understand.
 22 CHAIRPERSON: You can't cross-examine – I
 23 won't allow you to cross-examine the National Commissioner
 24 on the General Naidoo statement unless she has it in front
 25 of her.

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1 MR MADLANGA SC: I accept that fully,
 2 fully, and without any reservations. Thank you, Mr
 3 Chairman. General, in the version of –
 4 MR MPOFU: Sorry, Chairperson, can I just
 5 make an enquiry? The version of the statement that we have
 6 seems to have been faxed. Is that the one? So when you
 7 refer to the page numbers, is it the fax page numbers?
 8 MR MADLANGA SC: Thank you, I was exactly
 9 going to say that. Thank you, Mr Mpofo. My version does
 10 have fax page numbers and I am referring to page 5. I will
 11 now use the Latin, Mr Chairman, and say inferne, and then
 12 to the top of page 6. General, look at the very last line,
 13 there's the sentence that starts halfway through that line.
 14 Do you see that?
 15 GENERAL PHIYEGA: Uh-uh.
 16 MR MADLANGA SC: The very last line at
 17 page 5.
 18 GENERAL PHIYEGA: "In addition?"
 19 MR MADLANGA SC: "I instructed the
 20 personnel to form a line so that."
 21 GENERAL PHIYEGA: Okay, ja. That's it.
 22 MR MADLANGA SC: "I instructed the
 23 personnel to form a line so that we could continue to move
 24 forward in a sweeping action to clear the rocks, as the NIU
 25 had been before the shooting. Just as we moved forward

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1 towards the second line of rocks, we came under fire from
 2 the strikers to my left and the bullets narrowly missed me
 3 and struck the rocks around me. I immediately returned
 4 fire with two rounds from my pistol Z88," and so on, "at
 5 the individual I could see taking cover between rocks and
 6 trees, with a firearm in his hand. Several other members
 7 also returned fire in the direction of the shots, which
 8 immediately stopped. We later arrested two individuals in
 9 that area with firearms in their possession, one of whom
 10 admitted to firing on the police as they advanced." You
 11 see that?
 12 GENERAL PHIYEGA: Yes, I do.
 13 MR MADLANGA SC: At the time Mr Myburgh
 14 made the report that I earlier referred you to, at the time
 15 he made that report to you, did you even consider that
 16 General Naidoo, who was at the scene of the killing - you
 17 said you knew this – did you even consider that he might
 18 well have been involved in the shooting himself? Did that
 19 cross your mind at all? Did you even consider that?
 20 GENERAL PHIYEGA: I did not. I will be
 21 able to answer you if you ask me the question. No, at that
 22 point I didn't.
 23 MR MADLANGA SC: You are a senior in the
 24 police force. Yes, I realise what your experience is, but
 25 you are a commissioner.

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1 GENERAL PHIYEGA: Yes, I am.
 2 MR MADLANGA SC: I see that as quite
 3 basic. Somebody is there; you say that you knew he was
 4 there. Shooting by police took place, and he says he was
 5 at the scene when this happened. You knew it. You did not
 6 even consider that he might well have been part of the
 7 shooting.
 8 GENERAL PHIYEGA: Perhaps the way you're
 9 asking your question, you're confusing me, and maybe let me
 10 try and see whether I'm understanding you. You've
 11 presented to me the statement of Wouter. You asked me all
 12 those relevant questions to say did I investigate it or I
 13 did not investigate, and I said we engaged Wouter. The
 14 issue that is raised in the statement that he's not unable,
 15 he's not able to identify or to point at the person,
 16 continued to present to us. You then asked me whether I
 17 followed up to investigate, and I said the commanders that
 18 I had, had the responsibility to pursue this matter and
 19 those commanders would both be General Mbombo and General
 20 Naidoo, because in order of command General Mbombo remains
 21 fully responsible for the province and General Naidoo
 22 responds to him, and I'm sure when they come to testify
 23 they will be able to answer a number of these questions,
 24 and I have said before we parted I did engage Wouter, I did
 25 want to understand the issue.

<p style="text-align: right;">Page 6935</p> <p>1 CHAIRPERSON: Sorry, what do you mean by 2 saying you engaged Wouter? By Wouter you mean Myburgh? I 3 don't know what his rank is – 4 GENERAL PHIYEGA: Myburgh. 5 CHAIRPERSON: So I don't know what 6 Myburgh's rank is. Do we know? Is it not on the 7 statement? When you say "I engaged Myburgh," what do you 8 mean? Did you have an interview with him? Did you 9 question him yourself? 10 GENERAL PHIYEGA: The issue of Myburgh, 11 as stated in the statement under 4, on the same day, if I 12 may just – "On the same day, on 1st August – on 1st October 13 2012, I once again narrated the same story to Major-General 14 Naidoo. Major-General Naidoo was the second person I 15 reported this shooting incident to ever since it happened, 16 whereafter Lieutenant-General Mbombo and the National 17 Commissioner were informed by myself as per arrangement on 18 the 2nd of October." 19 CHAIRPERSON: Yes, I know that. I read 20 that, and you said you engaged him. 21 GENERAL PHIYEGA: Yes. 22 CHAIRPERSON: And what I want to know, 23 what did you mean by that word "engage?" Did you – 24 GENERAL PHIYEGA: What I'm – 25 CHAIRPERSON: Did you speak to him? Did</p>	<p style="text-align: right;">Page 6937</p> <p>1 GENERAL PHIYEGA: The focus of our 2 engagement was to say which police officer has done it, 3 because he was talking about a police officer. 4 CHAIRPERSON: No, no, I understand that, 5 and he couldn't identify the police officer. 6 GENERAL PHIYEGA: Yes. 7 CHAIRPERSON: But what I'm asking you, 8 isn't it reasonable to suppose that an experienced 9 detective who was put on to the case, might have been able 10 on the information which he had at his disposal, to 11 identify the police officer by ascertaining where precisely 12 the shooting had taken place, possibly identifying who the 13 deceased was, because he had a blanket, that kind of 14 information, which could have enabled an astute, 15 experienced detective to trace the identity of the NIU 16 member, even though the warrant-officer was not able to 17 identify him? Isn't that a fair assumption? 18 GENERAL PHIYEGA: I would agree that it 19 could well have been possible. 20 CHAIRPERSON: The next question you were 21 asked is did you yourself give instruction as to anybody to 22 investigate the case further? 23 GENERAL PHIYEGA: General Mbombo and 24 General Naidoo had to look into this matter. I, and I may 25 say that one of the results was this very statement.</p>
<p style="text-align: right;">Page 6936</p> <p>1 you have a face to face interview with him? What form did 2 the engagement take? 3 GENERAL PHIYEGA: Yes, both myself, 4 General Mbombo, and General Naidoo, engaged Warrant- 5 Officer, the warrant-officer, asked questions about this 6 very shooting that he's talking about, and we wanted to 7 know who this person is so that we can understand the facts 8 that were being presented to us as per this allegation, and 9 again he wasn't able to say to us, he said he could not 10 point the person, he does not know the person, he hasn't 11 seen the name tag. 12 CHAIRPERSON: Yes, so you say you asked 13 him questions. Did you have a face to face interview with 14 him? 15 GENERAL PHIYEGA: Yes. 16 CHAIRPERSON: Now even though he couldn't 17 identify the face, he didn't recognise the face of the NIU 18 member and he didn't make out his name tag, presumably 19 there were circumstances which could have been investigated 20 in an endeavour to identify the person? You know there 21 was, the body was at a particular spot, which he could be 22 asked to point out. The deceased had a blanket. There 23 were a number of clues that could have been followed up in 24 an attempt to identify this person. Do you know whether 25 any attempt was made to follow up those clues?</p>	<p style="text-align: right;">Page 6938</p> <p>1 CHAIRPERSON: Did you instruct them to do 2 so, or did you just leave it to their discretion to do so? 3 GENERAL PHIYEGA: I did. 4 CHAIRPERSON: What? I put a double 5 question. Did you instruct them, or did you leave it to 6 their discretion to do so? 7 GENERAL PHIYEGA: Yes, I asked them to 8 look into this matter. 9 CHAIRPERSON: You asked them to look into 10 it? 11 GENERAL PHIYEGA: Yes. 12 CHAIRPERSON: Now what Mr Madlanga asks 13 you is of course more serious. He suggests that in the 14 light of the passage he read you from Lieutenant-General 15 Naidoo's statement, that Lieutenant-General Naidoo might 16 have had a motive not to have the matter investigated, 17 either, as Mr Madlanga suggests, because he was involved in 18 the shooting, or possibly because even if he wasn't 19 involved in the shooting, he was aware of it at the time 20 and had taken no steps to see that the offender was brought 21 to book, so Lieutenant-General Naidoo was an inappropriate 22 person to even request to investigate the matter in the 23 light of the background which has been sketched to you. 24 Have you any comment on that? 25 MR SEMENYA SC: Chair, speaking for</p>

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1 myself, I did not understand Mr Madlanga to be meaning –
 2 CHAIRPERSON: No, no, Mr Madlanga only
 3 referred to he was involved in the shooting and the idea of
 4 a motive came from me and I prefaced it by the word
 5 “possibly,” but whether Mr Madlanga asked the question or
 6 not, it’s one which I think the witness should be
 7 encouraged to answer.

8 MR SEMENYA SC: Can I complete that,
 9 Chair? The concern that I have, I understand that General
 10 Naidoo would have been involved in the shooting, i.e. he
 11 shot, not that he was involved in the shooting which is
 12 described by Mr Myburgh.

13 CHAIRPERSON: Those are all questions
 14 that the witness can deal with, but even if he wasn’t
 15 involved physically in shooting, if he was accompanying the
 16 person who did and approved his behaviour, it might be a
 17 form of involvement. Alternatively, even if he wasn’t
 18 involved in the shooting, if he was present and saw it and
 19 took no steps to bring the offender to book, that would
 20 also be a motive for him not to investigate further –

21 MR SEMENYA SC: But those are –

22 CHAIRPERSON: So the question I think is,
 23 even though it is my own question, I think is an
 24 appropriate question and I suggest that we give the witness
 25 a chance to answer it.

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1 handed over to IPID.

2 MR MADLANGA SC: If you say that it is
 3 not your statement or evidence that it was near impossible
 4 for this matter to be investigated, why then did you even
 5 bother to tell this Commission about the fact that you had
 6 not been given detail identifying the persons concerned?
 7 Of what relevance was that to the questions that I was
 8 asking you?

9 GENERAL PHIYEGA: May I ask you to repeat
 10 your question?

11 MR MADLANGA SC: Not so long ago, perhaps
 12 in response to one or two questions earlier, or just before
 13 now, you said that it is not your evidence that it was near
 14 impossible to investigate this matter. Do you remember
 15 saying so?

16 GENERAL PHIYEGA: Yes.

17 MR MADLANGA SC: You spoke at the same
 18 time with Mr Hanabe. Can you please repeat your response?
 19 There may be problems with the transcription.

20 GENERAL PHIYEGA: Am I asking you to –

21 MR MADLANGA SC: No, no, no, will you
 22 just repeat the answer, the last answer you gave? You
 23 spoke at the same time with Mr Hanabe next to you and there
 24 may be problems with the transcription.

25 GENERAL PHIYEGA: Maybe I missed the

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1 [14:36] GENERAL PHIYEGA: The person who brings
 2 this to my attention and the attention of General Mbombo is
 3 first and foremost Major-General Naidoo. We request Major-
 4 General Naidoo to then bring the warrant-officer to talk to
 5 us. We ask the questions we asked, and we still find that
 6 he is saying “I cannot point at the police who did it, I
 7 don’t know his name,” and this is when I ask General Mbombo
 8 and General Naidoo to further look into this matter, and it
 9 is that process that even produces the very statement that
 10 we are discussing, because there wasn’t a statement.

11 MR MADLANGA SC: And from that statement
 12 and the interaction you had with Mr Myburgh, you came to
 13 the conclusion that because he could not give you the
 14 identities of the people concerned, this was near
 15 impossible to investigate?

16 GENERAL PHIYEGA: It is not my statement
 17 that it was near impossible to investigate. I said I had
 18 asked General Mbombo and General Naidoo to pursue this
 19 thing, and I think this is how it even lands with the IPID.

20 MR MADLANGA SC: When did you leave it to
 21 them to follow up? Was it after you had received Mr
 22 Myburgh’s statement?

23 GENERAL PHIYEGA: On the day it was
 24 reported to me, and the progress I was given was that a
 25 statement was made, and also that that statement has been

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1 answer again.

2 MR MADLANGA SC: You do remember saying
 3 that it is not your evidence that it was near impossible to
 4 investigate this matter. You remember saying so?

5 GENERAL PHIYEGA: Yes.

6 MR MADLANGA SC: Now what my question is,
 7 is of what relevance was your evidence to the effect that
 8 Mr Myburgh could not give you details on the identity of
 9 the shooter? Of what relevance was that, if what you
 10 intended was not that it was near impossible for the police
 11 to investigate this matter?

12 GENERAL PHIYEGA: The context of the
 13 first aspect of your question was that when we engaged
 14 Warrant-Officer, the warrant-officer, he indicated that he
 15 did not know the name, could not identify the person. That
 16 was the first context of the relevance. The second aspect,
 17 I have responded to you, indicating that I had requested
 18 the commanders to continue looking into this matter. The
 19 third aspect is that there was even an outcome of that
 20 because I’m seeing even the statement was part of the
 21 request that the commanders that I’ve said now and even
 22 earlier, what they did to, further on, it did, it still did
 23 not solve who the person was and what was that. The
 24 relevance was for them to look into this matter, and I was
 25 also, I’ve also responded to you when you were saying, you

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1 were comparing this with the other matter that you
2 presented to me.

3 MR MADLANGA SC: You have made mention of
4 IPID. Do you have a record of an IPID docket in respect of
5 this matter? I'm not suggesting there isn't, but this is
6 information that perhaps may be important or relevant for
7 completeness on this subject.

8 GENERAL PHIYEGA: No, we don't keep those
9 because we are being the police.

10 MR MADLANGA SC: I know that very well.
11 I know that very well. All I'm asking is this; do you
12 know, do you know whether or not there is such a docket, an
13 IPID docket?

14 GENERAL PHIYEGA: No, I don't, but I'm
15 hoping that the response I was given by General Mbombo that
16 this statement was submitted to IPID, that they had pursued
17 the matter.

18 MR MADLANGA SC: May I refer you to a
19 document that I believe has been placed in front of you,
20 it's a spreadsheet with several columns. At the top in a
21 horizontal column it has scene 2, and then in vertical
22 columns there's rounds fired, there's firearms, rounds
23 fired, cartridges found, and then number, Persal, rank,
24 initials, name, and then below that there are people's
25 names and a whole lot more information. Do you have that

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1 in front of you?

2 CHAIRPERSON: [Inaudible]

3 MR HANABE: Sorry, Chairperson.

4 CHAIRPERSON: FFF8.

5 MR MADLANGA SC: Thank you. Thank you,
6 Mr Chairman.

7 CHAIRPERSON: How do we describe the
8 exhibit? This is an analysis of cartridge cases found, and
9 that's also names as well –

10 MR MADLANGA SC: It's an analysis of
11 shots fired and cartridge cases –

12 CHAIRPERSON: Analysis of shots fired,
13 etcetera, at scene 2.

14 MR MADLANGA SC: At scene 2, yes. Yes,
15 and it's the latest version that was furnished to us, the
16 evidence leaders, by SAPS itself, Mr Chairman, and it
17 purports to be SAPS' own analysis of the situation
18 reflected thereon. Take your time, General –

19 CHAIRPERSON: It doesn't seem to tell us
20 whether the people were – or does it? Does it tell us
21 where the people came from? Oh, it does. All the NIU
22 people are on the first page. Is that right?

23 MR MADLANGA SC: Yes.

24 CHAIRPERSON: And the top of the second
25 page.

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1 MR MADLANGA SC: Yes, Mr Chairman.

2 CHAIRPERSON: So if there's any substance
3 in what Mr Myburgh said, one of the people listed there
4 will be the person who [inaudible].

5 MR MADLANGA SC: No, Mr Chairman, no, no,
6 the second page is not NIU, it's TRT Pretoria.

7 CHAIRPERSON: It's just from the top to
8 the foot of the first page.

9 MR MADLANGA SC: Yes, yes, first page top
10 to the foot –

11 CHAIRPERSON: And that's all the NIU
12 people at scene 2 –

13 MR MADLANGA SC: Yes, yes.

14 CHAIRPERSON: - who fired.

15 MR MADLANGA SC: Yes.

16 CHAIRPERSON: I see. So if Mr Myburgh is
17 right, if Warrant-Officer Myburgh is right, the person whom
18 he's referring to is listed there, although we don't know
19 who he is.

20 MR MADLANGA SC: We would expect him to
21 be, or he must be there, Mr Chairman, yes. Now and also,
22 Mr Chairman, of importance, Mr Myburgh's statement refers
23 to the firearm being put back in the leg holster. So it
24 must be a 9mm firearm.

25 CHAIRPERSON: I see there are only four

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1 NIU members with 9mm firearms.

2 MR MADLANGA SC: That's the next point I
3 was getting to. Now General, if you run your eyes through
4 this, and do you confirm that there are only four NIU
5 members who fired 9mm pistols, and their names appear
6 against numbers 3, 6, 7, 23. Have I given all? Yes. Do
7 you see that?

8 GENERAL PHIYEGA: I really cannot – I
9 see, 3, 6, 7, 8, but the question you are asking me, I'm
10 not the right person to answer it.

11 MR MADLANGA SC: General Phiyega, I am
12 not asking you whether for a fact, whether you know for a
13 fact that on the day - and you know this yourself – on the
14 day these four people fired shots there. What I'm asking
15 you is, do you see that this record which we have been
16 furnished by SAPS itself says that of the NIU members who
17 fired shots at scene 2, only four fired shots from 9mm
18 pistols? Do you see that this is what this document
19 reflects? That is my question.

20 GENERAL PHIYEGA: I would still say to
21 you, you gave me this document two minutes ago. I need
22 time to look at it and I want you to walk me through what
23 you say is NIU and four. If you want me just to look at
24 numbers and you're not looking for an interpretation, it's
25 a different story.

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1 CHAIRPERSON: I don't think we can expect
 2 an interpretation from the National Commissioner. To be
 3 fair, I don't think we can expect the National Commissioner
 4 to interpret the document for us, but you can draw her
 5 attention to the entries that you consider relevant and
 6 point out to her that it looks as if there were only two
 7 constables from the NIU who were on the scene who fired 9mm
 8 bullets. So if it was a constable who fired a 9mm bullet,
 9 then it's not so difficult to investigate the case as, I
 10 think to be fair to her, she was led to believe.

11 MR MADLANGA SC: Just to conclude this,
 12 General, much as you're not in a position to interpret the
 13 document, I will suggest to you - as the Chairman has
 14 already taken you to the point, and that is exactly what I
 15 was leading to - I will suggest to you that if you look at
 16 number 3, there it is, the Persal number is given. Do you
 17 see that?

18 GENERAL PHIYEGA: Yes, I do.

19 MR MADLANGA SC: Then you also see under
 20 rank, do you see the column marked "Rank?"

21 GENERAL PHIYEGA: Yes, I do.

22 MR MADLANGA SC: And go down again, still
 23 against the number 3, do you see that the rank is given as
 24 constable? CST, and I assume that means constable.

25 GENERAL PHIYEGA: Yes, I see that.

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1 MR MADLANGA SC: And then go back to the
 2 top again, the top of the document, and you will see there,
 3 there is 9mm, there's R5, there's shotguns, then there is
 4 R5 to the right of the 9mm. Or do you see the 9mm there?

5 GENERAL PHIYEGA: Yes, I do.

6 MR MADLANGA SC: And above that, that is
 7 where the 9mm is. Do you see that it says "rounds fired?"

8 GENERAL PHIYEGA: I see.

9 MR MADLANGA SC: Now go down again in a
 10 straight line, vertically, that is, from 9mm, so as to see
 11 what this document says about rounds fired, 9mm rounds
 12 fired. Go down to number 3. Now just to make sure that
 13 you do indeed understand this, can you give me the number
 14 yourself now? Against 3, number 3, how many rounds of 9mm,
 15 how many rounds are said to have been fired by Constable
 16 Halam with a 9mm pistol?

17 GENERAL PHIYEGA: There are three.

18 MR MADLANGA SC: There are three. Now
 19 I'm sure now that you do follow the document, General.

20 GENERAL PHIYEGA: I will crawl along with
 21 you.

22 MR MADLANGA SC: Yes. Now let us look
 23 for another constable, and against his name look under 9mm
 24 rounds fired. The next constable I see with 9mm rounds
 25 fired is number 23. Do you see that?

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1 GENERAL PHIYEGA: Yes, I see 23.

2 MR MADLANGA SC: And that is Constable
 3 Thafeni.

4 GENERAL PHIYEGA: Correct.

5 MR MADLANGA SC: And he is said to have
 6 fired two rounds with a 9mm pistol.

7 GENERAL PHIYEGA: Yes, I'm walking now.

8 MR MADLANGA SC: And I see no other
 9 constable who is reflected as having fired rounds from a
 10 9mm pistol. Do you see any other?

11 GENERAL PHIYEGA: The two you mentioned,
 12 I've seen. Probably there isn't, because you've had an
 13 opportunity of perusing this document.

14 [14:56] MR MADLANGA SC: Would you accept that
 15 based on what I've just done now - and to use your
 16 language, walking you through - do you accept that it would
 17 have been a matter of relative ease for these two
 18 constables to be brought to Mr Myburgh in order to see if
 19 he would be able to identify them? But of course, a proper
 20 -

21 CHAIRPERSON: It would be sensible -

22 MR MADLANGA SC: A proper identification
 23 parade might have had to be done, but do you accept that it
 24 would have been a matter of relative ease for them to be
 25 picked out and to be part of an identification parade?

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1 GENERAL PHIYEGA: It could have been,
 2 depending on what time the facts are presenting, and I'm
 3 hoping that those that I've asked to investigate can answer
 4 these questions that you are posing.

5 MR MADLANGA SC: Commissioner, I'm asking
 6 this of you.

7 GENERAL PHIYEGA: I have answered to say
 8 it could have been.

9 MR MADLANGA SC: Maybe I got confused by
 10 the long addition after the "it could have been." Thank
 11 you. Thank you very much, General. General, the next
 12 question I'm going to ask refers back to what you said in
 13 the media statement, which is that the police shot at the
 14 protesters in self defence. That is what I am referring
 15 back to, and that is what the context of my next question
 16 is. It is not so much that you should anticipate what the
 17 findings of this Commission should be. So that is not what
 18 I'm asking you. It will be in the context of what you
 19 yourself have said. Do you understand that?

20 GENERAL PHIYEGA: Mmm.

21 MR MADLANGA SC: If this Commission were
 22 to ultimately draw an inference that the constable that Mr
 23 Myburgh saw putting back a firearm into the side or leg
 24 holster, had in fact shot at one of the injured people who
 25 were lying on the ground, would you still continue to hold

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1 the view that in respect of all the people that the police
2 fired shots at, they did so in self defence? Would you say
3 that even in respect of such a shot if this Commission were
4 to find it finally in fair that Mr Myburgh, or rather, in
5 fair from Mr Myburgh's evidence, that the constable had
6 fired a shot at a person lying on the ground?

7 GENERAL PHIYEGA: I'm consistent in my
8 view that given the sensitivity, the gravity of this matter
9 and what it means to all of us, I would be very, very
10 cautious to answer such a question on presuppositions. I
11 would answer when I have the real facts. To say it's
12 hypothetical, I find it difficult to say I would change on
13 the basis of a hypothesis.

14 MR MADLANGA SC: I am not asking you to
15 hypothesise. There was a conscious choice of words on my
16 part, and I said if ultimately – and I'm not asking you to
17 hypothesise – if ultimately this Commission were to infer
18 from what Mr Myburgh says that the unidentified constable
19 in fact fired a firearm at a protester who was lying
20 injured on the ground, would you still say, would you still
21 say that the firing of such a shot was in self defence?

22 MR SEMENYA SC: Chair, the witness has
23 answered that question. It is predicated on a hypothesis
24 of a finding by the Commission and the witness says it's
25 too grave a matter on which I will offer an opinion on a

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1 hypothesis. It might not be an answer we want, but that's
2 an answer.

3 MR MADLANGA SC: I've never known it, Mr
4 Chairman, that I'm not entitled to try to probe questions
5 further, unless –

6 CHAIRPERSON: But it is a hypothetical
7 question. I'm not sure that the fact that it's a
8 hypothetical question is the reason why a witness can
9 refuse to answer it, but if a witness does decline to
10 answer it and gives that reason, the very declension can
11 lead to inferences being drawn at a later stage. I don't
12 know that one need take it further at this stage. The
13 witness will be aware of the fact that inferences maybe
14 drawn in the case of questions that she declines to answer.

15 MR SEMENYA SC: No, but Chair, with
16 respect, the witness has answered.

17 CHAIRPERSON: She said it's a very grave
18 matter and in the circumstances it wouldn't be appropriate
19 for her to answer. That's a declension in any language,
20 but Mr Bizos, you've got a point as well?

21 MR BIZOS SC: I merely want to support my
22 learned –

23 CHAIRPERSON: - microphone on.

24 MR BIZOS SC: I want to support my
25 learned friend, because my learned friend on my right has

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1 persistently objected to any hypothetical question.
2 Putting hypothetical questions to educated people who
3 understand the nature of a hypothetical question is a very
4 regular form of cross-examination.

5 CHAIRPERSON: I'm aware of that, but if a
6 witness –

7 MR BIZOS SC: With respect, Mr Chairman,
8 to support the witness every time a hypothetical question
9 is that "I do not want to do that," I want to draw to the
10 Commission's attention and to the counsel and to the
11 witness that we are going to argue that this is a
12 deliberate attempt for people to persist in their
13 statements and the correctness of the statements that they
14 have already made and they are not prepared to answer
15 questions on the hypothesis that the court finds, and it
16 impedes proper cross-examination. I can understand that
17 the Commission would want a semi-literate person to be
18 protected, but not a witness such as the one that is in the
19 witness box now.

20 CHAIRPERSON: Thank you. Mr Madlanga, do
21 you wish to add anything?

22 MR MADLANGA SC: I agree fully with what
23 Mr Bizos is saying, Mr Chairman.

24 CHAIRPERSON: The witness has given a
25 reason why she declines to answer this hypothetical

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1 question, which may or may not be a good reason. I don't
2 think there's any point in pressing her on this particular
3 issue. As I said, a declension by a witness to answer a
4 question, albeit a hypothetical one, may in appropriate
5 circumstances lead to an inference being drawn against her.
6 If she's prepared to take that chance, that's her choice.
7 Would you like to proceed to your next question?

8 MR MADLANGA SC: Thank you. General, I
9 will now take you back to a paragraph of your media
10 statement that I referred you to, and that is the
11 penultimate paragraph of page 2 of the media statement. In
12 this paragraph you say the following, "The dispersion
13 action had commenced at this and the armed protesters were
14 driven from their stronghold to a high bushy ground in the
15 close vicinity." I suggested to you earlier that this
16 related to scene 2 and you said that you do not know.
17 Remember?

18 GENERAL PHIYEGA: Yes, I did.

19 MR MADLANGA SC: The statement goes on
20 and says, "The police members encircled the area and
21 attempted to force the protesters out by means of water
22 cannons, rubber bullets, and stun grenades." You see that?

23 GENERAL PHIYEGA: Yes, I do.

24 MR MADLANGA SC: You remember that in
25 response to one of my earlier questions you said that you

<p style="text-align: right;">Page 6955</p> <p>1 did read the SAPS presentation?</p> <p>2 GENERAL PHIYEGA: Yes.</p> <p>3 MR MADLANGA SC: And you were aware that</p> <p>4 that presentation so to speak charts the path or course</p> <p>5 that SAPS proposed to follow by way of the evidence it</p> <p>6 would present before this Commission. Was that your</p> <p>7 understanding of the presentation?</p> <p>8 GENERAL PHIYEGA: It is my understanding.</p> <p>9 MR MADLANGA SC: And without doubt</p> <p>10 therefore this would have been a very important document,</p> <p>11 not so?</p> <p>12 GENERAL PHIYEGA: Which document? The</p> <p>13 statement or the presentation?</p> <p>14 MR MADLANGA SC: No, no, the</p> <p>15 presentation. The presentation.</p> <p>16 GENERAL PHIYEGA: Yes, it is true.</p> <p>17 MR MADLANGA SC: And as such, General, I</p> <p>18 take it that it is not a document that you would read</p> <p>19 perfunctorily. It's a document that you would read with a</p> <p>20 view to following the contents, not so?</p> <p>21 GENERAL PHIYEGA: Yes, it is true.</p> <p>22 MR MADLANGA SC: And you did indeed also</p> <p>23 not read it perfunctorily; you read it in order to</p> <p>24 understand the contents, not so?</p> <p>25 GENERAL PHIYEGA: I sought to do so.</p>	<p style="text-align: right;">Page 6957</p> <p>1 it could be.</p> <p>2 MR MADLANGA SC: But on the language use,</p> <p>3 SAPS itself in the presentation – or just a minute.</p> <p>4 Commissioner, just to make sure that I understand your</p> <p>5 answer, do you accept that the presentation itself is</p> <p>6 replete with reference to scene 1 and scene 2? Do you</p> <p>7 accept that?</p> <p>8 GENERAL PHIYEGA: Yes, I do, but I also</p> <p>9 want to say we have developed over the journeys that we</p> <p>10 have travelled, language, it's been an evolving language.</p> <p>11 We define things to achieve commonality. Issues of scene</p> <p>12 2, scene 1, we've migrated as a community of this</p> <p>13 Commission to build a language, and this is why I say yes,</p> <p>14 it could be, based on the fact that I'm mentioning that it</p> <p>15 has been a process of developing a common understanding and</p> <p>16 bringing common definitions and common wording.</p> <p>17 MR MADLANGA SC: Which then, to use the</p> <p>18 word that you use, could mean that what you are referring</p> <p>19 to in the penultimate paragraph of your statement, are</p> <p>20 indeed – rather the media statement, are indeed events that</p> <p>21 took place at scene 2. So you accept that? Or again you</p> <p>22 at the very least say, could be.</p> <p>23 GENERAL PHIYEGA: If I may be allowed</p> <p>24 just to read that paragraph so that I can answer you.</p> <p>25 MR MADLANGA SC: And perhaps you may also</p>
<p style="text-align: right;">Page 6956</p> <p>1 MR MADLANGA SC: No, no, no, I want to</p> <p>2 make sure that we are still walking together, so to speak,</p> <p>3 General.</p> <p>4 GENERAL PHIYEGA: Yes.</p> <p>5 MR MADLANGA SC: Now you say you sought</p> <p>6 to do so.</p> <p>7 GENERAL PHIYEGA: Mmm.</p> <p>8 MR MADLANGA SC: I want to know whether</p> <p>9 you in fact did so, whether you yourself read, in order to</p> <p>10 you yourself understand.</p> <p>11 GENERAL PHIYEGA: I did try to read to</p> <p>12 understand.</p> <p>13 MR MADLANGA SC: Now in that reading, and</p> <p>14 reading with a view to understanding, would you agree with</p> <p>15 me that the one bushy area that the police encircled during</p> <p>16 the operation was scene 2?</p> <p>17 GENERAL PHIYEGA: Yes, it could be.</p> <p>18 MR MADLANGA SC: I'm not sure I</p> <p>19 understand the "yes, it could be." What do you mean by</p> <p>20 that?</p> <p>21 GENERAL PHIYEGA: I am saying yes, it</p> <p>22 could be, because I'm also starting from the fundamental</p> <p>23 that by the time the statement was done we did not have a</p> <p>24 scene 1 and a scene 2 and a what and a what. So I think,</p> <p>25 I'm actually saying I accommodate that, and I'm saying yes,</p>	<p style="text-align: right;">Page 6958</p> <p>1 have to read the paragraph before that.</p> <p>2 GENERAL PHIYEGA: I'll read it –</p> <p>3 CHAIRPERSON: Perhaps, it's quarter past</p> <p>4 3. When is it appropriate that we can take the tea break?</p> <p>5 MR MADLANGA SC: It is appropriate now,</p> <p>6 Mr Chairman.</p> <p>7 CHAIRPERSON: It may help the witness to</p> <p>8 give her a chance to read this –</p> <p>9 MR MADLANGA SC: Yes.</p> <p>10 CHAIRPERSON: - during the adjournment.</p> <p>11 If that can –</p> <p>12 MR MADLANGA SC: Yes, Mr Chairman.</p> <p>13 CHAIRPERSON: Very well, we'll take the</p> <p>14 tea adjournment at this stage.</p> <p>15 [COMMISSION ADJOURNS COMMISSION RESUMES]</p> <p>16 [15:33] CHAIRPERSON: The Commission resumes.</p> <p>17 National Commissioner, you're still under oath.</p> <p>18 MANGWASHI VICTORIA PHIYEGA: Yes.</p> <p>19 CHAIRPERSON: Mr Madlanga?</p> <p>20 MR MADLANGA SC: Mr Mpofo has just</p> <p>21 signalled to me, Mr Chairman.</p> <p>22 MR MPOFU: Yes, thank you, Chairman, just</p> <p>23 before we – so that we don't interrupt, there is a small</p> <p>24 matter that we'd like to dispose of concerned the</p> <p>25 subpoenaed people. Chair, you'll remember that they had</p>

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1 been remanded for yesterday, the 18th, when we were not
2 sitting. What has happened is that because of that
3 confusion, two of them are not here; four are here, and
4 when we were negotiating with our colleagues to deal with
5 that situation, it has now become academic in the sense
6 that the decision has been made by the evidence leaders in
7 any event to withdraw the subpoenas. So what we propose to
8 do, Chairperson, subject to confirmation by our colleagues,
9 is simply to address those that are here and we will then,
10 the other two that are not here, we will convey to them the
11 decision. Thank you, Chairperson.

12 CHAIRPERSON: Do you want them called up,
13 or are you just happy that you and Mr Madlanga can perhaps
14 speak to them after we adjourn, and will you see to it
15 they're paid their witness fees for coming today?

16 MR MPOFU: Yes, Chairperson, we will.
17 Thank you.

18 CHAIRPERSON: I'm sure we don't have to
19 worry about the present witness; I'm sure she'll be looked
20 after.

21 CROSS-EXAMINATION BY MR MADLANGA SC (CONTD.):
22 Thank you. Thank you, Mr Chairman. National Commissioner,
23 I'm sure you have considered the paragraph that I referred
24 you to, but can I apologise and say that I want to take you
25 back to the matter relating to Mr Myburgh, just to ask one

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1 General Mbombo, and I took it that they, because they were
2 task posed, they would invariable have been involved in the
3 process.

4 MR MADLANGA SC: Again my apologies if I
5 will make you or cause you to repeat what you may have said
6 already. Are you in a position to give us details of the
7 feedback that General Mbombo gave you on this subject?

8 GENERAL PHIYEGA: I will repeat the
9 issues I have said earlier on, that the warrant-officer was
10 still not able to point to a person –

11 MR MADLANGA SC: Commissioner, I'm very
12 sorry, I'm very, very sorry, General, it's not in my nature
13 to interrupt a witness in the middle of a response, but I'm
14 not asking you now about the warrant-officer, who I assume
15 is Mr Myburgh. Is that so? Mr Myburgh is a warrant-
16 officer, you say?

17 GENERAL PHIYEGA: Yes.

18 MR MADLANGA SC: I'm not asking you about
19 him now. I'm being specific on what you referred to as
20 feedback. Can you give us details of the feedback that you
21 yourself were given by General Mbombo? What did General
22 Mbombo say to you by way of this feedback?

23 GENERAL PHIYEGA: I was attempting to
24 give you that feedback. The warrant-officer could still
25 not point to a person and identify a person that he was

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1 or two questions around that, and I will then move back to
2 where I had taken you, that is to the media statement.
3 Commissioner, I'd like to refer to what you did in respect
4 of the tampering report at scene 2. The very fact that
5 I've referred to a tampering report, after you had
6 instituted an investigation, you actually got a formal
7 report in writing. You confirm that?

8 GENERAL PHIYEGA: Yes.

9 MR MADLANGA SC: The investigation having
10 been done by Major-General Johnson and the report itself
11 being signed by I think Lieutenant-General, I think that's
12 the rank, and the name is Moono, I think it's M-O-O-N-O,
13 yes. You confirm that?

14 GENERAL PHIYEGA: It is true.

15 MR MADLANGA SC: Now did you receive
16 anything approximating that, did you receive anything with
17 the appearance of a formal and written report in respect of
18 the issue that Mr Myburgh had raised?

19 GENERAL PHIYEGA: I did not receive
20 anything written down, but I received feedback and the
21 statement is also part of that feedback.

22 MR MADLANGA SC: I'm sorry to appear to
23 belabour this, and the feedback, was it by both Generals
24 Mbombo and Naidoo, or was it by only one of them?

25 GENERAL PHIYEGA: The feedback was from

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1 referring to.

2 MR MADLANGA SC: Are you saying this –

3 GENERAL PHIYEGA: What I'm saying is that
4 further to that the warrant-officer had now written a
5 statement, and then I've also said that that statement had
6 been given to IPID.

7 MR MADLANGA SC: Oh, thank you. Thank
8 you, because you started by referring to the warrant-
9 officer I had no idea that in fact what you were saying
10 was, "General Mbombo reported to me that the warrant-
11 officer," and then, and so on and so on. My apologies
12 there, Commissioner. Now let me take you back to your
13 media statement and the penultimate, or second-last
14 paragraph of page 2. My question, when you said you would
15 have to look at the paragraph, my question was – and I said
16 I would use the word that you had been using – my question
17 was, could it be that what you are referring to there are
18 the events that took place at scene 2 on 16 August 2012?

19 GENERAL PHIYEGA: And I requested to
20 answer you by reading and responding. Remember, reading
21 and responding.

22 MR MADLANGA SC: Please respond, General.

23 GENERAL PHIYEGA: The paragraph that is
24 here, Sir, is "The dispersion action had commenced at this
25 time and the armed protesters were driven from their

<p style="text-align: right;">Page 6963</p> <p>1 stronghold to a high bushy ground in the vicinity." When I 2 read that paragraph, it talks about "The dispersion action 3 had commenced at this time," which means at the source 4 point some dispersion was starting to take place, "and the 5 armed protesters were driven from their stronghold to a 6 high bushy," high bushy is the second part, so I'd like to 7 understand your question, which side of the sentence are we 8 talking about?</p> <p>9 MR MADLANGA SC: Is the high bushy ground 10 which, when you read that part with the sentence that 11 follows, which says the police encircled it, is that high 12 bushy ground that was encircled not at scene 2?</p> <p>13 GENERAL PHUYEGA: And I have said yes, it 14 could be.</p> <p>15 MR MADLANGA SC: Now I take you to the 16 last two sentences of that paragraph and you should listen 17 to them in the context that what they must surely mean is 18 that what is stated in them, that is the two sentences, is 19 something that took place at scene 2. I will proceed to 20 read. "The militant group stormed towards the police, 21 firing shots and wielding dangerous weapons," and the next 22 sentence reads, "Police retreated systematically and were 23 forced to utilise maximum force to defend themselves," and 24 that too, you accept, in context must be or could be a 25 reference to scene 2?</p>	<p style="text-align: right;">Page 6965</p> <p>1 and I used the words, "without qualification" - what other 2 word did I use? But basically whether she says this is 3 what happened and she's not even willing to qualify it, 4 that was one of the questions that I raised with the 5 witness when I first introduced this subject. Yes, it is 6 so, it is so that not only in response to this, but in 7 response to a whole lot of other questions she did refer to 8 her commanders, but, but as she is testifying here today, 9 she has indicated that she as General Phiyega is willing to 10 say that this she continues to stand by. She went so far, 11 Mr Chairman, she went so far as to say that unless other 12 facts were to be suggested to her, and for as long, 13 effectively therefore for as long as there was no such 14 suggestion of new facts to her, she continued, or rather, 15 she continued to stand by what she had said in this 16 statement.</p> <p>17 CHAIRPERSON: I think the problem can be 18 solved, if there is a problem, by using the phrase that was 19 used before, "to the best of her knowledge," because she 20 did say earlier that to the best of her knowledge these are 21 the facts.</p> <p>22 MR MADLANGA SC: Yes.</p> <p>23 CHAIRPERSON: And obviously she can't say 24 categorically that happened because as she says, she wasn't 25 there.</p>
<p style="text-align: right;">Page 6964</p> <p>1 GENERAL PHUYEGA: Yes, it could be.</p> <p>2 MR MADLANGA SC: You will recall that I 3 said that my next questions are still in the context of 4 what you said, which is that you stand, even as of today 5 you stand by what you said in the media statement. So you 6 even stand by what these two sentences say?</p> <p>7 GENERAL PHUYEGA: To the best of my 8 knowledge, with the facts that I was given at that time I 9 still stand.</p> <p>10 MR MADLANGA SC: You still say that it is 11 fact that, "The militant group stormed towards the police," 12 and this is what I emphasised, "firing shots," you say that 13 to you continues to be fact and you stand by it, at scene 14 2?</p> <p>15 MR SEMENYA SC: Chair, I object. The 16 witness has told us how the information on this press 17 statement was compiled. She told us that she is not 18 accounting as an eyewitness to any of those statements, 19 that there are people who are commanders, who gave that 20 information to her. We also know that she was present when 21 these events happened at the scene. To then ask her 22 whether she still insists on this to be fact or not, is 23 completely unfair.</p> <p>24 MR MADLANGA SC: Mr Chairman, 25 Commissioners, I asked the question right at the beginning</p>	<p style="text-align: right;">Page 6966</p> <p>1 MR MADLANGA SC: Yes, yes, yes.</p> <p>2 CHAIRPERSON: She can only rely on the 3 information she was given.</p> <p>4 MR MADLANGA SC: Yes.</p> <p>5 CHAIRPERSON: But the point you're making 6 is – as I understand it, although you don't quite phrase it 7 that way, but she still says that to the best of her 8 knowledge those are the facts, and if those words are 9 inserted, I think the problem falls away. So please 10 proceed on that basis.</p> <p>11 MR MADLANGA SC: Thank you, Mr Chairman. 12 To the best of your knowledge, those are the facts and for 13 that reason you stand by what you said in this press 14 statement, in particular that a group stormed towards 15 police – and I underline – firing shots. You stand by 16 that?</p> <p>17 MR SEMENYA SC: No Chair, I must still 18 register the objection. Those are the facts as were 19 relayed to her. You can't ask this witness whether that is 20 factually correct.</p> <p>21 CHAIRPERSON: But he's not doing that. 22 He's saying, to the best of her knowledge those are the 23 facts, and then he added –</p> <p>24 MR SEMENYA SC: No, I'm objecting to the 25 question, Chair –</p>

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1 CHAIRPERSON: He added that obviously if
 2 other facts come to your knowledge later which contradict
 3 that, then it will be different. But please proceed.
 4 MR SEMENYA SC: I'm objecting to the
 5 question, not to her answer.
 6 CHAIRPERSON: No, I know you're objecting
 7 to the question –
 8 MR SEMENYA SC: The question is, do you
 9 still stand by that fact. I'm saying this witness cannot
 10 account for facts.
 11 CHAIRPERSON: Mr Madlanga, I think Mr
 12 Semenya is semantically correct. I think you can alter the
 13 phraseology of the question in a way that will permit you
 14 to, allow you to proceed.
 15 MR MADLANGA SC: Mr Chairman, I don't see
 16 this unfairness. I just do not. It is the Commissioner
 17 who stood before this nation - and indeed the world,
 18 because this was a matter of interest to the world as a
 19 whole – she stood there and she is the one who owned what
 20 is contained in this press statement. I accept that
 21 obviously she was not there, she does not have first-hand
 22 information, which is why I am not saying to her is this
 23 what actually happened. I am asking her what her view is
 24 of what she said to the nation and the world on the day, is
 25 she saying today, I continue to say so even today. That is

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1 all that I'm asking this witness and I do not, I do not for
 2 the life of me understand the objection.
 3 CHAIRPERSON: Let me rephrase the
 4 question. On the basis of what you know at this stage, do
 5 you still stand by the statement that you made?
 6 GENERAL PHIYEGA: Judge, I have said to
 7 the best of my knowledge and the facts that were presented
 8 to me, I would still say those were the facts that I
 9 presented on the 17th.
 10 [15:53] CHAIRPERSON: I think that's the answer
 11 that you sought, Mr Madlanga. I suggest you proceed.
 12 MR MADLANGA SC: Thank you, Mr Chairman.
 13 CHAIRPERSON: Mr Burger, you haven't
 14 turned your microphone on, but you have a look on your face
 15 that indicates that you may want to say something.
 16 MR BURGER SC: Chair, I'm complete lost
 17 in the debate. I have to ask the good General questions in
 18 time and if I don't follow the debate I can't ask. As I
 19 understand the evidence is the General goes and she speaks
 20 to the world on the 17th of August. She gives a version.
 21 She says to the best of her knowledge that was correct,
 22 those facts she sends into the world. Then comes an
 23 affidavit by the good warrant-officer. She's now asked by
 24 my learned friend, as I understand it, "Do you stand by
 25 that statement today? You've had new facts coming to you.

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1 You have an affidavit by the warrant-officer. Do you
 2 stand?" She says she stands by the facts as at the 17th of
 3 August. Now I don't follow that. I thought the question
 4 was, "Do you stand today by the press statement?" and I
 5 don't know what the answer to that is.
 6 CHAIRPERSON: I think she's answered that
 7 in the affirmative on the basis that on the facts known to
 8 her she still stands by the statement. So I think that
 9 that's the way one should understand it and I suggest that
 10 if you don't understand it, you can talk to the evidence
 11 leaders afterwards and they can explain to you. Please
 12 carry on, Mr Madlanga.
 13 MR MADLANGA SC: Thank you, Mr Burger.
 14 Mr Burger has actually captured the point. Now,
 15 Commissioner, other real facts, or allegations –
 16 allegations, Mr Semenya; I see the red light on –
 17 allegations by Mr Myburgh, I'm going to take you to some
 18 other material –
 19 CHAIRPERSON: Sorry, before you do that,
 20 can I just go back to Mr Myburgh for a moment? Mr Myburgh,
 21 you say, couldn't identify the person; he didn't know his
 22 name, couldn't identify his face. But he made allegations
 23 about an unknown policeman who behaved, according to him,
 24 in a particular way, and so that the fact that one can't
 25 find out who it was, although as we've seen it's not

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1 necessarily as difficult as you were led to believe, but
 2 the fact that one can't identify the policeman concerned
 3 doesn't mean that one has to reject in total the
 4 possibility of the accuracy of the general statement being
 5 not correct. So that's the difficulty I have about that,
 6 but anyway, perhaps that can be followed up by Mr Madlanga.
 7 I think the point is clear.
 8 MR MADLANGA SC: Thank you. Thank you,
 9 Mr Chairman. I will look at the transcript in that regard,
 10 but I seem to recall that I did refer to standing by them,
 11 with or without qualification, so that's all. She might
 12 well still stand by what she said, but maybe say "Ag, now
 13 in the light of A, B, C, D, I would qualify what I said by
 14 saying Y," the letter Y, that is. Now anyway, I was at the
 15 point, Mr Chairman, Commissioner, where I was saying I
 16 would now take the witness to other facts by means of which
 17 I would seek to demonstrate that what the witness said in
 18 respect of scene 2 may well not have been correct.
 19 CHAIRPERSON: Is that going to take some
 20 time? Is your first fact going to take some time? The
 21 reason I say that is it's about 1 minute to 4.
 22 MR MADLANGA SC: It certainly will, Mr
 23 Chairman, and again after taking the witness through that I
 24 will ask her whether as of today she still says "What I
 25 said on the 17th of August 2012 to the nation and the world

1 was correct" on -

2 CHAIRPERSON: So she may -

3 MR MADLANGA SC: On, based on the - yes.

4 CHAIRPERSON: On the facts, sorry,

5 whether she will say that is a matter to which we will know

6 the answer on Monday morning.

7 MR MADLANGA SC: Yes.

8 CHAIRPERSON: I'm going to adjourn these

9 proceedings as far as the hearing of evidence is concerned

10 until Monday at 10 o'clock, because I understand that the

11 National Commissioner is not available to be with us

12 tomorrow because she is required to be at parliament. But

13 we are going to adjourn the proceedings to have an

14 inspection in loco tomorrow. We're only able to have an

15 inspection in loco at the scene of the events of the 13th,

16 that is to say we will go to - in fact, the suggestion that

17 I make is that we resume the proceedings at the spot near

18 the K3 Shaft, the Karee Hostel area, near the railway line

19 where General Mpembe addressed the group of protesters who

20 were armed with weapons and suggested that they lay them

21 down -

22 MR MADLANGA SC: May I make another

23 suggestion, Mr Chairman?

24 CHAIRPERSON: Yes.

25 MR MADLANGA SC: Some of my colleagues

1 may be as bad as I am with directions. Would perhaps the

2 Marikana Police Station not be the best place to meet? I

3 would imagine it's easier to find, and then from there we

4 then proceed -

5 CHAIRPERSON: I'm proposing to be at the

6 scene, the spot to which I referred, at 9:30.

7 MR MADLANGA SC: Thank you, Mr Chairman.

8 CHAIRPERSON: Those who may need

9 assistance of some kind could possibly go to the Marikana

10 Police Station at 9:15. So the order I make, insofar as an

11 order, is the proceedings stand adjourned till tomorrow

12 morning at 9:30 at the spot near the K3 Shaft at the Karee

13 Hostel area by the railway line where General Mpembe

14 addressed a group of the strikers, and we will continue

15 with the evidence of the National Commissioner on Monday

16 morning here in Rustenburg at 10 o'clock.

17 [COMMISSION ADJOURNED]



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