MARIKANA COMMISSION OF INQUIRY: REPORT ON MATTERS OF PUBLIC, NATIONAL AND INTERNATIONAL CONCERN ARISING OUT OF THE TRAGIC INCIDENTS AT THE LONMIN MINE IN MARIKANA, IN THE NORTH WEST PROVINCE

TO THE PRESIDENT

MAY IT PLEASE YOU MR PRESIDENT:

WE HAVE THE HONOUR TO SUBMIT HEREWITH THE REPORT OF THE COMMISSION

SIGNED AT PRETORIA ON THIS 31ST DAY OF MARCH 2015

I G FARLAM (CHAIRPERSON) ……..

P D HEMRAJ SC (MEMBER) ……..……

B R TOKOTA SC (MEMBER) ……..……

CHAPTER 1

INTRODUCTORY MATTERS

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1. The establishment of the Commission and its terms of reference

1.1 By Proclamation No. 50 of 2012[1] (referred to in what follows as '*the Proclamation*'), the President appointed the Commission to investigate matters of '*public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana in the North West Province from Saturday 11th August to Thursday 16th August 2012 which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction of property*', with the terms of reference quoted below.

1.2 Although the period set out in the Proclamation begins on Saturday 11 August 2012, the Commission is of the view that in order to put matters in proper perspective it is necessary to have regard to what happened on the two preceding days, i.e. Thursday 9 August 2012 and Friday 10 August 2012.

[1] Published in Government Gazette No. 35680 of 12 September 2012

1.3 The Commission's terms of reference, as set out in paragraph 1 of the Proclamation, are, as follows:-

'*1. The Commission shall inquire into, make findings, report on and make recommendations concerning the following, taking into consideration the Constitution and other relevant legislation, policies and guidelines:*

1.1 the conduct of Lonmin Plc, in particular:

1.1.1 whether it exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between Lonmin and its labour force on the one hand and generally among its labour force on the other;

1.1.2 whether it responded appropriately to the threat and outbreak of violence which occurred at its premises;

1.1.3 whether it by act or omission, created an environment which was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct;

1.1.4 whether it employed sufficient safeguards and measures to ensure the safety of its employees, property and the prevention of the outbreak of violence between any parties;

1.1.5 to examine generally its policy, procedure, practices and conduct relating to its employees and organised labour; and

1.1.6 whether by act or omission it directly or indirectly caused loss of life or damage to persons or property.

1.2 The conduct of the South African Police Service, in particular:

1.2.1 the nature, extent and application of any standing orders, policy considerations, legislation or other instructions in dealing with the situation which gave rise to this incident;

1.2.2 the precise facts and circumstances which gave rise to the use of all and any force and whether this was reasonable and justifiable in the particular circumstances;

1.2.3 to examine the role played by SAPS through its respective units, individually and collectively in dealing with this incident; and

1.2.4 whether by act or omission it directly or indirectly caused loss of life or harm to persons or property.

1.3 The conduct of the Association of Mineworkers and Construction Union (AMCU), their members and officials and in particular:

1.3.1 whether it had exercised its best endeavours to resolve any disputes which may have arisen (industrial or otherwise) between itself and Lonmin and/or NUM or any other parties;

1.3.2 the extent to which it exercised effective control over its membership and those persons allied to it in ensuring that their conduct was lawful and did not endanger the lives and property of other persons' and

1.3.3 whether by act or omission it directly or indirectly caused loss of life or damage to persons or property.

1.4 The conduct of the National Union of Mineworkers (NUM), its members and officials and in particular:

1.4.1 whether it had exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between itself and Lonmin and/or AMCU or any other parties;

1.4.2 the extent to which it exercised effective control over its membership and those persons allied to it in ensuring that their conduct was lawful and did not endanger the lives and property of other persons; and

1.4.3 whether by act or omission it directly or indirectly caused loss of life or damage to persons or property.

1.5 The role played by the Department of Mineral Resources or any other government department or agency in relation to the incidents and whether this was appropriate in the circumstances, and consistent with their duties and obligations according to law.

1.6 The conduct of individuals and loose groupings in fermenting and/or otherwise promoting a situation of conflict and confrontation which may have given rise to the tragic incident, whether directly or indirectly.

2. The Commissions Act, 1947 (Act No. 8 of 1947) shall apply to the Commission, subject to such modifications and exemptions as may be specified by proclamation from time to time.

3. These terms of reference may be added to, varied or amended from time to time.

4. The Commission shall submit interim reports and recommendations to the President each month prior to the final report being presented to the

President. The Commission shall complete its work within a period of four (4) months from the date hereof and must submit its final report to the President within a period of one (1) month after the date on which the Commission completes its work.

5. The Commission shall where appropriate, refer any matter for prosecution, further investigation or the convening of a separate enquiry to the appropriate law enforcement agency, government department or regulator regarding the conduct of a certain person/s.'

1.4 The periods referred to in paragraph 4 of the Proclamation were extended

(a) to 31 May 2013 by Proclamation 4 of 2013[2] in terms of which the Commission was called upon to submit its report within 6 weeks after the date on which it completed its investigation and in which, provision was made for the Chairman to determine any place other than Rustenburg as its seat and in terms of which the obligation to submit interim reports was removed;

(b) to 31 October 2013 by Proclamation 15 of 2013[3] in terms of which the Commission was called upon to submit its report within six weeks after the date on which it completed its investigation;

[2] Published in Government Gazette 36154 of 12 February 2013
[3] Published in Government Gazette 36526 of 31 May 2013

(c) to 30 April 2014 by Proclamation 48 of 2013[4] in terms of which the Commission was called upon to submit its report within six weeks after the date on which it completed its investigation;

(d) to 31 July 2014 by Proclamation 30 of 2014[5] in terms of which the Commission was still called upon to submit its report within 6 weeks after that date and, in addition, as provided in paragraph 3 of the Proclamation, paragraph 1.5 of the Commission's mandate was deleted;

(e) to 30 September 2014 by Proclamation 40 of 2014[6] in terms of which the Commission was called upon to submit its report to the President within six weeks after the date on which the Commission completed its investigation; and

(f) to 14 November 2014 by Proclamation 66 of 2014[7] in terms of which the Commission was called upon to submit its final report on or before 31 March 2015.

2. The regulations applicable to the Commission

2.1 In terms of paragraph 6 of the Proclamation, the President made, by Proclamation 59 of 2012[8], regulations with reference to the Commission.

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[4] Published in Government Gazette 37001 of 1 November 2013
[5] Published in the Government Gazette No. 37611 of 5 May 2014
[6] Published in Government Gazette No. 37798 of 4 July 2014
[7] Published in Government Gazette 38030 of 26 September 2014

2.2 The most pertinent regulations and the steps taken in terms thereof are set out below.

2.3 In terms of **regulation 2** which provides for the manner in which the Commission's proceedings should be recorded, the chairperson determined that the proceedings be electronically recorded and that a running transcript of the proceedings be prepared. He also ensured at the outset, as provided in **regulation 3**, that all persons charged with the recording of the proceedings took the prescribed oath or affirmation.

2.4 In terms of **regulation 5** which provides for the designation of knowledgeable and experienced persons to assist the Commission, the chairperson designated Adv. P C van der Byl SC as legal researcher to assist the Commission in the performance of its functions.

2.5 In terms of **regulation 7A** which provides for the assistance to the families of the deceased to attend the enquiry, arrangements were made for the '*families or representatives of the families of the persons who died in the tragedy who wish to attend the inquiry to attend the inquiry and to remain in attendance for such time as they may wish to attend the inquiry or such other period as may be*

[8] Published in Government Gazette 35730 of 28 September 2012 and amended by Proclamation R66 of 2012, published in Government Gazette 35875 of 14 November 2012

agreed upon between the Secretary and the families or representatives of the families'.

2.6 In terms of **regulation 8** any person appearing before the Commission was entitled to the assistance of an advocate or an attorney.

2.7 In terms of **regulation 9(1**) no person appearing before the Commission might refuse to answer any question on any ground other than the privilege contemplated in section 3(4) of the Commissions Act No 8 of 1947.

2.8 In terms of **regulation 9(2)** no evidence regarding any fact or information that comes to light in consequence of any answers given by a person obliged in terms of **regulation 9(1)** to answer questions put to him or her shall be admissible in any criminal proceedings against that person other than proceedings in which that person is charged with an offence of contravening section 6 of the Commissions Act.

3. Participants and their representation

3.1 Apart from the evidence leaders (Advs M R Madlanga SC, until 31 July 2013, G Budlender SC, M Chaskalson SC, K Pillay SC, C Wesley, M Mojapelo and T Lupuwana), appointed by the Commission in terms of **regulation 5**, the following persons and

bodies participated in the proceedings as provided in **regulation 8**, and were represented during the proceedings of the Commission by the following legal practitioners, namely –

(a) the **South African Police Services** ('the SAPS'), represented during the major part of the proceedings by Adv I Semenya SC, together with Advs F Mathibedi SC and S Baloyi, and, in the earlier part of the proceedings, also with Adv V Ngalwana SC;

(b) **Lonmin PLC**, represented throughout by Adv S Burger SC, together with Advs A Bham SC and M van As;

(c) the **National Union of Mineworkers** ('NUM'), represented throughout by Adv K Tip SC, together with Adv T Ntsonkota;

(d) the **Legal Resources Centre** (LRC), the **Benchmarks Foundation** and the **family of Mr John Kutlwano Ledingoane who was killed on 16 August 2012**, represented throughout by Adv G Bizos SC, together with Advs T Ngcukayithobi and J Brickhill;

(e) the **Association of Mineworkers and Construction Union** ('AMCU''), represented throughout by Advs H Barnes and A Gotz and initially also by Adv T Bruinders SC;

(f) the more or less **270 mine workers who were Injured and Arrested** ('the injured and arrested parties') represented by Adv D Mpofu SC, together with Advs M A Qofa and R Tulk;

(g) the **Department of Mineral Resources**, represented where necessary by Adv C Badenhorst SC;

(h) the **families of the three strikers who died on 13 August 2012 and the families of the persons who died on 16 August 2012 at scenes 1 and 2, excluding the family of Mr John Kutlwano Ledingoane,** represented throughout by Adv D Ntsebeza SC, together with Advs T Motloenya and N Lewis;

(i) the **Bapo Ba Mogale community,** represented from time to time by Adv T Ncongwane SC, together with Advs R Mogagabe SC and K Kgoroeadira;

(j) **Lieutenant Shitumo Solomon Baloyi who was injured on 13 August 2012 and the family of Warrant Officer Sello Ronnie Lepaaku who was killed on that date,** represented by Adv L C Gumbi;

(k) the **South African Human Rights Commission** ('the SAHRC') represented by Adv M Le Roux and Mr T Fisher, Barrister at Law;

(l) **the family of Warrant Officer Hendrick Tsietsi Monene, who was killed on 13 August 2012,** represented by Adv T Masevhe;

(m) **the Minister of Police**, represented by Adv L Nkosi-Thomas SC;

(n) **the families of Mr Frans Mabelane, Mr Thapelo Eric Mabebe and Mr Julius Langa**, **who were killed on 12th and 13th August 2012,** represented by Mr. T Ramphele, attorney.

3.2 The Commission also received written submissions from Amnesty International, Mr Robert David Bruce and CASAC. The submissions received were made available to the participants for comment and were considered in the context of the evidence and submissions made by persons and bodies who participated throughout the proceedings.

3.3 The Commission wishes to express its gratitude to all the persons who and bodies which assisted it to perform the task the President mandated it to do. They are:

3.3.1 The Municipalities of Rustenburg and Tshwane, which made venues available to the Commission free of charge and thus made a significant contribution to the Commission's work.

3.3.2 The officials of the Department of Justice and Constitutional Development and the secretariat of the Commission for all they have done to facilitate the workings of the Commission.

3.3.3 The Evidence Leaders and the researchers for all the dedicated work they did to enable the Commission to carry out its function.

3.3.4 The legal practitioners, who represented the various 'parties' who participated in the proceedings of the Commission for the input and their submissions which have been of great assistance to the Commission in the preparation of this report. (Although the participants were not parties in the strict sense, they were treated as such and were for convenience referred to as parties).

3.3.5 The media for the coverage they gave to the Commission's work, which enabled the public both in this Country and beyond our borders to follow what was happening at the Commission.

3.3.6 The members of the families of the deceased, who have attended the proceedings of the Commission in an endeavour to learn as much as they could about the circumstances in which their loved ones died and who participated in the proceedings by giving the Commission

personal details about the lives of the deceased and the impact their deaths had on their families.

3.3.7 The Commission's researcher, Adv PC van der Byl SC, who gave sterling and dedicated assistance to the Commission during the hearings and in the preparation of this report.

3.3.8 Ms Dikeledi Senokwane, the executive assistant to the Commissioners, for the diligent and extremely competent assistance she rendered to the Commissioners.

4. The manner in which the Commission conducted its proceedings

4.1 In performing its functions in accordance with its terms of reference, the Commission considered its mandate in two phases, namely -

(a) **first**, the conduct of Lonmin, the SAPS, AMCU and NUM as envisaged in **paragraphs 1.1 to 1.4** of its terms of reference in so far as such conduct was directly linked to the events which took place during the period 9 August 2012 to 16 August 2012 ('Phase 1'); and

(b) **secondly**, all the other issues covered by the terms of reference ('Phase 2').

4.2 As already indicated, **paragraph 1.5** of the Proclamation was deleted[9] leaving the Commission, subject to what is set out below, to deal, as Phase 2, with the issues mentioned in **paragraph 1.1.3** of the Proclamation, which are dealt with below.

4.2.1 In a letter dated 24 April 2015 addressed to the chairperson by the President, the President indicated that the 'investigation relating to the role of the Department of Mineral Resourses and other departments or agencies pertaining to the tragic incidents as contemplated in paragraph 1.5 of the terms of reference may be considered at a later stage, guided by the outcome of the Commission's findings and recommendation with regard to the incidents of 9-12 August 2012'.

4.2.2 It is for this reason that the Commission made the recommendation contained in Chapter 24.

4.3 As provided in **paragraph 2** of the Proclamation, the provisions of the Commissions Act No. 8 of 1947 apply to the Commission.

4.4 In terms of section 4 of that Act the Commission was required to hear all the evidence and addresses in public, subject to a

[9] See: footnote 5 above

qualification that the chairperson might in his discretion '*exclude from the place where such evidence is to be given or such address is to be delivered any class of persons or all persons whose presence at the hearing of such evidence or address is, in his opinion not necessary or desirable*'.

4.5 On an application made on behalf of the SAPS, the chairman made a ruling on 15 April 2014, for the reasons set out in **Annexure A** directing, amongst other things, that the evidence of a person referred to as 'Mr X' be heard *in camera* and by video link.

4.6 During the course of the Commission's proceedings the Commission conducted four inspections *in loco*, namely, on 1 and 2 October 2012, 13 August 2013 and 8 September 2014, which were attended by the parties and their legal representatives. During these inspections, points regarding the incidents on 12, 13 and 16 August 2012 were pointed out to the Commission.

4.6.1 The proceedings at these inspections were duly videotaped and these videos form part of the record of the proceedings of the Commission.

4.6.2 It was unfortunately necessary for the inspection on 16 August 2014 to be terminated before all the points that the

Commission had come to see were pointed out. This was because of unruliness amongst some of the parties.

4.6.3 The Commission was accordingly obliged to hold a further inspection on 30 September 2014. At this inspection attendance was strictly limited to the parties' legal practitioners and persons whose presence was required for pointing out purposes. These proceedings were also duly videotaped and those videos also form part of the record of the Commission's proceedings.

4.7 The Commission sat on 300 days (of which seven days were devoted to oral argument) and the transcript of the proceedings comprises 39 719 pages of evidence, interim and interlocutory applications and oral argument. In addition to various videos and video clips, documentary evidence (having ran four times through the alphabet from A to ZZZZ, many of which have various sub-numbers e.g. ZZZZ 1 to 49) consists of thousands of pages.

5 The procedure followed by the Commission in conducting its proceedings

5.1 In conducting its proceedings the Commission followed a *quasi*-adversarial procedure, in that the evidence leaders, who were assisted by two investigators, investigated the facts, led some

witnesses and cross examined others and addressed full and helpful arguments to the Commission.

5.2 In this regard the Commission ruled -

(a) in relation to evidence in chief, that statements or affidavits, setting out the major points to be covered in the evidence in chief by the various witnesses had to be filed and these statements or affidavits had to be distributed beforehand to the Commissioners and the representatives of the other parties;

(b) as regards cross-examination, that an application to cross-examine a witness should be given to the Commissioners, setting out the topics proposed to be raised during cross-examination together with copies of documents to be relied upon in the proposed cross examination. Copies of the documents but not the list of topics had to be made available beforehand to the party whose witness was to be cross examined. After considering the application, the Commission granted the party applying leave to cross examine on some or all of the topics.

5.3 In following this procedure the Commission attempted to shorten the proceedings. Eventually in order to shorten the proceedings further,

it limited the time available to the parties to lead or cross examine witnesses.

6. Interpretation of terms of reference

6.1 It will be recalled that paragraph 1.2.1 of the Terms of Reference of the Commission enjoins the Commission to investigate the conduct of the SAPS, in particular, *'the nature, extent and application of any standing orders, policy considerations, legislation or other instructions in dealing with the situation which gave rise to this incident.'* Apart from the Constitution and the South African Police Service Act No. 68 of 1995, (the SAPS Act), the Commission considered the standing orders, policy considerations and instructions set out in **Annexure B,** which will, in so far as may be necessary, be referred to in this report.

6.2 In the course of the Commission's proceedings submissions and suggested recommendations were made by some of the parties in relation to various issues which call for a consideration as to whether such recommendations fall within the ambit of the Commission's terms of reference. These issues relate to suggested recommendations with regard to the civil and criminal liability of some of the parties involved in the incidents during the period 9 to 16 August 2012.

6.3 The submissions relating to the civil and criminal liability are clearly premised on paragraph 5 of the Commission's Terms of Reference. This paragraph, amongst other things, enjoins the Commission to 'refer any matter for prosecution' where this is appropriate. This paragraph was clearly not intended to require the Commission to usurp the functions of the National Prosecuting Authority, which are set out in section 179 of the Constitution. The various Directors of Public Prosecutions will clearly not be bound by any recommendations the Commission may make but they will, the Commission is sure, carefully consider them before deciding whether to accept or reject them.

6.4 Counsel for the LRC correctly submitted in paragraphs 144 and 145 of their heads of argument that the appropriate threshold for the making of recommendations in respect of potential criminal liability is a *prima facie* basis for finding that a particular person may be criminally liable.

6.5 The Commission is mindful of the fact that it has not been possible (nor would it have been appropriate) for it to hold a series of mini-criminal trials in respect of the persons whose conduct has to be scrutinised by the Commission in carrying out its terms of reference. The evidence such persons would have given would in any event, not be admissible against them if they were to be prosecuted, (except for offences under Section 6 of the Commissions Act) and it

would clearly be undesirable and unfair to such persons for the Commission to 'find them guilty' of any offences. What the Commission has decided to do, where it is appropriate, is to recommend that the conduct of certain persons be investigated and for a decision thereafter to be made by the appropriate authority whether prosecution should be instituted.

6.6 As far as civil liability is concerned, the Commission accepts that any finding it may make must be on a prima facie basis and it accepts in this regard, the submission made by the LRC in paragraph 144 of its heads of argument.[10]

6.7 A substantial amount of photographic and video material was placed before the Commission. The times when particular photographs were taken and video recordings made were inaccurate as the 'clocks' on the equipment used were not set correctly. The Evidence Leaders were able to produce a time line of events, which all the

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[10] LRC heads p. 91, paras 143, 144 and 145 which read as follows:

'*143. It is not appropriate – in making findings of 'responsibility', which may include potential civil and criminal liability – to apply strictly the standards of the balance of probabilities or reasonable doubt.*

144. Instead, the Commission is enjoined to adopt a flexible approach to assessing the factual issues and to make findings accordingly. In respect of potential civil and criminal liability, the appropriate threshold is whether there is a prima facie basis to find that a particular person may be civilly or criminally liable and to make recommendations accordingly.

145. In applying this standard, the Commission is called upon to make findings that particular persons or parties may be 'responsible' for deaths and injuries and other events at Marikana. Where the facts before the Commission constitute 'sufficient evidence' to establish a prima facie basis for responsibility, the Commission should find accordingly.'.

parties accepted. The base for this time line was the time on the eTV video cameras which appears to be correct and the times on all the photographs and video material put before the Commission have been converted to eTV time.

CHAPTER 2

PRINCIPLES APPLIED BY THE COMMISSION IN CONDUCTING ITS PROCEEDINGS

1. Introduction

1.1 It is at the outset necessary to refer to the generally accepted principles applicable to commissions of inquiry.

1.2 A useful starting point is the remarks made by Van den Heever JA in the reports of the Durban Riots Commission. The proper function of a commission of inquiry, he said, is- [11]

> '*.. to find the answers to certain questions put [by the State President] in the terms of reference. A Commission is itself responsible for the collection of evidence, for taking statements from witnesses and for testing the accuracy of such evidence by inquisitorial examination – inquisitorial in the Canonical, not the Spanish sense.*'

1.3 In an article by W Bray entitled: *'n Paar Gedagtes raakende die Getuie voor 'n Kommissie van Ondersoek'*[12], it was said that the functions of a commission of inquiry are generally not truly judicial because there are no facts in issue to be decided judicially, therefore rules of evidence may be relaxed.

[11] UG 36 – 49: Report of the Commission of Inquiry into riots in Durban
[12] (1982) 45 THR-HR 390 at 393

1.4 In ***S v Sparks and Others 1980(3) SA 952 (T) at 961B-C*** Human J (with whom Theron AJP and Franklin J) said:

> '*A court of law is bound by rules of evidence and the pleadings, but a Commission is not. It may inform itself of facts in any way it pleases - by hearsay evidence and from newspaper reports or even through submissions or representations or representations on submissions without sworn evidence.*'

1.5 In the course of the Commission's proceedings the question arose as to whether any party is burdened with an obligation to prove or disprove any allegation made before the Commission ('*the burden of proof*'). Linked to that question, the status of statements or affidavits made by persons (particularly the police officers who fired shots at Scenes 1 and 2 who were not called to give oral evidence,) was also raised.

2. Burden of Proof

2.1 It is well established that a commission such as the present is mainly a fact-finding body (***Bell v Van Rensburg NO 1971(3) SA 693 (C) at 719*)**. It is not a court of law nor even a quasi-judicial body.

2.2 Counsel for the SAHRC submitted (in para 2.4 of their heads of argument) that there is a burden of proof resting on the SAPS to

prove that the killings of the 37 persons by the members of the SAPS were lawful.

2.3 The Commission does not agree with this submission. The inquiry on which it is engaged is not a *lis*, a law suit, brought by one party against another. The Commission's task is, amongst other things, to make factual findings on matters which are in dispute. If it cannot do so, it must say so. There are no parties in the strict sense of the word (although various persons and bodies including the SAHRC have been given permission to participate in the proceedings) and no-one can be said to bear what the Appellate Division in ***Mabaso v Felix 1981 (3) SA 865 (A) at 871H*** called the 'overall onus of proof', what Wigmore (9 *Evidence* 2485) called 'the risk of non-persuasion'. That is because there is no case for anyone to lose if at the end of the day the Commission is not persuaded that the killings were lawful. It is of course different where there is a *lis*. The matter was considered by the Appellate Division in ***Mabaso v Felix***: In that case it was pointed out that in a criminal case the State bears the overall onus to prove the unlawfulness of an assault, whether fatal or not. The court held, however, (at 872H – 374E) that the position is different in a civil case where 'considerations of policy, practice and fairness inter partes' require that the defendant should bear the overall onus of averring and proving the lawfulness of his actions in assaulting and killing the deceased.

2.4 In support of their submission counsel relied on two cases, ***Bleier v Uruguay*****,** a decision of the United Nations Human Rights Committee (Communication No. 30/1978, the passage relied on by counsel being at para 13.2) and ***Bektas and Ozlap v Turkey***, a decision of the European Court of Human Rights, Application No. 10036/03 (20 July 2010), the passage relied on by counsel being at para 57.

2.5 Both cases were suits brought against the State party concerned, where in the event of the tribunal's being unable to determine on the evidence led whether the killings were lawful one of the parties had to lose, i.e., it bore the risk of non-persuasion. The cases are no authority for the proposition for which counsel contended, *viz.*, that in a commission, where there are no parties *stricto sensu* and no winners and losers, there is a burden of proof on the State.

2.6 The facts of the ***Bleier*** case are similar to those in another case on which counsel relied, ***Orhan v Turkey***, European Court of Human Rights, Application No. 25656/94 (18 June 2002). In that case the court drew an inference against Turkey (as the United Nations Human Rights Committee had done against Uruguay in the ***Bleier*** case) because it failed, without giving a satisfactory explanation, to submit the information which it had in its possession relating to the allegations of the applicant, to which information it had sole access.

2.7 The drawing of such an inference is permitted in our domestic law, where the principle was laid down by the Appellate Division in ***Galante v Dickinson 1950 (2) SA 460 (AD)*** **(at 465)**, *viz.* that an inference can be drawn against a party who fails 'to give evidence on matters which are unquestionably within his knowledge'.

2.8 Counsel submitted (in para 2.3.8 of their heads) that 'The Commission should adopt a similar approach: where the SAPS have failed to provide an *adequate* explanation for the failure to furnish the Commission with vital information, the Commission is entitled to draw inferences against the SAPS and is entitled to apply a lower standard of proof in reaching findings against it.'

2.9 The Commission agrees with the first part of the submission (particularly in view of the undertaking by the National Commissioner that the SAPS would give its full co-operation to the Commission). It does not, however, as will appear from what is said in the next section, agree that that involves applying a lower standard of proof.

3. Standard of Proof

3.1 The chairperson said on Day 135[13] that the Commission would 'evaluate all of the available evidence and come to a view of the probabilities on the facts.' Counsel for the SAHRC submitted (in

[13]Day 135,Scott, p. 14347

para 2.3.3 of their heads) that this is the appropriate standard to apply to the majority of the issues in dispute but 'that some flexibility may be justified in relation to certain issues'. Reference was made to a comprehensive discussion of the topic by Stephen Wilkinson *et al,* ***Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions***, a research project undertaken under the auspices of the Geneva Academy of International Humanitarian Law and Human Rights in close co-operation with Geneva Call and published by the academy.

3.2 In Section IV of the report the authors (at page 51) recommend 'balance of probabilities' (i.e., the domestic standard of proof in civil cases) as a 'coherent starting point for the application of a set standard of proof'. At page 55 they say: 'FFMs [Fact-Finding Missions] should ensure that their findings are credible and reliable: lower standards of proof should therefore be accepted only in limited circumstances.' At page 58 they deal with the level of co-operation that can be expected from the parties under investigation. They say that when 'the parties under investigation are not open and receptive, it is likely that some findings will only ever reach the standard of "one of the reasonable conclusions" [i.e., a standard lower than the civil standard]. The FFM may need to rely on adverse inferences.'

3.3 The Commission is of the view that it would not be appropriate for it to adopt a lower standard than the civil standard when it makes

factual findings. In this regard it is important to bear in mind that both the criminal and civil standards are flexible. In **Cross on Evidence** (12th edition by Colin Tapper), the following dictum by Denning LJ in ***Bater v Bater*** **([1951] P35 at 36-37)** is quoted:

> '*It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of probability within that standard. The degree that depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion.*'

3.4 Cross and Tapper also quote what Morris LJ said in ***Hornal v Neuberger Products Ltd ([1957] 1 QB 247 at 266)***:

> '*Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities.'*

3.5 And, as has been said above, in the application of the civil standard, inferences can be drawn in appropriate cases against a person who alone knows the relevant facts but fails to give evidence thereon. In the present case the undertaking by the SAPS to co-operate fully

with the Commission is relevant to the question whether the drawing of an adverse inference against the SAPS is appropriate.

3.6 Furthermore it is important to note that the Commission's Terms of Reference enjoin it to inquire, make findings, report and make recommendations on the matters set out in the Proclamation establishing the Commission. The recommendations it may make include recommending further investigations and possible prosecutions. When it comes to making recommendations regarding possible prosecutions the Commission will consider (a) whether there is a *prima facie* case against the person in respect of whom the institution of a prosecution is to be considered; and (b) if not, whether there is a reasonable prospect that further investigation will uncover a *prima facie* case.

3.7 The Commission will thus not be making factual findings in this part of its work and the application of the civil standard will not arise.

4. Status of statements and affidavits

4.1 The question of the status of various statements and affidavits submitted by the SAPS arose in the course of the proceedings at the time when the SAPS presented to the Evidence Leaders a lengthy list of witnesses, including a number of SAPS members who had

fired shots at Scenes 1 and 2, whom the SAPS wanted to call to give evidence and when it was, because of time constraints, not possible to call those members as witnesses. The chairman directed that the SAPS has a duty to '*justify*' all the shootings by SAPS members which caused injury or death.[14]

4.2 On the question relating to the status of the various statements or affidavits submitted, the chairman held that the SAPS may discharge that duty by calling witnesses to give oral evidence by submitting written statements of witnesses or by relying on the other evidence which is before the Commission[15]; that no adverse inference may be drawn from the fact that the SAPS has not called every SAPS member who fired a shot or shots as a witness to give oral evidence; and that the Commission will evaluate all of the evidence before it '*in considering whether shooting by members of the SAPS was justified*'.

4.3 In so far as the ruling purports to hold that the SAPS has a duty to '*justify*', in a strict legal sense, all of the shootings by SAPS members which caused injury or death, the word '*justify*' was, bearing in mind the ruling on the burden of proof, not correctly used.

4.4 The Commission agrees with the submissions raised by the South African Police Services in paragraph 98 of its Heads of Argument which reads as follows:

[14] Day 292, Mr Seedat, pp. 38359 to 38360
[15] Day 292, Mr Seedat, pp. 38359 to 38360

> '98. *The ruling that the SAPS has a duty to justify all of the shootings by SAPS members which caused injury or death, in the context of a commission hearing, cannot be a reference to a legal duty. There being no onus bearing party in these proceedings, in the strict legal sense, the SAPS is not called upon to discharge such a duty. A commission is an investigative and not adjudicative process. Therefore the SAPS only has a "duty" to place evidence before the Commission which explains the circumstances under which the police acted. The conclusions from the consideration of the evidence may point to any justification for the police conduct or lack thereof.'*

4.5 Accordingly the Commission is of opinion that no onus lies on any of the parties to prove or disprove any responsibility, but that each party has an obligation to place all relevant information at its disposal before the Commission.

4.6 The Commission has in the course of its work had regard in the main to oral evidence given on oath or after an affirmation made by the witness which was subjected to cross examination. It has also, where it considered it appropriate, had regard to affidavits deposed to by persons who were not subjected to cross examination, as well as statements appearing in Occurrence Books kept by the SAPS and by Lonmin but in doing so it has been mindful of the need to bear in mind the fact that evidential material of this kind must be used with care. Among the evidential material put before it were

also warning statements made by SAPS members to IPID investigators. These statements are dealt with in Chapter 22 below.

5. Self- and Private Defence

5.1 The SAPS contended that the shots fired by its members on 13 and 16 August, some of which killed and injured some of the strikers and another person, a non-striker who was near scene 1 on 16 August were fired while the members were defending themselves and their colleagues from an attack and that the shots fired were accordingly lawful.

5.2 NUM contended that the shots fired by its members at its office on 11 August were also justified because they were acting lawfully to defend themselves and their office, which they had been informed was going to be set alight and burnt by some of the strikers who were approaching it.

5.3 It is accordingly convenient to summarise the legal principles relating to the doctrine of self- and private defence in our law.

5.4 As was stated by Chaskalson P in ***S v Makwanyane and Another 1995(3) SA 391 (CC), para [138]*** **at 448 H – 449 A:**

> *'Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor …To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life. The same is true where lethal force is used against a hostage taker who threatens the life of the hostage. It is permissible to kill the hostage taker to save the life of the innocent hostage. But only if the hostage is in real danger. The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring life or lives of innocents over the life or lives of the guilty. But there are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon those limits being adhered to.'*

5.5 In footnote 166 at 449 H Chaskalson P said:

> *'Self-defence is treated in our law as a species of private defence. It is not necessary for the purposes of this judgment to examine the limits of private defence. Until now, our law has allowed killing in defence of life, but also has allowed killing in defence of property, or other legitimate interest, in circumstances where it is reasonable and necessary to do so.* ***Ex parte Minister van Justisie: In re S v Van Wyk 1967 (1) SA 488 (A).*** *Whether this is consistent with the values of our new legal order is not a matter which arises for consideration in the present case. What is material is that the law applies a proportionality test, weighing the interest protected against the interest of the wrongdoer. These interests must now be weighed in the light of the Constitution.'*

5.6 For a successful invocation of the defence there has to be an unlawful attack on the defender or another, which has commenced or is imminent, against which the defender has used force against the attacker which was not excessive in relation to the danger and was the only or least dangerous means whereby the defender could have avoided the danger: see, e.g., ***R v Attwood*** **1946 A.D. 331 at**

340 and *R v Patel* 1959 (3) SA 121. As it was put in ***R v Patel***, at 123 D, *'(i)n considering these, the Court must beware of being an armchair critic and must take into account the exigencies of the occasion.*'

5.7 In deciding whether the use of force was the only or least dangerous means of avoiding the danger, i.e., was necessary, as was held by Madlanga AJP in ***Ntamo and Others v Minister of Safety and Security 2001 (1) SA 830 ((Tk HC) at paras [21] to [24], at 836H - 837H),*** to have regard not only to the events immediately preceding the use of force by the defender but also to the question as to whether some other form of intervention was available to the defender at an earlier stage.

5.8 Madlanga AJP discussed the issue of the wrongfulness of resorting to lethal force, as opposed to some lesser form of force, in paras [33] and [34] of his judgement as follows:

> *'(A) lot turns on the specific facts of each case and the person relying on private defence must proffer such facts as may justify the use of that force. No facts were placed before me explaining why the police did not shoot at the deceased's legs. There was no suggestion that shooting at the deceased's legs would not have neutralised him. Even if this was an emergency and the police had to act swiftly, they still could have shot at the legs and, for all we know, that the exact same time they used in shooting at the torso. The have failed to explain why they did not do so. They have thus failed to justify their use of lethal force. Whilst appreciating that the life-threatening situation would in all probability affect one's calm and proper judgment and that, therefore, this should come into*

the equation, surely the boni mores by no means make light of the sanctity of life, and that includes the life of the aggressor. It can never be that any person who whips out a firearm and threateningly points it at the police apparently intent on shooting them is fair game to be shot and killed by the police. The police must justify their resorting to lethal force. In this regard examples of factors that may be relevant are the following:

(i) the imminence of the danger;

(ii) how threatening the danger is to life or limb;

(iii) the nature of the instrument, if any, the attacker is using in waging the unlawful attack;

(iv) the proximity of the attacker and the attacked;

(v) the mobility of the attacker and the celerity of his/her movement; and

(vi) how easy or difficult it would be to apply force to a less delicate part of the body.

[34] The particular facts of each case will determine which of these and other factors are relevant. By way of example, the more imminent and threatening the danger and the more difficult it is, for example, to shoot at the legs by reason of, say, the attacker's mobility and speed, the easier it will be to discharge the onus and vice versa. In casu, the police have failed to sufficiently set out all the relevant facts.'

5.9 In para [35], before quoting the passages from ***Makwanyane*'s** case which are set out in para 5.14 above, he said:

'The new constitutional dispensation certainly has a bearing on the boni mores of society ***(cf Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equality Intervening) 1999 (4) SA 1319 (SCA) para [23] at 1329E – 1330A,*** *a case dealing with the period immediately preceding post-apartheid constitutional era). Surely, the legal convictions of the community on the issue under discussion are, at present, informed by, inter alia, the sanctity of life, a fundamental right enshrined in s 11 of the Constitution of the Republic of South Africa Act 108 of 1996.'*

5.10 Paragraphs [36] to [38] are also important in this context because they indicate that in applying the doctrine of proportionality in this context the principles laid down by the European Court of Human Rights in interpreting article 2 of the European Convention of Human Rights provide 'informative and useful' guidance to our courts. They read as follows:

> *'[36] The doctrine of proportionality has been dealt with in the constitutional context in jurisdictions where the right to life is sacrosanct. In my view, it would be useful to draw from the experiences of these jurisdictions. I use decisions of the European Court of Human Right as examples. In the case of* ***McCann and Others v United Kingdom (1996) 21 EHRR 97*** *the European Court of Human Rights was concerned with the interpretation of art 2 of the European Convention on Human Rights, which reads as follows:*
>
> > *"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of court following his conviction of a crime for which this penalty is provided by law.*
> >
> > *2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is not more than absolutely necessary:*
> > *(a) In defence of any person from unlawful violence;*
> > *(b) …*
> > *(c) …"*
>
> *[37] Although neither the common-law test of wrongfulness in cases involving the use of lethal force in private defence nor the provisions of s 11 of the Constitution make reference to the concept of "absolute necessity" (para 2 of art 2 of the*

Convention), in my view, the principles enunciated in the McCann case are quite informative and useful. In that case the following was said:

> *"(T)he force used must be strictly proportionate to the achievement of the aims set out in subparas 2(a), (b), and (c) of art 2.*
>
> *In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination."*

[38] The European Court of Human Right reaffirmed the above statement of the law in ***Andronicou and Another v Cyprus (1998) 25 EHRR 491 at 545****. The latter was a case of hostage taking in which members of a Cyprus specialist police unit, in their rescue effort, had shot and killed both the hostage taker and the hostage. The Court which decided (by five votes to four) that there was no violation of art 2 of the Convention was agreed that, amongst others, important considerations are adequate and proper planning and meaningful control in the execution of the plan. In a dissenting judgment Judge Pikis said (at 565):*

> *"The State has added duty of planning as well as controlling the operation so as to limit the circumstances in which force is used and, if the use of force is unavoidable, to minimise its effects."*

For present purposes, I wish to qualify the idea of planning. It should not conjure up ideas of nothing but elaborate planning. The nature of planning should, inter alia, depend on the nature of the harm to be averted and the time available for taking appropriate action. Reverting to the instant case, the bungling of the police, their lack of professionalism in approaching the deceased and their planning (or lack thereof) sink the defendant even further if we import, as we must do, the

> *dictates of the Constitution to the notion of legal convictions of the community.'*

5.11 It is also important in this context to consider the question raised by Professor Andrew Ashworth in *Principles of Criminal Law*, 7ed, : 'If the law gives the subject of the attack the liberty to wound or kill his aggressor, what happens to the aggressor's right to life and physical safety?' He points out that some legal systems favour the approach that the aggressor forfeits these rights when he embarks on the attack. This approach is contrary to our law as is clear from the quoted dictum of Chaskalson P in para 5.4 above, where he spoke of balancing the 'rights of the aggressor against the rights of the victim'.

5.12 Where the person who purported to act in self- or private defence was mistaken in thinking that he was under attack he cannot rely on the doctrine of private defence, as was held by the Appellate Division in ***S v De Oliviera 1993 (2) SACR 59 (A)*** **at 63 – 64** where the legal position was set out as follows:

> *'A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way (**S v Ntuli 1975 (1) SA 429 (A) at 436E)**. In putative private defence it is not lawfulness that is in issue but culpability. If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private*

> *defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life of property was in danger may well (depending on the precise circumstances) exclude* dolus *in which case liability for the person's death will also be excluded…'*

5.13 ***McCann's*** case concerned a planned terrorist attack to be carried out in Gibraltar by members of the Provisional IRA, who were going to detonate a car bomb. After the three suspects had arrived in Gibraltar (but before the car bomb was brought across the border from Spain), they were shot by soldiers belonging to the British Special Air Service (SAS), who testified that they had fired at the suspects believing that they were about to detonate the bomb.

5.14 At the Gibraltar inquest, the jury (by a majority of nine to two) returned verdicts of lawful killing.

5.15 The relatives of the deceased applied to the European Court of Human Rights for financial compensation and costs and expenses, alleging a violation by the United Kingdom of Article 2 (art 2) of the European Convention for the Protection of Human Rights and Fundamental Freedom.

5.16 The Grand Chamber of the Court held (by ten votes to nine) that there had been a violation. The majority accepted that the SAS members who shot the deceased had acted lawfully but held that the anti-terrorist operation as a whole was not controlled and organised

in a manner which respected the requirements of Article 2 (art 2) of the Convention. In paragraph 213 of the judgment, the majority summarised its conclusions as follows:

> *'In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 paragraph 2(a) (art2-2-a) of the Convention.'*

5.17 The decision was thus based on defective planning of the operation. Thus the necessity to kill the suspects would not have arisen if they had been prevented from entering Gibraltar.

5.18 In their heads of argument, counsel for the SAHRC summarised the ratio of the ***McCann*** judgment (which they call 'the principle of prevention/ precaution') as follows:

> *'the principle of prevention/precaution requires that those in command of policing operations in which higher levels of force are anticipated as a possibility to plan and command those operations in such a way as to minimise the risk that lethal force will be used.'*

5.19 Counsel for the SAPS contended that this principle is not part of South African law. As has been seen, it has been specifically cited and applied by Madlanga AJ P in the ***Ntamo*** case. The Commission

agrees with that judgment and is satisfied that the McCann principle is indeed part of our law.

5.20 In ***Makwanyane*** (in footnote 166 at 449H), quoted above in para 5.5 above, Chaskalson P left open the question as to whether the decision in ***Ex parte Minister van Justisie: In re S v Van Wyk 1967 (1) SA 488 (A),*** to the effect that our law allows killing in defence of property, 'is consistent with the values of our new legal order'. There is as yet no authoritative pronouncement on the issue, which is accordingly still open. The Commission is of the view that, provided the property sought to be defended is sufficiently valuable our law does permit a defender to use force to protect it. But, as pointed out earlier, such force must be necessary and not more harmful than necessary in the circumstances. Thus where an aggressor who is launching an imminent attack could be deterred from attacking by a warning shot, this must be done **(cf *Ntamo* at para [24] at 83 F – G).**

CHAPTER 3

THE PROCESSES OF COLLECTIVE BARGAINING AS THEY IMPACTED ON EVENTS AT MARIKANA

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1. Introduction

1.1 The evidence shows -

(a) that the tragic events at Marikana are rooted in widespread labour disputes in the area, particularly, at Lonmin's Karee mine and at the nearby Impala Platinum Mine ('*Implats')* which were characterized by violence, intimidation and loss of life and the undermining of agreed collective bargaining processes; and

(b) that the tragic events that occurred during the period 12 to 16 August 2012 originated from the decision and conduct of the strikers in embarking on an unprotected strike and in enforcing the strike by violence and intimidation, using dangerous weapons for the purpose.

1.2 It is convenient first to deal briefly with the processes of collective bargaining and the background facts which appear to have given rise to the unrest at Marikana.

2. The processes of collective bargaining

2.1 The processes of collective bargaining are embedded in the Constitution and in a set of sophisticated enactments, central to which is the Labour Relations Act No. 66 of 1995 ('*the LRA*').

2.2 At its core the labour relations dispensation which resulted from these developments is an arrangement of lawfully organised union and employer entities functioning within a bargaining environment that not only regulates their interaction, but also provides for the possibility of resort to lawful strike or lockout measures.

2.3 In his statement, Mr Erick Gcilitshana ('*Mr Gcilishaha*'),[16] a national office bearer of NUM and employee of Lonmin, outlined the general practice followed by NUM in its conduct of wage negotiations.

2.3.1 According to him NUM's priority is to make any wage negotiations an inclusive process with mandates being obtained from members before negotiations commenced.

[16] Exhibit XX1, statement of Gcilitshana, paras 21-32

2.3.2 Mass meetings of workers are held in order to report back and to obtain final mandates before negotiations are concluded.

2.3.3 He detailed the process where each branch would convene a shop stewards' council at which workers' demands were directly received. Thereafter each branch convened separate mass meetings at which the demands are presented and debated.

2.3.4 The executive leadership of each branch would further discuss the demands which are placed before a central stewards' council for consideration.

2.3.5 A list of demands is placed before a central mass meeting of workers for finalization before submission of the demands to Lonmin.

2.3.6 The demands are first forwarded to a dedicated market research section within NUM's head office, where they are assessed for consistency with the union's policies and evaluated against industry and market norms and practices. The purpose of this, he said, is to ensure that NUM does not make unreasonable demands of the employers and in turn, that it does not create unreasonable expectations on the part

of workers which may backfire on the union and negatively affect the credibility of NUM's negotiations.[17]

2.3.7 He said that it would be only after this process that a set of demands would be considered for submission to the employer.

2.4 Against this brief background, consideration can be given to the events that occurred at Implats and whether such events triggered the events that occurred at Lonmin.

3. The events that previously occurred at the nearby Impala Platinum ('*Implats')* Mine

3.1 On 7 October 2011 NUM (being at the time the '*representative trade union*' at Implats as well as at Lonmin) and Implats, as provided in section 14 of the LRA, entered into a collective agreement, expiring on 30 June 2013, regulating wages and other conditions of employment.

3.2 Notwithstanding the agreement concluded between NUM and Implats, Implats, on or about 18 December 2011, unilaterally granted an additional wage increase of 18 per cent effective from January 2012 to one category of its workers, being the '*Miners*' who are

[17] Day 35, Gcilitshana pp. 3804-3805

miners in first line supervision of mining work teams, allocated to every face panel, and are mostly NUM members within the bargaining unit.[18]

3.3 This decision by Implats, according to the evidence,[19] put NUM in a spot in that, apart from having undermined the collective agreement concluded on 7 October 2011, it caused discontent amongst the NUM members for at least two reasons, namely, first, because the increase was granted only to one category of workers and, secondly, it created the impression that NUM had been lying to them when at the time of the conclusion of the agreement it had persuaded them to agree to the agreement on the grounds that, as contended by Implats, '*their coffers have been exhausted*'',[20] hence the fact that the RDOs, in particular, decided not to persist with their demand to be upgraded from category 4 to category 7 workers.

3.4 During January 2012 the RDOs at Implats became aggrieved by the Implats decision in that regard and embarked on an unprotected strike in demand of a monthly basic salary of R9 000. This strike was characterized by high levels of violence and intimidation much of which was directed at the NUM and its members. During the strike 60 persons were injured and four persons lost their lives. The

[18] They are in effect the persons who have to do the early examination to ensure that the area is safe before other workers can get in and who should be pointing where the rock drill operators have to drill and who have, after a blast, to clear the shaft.
[19] Day 35, Gcilitshana pp. 3774-3777
[20] Day 35, Gcilitshana p. 3788

result was that the NUM branch offices at Implats were forcibly closed.

3.5 In response to the unprotected strike Implats dismissed about 17 200 of its workers on or about 2 February 2012, but later it reinstated the majority of the workers so dismissed.

3.6 During April 2012 Implats acceded to the demands by granting increases of various kinds to its entire workforce, which brought an end to the strike.

3.7 The RDOs they were all promoted from category A4 to category B1, which in effect resulted in an overall increase of their salaries, including a holiday leave allowance, a living out allowance and a retirement contribution, from a total guaranteed pay of R6 540 to a total guaranteed pay of R9 991 with effect from 1 April 2012, being a date brought forward from 1 July 2012 (the dates in the collective agreement of 7 October 2011).[21]

[21] Exhibit XX2.4 - Implats Management Brief No. 11.12

4. The impact of the developments at Implats on Lonmin

4.1 These increases gave rise to the fact that RDOs at Lonmin were lagging behind in wages, compared to their colleagues at the surrounding platinum mines, particularly at Implats.

4.2 On 2 December 2011 NUM and Lonmin, after a fairly long bargaining process, concluded a '*substantive*' agreement[22] which was valid for two years commencing on 1 October 2011 and expiring on 30 September 2013, providing, *inter alia* -

(a) that the agreement bound all permanent employees whether or not they are members of NUM and were employed at Lonmin;

(b) that certain categories of employees who included the RDOs would receive, with effect from 1 October 2011, increases depending on the category of employees in which they fell of 9 and 10 per cent per annum;

(c) that employees would receive a housing allowance, depending on the category in which, they fell of R1 850 and R1 950 per month;

[22] Exhibit XX2

(d) that any disputes relating to the interpretation and application of the agreement were to be dealt with in accordance with the procedure described therein;

(e) that *'(a)ll proposals and demands on which agreement was not reached, or which were withdrawn by the unions or the company, are regarded as having been settled and may not be subject to strike action until this agreement lapses on the 30th of September 2013*'[23]; and

(f) that no addition to or variation, consensual cancellation or novation of the agreement and no waiver of any right arising from the agreement or its breach or termination would be of any force or effect unless reduced to writing and signed by all the parties or their duly authorised representatives.[24]

4.3 As was confirmed by Mr Gcilitshana,[25] the unilateral wage increases at Impala impacted on Lonmin workers in two ways: first, that some workers might cross over to Impala; and, secondly, that those workers who did not form an expectation of achieving substantial increases through the same route, namely unprotected strike action.

4.4 That expectation was indeed formed and the same route was pursued. The first clear manifestation of it was the presentation to Mr

[23] See: Clause 12.3 of the agreement.
[24] See: Clause 12.4 of the agreement
[25] Day 35, Gcilitshana pp. 3814-3816

Michael Da Costa of a demand for RDO nett wages to be increased to R12,500. He was at the time the VP Mining Operations at Karee and he gave detailed evidence of the manner in which this happened.

4.5 According to him, during June 2012 approximately 300 RDOs at Lonmin's Karee mine, apparently took notice of the strike and the increases granted to RDOs at Implats. Two of their representatives, Mr Magqabine and Mr Mofokeng, approached him at Karee, indicating that they do not wish the involvement of any of the trade unions as their demand did not involve the entire workforce. They demanded, notwithstanding the existence of the collective agreement a basic nett salary of R12 500 per month.[26] They were unable, except for indicating that it was '*a nice figure*', to shed any light on when that amount was first discussed or decided upon, by whom it was discussed and decided upon, and what the rationale for demanding that specific amount was.

4.5.1 Mr Da Costa told them that raising any grievance by marching to his office was an incorrect way of doing things. The discussion went on for approximately one hour. Mr Da Costa kept referring back to the structures in place which dealt with wage negotiations whereas they kept stating that they wished to deal with the matter outside of those

[26] Day 239, Da Costa p. 30023

structures. They also said that they were not making a demand but were simply requesting an increase in the basic salary. Mr Da Costa informed them that he would take the matter up to Lonmin's Exco and that he would give them feedback by 2 July 2012.

4.5.2 In response to this demand Mr. Da Costa prepared a memorandum to Lonmin management, recommending, for reasons set out therein, the engagement with NUM and AMCU to reach agreement on the matter and the payment of certain allowances so as to bring RDOs' remuneration on a *par* with the remuneration paid by Implats to its RDOs.[27]

4.5.3 Lonmin management decided to award, effective from 1 July 2012, the following additional monthly allowances to RDOs and their assistants at all divisions of Lonmin, namely -

R750 to all unassisted RDOs;
R500 to assisted RDOs; and
R250 to assistant RDOs.

4.5.4 The RDOs were, however, not prepared to accept this award and decided at a meeting held on 9 August 2012 to go on an

[27] Exhibit XXX3 at p. 448 of bundle

unprotected strike in support of their demand for a wage of R12 500 per month.[28]

4.6 In contending that the Implats strike had a major impact on the Lonmin strike, counsel acting on behalf of Lonmin, under cross examination, drew parallels between Implats and Lonmin, in that, in both strikes, RDOs were involved; both strikes were preceded by demands outside collective bargaining structures; both strikes were unprotected; both strikes were accompanied by high levels of violence and intimidation; in both strikes, the NUM offices were threatened and targeted; both strikes resulted in NUM losing membership and AMCU gaining membership.

[28] Exhibit YY1, para 3; Day 37, Setelele pp. 4077-4079

CHAPTER 4

THE EVENTS THAT OCCURRED ON THURSDAY, 9 AUGUST 2012

1. It is common cause that on Thursday, 9 August 2012, which was a public holiday, a significant group of RDOs (according to some sources, approximately 3000 at some stage) met outside the Wonderkop Stadium at Lonmin between 08h00 and 13h00, and, having rejected the allowances offered by Lonmin, decided not to go to work the next day and to march in support of their demand of a monthly nett salary of R12 500, to the offices of the Lonmin Platinum Division ('LPD').[29]

2. It is also common cause that this strike as it progressed over the period was an unprotected strike.[30]

3. Mr Vusimuzi Mabuyakhulu ('Mr Mabuyakhulu') testified that the workers decided not to engage the unions for three reasons[31], namely -

   (a) first, that the RDOs came from different units, namely Karee, Rowland and Eastern Platinum and hence belonged to different unions;

[29] Exhibit OO 17, paragraph 6.1 and 6.2
[30] See : section 67 of the Labour Relations Act 66 of 1995
[31] Day 48, Mabuyakhulu, pp. 5261 to 5262

(b) secondly, that at that stage NUM had allegedly already made it clear that they were unable to take forward the demand of the RDOs; and

(c) thirdly, that in 2006/2007 a similar request had allegedly been made to NUM and they did not receive any feedback.

4. This gathering was observed by, amongst others, Mr. Pieter Botha, a security superintendent in the employ of Lonmin. He described it as peaceful.[32]

5. News of this gathering reached Mr. Barnard Mokwena, Lonmin's Executive Vice President for Human Capital and External Affairs, on 9 August 2012, together with '*strong rumours*' that the workers were possibly intending to embark on a "*wild cat strike*" as from 10 August 2012 in response.[33]

6. Lonmin, thereupon, issued an internal communique (drafted by Mr. Mokwena) reminding employees that Lonmin had existing collective bargaining structures and that no demands outside of these structures would be tolerated.[34]

7. The communique also warned –

[32] Exhibit ZZZZ 16, paragraphs 6, 7 and 8
[33] Exhibit RR1, paragraph 15
[34] Exhibit WWWW1 page 8

a) that the planned work stoppage on 10 August 2012 amounted to unprotected industrial action and that any gathering of workers would be in breach of the Regulation of Gatherings Act;

b) that the SAPS would be called in to assist and that management would not hesitate in dismissing workers who participated in the industrial action.

8. It was seriously disputed by NUM, as contended by Mr Mabuyakhulu, that NUM had at that time made it clear that they were unable to take the demand of the RDOs forward and that in 2006/2007 a similar request had been made to NUM in respect of which they did not receive any feedback.

9. These contentions raised by Mr Mabuyakhulu are in any event at odds with the indications given by the representatives of the RDOs to Mr Da Costa to the effect that they do not wish the involvement of any of the trade unions as their demand did not involve the entire workforce.[35]

10. It would accordingly appear that at that stage the RDOs decided, for reasons unrelated to any of the trade unions (AMCU having not aligned itself with the demand and NUM having distanced itself from the demand), to advance their claim for a wage of R12 500, on their own.[36]

[35] Exhibit OO17, paragraph 3.16
[36] Exhibit EEEE19.2 and Exhibit OO1

11. Mr X, the witness who was permitted to testify by television link from a remote location, testified about this matter and on a number of other matters. A summary and evaluation of his evidence is contained in **Annexure C.**

CHAPTER 5

THE EVENTS THAT OCCURRED ON FRIDAY, 10 AUGUST 2012

The following incidents on the 10th call for consideration and evaluation:

A The march to Lonmin Platinum Division offices and the meetings with Lonmin Security;

B Whether the crowd was armed and the mood of the crowd;

C The presence of SAPS;

D The intimidation of employees and the shooting of rubber bullets by Lonmin Security;

E Whether the shooting by Lonmin security was justified;

F The shooting of Mr Mutengwane and Mr Dlomo;

G SAPS contingency plan of 10th August 2012; and

H Lonmin's failure to apply its counter industrial response.

A The march to Lonmin Platinum offices and the meeting with Lonmin Security

1) At approximately 06h00 on 10 August 2012 Lonmin workers began gathering at the Wonderkop Stadium. This was observed by, amongst others, Mr Botha.[37] Estimates of the size of the crowd that began gathering vary from between six hundred to one thousand five hundred. Eventually, the size of the crowd increased to approximately three thousand.

2) At 07h00 Graeme Sinclair, the Group Mining Emergency and Security Manager of Lonmin, held a debriefing with other Lonmin managers[38] including Mr Blou and Mr Jomo Kwadi, Lonmin's Senior Manager of Employee Relations. It was recorded at this meeting that workers had not reported for work at the various Lonmin shafts as per usual.[39] It is also recorded that AMCU was not aligned with the demand of the workers and that NUM had distanced itself from it.

3) At approximately 08h00 the workers started marching from the Wonderkop Stadium to the LPD offices.[40] Mr Blou was concerned about the fact that SAPS was not present at this time, considering the size of the crowd and in light of the fact that no application had been made in terms of the Regulation of Gatherings Act.[41]

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[37] Botha statement 2 July 2014; Exhibit ZZZZ 16 paragraph 9.
[38] Exhibit EEEE19.2.
[39] Exhibit EEEE19.2
[40] Exhibit EEEE19.2.
[41] Exhibit RRRR1.1, paragraphs 12 and 13.

4) Mr Blou telephoned Lieutenant General Mbombo, the North West Provincial Commissioner of Police, and requested that assistance be provided by the Public Order Police (POP) unit at Rustenburg. Lieutenant General Mbombo advised him that the necessary support would be sent to Lonmin.[42]

5) At the LPD office Messrs Sinclair and Blou had a telephonic discussion with Mr Abey Kgotle, the Executive Manager for Human Capital of Western Platinum, who informed them that management would not speak to a faceless crowd when there were recognised and established structures in place whereby demands could be put to management.[43]

6) Mr Kgotle in his witness statement stated that on 10 August 2012 he reported for work at approximately 08H00, and at 09H00 he received an urgent telephone call from Mr Sinclair who advised him that there was a group of people gathering near Wonderkop, and that there appeared to be a planned march to LPD later that day.[44] Mr Kgotle stated further that they hastily convened a meeting with a few of Lonmin's senior management. At this meeting they took a resolution not to accept the memorandum from the marchers because Lonmin would not bargain outside its established bargaining structures.[45]

7) By 10h00 the crowd had moved past the four-way stop at Rowland Shaft.[46] Mr Botha observed that the crowd was armed only with sticks and

[42] Exhibit RRRR1.1, paragraphs 12 and 13
[43] Exhibit FFFF1, paragraph 25; Exhibit RRRR 1.1 paragraph 19.
[44] Exhibit OO16 para 12
[45] Exhibit OO16 para 16
[46] Exhibit OO16 par 16

knobkerries and that no other weapons could be seen.[47] SAPS had arrived on the scene by this time with four Nyala armoured vehicles and several soft skin vehicles.[48] SAPS took over the task of escorting the workers from Lonmin security.[49] This appears on Exhibit W.

8) At the Wonderkop four-way stop (also referred to as the LPD four-way crossing), which is situated approximately 600 meters from the LPD office, Messrs Sinclair and Blou as well as the SAPS commander approached the crowd. Speaking in Fanagalo, Mr Sinclair asked the crowd what it was that they wanted. Approximately six workers came forward and told Mr Sinclair that they wanted to speak to management.[50] Mr Sinclair replied that management had instructed him to convey to them that management was not willing to negotiate with the crowd as they were not following the existing channels of negotiation. Mr Sinclair also requested that the crowd put their demands in writing, to which the crowd replied that they were illiterate and could not write down their demands. Mr Sinclair then returned to the LPD office together with Mr Blou to inform management of the events and to obtain further instructions.[51] The crowd then dispersed.

9) After the march Mr Kgotle issued a communique[52] informing workers that their conduct amounted to serious misconduct and instructing them to report for duty. The communique pointed out that failure to comply with the instruction would lead to the termination of their employment.

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[47] Botha statement 2 July 2014, exhibit ZZZZ16 paragraph 10.
[48] Botha statement 2 July 2014, exhibit ZZZZ16 paragraph 10.
[49] Botha statement 2 July 2014, exhibit ZZZZ16 paragraph 11.
[50] Exhibit BBB8, paragraph 4.
[51] Exhibit FFFF1, paragraphs 22, 23 and 24.
[52] Exhibit CCC4.

10) By around 13h00, the crowd had arrived at the LPD office.[53] Video footage of the march shows that Mr Sinclair, flanked by members of Lonmin security and SAPS, spoke to representatives of the workers who came forward.[54] Mr Sinclair conveyed the contents of Mr Kgotle's communique to the crowd. The workers' representatives then addressed the crowd. This was recorded by Mr Callie Miles, a security manager in the employ of Lonmin.[55] Thereafter the crowd began to disperse from the LPD office and proceeded back to the Wonderkop Stadium.

11) Whilst dispersing, members of the crowd showed their displeasure, displayed aggressive behaviour, and intimated that management would have to take the consequences and would be responsible for what was to happen.[56] Mr Sinclair said that the levels of aggression and the number of workers involved were unusual and very disturbing and not something he had previously experienced. He realised at this stage that people from Karee and other mines were joining the crowd.[57]

12) Mr Blou, in his statement said that as the crowd was dispersing, threats from various people in the crowd were uttered and with suggestions that this was not the end of the issue and something would happen further. He said that he could not point to any specific individuals who uttered such threats, but there were voices from the crowd with a level of verbal aggression which he

[53] Exhibit FFFF1, paragraphs 26 and 27; Exhibit RRRR1.1 paragraph 20.
[54] Exhibit BBB8, paragraph 4.
[55] Exhibit AAAA27.
[56] Exhibit FFFF1, paragraph 28; Exhibit RRRR1.1, paragraph 20.
[57] Exhibit RRRR2.1 paragraph 32

had not previously experienced at the mine.[58] He said that the words were to the effect that management would have to deal with the consequences and would be responsible for what was to happen.

13) He testified that he was aware that there were two occasions when road blocks were put up involving Lonmin Security and SAPS, the one at Rowland Crossing and the one closer to LPD, and although management had issued an instruction to security that the crowd should not get to the office, the marchers in fact simply pushed their way past those road blocks.[59] He said that that did not ring any alarm bells with him in respect of the mood of the marchers because in their assessment, this was consistent with previous marches and previous gatherings. He said that the game changer was when the crowd had been advised that their demands would not be entertained, and that is when great dissatisfaction was shown by them.

14) Mr Blou said that when the crowd had dispersed, he agreed with Mr Sinclair's words that there was a fairly alarming sense of mood at that point at LPD.[60] He agreed that there was clearly a significant change of mood which required an appropriate response from Lonmin.[61]

15) Dewald Andre Louw, a Security Superintendent in the employ of Lonmin, observed the crowd and testified that at the LPD it appeared to him that the crowd were being controlled by between four to six individuals who would give instructions that the crowd would obey.[62]

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[58] Exhibit RRRR 1.1 paragraph 20
[59] Day 281, Blou, p. 36172
[60] Day 281, Blou, p. 36174
[61] Day 281, Blou, P.36155
[62] Day 262, Louw, p. 33043

16) Mr Mabuyakhulu testified that on 10 August 2012, the workers met at the gate to Wonderkop stadium. A decision was made that they should go and meet the employer. Before embarking on the march the workers elected 5 or 6 people to represent them.[63] They then marched to LPD. On the way they were stopped by two white people and some SAPS members. They conveyed their demands to them. When these people did not come back with a response, they proceeded further to the LPD offices.

17) Mr Mabuyakhulu testified that the workers then marched to the Time Management Office (also known as the LPD).[64] At the LPD, the delegation of five went forward and were met by representatives from Lonmin. After some time the five returned and informed the workers that according to the employer, NUM did not want them to talk to the workers.

18) Mr Mabuyakhulu testified that the workers asked the representatives to find out from the employer what they were supposed to do next. The report conveyed to the workers was that the employer said that they should do whatever they wanted.

19) With regard to the reaction of the crowd to this message, Mr Mabuyakhulu in his evidence said:[65]

> *"we asked them to return back to the employer to go and ask what should be done next. They came back to us and reported that the employer said we can do what we want,*

[63] Day 48, Mabuyakhulu, p. 5264
[64] Exhibit LLL 26, paragraph 7; Exhibit BBB8, paragraph 4.
[65] Day 48, Mabuyakhulu, p. 5265

then let's make the decision what to do. This is where the problem started, Mr Chairman. We decided that lets go and sit down and talk and allow the employer to come back to us and this is where the trouble started."

20) The workers then returned to Wonderkop stadium and dispersed from there. Before dispersing, the workers agreed to meet again the following morning at Wonderkop Stadium.[66] Mr Mabuyakhulu, somewhat curiously, testified that the decision was made that they would meet the following day and sit there and wait until the employer changed his mind and spoke to them.[67] He did not explain on what basis it was expected that the employer would change his mind.

21) At approximately 13h58 a Lonmin management debriefing was conducted by Mr Sinclair.[68] The note of the debriefing recorded that two SAPS members were in attendance.[69]

22) In response to the march, Lonmin issued a further internal communique. In that communique Lonmin gave notice that it intended to bring disciplinary proceedings against those involved in the march and thanked all employees who heeded management's call and reported for duty.

[66] Exhibit AAAA1.2, paragraph 5.
[67] Day 48, Mabuyakhulu, p. 5266
[68] Exhibit EEEE19.2.
[69] Exhibit EEEE19.2

B Whether the crowd was armed and the mood of the crowd

1) Captain Veerasamy Velayudam Govender, the commander of Visible Policing stationed at Marikana, testified that he monitored the march on 10 August from the Wonderkop stadium up to the return of the workers to the stadium later on in the day.[70] He testified that he was in close proximity to the workers during the march but that the mood of the crowd was peaceful.[71] Some of the workers had sticks in their hands, but nothing dangerous that he noted. He testified that he did not see any threat being posed by the workers towards the police.[72]

2) Mr Sinclair stated that the crowd showed displeasure and aggression when they dispersed after the march.[73] The march was recorded in videos taken by Mr Botha,[74] Mr Miles,[75] and by W/O Masinya,[76] a video operator attached to the Rustenburg POP unit. Whilst these recordings confirm some of the observations that were made by Captain Govender that the crowd dispersed peacefully after the march, in other videos some of the persons in conversation with Mr Sinclair can be observed to be reacting with some degree of displeasure.[77]

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[70] Day 274, Govender, pp. 35022 - 35024. And see Exhibit LLLL 5.
[71] Day 274, Govender, p. 35023
[72] Day 274, Govender, p. 35023
[73] Exhibit FFFF1 paragraph 28
[74] Exhibit W1.
[75] Exhibits W2, W3 and W5.
[76] Exhibit W4.
[77] Exhibit W1 and W2

3) The versions of Mr Sinclair and Mr Blou do find support in the evidence of Mr Mabuyakhulu with regard to the reaction of the crowd when the attitude of Lonmin management was conveyed to the strikers.

C The presence of SAPS

There are no complaints about the lack of co-operation by SAPS for this event. The Lonmin Log Book records that at 07h00, two POP platoons and one superintendent, Colonel Merafe, were in attendance, and that at 13h45, the police arrived at Wonderkop. The evidence is that there were four Nyalas and several soft skin vehicles in attendance. This is visible on the videos as well.

D The intimidation of employees and the shooting of rubber bullets by Lonmin Security

1) The Lonmin Log Book reports that information about incidents of intimidation were received and noted as follows:

(a) At approximately 16h30 on 10 August 2012 the first recorded report in the Lonmin Log Book of intimidation by workers was received by Lonmin, when it was reported that intimidation had occurred at the Wonderkop NUM offices.[78]

[78] Exhibit EEEE19.2.

(b) At 17h15 it was reported by the EPL hostel manager Mr Makgema that he had received the information that the workers at the EPL hostels would be intimidated when they wanted to go to work.

(c) At 17h25 Mr Botha reported that Lonmin security were in the process of monitoring a meeting at Wonderkop near the SAPS satellite police station.[79]

(d) At 17h45 Mr Blou reported the receipt of information that a few people at the mine were intimidated.[80]

(e) At 17h50 Mr Kellerman reported that the meeting at the Wonderkop Stadium was adjourned and that a further meeting was going to be held at the Karee Hostel.[81]

(f) At 18h10 it was reported that approximately 200 workers were gathered at the Karee Hostel.[82]

(g) At 18h25 the manager of the K3 Shaft reported the intimidation of employees who were going to work.[83]

(h) At 18h35 Mr Botha reported that he and Mr Kellerman had fired about 10 rounds at the commuters who were aggressive and who were busy intimidating people.[84]

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[79] Exhibit EEEE19.2.
[80] Exhibit EEEE19.2
[81] Exhibit EEEE19.2
[82] Exhibit EEEE19.2
[83] Exhibit EEEE19.2
[84] Exhibit EEEE19.2

(i) At 18h59 Mr Kellerman reported that commuters were intimidating workers not to go to work, and were using pangas and knobkerries to do so.[85] He reported further that Mr Botha had fired 15 rounds of rubber bullets at them.[86]

(j) At 19h31 Camera 637 observed commuters who were offloading workers from the bus at EPL Hostel.[87]

(k) At 20h00 it was reported that two workers who were on their way to work had been assaulted near the NUM offices at Wonderkop.[88]

(l) At 21h19 a report was received that commuters were intimidating workers at K3 Shaft.[89]

2) Mr Malesela William Setelele,[90] the chairperson of the NUM branch at WPL (Western Platinum Limited), stated that during the course of the evening of 10 August, they received reports of widespread intimidation of workers who wanted to report for duty. They were also informed that the bus service had been stopped with the result that employees were unable to travel to work. According to Mr Setelele they used the NUM vehicle, a Toyota Quantum, to transport workers to work throughout the mine.[91] This vehicle had been provided to NUM by Lonmin.

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[85] Exhibit EEEE19.2
[86] Exhibit EEEE19.2
[87] Exhibit EEEE19.2
[88] Exhibit EEEE19.2
[89] Exhibit EEEE19.2
[90] Malesela William Setelele was shot dead at Marikana on 17 October 2013.
[91] Exhibit YY1, paragraph 14

2) He said that he did not notice any signs of intimidation whilst transporting the workers throughout that night, expect for an incident that occurred near the Wonderkop Stadium. A group of persons gathered there shouted to them, in a threatening manner, that they would be killed for transporting workers to work while they were on strike.

3) Gene Kellerman[92] in his statement in the docket Marikana CAS 68/8/2011, which pertains to 2 counts of attempted murder on 11 August 2013, says that on the 10th, Lonmin received reports of intimidation and the preventing of employees from going to work throughout the day. At 18h00, Mr Botha, his colleague, received instructions from Lonmin Emergency Disaster Management to attend upon Rowland Shaft. He accompanied him.

4) He attended the scene and when about 100 meters away from the crowd, he clearly saw them armed with pangas, spears and knob kieries. He observed the crowd singing and dancing and he noted that during the evening a group of about 20 to 30 persons would break away towards the hostel areas and intimidate the employees who wanted to work, and prevented them from going to work. They were also jeering, threatening and swearing at members of security.

5) He says that at about 18h45, when a group of workers came off duty, he warned them to walk on the opposite side of the road to where the strikers had positioned themselves. Six of them did not listen to his warning and were charged at by 20 to 30 strikers shouting and wielding weapons,

[92] Exhibit EEEE 29

whereupon they fled from the scene towards the Roland shaft. The group of strikers ran towards the six employees. Both Botha and Kellerman shouted at the group to stop chasing after the others, but they did not stop. Botha thought that the group might catch up with the fleeing workers and decided that he had no other option but to use rubber bullets to attempt to bring the situation under control.

6) Mr Kellerman says that he was armed with a shotgun which he had loaded with low grade low density rubber bullets. He fired a warning shot into the ground with no result. He says he had no option but to fire twice at the crowd with rubber bullet reduced rounds. He says that he ensured that he aimed low and towards the legs of the strikers, and also took care that there were no other pedestrians in the area where the employees were being chased.

7) He says that at the time he shot, he had no other measure available to him to bring the situation under control, to stop the armed strikers from chasing the employees and to protect the employees either going to or returning from work.

8) He says the group then turned around and joined the bigger group of strikers and the shooting of rubber bullets seemed to have the desired effect. There were no injuries to any person on the scene.

9) Mr Botha contacted Captain Govender at the Marikana Police Station, who despatched a vehicle to the scene and attended with two other policemen. Captain Govender and his crew drove towards the direction of the crowd,

and when they returned, Captain Govender said that he had noticed the crowd were in possession of traditional weapons. Mr Kellerman says that he noticed that the crowd ran off in the direction of Nkaneng village when the Police vehicle drove towards them.

10) Mr Botha contacted their security manager, Mr Miles, for back up. Captain Govender left the scene just before the back-up arrived at 20h00.

11) He says that until about 22h30, there were similar incidents of chasing and threatening of workers and during which incidents, he shot 16 rubber bullets, in an attempt to contain the strikers to protect those employees who came to work.

12) Mr Kellerman filed two shooting reports in respect of the shootings in which he was involved on the evening of 10 August. The first report related to his firing of five 37mm rubber (stopper) rounds.[93] The second report related to his firing of sixteen rubber bullets, two of them being warning shots.[94] In this report he did not distinguish between the three separate shooting incidents, and treated them as one. As regards the time of the incident, the description of the incident, and the reason for the incident which led to the shots being fired, Mr Kellerman's two shooting reports were in identical terms to the shooting report that was filed by Mr Botha.

13) The same statement is made by Mr Botha in the docket, the only difference being the number of shots fired by him. According to Mr Botha, at approximately 18h00 on 10 August 2012 and at the Rowland crossing he

[93] Exhibit EEEE32A.
[94] Exhibit EEEE32B.

observed a group of about 20 to 30 workers carrying knobkerries, spears and pangas.[95] He said that the group was threatening those workers who were coming off their shifts and those workers who were going to work for the evening shift.[96] He was accompanied by Mr Kellerman.[97] According to Mr Botha, they approached this group of workers in their Nissan Livina motor vehicle and fired rubber bullets at them, aiming for their legs, after which the group quickly dispersed and fled to the surrounding areas.[98]

14) Mr Botha filed a shooting report in respect of these shootings. [99] In this report he did not distinguish between the three separate shooting incidents but treated them as one. The time of the incident was recorded as being 18h35 to 20h10.[100] In the shooting report, he stated that the persons shot at had knob kieries, pangas and spears in their possession and intimidated the workers in the area.

15) The reason given by Mr Botha for the incident which led to the shots being fired was that the RDOs were involved in an illegal march and intimidated employees.[101]

16) In the shooting report Mr Botha recorded that he had fired seventeen rubber bullets, all of them warning shots.[102]

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[95] Botha statement 2 July 2014, paragraph 14.
[96] Botha statement 2 July 2014, paragraph 14.
[97] Botha statement 2 July 2014, paragraph 14.
[98] Botha statement 2 July 2014, paragraph 14.
[99] Exhibit EEEE32C.
[100] Exhibit EEEE32C.
[101] Exhibit EEEE32C.
[102] Exhibit EEEE32C.

17) In his testimony Mr Dirk Botes, a Security Risks Manager in the employ of Lonmin, testified that the reports of shots being fired by Mr Botha and Mr Kellerman at 18h35, 18h59 and 20h10 on 10 August 2012 related to three separate incidents, and that he was present during the second and the third such incidents.[103] He was unable to explain why he only dealt with one shooting incident in his statement[104] and said that he 'forgot' about the latter incidents.[105]

18) Mr Botes was on the scene at the Rowland Crossing at approximately 20h30 in the company of Mr Sinclair where they met Mr Miles, Mr Botha and Mr Blou.[106] Mr Botes was informed that two people from amongst a group of marchers had been shot near the NUM office.[107] According to Mr Botes, he observed that there were scattered groups of individuals who were intent on joining the strike; that there were groups of people who were intent on intimidating workers who were ready to go on night shift; that these groups were dancing and toyi-toying; and that he spoke to the SAPS commander who was on the scene who told him that as the people were peaceful SAPS would do nothing further.[108]

19) Mr Botes, testified that the crowd of strikers danced and intimidated employees on the walkway from the hostel complex to the shaft, and prevented them from going to work. When members of Lonmin Security warned them to disperse, they threw stones at them. This prompted the

[103] Day 265, Botes, p. 33433 - 33434.
[104] Exhibit GGG19
[105] Day 265, Botes, p. 33440
[106] Exhibit EEEE2 paragraph 13, read with Exhibit EEEE9, paragraphs 8.1 and 8.2.
[107] Exhibit EEEE2 paragraph 8.9
[108] Exhibit EEEE2 paragraphs 13 and 14.

Lonmin Security members, including Mr Botes, to fire at the groups of people with rubber bullets.[109]

20) Captain Govender says that at approximately 18h20 he had received a report from Mr Blou that employees of Lonmin were being threatened and intimidated by other employees as a result of industrial action, and that the threat was concentrated at Rowland Shaft and at the K3 Shaft.[110] He immediately proceeded to the Rowland Shaft at Wonderkop, accompanied by other SAPS members.[111]

21) Upon his arrival at Wonderkop he noticed a group of approximately 15 males standing on the side of the road opposite Rowland Shaft. He said that he could not confirm if this group was the same group of persons who were intimidating employees. As he approached them, they moved off in the direction of the hostels.

22) He said that whilst he sat in his vehicle monitoring the group he was approached by Mr Graeme Sinclair and Mr Dirk Botes, who told him that SAPS should disperse the group of males standing on the opposite side. Mr Botes was excited and quite vocal.[112] He told Mr Botes that those people were just standing there and not presenting a problem to anybody.[113] Captain Govender testified that as far as he could see the strikers were not

[109] Day 266, Botes, p. 33595
[110] Exhibit FFFF7 paragraph 2.
[111] Exhibit FFFF7 paragraph 2
[112] Day 274, Govender, p. 35031
[113] Day 274, Govender, pp. 35027 - 35028

in possession of sharp instruments but merely had knobkerries.[114] He testified that he did not see them as threatening.[115]

23) Captain Govender testified that one of his colleagues, Constable Njomo went to enquire from the group what they were doing there. They said that they were waiting for a taxi, but they subsequently dispersed before any taxi came along.

24) He also testified that he did not witness any shooting by Lonmin security with rubber bullets.[116] Mr Kellerman's shooting incident report mentions that the shooting of the rubber bullets occurred in the presence of SAPS. This cannot be reconciled with the version of Captain Govender.

25) Captain Govender's evidence is in contrast to what is said by Sinclair, Botes and Kellerman. It occurs to the Commission, that it might be for the following reasons:

(a) the strikers moved off while the police were present, and Captain Govender and his crew were unable to notice exactly what the strikers had in their possession,

(b) the strikers desisted from any provocative behaviour while SAPS were present,

(c) the group of persons that Captain Govender observed were not the same group that were intimidating employees.

[114] Day 274, Govender, p. 35027
[115] Day 274, Govender, p. 35033
[116] Day 274, Govender, Page 35035

E Whether the shooting by Lonmin security was justified:

26) The question that arises is whether the three incidents of shooting by Lonmin security on the evening of the10th were justified. It has been submitted that the bland references to strikers intimidating workers are insufficient grounds to justify shooting at people and that Lonmin was unable to provide sufficient clarity or detail on exactly what intimidation was taking place and, more importantly, why it was necessary to resort to shooting at people gathered there. The Commission disagrees.

27) Whilst neither Kellerman nor Botha testified, there is nothing to gainsay the versions in their statements that the employees were being chased and intimidated by armed strikers. There was no statement of any striker or any cross examination that placed another version of the behaviour of the crowd before the Commission. Mr Botes testified that the shooting occurred when people were intimidating workers who walked from the hostel complex to Rowland crossing and when the crowd threw stones at the security personnel.[117] This evidence of Mr Botes was not challenged in cross examination.

28) Given the climate of intimidation of striking workers that prevailed at the time, it is very probable that Lonmin Security shot rubber rounds in an attempt to protect working employees being intimidated.

[117] Day 265, Botes, p. 33435

F The Attempted murder of Mr Mutengwane and Mr Dlomo

29) A docket was opened at Marikana under CAS 69/08/2012, in respect of these two shootings, the charges being two counts of attempted murder.[118]

30) In his statement, Mr Thando Elias Mutengwane, a Lonmin employee, stated that he was walking towards Nkaneng past the Wonderkop Stadium on 10 August 2012 at approximately 18h15 when someone in one of Lonmin Security's Twin cabs opened fire at him.[119] He saw white men in or on the bakkie, and realised that he had been shot in the left thigh.[120] His medical report filed in the docket[121], describes a gunshot wound, with the bullet visible on the X ray. Another man who was walking with him was also shot.[122]

31) Another Lonmin employee, Mr Bulelani Kluvert Dlomo, stated that at about 19h40 he was walking away from the Rowland crossing after being dropped off by a taxi when he heard four or five shots that came from a group of Lonmin security officers.[123] He fell to the ground having been shot in the head and next found himself in hospital.[124]

32) It is not clear to the Commission from the contents of the docket whether the injuries caused to Mr Mutengwane and Mr Dlomo were caused by rubber

[118] Exhibit XX5.
[119] Exhibit XXX2.18
[120] Exhibit XXX2.18
[121] Exhibit EEEE28
[122] Exhibit XXX2.18
[123] Exhibit XXX2.19
[124] Exhibit XXX2.19

bullets or sharp ammunition. In the Commission's view, these shootings merit further investigation by SAPS.

G SAPS contingency plan of 10th August 2012

33) In relation to the SAPS Contingency Plan of 10 August 2012, the following appears from the evidence:-

(a) On 10 August 2012 the SAPS purported to have a contingency plan in place to deal with the unrest situation at Marikana. The contingency plan was signed by Lieutenant Colonel Joseph Omphile Merafe, the Unit Commander of Rustenburg POP, and by Brigadier Mokhele Samuel Seboloki, the then Acting Cluster Commander for Rustenburg.

(b) Major General Naidoo testified that the contingency plan made provision for SAPS to deploy resources to conduct policing generally because as at that date SAPS could not specifically say what was going to happen. He testified further that the deployment of POP units from other provinces and the NIU was to enhance the contingency plan. Major General Naidoo testified that the contingency plan was activated from 10 August 2012 and was continuously built on and upgraded thereafter.

(c) Lieutenant Colonel Merafe testified that the contingency plan was prepared on his behalf by Warrant Officer Motlame on 10 August 2012 after the march that had occurred that day. It was conceptualised as an intervention plan (in the sense that it was drafted so that SAPS were ready in the event that intervention was required).

(d) Captain Govender was the commander of Visible Policing (VISPOL) at the Marikana police station on 10 August. He was mentioned in paragraph 10.2 of the contingency plan under the heading '*Command and Control*', where it was recorded that he was the VISPOL commander. The operation that was envisaged in the contingency plan fell within his usual area of operations. It would therefore have been expected that he would have intimate knowledge of the contents of the plan. However, Captain Govender testified that not only was he never given a copy of the document, he did not even know about the existence of the document.

(e) While the contingency plan directed that a JOC would be activated at 07h00 on 10 August 2012 and would remain open for the duration of the strike, Captain Govender testified that he had no knowledge of any such JOC being established. He also said that whereas the Contingency Plan provided that one officer and six members from the Marikana police station would be responsible for patrolling and visible policing in the

area, the patrolling and monitoring that was conducted by his unit in the area on 10 and 11 August 2012 was conducted as part of their normal policing duties and not in accordance with the Contingency Plan.

(f) A JOC was established by SAPS on 12 August 2012 at 18h00 at Lonmin.[125] By that time ten people had been injured and four people had been killed.

(g) In cross examination Major General Naidoo was invited to comment on the assertion that if the SAPS had executed the Contingency Plan the incidents that led to the injuries and deaths that occurred up to the time that the JOC was established might have been picked up early by the SAPS, and the injuries and deaths might possibly have been prevented. Major General Naidoo responded that he had no comment.

(h) The SAPS intelligence report for 11 August 2012 recorded the following in respect of the events that had occurred on 10 August 2012:

> '*It was reported on 2012-08-11 that two people were injured during the previous night and that it was linked to the activities of AMCU members. They had an unlawful gathering on 2012-08-10 at the Karee*

[125] Exhibit FFF25

Hostel Sports ground in support of their wage demands. The gathering was not approved and was monitored by the SAPS and Mine Security personnel. It was also reported that a group of 2000 AMCU members were gathered at the Karee mine hospital and later moved to the nearby Nkaneng informal settlement and from there to the 'Koppie'. The information was reported to OIAC Provincial and National Offices. Brig Engelbrecht also discussed this with the DPC, operational services [Maj Gen Mpembe] during the same day and the seriousness was explained, as well as the need for police visibility.'

(i) That report again attributes the shooting of Mr Mutengwane and Mr Dlomo to inter union rivalry between AMCU and NUM, despite the fact that both men state categorically in their statements that they had been shot by Lonmin security. The intelligence report also hints at a lack of increased visible policing in light of the intelligence reports that had been received.

H Lonmin's Counter Industrial Action Response Procedure

1) An issue which can at this stage be dealt with under the events of 10 August 2012 (although it has also relevance to the events on 11 and 12 August 2012) is the applicability of '*Counter Industrial Action Response Procedure*'.

34) According to the cover page of this document it appears that it was last revised in May 2012. It was approved by Lonmin's Manager of Mining Security.

35) The document has a footer on each page which states that a signed copy of the document is held at E & DM Mining Security (Middelkraal).

36) Mr Sinclair testified that the security procedures document was formally adopted by Lonmin. He testified that their operational procedures are based on that document which guided the response of Lonmin security in an emergency situation. While he testified that exhibit XXX8 is a guideline for Lonmin security of what should be done, Mr Sinclair accepted under cross -examination that exhibit XXX8 constitutes rules prescribed by Lonmin for how unprotected industrial action should be dealt with.

37) Mr Mokwena, on the other hand, testified that this document was never a fully authorised company policy as it had not been authorised or signed by three operation executives, including himself, and

presented to EXCO.[126] This evidence is surprising in view of the evidence of Mr Sinclair that the document was binding on Lonmin security. In any event Mr Blou testified that there are many policies and procedures within Lonmin that are not physically signed off, but this did not mean that they were not implemented. Mr Blou testified that exhibit XXX8 reflected good practice and governed Lonmin's security operations.

38) In these circumstances it would appear that the document was at least perceived as binding on Lonmin security.

39) Some of the crucial issues dealt with in exhibit XXX8 include the following:

(a) In terms of clause 4.1.3, the procedure will serve as a guideline for managing industrial action. Each individual incident will require the Manager of Mining Security (or his delegate) applying his discretion as to the most effective way to manage the situation. Mr Blou testified that in practice this duty rested on him.[127] He testified further that this required that information be fed through to him effectively so that he could properly exercise his discretion as to how to manage a situation.

[126] Day 290 Mokwena p. 37884
[127] Day 281, Blou, p. 36129

(b) It is necessary to obtain sufficient forewarning through intelligence gathering and maintaining effect channels of communication (clause 4.3);

(c) The manager of mining security (or person appointed by him) has to ensure effective and detailed planning, briefing and debriefing (clause 4.4.1). Mr Blou testified that in practice this duty rested on him.

(d) Clause 4.4.3 requires that detailed records be kept. It requires specifically that detailed minutes be kept of briefing meetings and that these should incorporate details of plans. Mr Blou testified that Lonmin security were well aware of the requirement that detailed minutes be kept. He, however, accepted that the log book did not reflect accurate or detailed minutes. He accepted that this was a discrepancy and explained that either the minutes were not captured properly or they were not captured at all because of the fast pace at which events unfolded. In relation to plans, Mr Blou testified that these were usually done on notice boards and whiteboards in the Lonmin JOC. He, however, accepted that they ought to have been recorded in proper minutes.

(e) In terms of clause 4.5, during the planning, important shortfalls, risks and events must be identified and recorded. Mr Blou accepted in his evidence that shortfalls included shortfalls in the gathering of information, the processing of information,

decisions about deployments, equipment to be used in deployments, the number of deployments, and the place of deployment. In relation to the requirement to conduct thorough risk assessment, Mr Blou accepted that when in planning the management of potential risks, it is important to consider all realistically possible scenarios.

(f) Clause 5 regulates the establishment of the JOC.

(g) Clause 6 deals with administration and record-keeping;

(h) Clause 7 deals with operational requirements:

(i) Clause 7.1.3 entrenches the doctrine of minimal force.

40) Notwithstanding the detailed provisions of Exhibit XXX8, there has been little or no evidence from Lonmin of any detailed planning, briefing or debriefing in relation to the incidents of 10, 11 or 12 August 2012.

CHAPTER 6

The events that occurred on Saturday, 11 August 2012

The following incidents on the 11th call for consideration and evaluation:

A. the March to the NUM Office and the Confrontation at the NUM Offices

B. the shooting of Mr Mabuyakhulu and Mr Ngema

C. the intention of the crowd

D. whether the crowd was armed with sharp weapons

E. the shooting by the NUM members

F. who was responsible for the shooting of Mr Mabuyakhulu and Bongani Ngema and the subsequent attack on Mr Mabuyakhulu

G. whether SAPS were in attendance

H. Rituals

I. ICAM

J. Lonmin Briefing

A The march to the NUM office and the confrontation at the NUM office

1) On 11 August 2012 at 02h19, Riaan Beukes, a Senior Security Officer in the employ of Lonmin, reported that NUM members had informed him that they would go through the village and ask the workers to go to work, and that they wanted him to do the same inside the hostel.[128] Mr Setelele said that in the early hours of 11 August 2012 he had used a loudhailer whilst driving around to inform people that the strike was not endorsed by the NUM and that they should report for duty. He also arranged for other NUM members and shop stewards to do the same on foot in the hostel complex.[129]

2) At 08h00 a Lonmin management debriefing was conducted by Mr Sinclair. The note of the meeting recorded reports of intimidation at the Roland Shaft, Nkaneng, Marikana and Wonderkop. Jomo Kwadi expressed a fear that NUM members using loudhailers encouraging their members to go to work and trying to assist them with transport and protecting them would lead to NUM taking the law into its own hands and that faction fights between the rival unions might result.[130]

3) Mr Mabuyakhulu was amongst the group of protesters who were at the Wonderkop Stadium on the morning of 11 August 2012. He says in his evidence-in-chief[131] that they met at 09h00 to see what they were going to do that day. There were various discussions, and information was conveyed to them that some people had been shot by members of NUM who were

[128] Exhibit EEEE19.2 [also Exhibit XXX4].
[129] Exhibit YY1, paragraph 16.
[130] Exhibit EEEE19.2.
[131] Day 48, Mabuyakhulu, p. 5266

driving around in a Quantum which is owned by the mine. They also received a report that certain persons had guns pointed at them and were told to go to work under force. He says the decision that was taken was that they should go to NUM to enquire from them as to why they do not want the employer to talk to them.

4) Under cross examination, he could not say why it would not have been appropriate for only a small number of representatives to go to the NUM office to talk about the issue, rather than all 3000 of them marching to the office. It was also put to him in cross examination that he said in his statement that he wanted to go to the NUM office to find out why they had been shooting at the AMCU members the previous day

5) The group of protestors marched from the direction of Wonderkop stadium moving to the east through the Karee hostel and towards the NUM office that was situated just outside and to the north-east of the eastern gate to the hostel area. These events were observed by Mr Akanyang Julius Motlogelwa and Mr Sello Elias Dibakoane, security officers in the employ of Lonmin.

6) Mr Dibakoane said in his statement[132], that the meeting on the morning of Saturday 11 August 2012 took place at about 09h00 and at about 09h30 the crowd started singing and chanting and appeared to be preparing to move to the NUM offices. At approximately 09h40 he and Julius Motlogeloa received information from an informant that the crowd intended to march to the NUM offices to burn down the offices because NUM was assisting its members to

[132] Exhibit ZZ3, paragraphs 2.7 to 2.10

attend work the previous day. He decided to drive to the NUM offices to warn the members present there of the position.

7) He said some members of the marching crowd were carrying traditional weapons which included sticks and spears. He did not observe any pangas or firearms.

8) Mr Motlogelwa stated that a certain David informed him that protesters have decided to destroy and burn the NUM offices at the Hostel. At about 11:00 they started singing and marched towards the Hostel. He saw that they carried sticks and spears. He drove to the Hostel and informed Mr. Brown (Mr Setelele), the chairperson of NUM at Rowland shaft, that protesters are coming to destroy and burn their offices. He advised him to vacate their offices to save their lives. Mr Brown and his team said that they were not going to leave.

9) Mr Setelele said that he was at the NUM office that morning when two Lonmin security officers, Elias Dibakoane[133] and Julius Motlogelwa,[134] arrived there and told him that a group of protesters had started marching from Wonderkop Stadium headed in the direction of the NUM office, and that they were carrying an assortment of weapons that included knobkerries and spears,[135] and that according to their information the protesters intended to burn down the NUM office and the vehicle that NUM had been using to

[133] Exhibit ZZ3
[134] Exhibit ZZ4 [also Exhibits XX2.20, AAAA38 and DDDD10].
[135] Exhibit YY1, paragraph 17.

transport employees to work.[136] Mr Setelele left the NUM office immediately to take the vehicle that NUM had been using to a place of safety.[137]

10) Mr Setelele acknowledged that at this time there were a number of weapons such as knobkerries, sticks and spears at the NUM office, which was not ordinarily the case. He stated that some of these weapons been confiscated from protesters during the course of previous night, whilst others had been brought there by NUM members who had fetched them from home in response to the threats and intimidation of the protesters that they had experienced during the previous night whilst assisting employees to get to work. He stated that he later heard that Daluvuyo Bongo had distributed these weapons amongst the NUM members who had decided to defend the NUM office against the approaching protesters.[138]

11) Mr Saziso Albert Gegeleza said in his statement[139] that they all moved out of the office and onto the road because they feared that they might be trapped in the building or its yard, which was fenced. He said that although many people spoke in favour of remaining and trying to protect the office, it was clear that most of them, if not all, were very afraid of the strikers given the information they had received. Several of those present did in fact leave. By the time that the strikers arrived, there were less than 20 people who had remained at the office. He was one of those who resolved to stay, despite his fear.

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[136] Exhibit YY1,
[137] Exhibit YY1, paragraph 18.
[138] Exhibit YY1
[139] Exhibit ZZ2, paragraph 14, paragraphs 15 to 24.

12) He said that whilst standing outside the office fence, two security personnel drove up in a white van and advised Mr Bongo they should all leave the scene because the strikers were on their way to attack and burn the office. In response to a question from Mr Bongo, they made it clear that they were not in a position to provide any protection. The two security personnel were visibly worried about the situation. Immediately after they had spoken to Mr Bongo, they left in the direction of the Wonderkop Township. He said that the fact that Lonmin security had said that they were unable to assist them added to the level of the fear amongst those who were still at the office.

13) They could hear that the strikers were approaching and he then led a small number of persons to the sidewalk alongside the Brits taxi rank road, from where he saw that a very large group of strikers was coming around the corner of the road from the hostel and stadium and moving in their direction. He observed that they were singing and chanting in an aggressive manner and were armed with knobkerries and sticks and several of them had assegais.

14) He observed that many of the strikers were turning down the road which led to the entrance to the NUM office. The others continued to move down the road towards where he was. When they were more or less in line with the satellite police station the strikers in front stopped.

15) The strikers started shouting at them, including threatening words like ‘here are these dogs’ and were very hostile. There was at no stage any indication that they had come there in order to speak to the NUM people. Nothing at all

was said to the effect that they wanted NUM to take their demand to Lonmin management.

16) Some of the crowd threw stones at them and then the crowd started moving forward again. These events, he said were happening very fast and he had no doubt that they were going to attack them and was extremely afraid. They were nevertheless determined that they would not run away but that they would defend themselves and the NUM office.

17) He heard at least 3 gunshots, but because of the noise, could not tell exactly from where the shots had been fired. He was very startled by that and said that it seemed that the strikers were also startled. Almost immediately the strikers in front of the group began retreating. Those behind did the same and very quickly the strikers were dispersing. He saw that the same was happening with those strikers who had gone down the road towards the NUM office entrance.

18) The majority of the strikers turned back up the road through the hostel complex and others pushed through a broken portion in the concrete fence (known as a “stop-nonsense‟) on the side of the road opposite the satellite police station. As they went through this gap, some of the strikers dropped the weapons they were carrying.

19) He believed that the gunshots saved him and others from serious injury and, even, from being killed.

20) The NUM members chased after them to ensure that the strikers kept on the move and continued to disperse. The concern was that they should not have the opportunity to regroup and launch another attack on the NUM office.

21) Mr Dibakoane and Mr Motlogelwa were positioned near the scene where this incident occurred. Mr Dibakoane, in his statement,[140] described that the NUM crowd were standing outside the NUM office and facing in the direction of the oncoming strikers. He did not observe any weapons on the NUM members, although some NUM members, were wearing blankets which could have concealed weapons.

22) Mr Motlogelwa, who had stopped the Lonmin security vehicle some 70 metres behind the gathered NUM members and in a position facing the approaching crowd, observed that as the crowd approached the MTN container located on the corner of the cross road in front of the NUM office, approximately 30 NUM members started to run towards the crowd. The two crowds clashed in the vicinity of the MTN container. He said there was chaos and that everybody scattered and started running in all directions.

23) He heard two loud sounds which he took to be gunfire and watched as the crowd ran off in the opposite direction towards Wonderkop. As the crowd retreated, Mr Motlogelwa slowly drove his security vehicle towards the direction of the Wonderkop stadium trailing behind the retreating striking employees.

[140] Exhibit ZZ3, paragraphs 2.10 to 2.23.

B The shooting of Mr Mabuyakhulu and Mr Ngema and the subsequent attack on Mr Mabuyakhulu.

24) Two members of the crowd of protesters, Mr Bongani Ngema and Mr Mabuyakhulu, were shot in the process. Both were later taken to the Andrew Saffey Hospital by Lonmin security personnel. An attempted murder docket was opened at Marikana under CAS 67/08/2012[141] in respect of Mr Ngema and an attempted murder docket was opened under Marikana CAS 68/08/2012[142] in respect of Mr Mabuyakhulu.

25) Mr Mabuyakhulu, said in his statement[143] that whilst they were marching on the same street as the taxi rank but before they could reach the junction behind the satellite police station, they observed that a small group of NUM members were approaching. The group was singing something about 'AMCU' and 'Karee' and thereafter he heard gun shots. He did not see who was shooting but it was from the side of the group of NUM members in NUM shirts.

26) They then ran away into different directions. He saw one person fall, apparently from a gunshot. He then decided to go through the gap in the concrete fence known as 'stop nonsense' and started to run and realised that he had been shot in the back. He continued running towards the bus rank. He then fell after losing power and feeling weaker.

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[141] Exhibit XX5
[142] Exhibit XX6
[143] Exhibit BBB8, paragraphs 8 and 9.

27) Mr Mabuyakhulu in his evidence[144] said that while he was running away, he became aware that he had been shot and he collapsed and fell down. He was set upon, he said, by members of the NUM who asked him where he worked. He lied and said he was working at Rowland Shaft. They said that he was lying and that he was working at Karee and was an AMCU person. One of the persons said 'let's finished him off' and used the handle of a spear and struck him with it until it broke. He gave a description of the person who struck him as wearing a NUM tee-shirt and white overalls and said that he was carrying a butcher's knife. He also says that he felt a blow at the back of his head whereupon he lost consciousness.

28) He said that he is able to identify his assailants from video footage. The video footage referred to appears on the SAPS hard drive.[145]

29) At page 5276, he deals with the medical reports relating to his injuries.[146] At page 5281, he says that a bullet was removed from his body and it was handed over to the police.

30) The videos were not played during the Commission hearings for the witness to identify the persons. This is something that the Commission recommends to be investigated and that the DPP apply his mind to seeing whether those persons who assaulted Mr Mabuyakhulu can be identified for the purposes of prosecution. Whilst there might not be any evidence about who shot him, the subsequent assault on Mr Mabuyakhulu while he lay injured on the ground, should be thoroughly investigated.

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[144] Day 48, Mabuyakhulu, p. 5269 et seq
[145] Day 48, Mabuyakhulu, p. 5285
[146] Exhibits XX 5 and XX 6

C The intention of the marching crowd

1) Mr Mabuyakhulu said that he was not aware of any intention to burn down the NUM office.[147] Under cross examination, he disavowed any intention whatsoever of any violence or threatening behaviour. He said that the reports of persons being shot from the Quantum and forcing employees to go to work did result in a reaction from the meeting, with people saying that it was just not right.[148]

2) He said that the report of persons being injured by the shooting did not produce any reaction from the crowd.[149] He hesitated to admit, under cross examination by counsel for NUM, that his statement to the investigating officer included his saying that they marched to the NUM offices to ask about the shooting. The furthest he went was to say that he might have said so.[150] He did agree though that at the meeting it was conveyed to them that members of AMCU had been shot by members of NUM, but denied that they had marched to the offices of NUM to find out why AMCU members had been shot.[151]

3) Under cross examination by counsel for SAPS, Mr Mabuyakhulu could not explain why a representative group did not attend upon the NUM office to

[147] Day 48, Mabuyakhulu, p 5265
[148] Day 49, Mabuyakhulu, p. 5350
[149] Day 49, Mabuyakhulu, p. 5353
[150] Day 49, Mabuyakhulu, p. 5346
[151] Day 48 ,Mabuyakhulu, p. 5319

discuss their concerns. He agreed that it would be easier for five persons to make the enquiries, rather than a crowd of 3000. [152]

4) AMCU in their Heads of Argument at paragraph 26, submit that the strikers did not have violent intentions, and that there was but a rumour about the intention to burn down the NUM office. This point was also made by counsel for Injured and Arrested Persons.

5) The Lonmin Logbook records a report at 08h39 of a threat to burn down the NUM office, and at 08h47, Mike Gerrtsen from Rowland reported that people were planning to burn the cars at the shaft. If these were indeed just rumours, they certainly seem to have been widespread.

6) There had already earlier that morning been incidents recorded of intimidation of employees. At 08h39 Rowland Shaft control room reported that people were running away from the parking area because they are afraid of people passing from the shaft. Perhaps the prevailing climate of distrust and intimidation gave more credence to these rumours.

7) The evidence leaders submit correctly, in the Commission's view, in paragraph 234 of their Heads of Argument, that despite Mr Mabuyakhulu's assertion to the contrary, it is probable that the protesters who descended on the NUM office did so with violent intent. This intent, they submit, was most probably fostered by the fact that NUM had actively assisted workers to go to work during the night, which constituted actions aimed at breaking the strike that the protesters were trying to enforce. This position was further inflamed

[152] Day 48, Mabuyakhulu, p. 5309

by reports of shootings and injuries to members of AMCU which allegedly took place the previous evening.

D Whether the crowd was armed with sharp weapons

1) Both the security officers saw sticks and spears in the possession of the crowd. Both Mr Setelele and Mr Gegeleza say that the crowd was armed with knobkieries, spears and assegais. There is nothing to gainsay this evidence.

2) Mr Mohammed Cassim, the owner of a hardware store at Marikana, said in his statement, that on 11 August 2012 at approximately 09h00 when he opened the doors of his store, he had a rush of persons buying pangas[153] and that his usual stock of pangas of about thirty items was quickly sold out.[154] He said that he was very suspicious because usually they would want the items to be wrapped in newspaper, but on that day they just put them in their trousers.[155]

3) There was some debate about whether the buying of the pangas occurred before the shooting incident.

4) There are differing versions given as to the time of these events. Mr Mabuyakhulu said that they gathered at 09h00.[156] Mr Dibakoane[157] said at that the meeting commenced at the Wonderkop Stadium at approximately

[153] Exhibit HHH7.2, paragraph 3.
[154] Exhibit HHH7.2, paragraph 4.
[155] Exhibit HHH7.2, paragraph 5.
[156] Day 48, Mabuyakhulu, p. 5266 - 5267, Exhibit BBB 8
[157] Exhibit ZZ3

09h00, and at about 09h30 the crowd started singing and chanting and preparing to move to the NUM offices. Mr Julius Motlogeloa said in his statement that at about 11h00 the protesters started singing and marched towards the hostel.

5) The Lonmin logbook reflects a report by Mr Frans Mabelane of a shooting at 09h00, and again at 09h03 of a person being shot next to the Schagen offices. At 09h36, it is recorded that medics are transporting a person with a gunshot wound to his lower back to hospital.

6) The vehicle tracking history of the Toyota Hilux used by Lonmin Security shows the vehicle present at the area of the NUM offices between 08h22 and 08h44, and again there between 10h10 and 10h11.

7) The evidence leaders submitted[158] that the confrontation between the unions took place between 08h35 and 08h42 because 08h35 is the time when the vehicle is recorded as driving to a position where it was facing the strikers from behind the NUM office. This is most likely, against the background of the times recorded in the Lonmin Log Book.

8) This being so, the buying of the pangas from Mr Cassim could not have taken place before the march to the NUM offices. Mr Cassim could also not have been the only source of sharp weapons, as number of sharp weapons in the possession of the strikers in the following days, exceeded thirty by far.

[158] Day 298, Argument, p. 39321

E The shooting by NUM members

1) It was not disputed that the NUM members opened fire on the crowd of protesters.[159] . Counsel for NUM, at the inspection in loco, recorded on video[160] admitted that it is NUM that fired the shots. Apart from this statement made by their counsel, the Commission has not heard any evidence as to the circumstances surrounding the shooting.

2) Mr Gegeleza said that he had no idea that anyone was in possession of a firearm.[161] It was put by Mr Madlanga, under cross examination[162] that the witness must have known about the firearms being carried by certain NUM members otherwise the probability of about 20 people confronting a crowd of about 2 000 did not make sense. The witness was adamant that he did not know about it.

3) NUM submit that their firing of shots was in defence of the office and themselves, and that the shooting in fact saved the lives of some 20 to 30 of them from the crowd of approximately 3 000 persons converging on them. They maintain that it was the strikers who threw stones at them first.

4) The question that requires to be answered is whether in initiating the clash by running towards the crowd and the subsequent firing of shots the NUM members can be construed as acting in self- or private defence.

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[159] Exhibit YY1, paragraph 21.
[160] Exhibit YY3
[161] Day 40, Gegeleza, p. 4335
[162] Day 39, Gegeleza, p. 4272

5) AMCU in its Heads of Argument at paragraph 24.4 submitted that the shooting by NUM officials on the 11th August 2012 was unlawful. Its submission in paragraph 26.9 was that in deciding to remain at the office against the advice of the security officers and in arming themselves, that they readied themselves for a fight.

6) The act of arming themselves with an assortment of weapons to protect their office and persons cannot in itself attract criticism, especially in the light of the information conveyed to them by the security officers and the short time period within which these events occurred. It is convenient to deal with their actions in two parts, before and after the shooting. Before the shooting, all they appear to have done is to run towards the approaching crowd. The Commission has not heard any evidence that they perpetrated any assaults upon any person in the crowd of strikers. The shooting of the crowd and the subsequent assaults are in the Commission's view matters that require further investigation. Certainly the assault upon Mr Mabuyakhulu while he lay on the ground does not appear to be justified.

7) It is difficult to determine whether the actions of the shooters were justified on any basis without having any evidence as to the circumstances in which the shooter(s) decided to fire. NUM has not permitted the Commission to be privy to this information. In the Commission's view, these shootings are matters which require to be further investigated.

F Who was responsible for the shooting of Mr Mabuyakhulu and Mr Ngema and the subsequent attack on Mr Mabuyakhulu?

1) Under cross examination by cousel for SAPS, Mr Mabuyakhulu said that he was not a danger to anyone at the time he was shot whilst running away and at the time he was bludgeoned about his head while lying injured on the ground.[163]

2) The docket placed before the Commission names a suspect, but not much seems to have been done to take the investigation further. Mr Mabuyakhulu testified that he is able to identify two of his attackers, and has done so already from a video shown to him.

3) Whatever the position at the time of shooting, the attack on the injured Mr Mabuyakhulu by two armed persons requires urgent investigation and prosecution.

G Whether SAPS were in attendance

1) The Lonmin Logbook records that at 08h45, PW (Mr Botha) reported for the second time to Marikana SAPS and Constable Ramafoko also informed SAPS. At 09h02, PW reported to Colonel Merafe and Captain Sefike and asked for assistance.

[163] Day 48, Mabuyakhulu, p. 5305

2) At 09h03, when 8 rubber rounds were fired to disperse a mob opposite the NUM offices, two SAPS Constables were available to assist. At 09h43, Mr Henry Blou was to contact SAPS Provincial Commissioner Mbombo or Major General Naidoo to report that no support had been received from SAPS and two shootings had already been reported.

3) It has not been disputed by SAPS that they were not in attendance at the scene.

H Rituals

1) Mr Sipete Phatsha who, according to him, joined the strike on 10 August 2012 and received a gunshot injury on the afternoon of 16 August 2012,[164] testified that what was depicted in Exhibit L87 was men washing themselves and that he did not see any *muti* being used and in any event does not take *muti* as he is a person '*who prays*'.[165]

2) He was, however, contradicted by Mr Xolani Nzuza who admitted that he was the second-in-charge of the strikers and who testified after Mr X had in his evidence disclosed the nature and extent of the rituals that had been conducted.[166] Mr Nzuza testified that he was on this day asked by Mr Noki, who was the leader, to assist with bringing the *inyanga.*[167] He formed part of

[164] Exhibit DDD1
[165] Day 51, Phatsha, p. 5570 - page 5572
[166] Exhibit PPPP1, paragraph 2
[167] Exhibit PPPP1, paragraph 3

a four man delegation which was tasked with going to fetch the *inyanga*.[168] He stated that the reason why he had not mentioned this fact in his first statement was because

> '*it is, in my view, completely irrelevant to the issues being investigated by the Commission.*[169] *The various religious and/or cultural beliefs of such a heterogeneous group as the 3000 or more strikers played no role whatsoever in relation to the massacre or its causes*'.[170]
>
> Mr Nzuza stated further that:
>
> '*[a]ny suggestion that the practice of traditional rituals had a sinister motive is pure nonsense, racial stereotyping and an insult to our belief system. It is a sign of the police clutching at straws to justify the mass murder of innocent workers after the fact. In all our interactions with the police, they never raised any objections to the performance of traditional rituals*'.[171]

3) An undercover security superintendent employed by Lonmin Security who infiltrated the meeting of strikers at the Koppie stated in his statement[172] as follows:

> *'We (large part of the security team) were standing opposite Wonderkop Stadium when I told Callie Miles that I am going to join the gathering so that I can get an understanding of what was happening and what they were planning to do. I crossed the road in a westerly direction in order to join the protestors where they were standing. When I got there I heard them saying that they were looking for a Sangoma. They were also discussing methods in which to pay the Sangoma. I didn't hear the beginning of the conversation, but overheard that they had to send someone to him in order to determine the rate required. At this point they dispatched approximately three persons to make the enquiry. I was able to determine*

[168] Exhibit PPPP1, paragraph 3
[169] Exhibit HHH21
[170] Exhibit PPPP1, paragraph 4
[171] Exhibit PPPP1, paragraph 4
[172] Exhibit ZZZZ15, file 1, tab 6

through the bits of conversation that I overheard, that they were attempting to secure the services of the same Sangoma who helped the Impala employees to win their battle earlier this year.

The delegates returned with an answer from the Sangoma that the going rate would be R1000.00 per person. The activists felt that R1000.00 was too much and once again despatched the delegates to negotiate a more affordable rate. When they returned they announced that an agreement had been reached at R500.00 per person. During the prelude to the negotiations we were instructed to make known the number of participants. We were able to come up with the figure of 1800 people.

After agreement had been reached between the Sangoma and the crowd, we were instructed by one of the delegates that the [place] currently occupied was too public and we needed to move to a more private spot. The Koppie was then selected as a suitable venue for whatever rituals were to be conducted.

When we arrived at the koppie, we divided ourselves into groups according to our working places, i.e Karee, Westerns and Easterns. We were instructed to remove our hats, turn off our cellphones and refrain from any sexual activity as any of these could fall/would interfere with his mutis.

Furthermore we were instructed to obtain water and about 500 Minora blades. I witnessed the fact that some people went down to the village to get water and Minora blades.

By the time that the Sangoma arrived it was already late and almost dark. Upon arrival he first had a discussion with the individuals who conducted the negotiations. After which he started with the first group (either Easterns or Westerns). From my vantage point I was able to see people removing their upper body garments. The bare-chested individuals then presented themselves one at a time to him to perform whatever ritual he was about to perform. The Sangoma was also half naked. I only saw a male Sangoma but I heard that there was a female Sangoma in the vicinity who it was alleged was to be the back-up plan should the principal Sangoma's muti not work.

While I was there I overheard the crowd saying that they were not going to sleep at all that night as they needed to plan how they were going to retaliate regarding their two comrades allegedly killed during the march that preceded the gathering

at the koppie. – It seemed to me that they were preparing for war.

I left the koppie before the Sangoma could start with his ritual on the group that I had infiltrated.

When I arrived back at my JOC team, I reported what I had witnessed. I mentioned that the Sangoma was present and had promised the crowd that if they participated in his rituals they would not need to fear the firearms of their enemies because the firearms would either jam or the bullets would turn to water before striking them.

I am not sure whether my superiors took my recommendations seriously due to the fact that they laughed regarding the water bullet issue.'

I The ICAM Report

Mr Blou testified about inscriptions contained in an annexure to the Lonmin ICAM report regarding the undercover security superintendent.[173]

J Lonmin Briefing

1) In the interim at approximately 14h00 a debriefing was conducted by Mr Blou and Mr Botes. The note in respect of the debriefing reads as follows[174]:

'This morning Sat 2012/08/11 a mob was noted and information was that they want to torch NUM offices and Lonmin Kombi that NUM uses.

There was somewhat a faction [fight] between the groups, gun shot and 2 people were injured.

[173] Exhibit RRRR2.4
[174] Exhibit EEEE19.2

Management had a meeting with NUM to assist defuse the situation.

Management will discuss with AMCU to assist … with KPL situation.

NUM feels SAPS and Mine security not doing enough. From Observation, there might be a fight between NUM and AMCU.

From Lonmin side, the following are in place: 24 hours man power plan + external services.

SAPS informed that problematic areas are the hostels, the bus stops and during shift changes.

Lonmin requests that SAPS open a JOC at E&DM boardroom.

SAPS to consult CIG on standby and get all information about the situation.'

2) At approximately 15h30 a further debriefing was held by Mr Blou and Mr Botes. The note in respect of this debriefing reads as follows[175]:

'Teams will continue to operate 24 hours.

SAPS behaviour not tolerable as they stopped the medics to get

names of the injured person.

SAPS is not giving cooperation, Matter referred to Abbey Kgotle

to resolve.'

3) At approximately 18h31 Lieutenant Colonel Merafe confirmed that he would send SAPS members to Marikana after the parade which was to be held at 19h00.[176]

[175] Exhibit EEEE19.2

4) At approximately 21h03 Mr Blou reported that a POPS hardskin vehicle was on the scene.[177]

5) The SAPS intelligence report for 12 August 2012 recorded the following in respect of the events that had occurred on 11 August 2012[178]:

> *'… Crime intelligence reported that AMCU members went through a ritual with a Sangoma with the belief that they could not be shot by the police or mine security during the day. They were further planning to set the office of NUM and the satellite police station near Wonderkop alight. This information was also reported and Brig Engelbrecht relayed it to DPC Mpembe.'*

6) After the rituals had been performed the strikers stayed on the Koppie through the night of 11 August 2012.[179]

7) It is apparent that on 11 August 2012 the strikers embarked on a process of arming themselves with sharp and dangerous weapons. In his evidence in chief Mr Phatsha stated that on 10 August 2012 he was armed with a stick, whereas on 16 August 2012 he was armed with butcher's knife and a sharpened iron rod.[180] He was asked what happened between 10 August 2012 and 16 August 2012 that made him change the nature of weapon he was carrying. He answered that it was because *'we were attacked by NUM*'

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[176] Exhibit EEEE19.2
[177] Exhibit EEEE19.2
[178] Exhibit TT5 pages 1 and 2 paragraph 6
[179] Exhibit AAAA1.2, paragraph 11
[180] Day 51, Phatsha, pp. 5457 - 5460

and that he wanted to use the weapons *'to protect or defend myself in case NUM came and attacked us, like before*'.[181]

[181]Day 51, Phatsha, p. 5462

CHAPTER 7

THE EVENTS THAT OCCURRED ON 12 AUGUST 2012

The following incidents on the 12th call for consideration and evaluation:

A. the confrontation between the strikers and Lonmin Security at the traffic island

B. the confrontation between the strikers and Lonmin Security at the hostels

C. the attack on K4 Shaft, the murder of Mr Mabebe and the assaults and damage to property at K4 Shaft

D. whether SAPS were in attendance

A The confrontation between the strikers and Lonmin Security at the traffic island

1) Lonmin security held a debriefing meeting at 07H40 on 12 August. In attendance were Mr Blou, Mr Kgotle and Tony from Murray and Roberts,[182] contractors at K4 shaft. From the record of the debriefing it appeared that Tony was going to send a communique to Human Capital (HC) to sensitise the Murray and Roberts employees who worked at the K4 shaft, [including Mr Thapelo Eric Mabebe], about the strike situation.

2) Mr Blou under cross examination[183] agreed that it was evident from the record of the debriefing that it must have been apparent to Lonmin security that there might be trouble at K4 shaft and that something had to be done about it to prevent trouble and to protect the people who were there.[184]

3) At approximately 08h07 Mr Martin Vorster reported that a group of at least 30 people had gathered at the koppie behind the Wonderkop sub-station.[185]

4) At approximately 09h29 Lonmin security personnel reported that the 'mob' at the Wonderkop koppie was moving in the direction of Nkaneng.[186]

5) Mr Dewald Louw, a Security superintendent in the employ of Lonmin, had reported for duty at 05h00 on 12 August 2012.[187] Together with Mr Sydney Mogola, he proceeded to the Wonderkop Stadium area where they relieved

[182] Exhibit EEEE19.2
[183] Day 282, Blou, pp.36326 - 36367
[184] Day 283, Blou, pp.36479 - 36485
[185] Exhibit EEEE19.2 [also Exhibit XXX4]
[186] Exhibit EEEE19.2 [also Exhibit XXX4]
[187] Exhibit AAAA36.

the night shift consisting of Mr Botha and Mr Kellerman. Messrs Botha and Kellerman informed them that it had been quiet through the night without any incidents.

6) At approximately 06h00 Messrs Louw and Mogola collected Mr Martin Vorster and then proceeded with their normal patrolling duties in and around the mining area, with the emphasis on the Karee Mine. Mr Louw then received notice to attend to a gathering that was happening at the EPL Hostel. Upon arriving at the EPL Hostel he found a group of protestors standing adjacent to the Teba Bank entrance. According to Mr Louw, something about the body language of the crowd and the way that they were standing and watching the Lonmin security members made him and the other security personnel who were on the scene uncomfortable. Mr Mogola made the comment that 'this is a decoy'. Mr Louw realised that if this was a decoy then they were being kept away from something that the crowd did not wish them to attend to. At that point Mr Louw realised that there were no Lonmin security members at the Wonderkop Hostel area. For this reason Mr Louw and the others returned to the Wonderkop Hostel area.

7) On the way to the Wonderkop area, Mr Louw received a report that the crowd gathering at the koppie were moving towards the Wonderkop Hostels. Messrs Louw and Vorster dropped Mr Mogola off at the office and continued to the Wonderkop Stadium area. They parked their vehicle on the traffic island which is situated outside the western entrance to the Wonderkop Hostel.

8) Mr Louw said that the crowd stopped about 20 metres before the traffic island and formed a crescent with the Lonmin security in the concave part. He and Mr Vorster got out of their vehicle and faced the crowd pointing their shotguns in the direction of the crowd. Mr Louw informed emergency OPS of the situation and asked for back-up.[188]

9) There were, he said, two groups of strikers, a smaller group in front of about 50 strikers and another group consisting of more than 1000 strikers behind them. The smaller group rhythmically slammed their traditional weapons together, humming and chanting just loudly enough to be audible.

10) One of the strikers stood up and hurled a rock at the Lonmin Security. At that point Mr Vorster opened fire with his shotgun and the rest of the group charged forward to attack them. Mr Louw also opened fire and managed to get off 2 shots before ordering Mr Vorster to get back into the vehicle so that they could retreat.

11) Before they managed to enter the vehicle, Mr Louw was hit with a knobkerrie on his left shoulder and struck on the left thigh by a large rock. Mr Vorster was cut by a panga on his right side all the way from the armpit to the hip.

12) After they entered the vehicle, Mr Vorster tried to pull away, but the vehicle stalled. Mr Vorster managed to get it going again and they drove through the crowd to the soccer field halfway between the island and the Rowland crossing. The vehicle was severely damaged.

[188] Exhibit AAAA36

13) In his evidence, Mr Louw described the crowd as militaristic, organised and disciplined. Their body language was hostile and attacking, especially the manner in which they gestured with their spears. He said that one striker moved his spear across his throat as if to slit his throat, conveying a message that they were going to slaughter them. Their facial expressions were hostile, and they were shouting and taunting the security officers, looking for a reaction. This was very different, he said, to any crowd behaviour he had witnessed in the past.[189]

14) He said that when he alighted from the vehicle, he indicated to the crowd to stop both verbally and with hand signals. The small group moved to their right as if to flank them and prevent them from moving off the island. Mr Vorster pointed his firearm at them and they moved back to their original position, they then moved to the right to flank them again and moved back when a firearm was pointed at them. The crowd then went into a crouching position, and this is when a striker in a white overall threw a rock at them.[190]

15) Mr Louw said that he fired two shots and the group stormed them. Whilst trying to get into the car, he was struck by a rock and a knobkierie. When inside the vehicle, there were problems with starting the vehicle. The crowd surrounded and attacked the vehicle. As the vehicle drove off, he fired four rubber bullets through the window that had been shattered by the strikers.[191]

[189] Day 262, Louw, pp. 33055 - 33057
[190] Day 262, Louw, pp. 32988 - 32991
[191] Day 261, Da Costa, p. 32997

16) In his testimony Mr Louw referred to aerial photographs depicting the scene.[192] He also referred to a series of six photographs which show the damage that was inflicted on the vehicle by the strikers during this incident.[193]

17) Under cross examination by counsel for the Injured and Arrested Persons, he said that he had been told by other security officers that the strikers wanted to go to the NUM offices to take revenge for the incident of the previous day where they had allegedly been shot at by NUM officials, and did not have any other information in this regard. He did not receive any information that the strikers wanted to target the security personnel. Mr Louw said that rumours of any threat to person or property were not taken lightly, and that they did act upon them.[194]

B The confrontation between the strikers and Lonmin Security at the hostels

1) Mr Louw testified that he informed Emergency OPS and Mr Miles of what had happened. They then returned to their office to replenish their ammunition. On their way back to the Wonderkop Hostel Mr Vorster and Mr Louw were informed that Mr Frans Mabelane and Mr Hassan Fundi had been trapped inside the hostel area and were unable to retreat.

[192] Exhibit DDDD4
[193] Exhibit DDDD3
[194] Day 264, Motlogeloa, pp. 33292 - 33293

2) Mr Vorster jumped into the Protea Coin armed vehicle and moved into the hostel area. Mr Louw used the damaged vehicle HDK 354NW and proceeded around to the eastern entrance of the hostel via the gravel road passing Andrew Saffy Hospital. However he was unable to enter the hostel from the eastern entrance to get to Messrs Mabelane and Fundi because the marchers were blocking the road.

3) Mr Joseph Masibi, a security officer in the employ of Lonmin, in his statement, said that he had received radio communication from Mr Louw requesting backup to assist them as he and Mr Vorster, were being attacked in their vehicle by strikers outside the Wonderkop Hostel.[195] Together with Mr Marcus Manamela, Mr Masibi immediately headed for Wonderkop. As they were approaching the Wonderkop Hostel they requested guidance on the radio as to the side from which they should approach the hostel. Mr Louw did not respond to their enquiry on the radio but Mr Mabelane informed him that they should approach from the hospital side towards the bus terminal, which is from the eastern side of the Wonderkop Hostel via the entrance at the eastern side.

4) Vehicle tracking records show that several Lonmin Security vehicles had reached the Hostel before Mr Masibi's Polo and that by the time he joined his colleagues, they had already retreated a considerable distance.

5) By 09:51, Mr Mabelane and Mr Fundi in a Nissan Livina, and Mr Motlogeloa and Mr Dibakoane in a Hilux, had stopped approximately 100 meters east of the boom at the west entrance to the Wonderkop hostel complex, and they

[195] Exhibit AAAA37

had been joined by a rescue vehicle driven by Mr van Rooi who was responding to the distress call of Mr Louw.[196]

6) By 09:52, the two security vehicles had retreated another 80m into the hostel complex and the rescue vehicle was roughly halfway between those vehicles and Mr Masibi's Polo which had reached the bus terminal;[197]

7) By 09:54 all three vehicles had retreated to the bus terminal where they had stopped near Mr Masibi's vehicle.[198]

8) Mr Masibi confirmed that he met Mr Mabelane and Mr Fundi and other colleagues at the bus terminal. Mr Mabelane explained to them that the strikers were on their way to burn the NUM office. He instructed them to take out their shotguns and stop them.[199]

9) Mr Masibi said that there was a disagreement between Mr Mabelane and some members of the team concerning the lack of manpower present as well as the absence of an armed vehicle which should have been present before attempting to stop the strikers. Mr Mabelane insisted that they needed to stop the illegal gatherers.

10) Some of the security team members attempted to prevent the crowd from approaching by raising their voices in order to be heard over the noise and from a distance. The strikers disregarded this and continued moving towards them, albeit a little more slowly.

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[196] Exhibit EEEE15.6
[197] Exhibit EEEE15.7
[198] Exhibit EEEE15.8
[199] Exhibit AAAA37

11) The security officials realized that the marchers were not going to stop and some of them started firing rubber bullets towards the marchers. Mr Masibi testified that he did not recall hearing any order given. However he also started to fire rubber bullets towards the strikers until he had emptied his firearm magazine that contained seven rounds. There was no chance to even attempt to reload the firearm.

12) Mr Masibi testified that he and his colleagues retreated and ran to his vehicle, the VW Polo. However when he reached the vehicle he realized that he would not have enough time to get into the vehicle and retreat along with it. He decided to leave the vehicle there and retreated on foot to where Mr Mabelane and Mr Fundi were already seated in their vehicles.

13) Mr Masibi managed to find an open Bakkie which was already in motion and climbed onto the back of it, travelling towards the taxi rank and turning right in the direction of Andrew Saffy Hospital. The vehicle tracking records place this at between 09:58 and 09:59.[200]

14) By the time the crowd reached the taxi rank in the immediate vicinity of the NUM office, Mr Masibi and his colleagues realized that Mr Mabelane and Mr Fundi had not escaped the crowd with them.

15) They were later informed that Mr Mabelane and Mr Fundi had been killed. Two Mossberg shotguns were stolen from Mr Fundi and Mr Mabelane in the process, and two vehicles were set alight. A docket for two counts of murder,

[200] Exhibit EEEE15.9 and EEEE15.10

malicious damage to property and two counts of theft of a firearm was subsequently opened at Marikana under CAS 107/08/2012.

16) In his evidence, Mr Masibi said that there were six security vehicles and twelve security officer present at the scene. Mr Mabelane, their senior, said that the information was that the crowd of strikers were intending to burn down the NUM offices, and that they should form a line and disperse the crowd with rubber bullets. He said that he and others disagreed with this instruction because they did not have enough equipment and that they could not disperse such a large crowd with rubber bullets. Mr Mabelane instructed them to use their shotguns to disperse the crowd with rubber bullets to prevent them from causing damage to Lonmin property.[201]

17) He said that the crowd were walking closely together, and would then crouch and clash their weapons. Mr Motlogelwa approached them unarmed, and gestured with his hand, enquiring what they wanted. The strikers approached clashing their weapons and gesturing with their hands indicating that the security officers should shift out of their way. Mr Motlogelwa then returned.[202]

18) As the crowd neared them the security officers in the line fired rubber bullets at them. He said the rubber bullets had no effect on the crowd. They retreated to their vehicles and as he was running he felt items being thrown at him but could not see what they were. He reached his vehicle but did not get in as the crowd was very close at the time. He ran past the vehicle in

[201] Day 262, Masibi, p. 33155 - 33157
[202] Day 262, Masibi, pp. 33158 - 33159

which Messrs Fundi and Mabelane were, and jumped onto a security vehicle passing by. He reloaded his firearm and fired 7 rubber bullets into the crowd.[203]

19) At the time he fired those shots, the crowd had completely surrounded the security vehicles and he could not see what was happening there. A short while later he saw smoke arising from the vehicle in which Mr Fundi had been. The majority of the strikers were still surrounding the burning vehicle. He could not see what was happening there and it was too dangerous to get any closer. He saw that a group of strikers had proceeded towards the taxi rank next to the NUM offices.[204]

20) Mr Motlogelwa in his evidence, confirmed much of what Mr Masibi said, and added that as he returned from trying to talk to the strikers, he saw Mr Dibakoane with his hands up as if surrendering and with his shotgun on the ground, He was also trying to address the oncoming crowd with gestures as if to stop them. He also gestures for them to stop. The crowd continued crouching and singing and gestured for them to get out of the way. He said that he addressed them by saying 'Oh please man, what is the problem? What is going on?' The crowd appeared not to hear him[205] and proceeded to approach them.

[203] Day 262, Masibi, p. 33160
[204] Day 262, Masibi, p. 33161 - 33163
[205] Day 263, Motlogeloa, pp. 33222 - 33225

21) He managed to leave the scene. At some stage he saw that the crowd had surrounded the vehicle of Mr Messrs Mabelane and Fundi. Another group ran past and threw stones at the vehicles that were driving away.[206]

22) He reported the incident to the Lonmin control room. He received feedback that contact could not be established with Messrs Fundi and Mabelane. At that stage one SAPS vehicle attended the scene. The policeman who observed the scene said that they could not approach the scene because they were in a small vehicle. At some later stage when he returned to the scene, he noticed that many policemen were present. [207]

23) The extent of the attack upon Messrs Mabelane and Fundi , and the damage to the vehicles, is visible on both video and photographs. The positions of the places where they were killed are depicted in the aerial photograph marked **Annexure D.**

24) It appears to be common cause that the strikers were responsible for the deaths of Mr Mabelane and Mr Fundi. No facts have been put forward to suggest that the killings were in any way justified, and no party had made submissions to that effect.

25) At the first inspection in loco, which the Commission held on 1 October 2012, it saw marks on the outside of the NUM office, which indicated that attempts appeared to have been made to gain access to the office.

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[206] Day 263, Motlogeloa, p. 33228
[207] Day 263, Motlogeloa, p. 33228

C The attack on K4 shaft, the murder of Mr Mabebe and the assaults and damage to property

1) During the incident at the K4 shaft, three people were assaulted and Thapelo Eric Mabebe was killed. A number of vehicles were damaged. A docket for nine counts of malicious damage to property and three counts of assault with intent to do grievous bodily harm was opened at Marikana under CAS 111/08/2012.[208] A docket for the murder of Mr Mabebe was opened at Marikana under CAS 109/08/2012.[209]

2) At 21h04, the Lonmin logbook records that there was trouble at the K4 Shaft, and that reports of intimidation were received.[210]

3) Mr Hermanus Andries Janse van Vuuren was employed by Murray and Roberts as an underground diesel mechanic, working at the K4 shaft.[211] He stated that on that night, he was scheduled to go on night shift at the K4 shaft. At approximately 21h00 he drove his red VW caddy bakkie to the K4 shaft to go on shift.

4) Prior to that day they had been briefed by Lonmin and by Murray and Roberts management about the strike that was taking place and were warned to be on the lookout for strikers who were walking around together in a crowd or gang.

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[208] Exhibit ZZZZ15.7
[209] Exhibit A 18
[210] Exhibit EEEE 19.2.
[211] Exhibit GGGG3.

5) When he arrived at the security gate at the K4 shaft there was one security guard on duty there. The guard stopped him and told him that it was not safe to enter the K4 shaft because there was a strike on at that moment. He said that he contacted his supervisor, Mr Pottek, who told him that he knew nothing about the strike at the K4 shaft and that he was to go on shift.

6) He then told the security that he was instructed by his foreman to get onto the premises, so he went through the security gate to the sliding gate and entered the premises. He entered the parking area and parked his vehicle. He said that his van was over heating and when he stopped his vehicle under the roof, he took out his tools and started repairing the water pipe that was leaking.

7) When he completed the repairs he tried to reverse to drive to another side to find parking and noticed that there were people in that area who had thrown blankets over the razor wire, trampling the wire, and who stormed at him. The people had balaclavas over their faces and wore what looked like ponchos that hid their clothing. They were all armed with knobkieries, pangas, and iron pipes which they held in their hands. He said that as he drove his vehicle, the people started throwing stones at him.

8) He said it was about 15 people that had stormed over the wire at that time. Whilst he was driving to get away from them throwing stones, his windscreen was hit by a pipe right in front of his face. He said it was a steel pipe. He kept on driving and stopped his vehicle where the end of the building is indicated in an L shape. Those are the open parking areas. He said that when he got to that point, they were still throwing stones and he shouted at

them 'stop now with your nonsense'. He got out of his vehicle and to escape but the turnstile was not working. He then hid behind a brick wall and lay there for some time.

9) After a while, he saw that motor vehicles were on fire. He then saw a person (who was obviously Mr Mabebe) lying on the ground (at the place depicted in the aerial photograph marked **Annexure E**) and he realised that this person had been chopped in his face and he was lying between the burning cars. He said that there was blood on his face. He said he realised that he had to pull him away from there. He said that he was afraid of the attackers but they were busy attacking Mr Keyter on his motorcycle.

10) He said he saw the attackers strike Mr Keyter with a pipe. He said that while Mr Keyter was trying to run away and climb over the turnstile, he was stabbed in the back with a screw driver or a knife. He also saw an attack on Mr Greyling. He said while they were waiting for the security and the ambulance to arrive, he looked for first aid boxes to assist Mr Mabebe but could not find any.

11) He said that when he arrived at the security gate, there was just one person there. He did not see whether he had a firearm. He only noticed him in possession of a tongfa. He said that this post was always manned by one person and he did not see any other security personnel in the vicinity.[212]

12) Under cross examination bycounsel for NUM, he said that he had not at any time before the 12th been told that it might be risky to report to work.

[212] Day 270, Van Vuuren, p. 34336

Counsel put on record the injuries that Mr Mabebe sustained. He confirmed that at the time he pulled Mr Mabebe away from the burning vehicles, that he was still alive and was able to speak and said that he was in serious pain. He said that they had to wait quite a long while before an ambulance came and took them to hospital.

13) The injuries to the witness and the damage to the vehicles are documented in photographs.[213]

14) In Marikana CAS 111/08/2012, Nontsokolo Gloria Botman, in her Affidavit[214] in the docket, said that on Sunday 12 August 2012 at about 18h00, she was posted at Lonmin K4 shaft and she was with her co-workers Mr Baleko and Mr Mokhotu, both of whom were posted on the other side of K4. Her posting was alongside the K4 parking at the main entrance. She said that she was not feeling safe because of the miners who were on strike and asked her two colleagues to stay with her.

15) At about 20h50 when Mr Mokhotu opened the boom gates for one of the employees on a motorcycle, she saw four unknown persons coming in her direction who went under the boom gate. They were standing still just looking at them and they were wearing blankets. She was able to see them but could not see their faces. She thought that they had something under the blankets. The person on her right hand side was visible to her and he was carrying stones in both hands.

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[213] Exhibits GGGG4.1 to GGGG4.6; Exhibits GGGG4.7 and GGGG4.8; Exhibit GGGG5; Exhibits GGGG7.1 to GGGG7.40

[214] Exhibit A10

16) She went to the guard room to report about the four persons and she heard one of the persons outside saying ‘Guys come in. She’s going to make a phone call’. She went outside and saw many people standing there. She told them that she was not calling anyone. She noted that they had sharp instruments like spears, pangas and knobkieries. They were speaking Xhosa and Sotho. They searched her and her colleagues and took away their cell phones.

17) One of the persons wanted to assault them, but the other person who was speaking Xhosa said that they want to burn the cars that are in the parking lot. They also enquired if there were other persons who were still around or had gone to the shaft. She said that she did not know. She was instructed by them to open the main gate so that they could enter and burn the vehicles at the parking. She said that they took her clock card and opened the main gate. They then all proceeded towards the entrance.

18) There was an employee who was standing just watching them and three men went straight to him and assaulted him with knobkieries until he fell to the ground.

19) She said that while they were there, she and her colleagues were inside the mob. While there, she saw two persons who were assaulted by the mob. She saw that another group, who forced the fence down on the other side of the yard, were surrounding the area. Whilst the group were concentrating on burning the cars, she managed to make her escape with her colleagues.

20) Mr Mohau Mokgothu, in his Affidavit[215], says much the same as Ms Botman, but adds that while they were being searched, the persons who were doing the searching demanded firearms and two way radios from them.

21) There are various statements in the docket about persons who ran away from the crowd and in the running fell and jumped over fences and injured themselves.

22) Mr Joseph Makgao from SAPS Marikana in his Affidavit[216], said that he attended at K4 shaft at about 01h30 on the 15 August 2012 and he found 8 motor vehicles were damaged and burned.

23) This incident is an unprovoked attack on unarmed persons at K4 shaft who were simply going about their business. The only reason for the attack appears to be to enforce the strike with intimidation. The Commission condemns this attack in the strongest terms.

D Whether SAPS were in attendance

It is clear from the evidence that there was simply no adequate SAPS presence at any of the events that occurred on the 12th. This is not disputed by SAPS.

[215] Exhibit A11
[216] Exhibit A6

CHAPTER 8

THE EVENTS THAT OCCURRED ON MONDAY, 13 AUGUST 2012

The following incidents on the 13th call for consideration and evaluation:

A The killing of Mr Julius Langa

B Events of the 13th August 2012 and the killing of two police officers, Warrant Officers Monene and Lepaaku, and three strikers, Mr Mati, Mr Jokanisi and Mr Sokanyile, and the assault of Lieutenant Baloyi

C After the incident at the Railway Line

A The killing of Mr Julius Langa

1) Mr Julius Langa was employed by Lonmin as a production team leader at Saffy Shaft[217] and was, according to Mr Botes, at the time of his death not affiliated to any union.[218] Mr Langa was brutally killed near EPL next to the

[217] Exhibit FFFF10 page 7
[218] Exhibit EEEE1

railway line in the early hours of 13 August 2012. The place where he was killed is depicted in Annexure F.

2) According to the post-mortem report Mr Langa had 18 incised wounds on his chest, back and upper limbs. These wounds varied from 1cm to 11cm. He also had wounds on his face and head.[219]

3) The Lonmin security officer who attended to Mr Langa's body, Mr Simon Kgopana, states that when he found Mr Langa's body he was lying on his stomach with 14 holes in his back. According to Mr Kgopana, Mr Langa appeared to have been stabbed with sharp instruments including pangas and knives. Mr Kgopana states further that even though when he arrived on the scene there were many bystanders, no one came forward with information on how Mr Langa died.

4) Apart from Mr X none of the witnesses who testified before the Commission admitted to having personal knowledge of how or why Mr Langa was killed.

5) The evidence before the Commission is overwhelming that Mr Langa was killed by strikers on his way to work. According to Mrs Langa, the last time she saw her husband was when he left for work in the early hours of 13 August 2012.

[219] Exhibit AAAA22

6) The Lonmin occurrence book is replete with reports of violence and intimidation directed at workers who did not join the strike. The occurrence book also has specific entries made the day before Mr Langa was killed which records specific threats by strikers directed at workers from Saffy shaft.

7) The following entries appear in the Lonmin occurrence book on 12 August 2012:-

(a) At 13h35:

> '*Information received from Patricia that the crowd would be mobilising to Saffy shaft tomorrow because the workers are still working*'.

(b) At 14h22:

> '*Received information from Michael Mokwena of Saffy that when the workers are going to work tonight they will be shot*'.

8) The following entries appear from the JOC occurrence book on 13 August 2012:-

(a) Entry 14 at 3h30 records that there were people gathered at Segwaeleng/Wonderkop bridge throwing stones at cars and passers-by;

(b) Entry 17 at 4h18 records that there were people intimidating workers going to work;

(c) Entry 20 records that at 5h10 people were gathering near Wonderkop intimidating commuters. Constable Serope shot two rounds with his shotgun to disperse people.

9) Mr Sinclair confirmed that the path on which Mr Langa's body was found is a popular route for workers based at Saffy shaft who live in the Wonderkop hostels. Workers walk along that particular path to EPL hostel in order to catch a bus (arranged by Lonmin) which transports them to Saffy shaft.

10) Crucially, the case put forward by the Injured and Arrested Persons does not dispute that Mr Langa was killed by strikers. To the contrary, during his cross-examination of Mr X, their counsel specifically placed it on record that the responsibility for the deaths of Mr Langa, Mr Mabebe, Mr Fundi and Mr Mabelane can '*be placed at the door of the protestors*'.

11) In addition to this concession, Mr Xolani Nzuza testified that the deaths of the ten people before 16 of August 2012 were caused by Lonmin's refusal to talk to the strikers. This evidence (significantly by one of the leaders of the

strikers) points ineluctably to the inference that Mr Langa was killed by the strikers as part of their violent campaign to enforce the strike.

12) A secondary issue arises in the context of Mr Langa death, namely, the extent to which Lonmin can be held responsible for failing adequately to protect workers during the violent strike is discussed below.

B Events of the 13th August 2012 and the killing of two police officers, Warrant Officers Monene and Lepaaku, and three strikers, Mr Mati, Mr Jokanisi and Mr Sokanyile, and the assault on Lieutenant Baloyi.

1) The Commission was, to a certain extent, assisted by video footage in getting a better picture of what took place at Marikana on 13 August 2012. This is helpful especially if regard is had to the fact that some witnesses may have perceived the events differently, some may have been mistaken, some may have been reluctant to reveal the truth for various reasons and some may have feared reprisals after giving evidence.

2) Mr Xolani Nzuza's account of the events of 13 August 2012 has to be treated with circumspection not only because of his doubtful credibility but because of his lack of candour of what had happened on that day.

3) He says he joined the strike for the first time on 11 August 2012 after he had been stopped from going to work and stones were thrown at him on 10

August 2012[220]. He continuously attended meetings at the Koppie from 11 August 2012 until the day of the tragedy.

4) Although the cause for the strike concerned the RDOs wage grievance and he was a winch driver, he was a leader in the strike, being the second in command.

5) On 13 August 2012 while the strikers were at the koppie it came to their attention that, despite the strike having started, certain employees were still be going to work at K3 shaft. A decision was then taken that a small group consisting of 100 to 200 strikers should go to K3 shaft to request the mine management to close the mine and allow the workers there to join the strike. He was part of the group.[221]

6) When Mr Nzuza gave the evidence in chief he stated that Mambush, the late Mr Noki, had asked him to go with him and the group to K3 shaft to see if there were workers at the shaft.[222] On their way to the K3 shaft at Karee they met Lonmin security next to the bridge. They told the Lonmin security members the purpose of their trip to Karee shaft.

7) He said that Mr Noki said to them that *'we have come here to stop the workers from working because we want them all on the mountain, what we want is, we want money, we are demanding R12 500.00 from the employer and we would like the employer to come and tell us when we will get this money.'*[223]

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[220] Day 277, Nzuza, p. 35458
[221] Exhibit HHH21 para. 6
[222] Day 277, Nzuza, p.35480
[223] Day 277, Nzuza, p.35487

8) The security personnel responded by saying that there were no employees working there and that they should go back to where they came from. The security personnel undertook to come back with the employer to them. Mr Motlogeloa who testified before the Commission appears to be the security officer who spoke to the strikers. He confirms that the late Mr Noki did talk to him and that he requested that they bring the management to the koppie.[224]

9) Mr Motlogeloa testified that when he saw the group he stood on top of the bridge and addressed them in Fanagalo. They were walking in a crouching manner when he stopped them. They told him that they had heard that there were employees who were working at the shaft and that they wanted to speak to them so that they could inform them to go home and stop working.[225]

10) When he spoke he was speaking to the man with a green blanket. That is Mr Noki. He informed them that there were no employees working there and that they should go back. Mr Noki accepted that there were no employees and requested him to bring management to the Koppie.[226]

11) After they were told by security that no one was at work at K3 shaft they turned back and on their way to the koppie met the police under the command of Major-General Mpembe near the railway line.

12) In so far as the evidence of the police is concerned a summary of the sequence of events is as follows. Major General Mpembe came back from

[224] Day 263, Motlogeloa, p.33233
[225] Day 263, Motlogeloa, pp.33232-33233
[226] Day 263, Motlogeloa, p.33233

leave on 13 August 2012. He, together with Major-General Naidoo, accompanied the Provincial Commissioner, Lt.-General Mbombo, to Marikana.

13) On arrival at Lonmin the three Generals had a meeting with Lonmin management where they were met by Mr Mokwena, who was accompanied by Messrs Hawker and Kwadi.[227] The Lonmin management briefed them about what had happened and informed them that these people who were on strike were faceless and were not known to Lonmin.

14) After the meeting they went back to the JOC. Whilst at the JOC they observed on a closed circuit television screen a group of strikers moving from Karee along the railway line. After seeing this group the Provincial Commissioner appointed General Mpembe as the overall commander of the operation and instructed him to remain there and take care of the situation.[228] He was further instructed to go and attend to the group which was coming from Karee mine along the railway line. He then decided to take about 70 members to accompany him to the group. Colonel Merafe who was one of the POP commanders also accompanied him with his group.

15) As already stated the SAPS members under the command of Major General Mpembe met the strikers near the railway line. The strikers' group consisted of about 200 strikers who were crouching and singing. They were armed with assorted dangerous weapons.

[227] Day 103, Mpembe, p.11079
[228] Day 103, Mpembe, p.11080

16) One of the songs the strikers were singing is depicted in exhibit QQ2.

17) Col. Merafe testified that when the strikers saw them they squatted on the road.[229] The police got out of their vehicles and walked towards the strikers. He then approached the strikers with Major-General Mpembe, Colonel Diole, the commander of Visible Policing, Lieutenant Colonel Tsiloane, and Captain Thupe, the commander of TRT members, behind him. Colonel Diole and Major-General Mpembe called him back saying 'these people will kill you.' He retreated and Major-General Mpembe addressed them.[230]

18) The Commission has seen the video footage of what happened when they met the police. The strikers were armed with assorted weapons such as pangas, assegais, spears and sharpened objects.

19) Major General Mpembe requested Mr Blou of Lonmin security, who was present at the time, to call management so as to get a Fanagalo interpreter but without success. Because he had previously worked in the mines he understood the language although he could not speak it. Therefore he decided to speak in Zulu to the strikers to which they responded well.

20) Major-General Mpembe introduced himself and informed them that they were not entitled to carry the dangerous weapons and it was illegal to carry them.

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[229] Day 216, Merafe, p. 26634
[230] Day 216, Merafe, p. 26632-26633

21) He informed them that the police were not going to arrest them but that they should hand over the weapons. They replied that they were carrying those weapons for self defence against NUM members. They told him that they were not fighting but they wanted to talk to the employer.

22) The strikers refused to hand over the weapons and requested the police to go with them to the mountain where, they said, they would hand over the weapons. Major General Mpembe informed them that he would not allow them to go unless they handed over the weapons.[231] They still refused.

23) Major General Mpembe observed that the strikers were not going to hand over the weapons. He phoned Lieutenant General Mbombo and informed her that he was going to escort the strikers and that it would not be advisable to disperse and disarm them. The Provincial Commissioner agreed.

24) Having observed the behaviour of the crowd, Major General Mpembe told the commanders to brief the members to escort the group to the koppie as it was not advisable for them to disperse and disarm them because to attempt to do so would be dangerous. Colonel Merafe did not agree.[232] General Mpembe informed them that he did not want a Tatane situation and that the situational appropriateness was of such a nature that they could not disperse and disarm them but should rather escort them back to the koppie.[233]

25) Having decided to escort the strikers Major General Mpembe informed the commanders that they should form a basic line and that they should escort

[231] Exhibit QQ2
[232] Day 103, Mpembe, p.11085
[233] Day 103, Mpembe, p.11087

the strikers to the koppie and make sure that they did not go into the informal settlement or in any of the business areas.

26) Major General Mpembe, after he had briefed the commanders, went back to the crowd and made a further effort to persuade the strikers to hand over their weapons. He said he was going to count to ten. He started counting.

27) He did not get beyond three. The strikers got up, sang and moved on through the police line. Major General Mpembe was still counting when they forced their way through the police line in a crouching manner, clashing their weapons together.

28) Major General Mpembe gave the following reasons for deciding not to disperse and disarm the group:

(a) the group was next to a railway line and he did not know when the next train would pass by and such movements of the train may be affected by the commotion;

(b) they were next to a service road and for that reason it would have been unwise to create such a commotion next to that road in dispersing the crowd;

(c) the mood of the strikers, who were angry and agitated, having refused to lay down their weapons, was of such a nature that they were likely to resist the action and a Tatane situation might have occurred;

(d) there was a business area nearby which would be affected by the dispersal and, applying the doctrine of situational appropriateness, he felt that dispersing and disarming the crowd was not an option at the time notwithstanding opposition by Colonel Merafe.[234]

(e) As this was a spontaneous group no plans were in place for the disarmament. There was also a residential area nearby.[235]

29) There were also Nyalas lined up to block them from entering the informal settlement as well as soft vehicles.

30) The Nyalas were then escorted and the police kept a reasonable distance between them in a line formation at the back following them.

31) Whilst they were still escorting the strikers a teargas canister was fired. This triggered a fight between the strikers and the police as the strikers attacked the police.

32) No one has been able to give a proper account of the attack.

33) Major General Mpembe testified that the firing of the teargas canister was not done as a result of his orders. Warrant Officer Kuhn, who fired the tear gas, was on the extreme left and Mpembe was on the extreme right hand side when the teargas was fired. He denied completely that he ever gave such an order. He stated that he had ordered the Nyalas to move into

[234] Day 103, Mpembe, p.11086
[235] Day 103, Mpembe, p. 11123

position to protect the informal settlement and there was accordingly no need for the teargas canister to be fired.

34) He testified that at Potchefstroom as they were preparing for the Commission at Roots they were divided into groups. Lieutenant Colonel Merafe and Captain Thupe together with Lieutenant Colonel Vermaak were sitting together and communicating. Colonel Vermaak warned him that he should not trust the people he was sitting with.

35) As they were sitting there Captain Thupe said he heard that it was General Mpembe who gave the order to Warrant Officer Kuhn.[236] Warrant Officer Kuhn himself said that he heard an order but did not know who gave the order or could not make out whose voice it was. At that stage Captain Thupe said "*General, I heard you giving the order".* When General Mpembe pointed out that he could not have given the order, because if he had done so, he would have done so through the radio so that everybody could hear then Captain Thupe kept quiet.[237]

36) Major General Mpembe stated that he did not even see Captain Thupe during the events of 13 August 2012 when they were escorting the strikers.

37) The explanation given for firing the tear gas was that the strikers were moving towards the informal settlement. Colonel Vermaak who was flying above the scene in a helicopter, testified, however, that when the stun grenade or teargas was fired he did not observe any deviation in movement of the strikers towards the informal settlement. Colonel Vermaak testified

[236] Day 104, Mpembe, p. 11166 and 11167
[237] Day 104, Mpembe, p.11168

that after the stun grenade was fired the strikers turned around and stormed towards the police members.[238]

38) He observed that SAPS members were being attacked by the strikers and in order to assist them he ordered Captain Oosthuizen, the pilot, to fly low so that the strikers could be scared. He threw teargas and stun grenades in order to scare the strikers off. About 20 teargas and 10 stun grenades were fired from the helicopter by Colonel Vermaak. He did so in order to stop the attack on the police members.

39) Captain Thupe testified that he was deployed to Marikana on 13 August 2012. On his arrival there he was briefed by General Mpembe and he accompanied him to the group near the railway line. The circumstances preceding the attack by the strikers on the police and use of tear gas and stun grenades are not in dispute.

40) In his testimony Captain Thupe testified that General Mpembe gave instructions to Warrant Officer Kuhn to use teargas.[239] He himself fired 8 rounds with pistol, shooting at the strikers in self-defence.[240]

41) It is recorded that he compiled a shooting list of his members that occurred on the 13th of August 2012. According to that list only 3 of his members fired. He fired 8 rounds with a pistol. Constable Sekgweleya fired 19 rounds with an R5 and Sergeant Mguye fired 10 rounds with an R5.[241]

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[238] Day 204, Vermaak, p.25233
[239] Day 227, Thupe, p. 27938
[240] Day 227, Thupe, p. 27940
[241] Day 227, Thupe, p. 27944

42) He had difficulties under cross examination with regard to the instructions allegedly given by Major General Mpembe to Warrant Officer Kuhn to fire teargas.

43) The Commission is of the view that his version in this regard is unsatisfactory in the light of the following, as appears from the cross examination by evidence leaders:

a) The question of Major General Mpembe having given instructions to Warrant Officer Kuhn to fire a teargas canister appeared for the first time in his statement, exhibit QQQ9, dated 14 April 2014;

b) This statement was made only after Major General Mpembe had given his evidence to the Commission;

c) This information did not appear in the statement which he made for the first time on 12 December 2012 when the events were still fresh in his mind;[242]

d) All that he said in that statement is that when the strikers changed direction and went straight towards the informal settlement an instruction was given for firing teargas to redirect them not to pass through the informal settlement; No

[242] See: Annexure HHH15.1

allegation is made that such instruction came from Major General Mpembe;[243]

e) Exhibit L does not mention instructions of Major General Mpembe.

f) Documents coming from SAPS do not support Captain Thupe's allegation that General Mpembe gave instructions;

g) Warrant Officer Kuhn in his statement does not mention that Major General Mpembe gave such an order but says that whilst he was busy running behind the strikers someone on his right side gave instructions that teargas and stun grenades must be thrown.[244]

44) The Commission is of the view that Major General Mpembe's denial that he gave an order to fire a teargas canister (or for that matter stun grenade) must be accepted.

45) Colonel Vermaak testified that whilst he was in the helicopter on the final approach to land they observed strikers carrying a person who appeared to be injured. This person was wearing a white overall.[245] He ran to the scene and saw Warrant Officer Monene who had been attacked by the strikers.

46) Major General Mpembe arrived and he was in a state of shock. He noticed that Major General Mpembe had lost control of the members.

[243] Day 227, Thupe, p. 27954-27956
[244] Exhibit RRR9 para. 4; Day 227, Thupe, p. 27972-27973
[245] Day 205, Vermaak, p.25242

47) Colonel Vermaak testified further that after he had landed he requested Captain Loest to give him two members of the TRT group to follow the strikers carrying the one with a white overall.[246]

48) He said that whilst they were still flying they observed persons with a shotgun and R5 which they suspected belonged to the police. After taking the TRT members with him they chased the strikers who crossed the stream. Whilst they were nearing the stream they were shot at with a shot gun and an R5 by the group. One of the members returned fire to the strikers. [247]

49) After the gun fire they crossed the stream and found the body of Mr Sokanyile. He left members to secure the scene and went back the first scene.

50) The evidence relating to the circumstances in which Mr Sokanyile was shot is very confused. There are three potential explanations as to who shot Mr Sokanyile. They are:

(a) He was shot by the group of Colonel Vermaak;

(b) He was shot by the group of Constable Yende; and

(c) He was shot by the group of Captain Thupe.

It is not possible for the Commission to decide on the evidence before it which explanation is correct. Consequently the question as to by whose group and

[246] Day 205, Vermaak, p.25243
[247] Day 205, Vermaak, 25245

in what circumstances Me Sokyanile was shot must be referred for further investigation.

51) Colonel Vermaak said that when he came back to the scene he found TRT members very angry. They alleged that General Mpembe was responsible for the attack on their members by the strikers and the he (Mpembe) whould lie with the deceased members.[248]

52) Colonel Vermaak had earlier telephoned the Provincial Commissioner and informed her that there was chaos. After hearing the threats he became worried about the safety of General Mpembe as he took the threats seriously. He telephoned the Provincial Commissioner again and requested her to give him permission to remove General Mpembe from the scene and take him back to the JOC. She gave permission. He then requested Captain Loest to get him two members with a nyala to assist taking General Mpembe to the JOC. He informed General Mpembe of the threats against him and he (Mpembe) walked to the Nyala. He voluntarily got into the Nyala and was taken to the JOC.[249]

53) Lt. Baloyi, who, the Commission was informed, was too ill to testify, did not give viva voce evidence but made a statement.[250] His version of the events before that attack is in line what can be seen on the video. He said that whilst General Mpembe was negotiating with strikers they became restless and started singing. They stood up and moved towards the police and were allowed to proceed.

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[248] Day 205, Vermaak, p.25252
[249] Day 205, Vermaak, p.25257
[250] Exhibit GGG16

54) General Mpembe instructed that they be escorted to the koppie where they would be disarmed. One senior commander disagreed saying that they would outnumber the police at the koppie.

55) Lt Baloyi said that he got into a nyala. He took one stun grenade from one of the members and they drove slowly behind the strikers. The strikers allowed the driver to pass them. He asked the driver to stop while it was facing South. He got out of the Nyala and watched the strikers moving towards the direction of the mountain.

56) Within seconds two teargas canisters were fired. The strikers ran towards him. He then threw a stun grenade at them and ran to the Nyala. He realised that the strikers had already reached him. They were attacking members. He ran past the Nyala and he was being chased by the strikers. While running away, he started firing rubber bullets with his shotgun at the strikers who were chasing him.

57) He was attacked from behind. He used his shot gun. He was hit with something like a panga. He was tripped and fell on the ground. The strikers started stabbing him in the chest. One of the strikers was pointing a firearm at police officers who were approaching and then pointed it at him but was disturbed by others who were trying to rob him of the shot gun. He was stabbed with an assegai below the umbilical cord and he surrendered the shot gun

58) He was rescued by the Nyala driver. The strikers stole his pistol and a radio.

He suffered very serious injuries. He was airlifted to Marikana Clinic where he was treated and later taken to Ferncrest Private Hospital, Rustenburg. He suffered nine stab wounds all over his body. He was lucky to survive.

59) Mr Mati, who was confirmed as one of the strikers, was found dead in front of a house in the informal settlement. How he met his untimely death is not clear from the available evidence.

60) Dr Nkosi examined the body of Mr Mati on 16 August 2012 and found that the chief cause of death was “Stab Wound of Right Femoral Vessels”.

61) Dr Naidoo subsequently viewed autopsy photographs and the post mortem report of the autopsy on the body of Mr Mati and remarked that it is not uncommon for doctors to misinterpret and mis-diagnose wounds or, if diagnosed correctly, to fail to make a critical descriptive differentiation between wounds caused by sharp weapons and those caused by firearm. He concluded that the wound through the thigh of Mr Mati was a gunshot wound and not a stab wound as was observed by Dr Nkosi.

62) In the light of the conflicting evidence of the doctors, the Commission is of the view that it does not have sufficient evidence about the death of Mr Mati. Consequently this should be referred for further investigation. It is not possible for the Commission to decide on paper whether the views of Dr Naidoo, who did not see the body of Mr Mati, should be preferred to those of Dr Nkosi, who did.

C After the incident at the Railway Line

1) After the incident near the railway line on the afternoon of 13 August 2012 the National Commissioner, General Rhia Phiyega, arrived at Marikana at around 16h00. One of those accompanying her was the Provincial Commissioner of Gauteng, Lieutenant General Petros. After being briefed by Major General Annandale, the Head Specialised Operations from Head Office, and Brigadier Adriaan Marthinus Calitz, the Provincial Head of Operational Response Services whom Lieutenant General Mbombo had appointed the Operational Commander of the operations at Marikana, she and other senior members of the SAPS met with Lonmin's management, who stated that the strikers were not known to them: they described them as 'faceless'. They said further that the genesis of the problem was rivalry between AMCU and NUM.[251]

2) On Major General Annandale's instructions Brigadier Fritz, the head of the Special Task Force, instructed Colonel Duncan Scott, a member of the STF, to go to Marikana to assist with the planning and co-ordination of an operation there. Colonel Scott arrived at Marikana during the course of the evening and he immediately started work on an operation briefing for the National Commissioner while the National Commissioner and her delegation were meeting with the Lonmin mine management. According to his

[251] D178, Mbombo, pp. 21300 - 21311

evidence the operational plan of 14 August 2012 was created after discussions with Mr Graeme Sinclair, the Group Mining Emergency and Security Manager of Lonmin, Colonel Merafe, the Head of POP at Rustenburg, and other POP officers. The essence of the plan was the encirclement of the strikers on the koppie and a filtering line of members of the police service who would be deployed to search people who approached the koppie and confiscate any dangerous weapons found in their possession.[252]

3) Originally Colonel Scott intended this plan to be implemented early on the morning of Tuesday, 14 August 2012, shortly after sunrise when there were fewer people on the koppie. This could not be done because none of the commanders came to the JOC early in the morning and when Colonel Scott was told that a substantial number of strikers was on the koppie he decided that the plan could not be proceeded with immediately.[253] There was also evidence that there were not enough SAPS members to implement the plan at that stage and that reinforcements from other provinces would be coming. It is unnecessary to make a finding on why it was decided not to implement the plan then.

4) In his evidence Colonel Scott set out in some detail how it was envisaged that the plan would work: [254]

[252] Consolidated statement, Col Scott, Exhibit HHH20; Day 134, Scott, pp. 14175 - 14177
[253] Day 134, Scott,, p.14177
[254] Day 134, Scott, pp. 14170 - 14173

a) a barbed wire cordon was to be drawn around the koppie, the idea being to uncoil the wire in two directions around the koppie at that same time so as to ensure that the encirclement took place quickly;

b) there was to be a filtering line of Nyalas placed between the informal settlement and the koppie;

c) there were to be NIU and STF reaction teams at koppie 3 and an observation post closer to the front of the koppie: both the reaction team and the observation posts were to be out of sight of the strikers on the koppie; and

d) there was to be a processing zone to the south-west of the koppie where the strikers who were inside the cordon were to be processed for arrest after the operation had been successfully completed, the idea being that the strikers would have exited through the point where the two lines of barbed wire met and would then have been taken to that area for processing.

CHAPTER 9

THE EVENTS THAT OCCURRED ON TUESDAY, 14 AUGUST 2012

The following incidents on the 14th call for consideration and evaluation:

A The planning of the operation;

B Negotiations to bring about a voluntary laying down of weapons and dispersing from the koppie;

C Discussions between Lieutenant General Mbombo and Lonmin Management; and

D The killing of Mr. Twala.

A The planning of the operation

1) As set out in paragraph 80 above, in his evidence Colonel Scott set out in some detail how it was envisaged that the plan would work. [255]

[255] Day 134, Scott, pp. 14170 to 14173

2) Though the implementation of this strategy was abandoned early on the morning of 14 August 2012 Colonel Scott further developed the plan later in the morning and presented it to a meeting of JOCCOM at 14h00 that day[256]. The plan he presented was in six phases, as follows:[257]

(a) phase one: the purpose of this phase was to engage in dialogue to seek a peaceful disarmament and dispersion of the strikers. SAPS deployment forming part of this phase included:

i) SAPS armoured vehicles would be positioned from south to north between the koppie towards the west and the informal settlement and Wonderkop Hostel towards the east;

ii) POP members in the armoured vehicles would have a response group of TRT members behind them;

iii) a reserve group consisting of additional POP armoured vehicles with barbed wire trailers would be on standby to form a barrier should the strikers decide to attack (This reserve group was to be out of sight of the strikers so as not to provoke confrontation.) In addition NIU, STF, Emergency

[256] D 134, Scott, p. 14192
[257] Consolidated statement, Col Scott, Exh HHH120

Medical Services, Fire Brigade and crime scene and investigation experts were to be based at the nearby Forward Holding Area ('FHA');

iv) the SAPS helicopter would be used to send information to the JOC and the ground forces, *inter alia*, by providing photograph and video footage to enhance operational awareness; and

v) the SA Airforce Oryx would be used as a response platform for the deployment of a STF tactical team.

(b) phase two: in the event of an increase in the threat level against the SAPS or an apparent mobilisation of the strikers towards anticipated key points behind the police line:

i) there would be an escalation in SAPS force levels with reserves from the FHA[258] being brought forward, the purpose of the resulting show of force being to dissuade illegal activity or planned violence towards SAPS;

ii) the POP armoured vehicles with barbed wire trailers, which during phase 1 were to be kept out of sight to avoid

[258] Later a second FHA (called 'FHA two' ('FHA2')), near an informal settlement north of the koppie was added, the original FHA becoming 'FHA one' ('FHA1')

provoking the strikers, were to be pre-positioned between the police line and the strikers so that the barbed wire could be uncoiled quickly to close off the area behind the police line (the so-called 'neutral area') from aggressive approaches by the strikers; and

iii) the STF and air reaction teams was to be positioned at the rear area and was to be used to provide a show of force deployable from the air.

(c) phase three: this was a pre-determined deliberate tactical option to be employed if negotiations failed and the show of force (which was part of phase two) had failed to deter further unlawful activity by the strikers.

3) The strategy for this phase was based on the initial encirclement strategy, entailing encircling the strikers with barbed wire and offering them an exit point through which they would need to move while handing over their weapons. As was the case with his initial plan, this phase was only capable of being implemented early in the morning when there was a relatively small number of strikers on the koppie.

(a) phase four: this was to be implemented once the strikers who had spent the night on the koppie or had approached it in the early morning had been disarmed and arrested. Essentially it involved the processing of those arrested and evidential material by the police detectives and the forensic services.

(b) phase five: this consisted of intelligence driven follow-up operations to carry out high risk arrests, to search the residences of the strikers and to search for weapons and other evidence. This would be for detectives and for crime intelligence members to follow up on information gained from interviews with arrested strikers who could possibly provide intelligence relating to the earlier murder and the whereabouts of firearms stolen from the mine security staff murdered on 12 August 2012 and the police members who were murdered on 13 August 2012. High risk arrests and the searching of residences was to be undertaken by members of the NIU and STF.

(c) phase six: this involved a cordon and search operation to be authorised by Lieutenant General Mbombo in terms of Section 13(7) of the South African Police Service Act 68 of 1995. What was planned for this phase was that the Wonderkop and Karee hostels were to be cordoned off and searched for dangerous weapons, the cordoning off to be done by POP members and searching (and seizure of any weapons found) to be done by TRT members.

4) After Colonel Scott presented the plan to, and it was approved by the JOCCOM, with POP commanders present, the commanders were briefed, the briefing being conducted by about 14h30, whereafter the commanders briefed their members.[259] At around 16h00 phase 1 deployment took up position at the FHA and the monitoring and negotiation group moved forward to occupy the ground to the east of the koppie. This area from then on became the neutral area which the police dominated. [260]

B Negotiations to bring about a voluntary laying down of weapons and dispersing from the koppie

1) It had already been decided the previous evening that attempts should be made to negotiate a peaceful resolution of the situation with the strikers before there was a move to an offensive tactical operation. Arrangements were accordingly made for Lieutenant Colonel Stephen James McIntosh, the commander of the Carletonville Family Violence, Sexual Offences and Child Protection Unit, who is a trained hostage negotiator, to go to Marikana and assist with the negotiations with the strikers. He arrived at Marikana at 12h30 on 14 August 2012. After being briefed by Brigadiers Calitz and Fritz and Major General Annandale he was taken by Brigadier Calitz at about 15h20 in a Nyala to the koppie where he found a crowd which he estimated

[259] Consolidated statement, Col Scott, Exh HHH20
[260] Ibid

to consist of between 4 000 to 5 000 strikers, who were armed with knobkieries, assegais, pangas and other homemade sharp instruments. He addressed the crowd, which he described as 'rowdy and aggressive', through the public address system of the Nyala, using a Lonmin employee as an interpreter as the negotiations were being conducted in Fanagalo. He began by saying that the police had come in peace and wanted to find a way for the situation to be resolved peacefully. He saw a group of well armed males, about 300 in total, who were in front of the others and appeared to be the leaders of the group. (In the rest of this report this group will be called, as it was during the hearings, 'the militant group'.) He asked for five of the strikers' 'bravest men' to come forward towards his Nyala so that he could speak and negotiate with them. Eventually five men came forward, one of whom had a green blanket wrapped around him. (It was common cause during the hearings that this man was Mr Noki, one of the leaders of the strikers.) Lieutenant Colonel McIntosh advised them that their safety was the concern of the police who would stay in the Nyala and that they would be safe and free to return to the group after talking to the police.[261]

2) The five strikers came right up to the Nyala and Mr Noki climbed on the bull bar of the Nyala in order to talk to the SAPS members through the porthole. He informed the negotiating team that the strike was about wages and demanded to speak to the Lonmin management. He also said that the strikers were there because members of NUM had killed some of their members on Friday 10 August 2012 at 16h40. He refused to give his name

[261] Statement: Lt Col McIntosh, exh HHH14

and was quite agitated and adamant that the strikers wanted to talk to the Lonmin management. Lieutenant Colonel McIntosh told them that the SAPS wanted them to disperse peacefully and to leave their weapons on the ground. He also informed them that the SAPS did not want to fight with them or hurt them but that they wanted a peaceful solution to the problem and guaranteed their safety. [262]

3) At about 17h03 the negotiators received information that there was a body at the back of the koppie and that investigators and crime scene personnel were required to go to the scene and that they wanted to fly in a photographer. The body, which was that of Mr Isiah Twala, a Lonmin supervisor, was found about 200 metres away from where the negotiators had been parked on the side near the back of the koppie (the position of Mr Twala's body is depicted in **Annexure H**). The strikers' representatives, on being requested to do so, gave feedback that the police could land the helicopter and conduct investigations on the scene, saying that they did not know anything about the body or the circumstances of the death. [263] The negotiators went to the body and investigations were conducted on the scene. (The killing of Mr Twala is dealt with in detail later in this chapter.)

4) When they went back to the negotiation point Mr Noki requested them to postpone the meeting until the next day at 09h00 to allow the group to discuss the process they wished to follow. After the request was transmitted

[262] Ibid
[263] Ibid

to the JOC, the negotiators informed the group that the negotiations would continue the next day, whereafter the negotiators withdrew. [264]

C. Discussions between Lieutenant General Mbombo and Lonmin Management

1) While Lieutenant Colonel McIntosh and his colleagues were negotiating with the strikers' representatives Lieutenant General Mbombo was having an extraordinary discussion with members of the Lonmin management, in particular Mr Barnard Mokwena, the executive vice president Human Capital and External Affairs at Lonmin, and Mr Sinclair. Lieutenant General Mbombo was not aware that the conversation was being recorded. The audio file of the conversation and a transcript (handed in as Exhibit JJJ192) were subsequently, however handed over by Lonmin to the SAPS in compliance with a subpoena issued under Section 205 of the Criminal Procedure Act. During the hearings a corrected transcript was handed in as Exhibit JJJ192 bis. Despite the fact that the conversation was a very important one the SAPS did not include the transcript on the hard drive it furnished the evidence leaders and the Commission in purported compliance with the initial undertakings made by the National Commissioner to co-operate fully with the Commission. The transcript and audio file were belatedly discovered by Lonmin. Prior to this discovery there was no

[264] Ibid

evidence before the Commission that that conversation took place. It was not mentioned in the initial statements by Mr Mokwena[265] and Lieutenant General Mbombo. [266] In her supplementary statement Lieutenant General Mbombo says that she did not mention this 'informal discussion' because nothing turned on it. This is an unsatisfactory explanation. As will be apparent from what follows, a lot turned on the conversation and it was incumbent on both SAPS and Lonmin to inform the Commission about it when the initial statements were filed and the transcript and the audio file ought to have been included on the SAPS hard drive.

2) Lieutenant General Mbombo said in her supplementary statement that she asked Mr Sinclair to arrange the meeting with Lonmin's management in order to ascertain if they had devised ways to address the unrest situation and to share with Lonmin the approach adopted by SAPS in policing the situation. [267]

3) As appears from the transcript, [268]Lieutenant General Mbombo began the meeting by saying that she wanted to meet with Lonmin management in order to understand the decisions they were taking as to how they intended getting the situation back to normal. Mr Mokwena's response was that Lonmin's priority was getting people arrested. It was very clear, he said, that AMCU was behind the strike and that AMCU had made media statements

[265] Exh 0015
[266] Exh GGG5
[267] Exh LLL1
[268] Exh JJJ192 *bis*

that they had presented a demand of R12 500 to management. He also referred to a tape recording on which AMCU had said that Lonmin would remain ungovernable. (In cross-examination [269]before the Commission Mr Mokwena said that he was prepared to retract the statement that AMCU was behind the strike. He also withdrew his allegation that AMCU had issued media statements about its alleged demand for R12 500. As regards the tape recording on which AMCU had allegedly said that Lonmin would remain ungovernable he said in cross-examination that he had never heard the tape recording and that his colleague, Mr Jomo Kwadi, who had claimed to be in possession of the recording, was unwilling to hand it over.)

4) Mr Mokwena emphasised that Lonmin would not start to talk to the strikers outside organised bargaining structures. Lieutenant General Mbombo said that the strikers felt that they were in control because their employer was not telling them anything and not calling them to work. She stated that she wanted to 'circle' the workers and then talk to them and the SAPS would give them the opportunity to put down their weapons and leave the koppie one by one. If they did not, however, surrender their arms the next day, 'it is blood'. In the transcript, she can be heard receiving a telephone call from the National Commissioner and having a conversation with her, in the course of which she is recorded as having said 'there are about 500 to 1000 that are there. So are we are thinking that whilst they are at that number, we can maybe circle them around…'.[270] She also mentioned in this context that that

[269] Day 291, Mokwena, pp 38003 - 38005
[270] Exhibit JJJ 192 bis, page 2, lines 4-6

evening she would be getting 480 members. (This was clearly a reference to the extra SAPS members who were to be arriving at Marikana from other provinces. According to figures provided by the SAPS in their counsel's heads, on the previous day, 13 August 2012, there were 209 members and officers at Marikana, on 14 August 2012 there were 532 members and officers and on 15 August 2012 there were 689 members and officers. In other words during the period 13 to 15 August an extra 480 members and officers were sent to Marikana. On 16 August 2012 the total SAPS deployment at Marikana was 718 members and officers.) When cross-examined [271] on this passage of the transcript she conceded that by saying 'it is blood' she had meant that if the strikers did not surrender there would be injury or death.

5) During this conversation Lieutenant General Mbombo encouraged Mr Mokwena to communicate with the strikers and to issue an ultimatum for them to come to work. She said that it did not matter if the workers were angered because the police were there and 'were prepared to move in a different direction'. Mr Mokwena agreed that they would prepare a communiqué which would be delivered by helicopter. In his evidence Mr Mokwena confirmed that what had been agreed with Lieutenant General Mbombo during this conversation was that Lonmin would issue ultimatums to its workers to come back to work.[272] If they did not do so, the police would act on the following day, 15 August 2012, to disperse them. He also testified

[271] Day 181, Mbombo, pp 21661 - 21662
[272] Day 291, Mokwena, p 38013

that Lonmin was not prepared to issue an ultimatum that workers should return to work without being satisfied that the police were going to take action to resolve the situation. Mr Mokwena testified further that to his recollection at no stage after this discussion did Lieutenant General Mbombo urge Lonmin to negotiate with the strikers[273]. [274]During the discussion Lieutenant General Mbombo referred to a discussion she had had with Mr Abey Kgotle, the Executive Manager for Human Capital of Western Platinum of Lonmin, the night before when she mentioned allegations that management at Impala were colluding with AMCU and she alleged that from a political point of view there was a feeling that the mining industry wanted to replace NUM with another face and that that was why these things were erupting. She also referred to a discussion the National Commissioner had had the day before with Mr Kgotle in which she apparently raised concerns that if management gave the strikers leeway they could be seen as supporting them.

6) Lieutenant General Mbombo also mentioned that when she spoke to the Minister of Police, Mr Mthethwa, he had said that Mr Cyril Ramaphosa was calling him and pressurising him. In this regard she said that the National Commissioner had asked her the previous evening who the shareholders were and that she had replied that she did not know but that the Minister had mentioned Mr Ramaphosa, whereupon the National Commissioner had said that she 'got it'. Explaining this, Lieutenant General Mbombo referred to the

[273] Day 292, Mokwena, p 38200
[274] Day 292, Mokwena, p 38185

fact that Mr Ramaphosa had presided over the hearing of the appeal brought by Mr Julius Malema against the decision of the African National Congress to expel him from the party and that Mr Ramaphosa was, as she put it, 'very strong in terms of the decision made'. She went on to mention that Mr Malema had intervened in the dispute at Impala and that the police had been able to manage the situation there after his visit. She stated that in her discussions with the National Commissioner they had been concerned about the fact that if once again it came across that Mr Malema had defused the situation it would seem as if he has taken charge of the mines. She added that because of Mr Malema's known position that the mines should be nationalised it had 'a serious political connotation' that had to be taken into account and which they needed to find a way of defusing. She said that she had told her people that they needed to act in such a way that they 'killed this thing'. Mr Mokwena agreed with this statement and said, 'immediately, yes'. During cross-examination, when she was questioned about what she had said about Mr Malema and it was put to her that she and the National Commissioner were concerned that Mr Malema should not get credit for defusing the situation, she denied that that was correct and said that what she had been afraid of was that Mr Malema might come and not solve the problem but in fact make it worse. [275]

7) Both Lieutenant General Mbombo and Mr Mokwena referred to being contacted by Mr Themba Godi, an opposition member of parliament. They agreed that the situation needed to be arrested because it allowed

[275] Day 180, Mbombo, p. 21544

opportunists the opportunity to comment and then 'the situation [would] get out of control'. Mr Mokwena then mentioned that the next day was 'D-Day'.

8) Also during the course of this discussion Lieutenant General Mbombo mentioned that a key challenge facing her was the cost of keeping all the members there every day. She implied that it was for this reason that she had given the operational commanders until the weekend 'if we cannot sort this thing' but she added that she hoped this would happen 'by tomorrow [i.e, Wednesday 15 August 2012] the latest'. During her evidence she confirmed that cost was one of the factors to be taken into account. She added that they had to work together and quickly but that they should not jeopardise the success of the operation.[276] Lieutenant General Mbombo was strongly criticised both in cross-examination and in argument for the comment she made during the conversation with the Lonmin management which indicated a complex political motive for wanting to act against the strikers and to do so the next day. The Commission agrees with the following submissions made by the evidence leaders in this regard:[277]

> '…*She was unable to provide a coherent and compelling explanation for the sentiments she expressed and testified under cross-examination that:*

[276] Day 178, Mbombo, p. 21337
[277] ELs' Heads, paras 542 - 544

542.1 The call from Mr Ramaphosa to the Minister did not influence her decision-making in respect of Marikana. She testified that any citizen is entitled to phone the police for assistance. We submit that this explanation is unconvincing to say the least. From JJJ192 bis it is evident that Gen Mbombo was at pains to convey to Mr Mokwena that the person who telephoned the Minister was politically influential. Under cross-examination she was unable to explain why she did [say] this if it was an irrelevant fact

542.2 We note also that Lt Gen Mbombo was unable to provide any explanation for her utterances in respect of Mr Julius Malema. While she persisted in her version that she was merely interested in doing policing work at Marikana, her testimony that she would have welcomed Mr Malema to Lonmin if it meant he could defuse the situation is wholly unconvincing and completely at odds with her utterances recorded in exhibit JJJ192 bis. Her explanation that she feared that Mr Malema would make matters worse is in sharp contrast to the sentiment that she expressed in JJJ192 bis – namely that he was given the credit for defusing the situation at Impala. Nowhere in JJJ192 bis does Lt

Gen Mbombo even hint at a fear that Mr Malema might worsen the situation at Marikana.

543. We submit that exhibit JJJ192bis clearly shows that Lt Gen Mbombo took into account irrelevant political considerations in approaching the situation at Marikana:

543.1 She did not want mining companies to be seen to be supporting AMCU;

543.2 She did not want mining companies to undermine NUM;

543.3 She was responding to what she perceived as pressure from Mr Cyril Ramaphosa whom she considered to be politically influential;

543.4 She wanted to end the violence before Mr Julius Malema arrived in Marikana and was given credit for defusing the situation;

543.5 She was concerned to put an end to a situation where an opposition member of Parliament was involving himself in the community.

544. These factors were put by the evidence leaders to Lt Gen Mbombo during cross-examination. She was

unable to provide an adequate explanation for her denial that the … inferences listed above can validly be drawn.…'

9) In their submissions[278] the evidence leaders also contended that the transcript of the conversation between Lieutenant General Mbombo and the Lonmin management shows not only that Lieutenant General Mbombo took irrelevant political considerations into account in approaching the situation but also that the National Commissioner participated in inappropriate discussions about political considerations. 'This much is clear', they say, 'not only from the wording of the transcript but also from Lieutenant General Mbombo's repeated testimony that she and General Phiyega discussed the possibility of Mr Malema coming to Marikana and taking credit for defusing the situation.'

10) Their submissions in this regard are set out in the following passage in their heads, with which the Commission is in full agreement:

'*545. …We contend that Gen Phiyega's testimony that she was unable to recall this specific conversation is both unsatisfactory and unconvincing, It is however telling that she does not dispute the testimony of Lt Gen Mbombo.*

[278] ELs' Heads, paras 545 - 546

> *546. We submit that, on the evidence, the Commission [should] make a finding that Gen Phiyega was complicit in engaging in discussions where political factors were inappropriately considered and discussed in relation to policing the situation at Marikana. This is inconsistent with our constitutional and statutory regime which requires that policing be conducted in an impartial and unbiased manner.'*

11) The conversation between Lieutenant General Mbombo and the Lonmin management terminated on the basis that the next day, Wednesday 15 August 2012, was to be 'D-Day', when the strikers either voluntarily laid down their arms and left the koppie or were forced to do so as a result of police action.

D The Killing of Mr Twala

1) The body of Mr Twala was found on 14 August 2012 behind the koppie at Wonderkop.[279] The post mortem report shows that he died as a result of multiple stab wounds to the body.[280]

2) According to Lieutenant Colonel McIntosh,[281] at around 17h03 on 14 August 2012, they received information that there was a body lying behind the

[279] See Exhibit B8 for location of the body
[280] Exhibit A780

Koppie and the LCRC and detectives wanted to fly in a photographer to process the scene, whereupon, the strikers allowed SAPS to land a helicopter in order to photograph and remove the body.

3) Mr X's evidence about this incident is dealt with in **Annexure C**.

4) Apart from the testimony of Mr X, the evidence relating to the death of Mr Twala is contained in witness statements in docket CAS 121/8/2012.

5) Mr Oupa Christopher Malinga[282] stated that on Tuesday, 14 August 2012 and in the morning Mr Twala arrived at his home and asked him to accompany him to a meeting at the koppie. When they arrived at the koppie, people had already gathered there and they were singing. After a while, he and Mr Twala decided to leave and on their way to the informal settlement, two men came up behind them and ordered them to go back to the koppie. He says that both men were wearing blankets and were armed with sharp instruments.

6) When they arrived at the koppie, they were both ordered to sit in the middle of a group of about 12 men and they were ordered to identify themselves. There was a third person who was already seated at the centre of the group when they arrived. Various questions were put to them by the crowd.

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[281] Exhibit HHH14 paragraph 8
[282] Exhibit A13

7) Mr Twala was accused by the group of being an informer (impimpi), and one of the persons present said that he used to parade them at the office for discipline. He described one of the five persons who were questioning Mr Twala.

8) He said that he and the other person were set free and Mr Twala remained seated in the middle of the group. He then saw them leaving to the other side of the mountain with sharp instruments placed against his body. Later he heard the sound of two gun shots coming from that direction. Later, the same persons that had left with Mr Twala returned but Mr Twala was not with them. He thereafter left the koppie.

9) Mr Leonnard Nzingisi Nzimasa said that he is employed at Eastern Platinum Mine and is the deputy Chairperson of NUM at No 2 Shaft. On Tuesday 14 August 2012, he was at the koppie attending the gathering. He was called out by one of the persons present to come to the front where the other leaders were.

10) Among the leaders that he saw at that stage were Anele, Xolani, Bayi, Rasta and Mambush, amongst others. He says that he was ordered to sit down in front, when a second and third person were also pointed out and called to the front.

11) They were ordered to sit down while being surrounded by this group. He does not know the name of the person who called him out but he is able to identify him if he is to see him again. One of the persons in the group asked each of them to identify themselves. He was the first to do so and was asked various questions by the group. Mr Siboko and Mr Nongovu who were a part of the group said nice things about him and he was left to go back to the crowd. A second person was also questioned and later allowed to go back. The group remained with one person for questioning.

12) After they questioned him, a group comprising of Anele, Xolani, Bayi, Rasta and Mambush and others took away that person to the other side of the koppie. He heard the sound of a person crying from that direction. After a short while, that same group of leaders returned from that side of the mountain and the one person was not with them. He says that he saw Anele cleaning the panga he was in possession of with grass, and realised that he was cleaning blood from it.

13) Mr Luxolo Mqokwana[283] said that he was also present at the koppie on 14 August 2012 and saw three persons being questioned and Mr Twala being taken away to the other side of the mountain. He says that before he was taken away, Anele searched Mr Twala and found a silver firearm on his person. He took it and handed it over to someone in the group. When the group had gone to the other side of the mountain, he heard the sound of gunfire from that direction. When the group came back, Mr Twala was not

[283] Exhibit A30

with them. He heard Anele giving feedback to the group that the work had been done. He saw Anele take the firearm he had taken from Mr Twala and a shotgun and cover it with his blanket.

14) Mr Vuyani Life Siboko[284] corroborated this version. As did Mr Thulani Nongovu.[285] He added that Mr Xolani Nzuza said that Mr Twala is a very bad person because lots of workers lost their job because of him. They also said that he is an impimpi. When he saw three people going down behind the hill with Mr Twala he heard a gunshot and he saw that one person had a panga. When they came back, they said to the workers they have finished the job. He describes the clothing of the person who said that, and says that he will be able to identify him. The song that everyone sang thereafter was 'how can we kill the NUM members?'

15) Mr Melibakho Solvet Bttatyi[286] said that on 14 August 2012, it was alleged at the gathering on the mountain that Mr Twala was present to spy on them for the employer.

16) Mr Nzuza asked Mr Twala what he was doing at the mountain and his reply was that he was there to join the strike. Mr Nzuza asked Mr Twala for his cellphone and paged through it and while doing so, he said that he saw the cell phone numbers of the leaders of NUM and the employer. Mr Nzuza

[284] Exhibit A15
[285] Exhibit A14
[286] Exhibit A16

asked Mr Twala why the cell phone numbers of the leaders of NUM and the employer were stored on his cell phone and Mr Twala replied that these were the leaders that he works with and he had their numbers in case there was a problem.

17) One of the persons said that Mr Twala must be taken behind the mountain. He was escorted by four persons behind the mountain. The one with the scar on his head was the one who searched him and found the firearm in his possession. He said that he can identify this person. When they returned from the mountain, they said to the workers that they must sing a song.

18) The Post Mortem Report[287] documents multiple stab wounds and firearm injuries and gives the cause of death as multiple stab wound injuries. The firearm injuries are not documented but 13 stab wounds are.

19) It appears that there are outstanding investigations in the docket which include the outcome of ballistic examinations as cartridge cases were recovered at the scene.

20) Mr Nzuza, who was charged with the murder of Mr Twala, testified[288] that he was not present at the Koppie at the time that Mr Twala was killed, but later indicated that when he arrived at the Koppie he saw Mr Twala standing and

[287] Exhibit A7
[288] Day 277, Nzuza, pp. 35513 - . 35514, and p. 35912

talking to the strikers at the Koppie. At the time he did not know Mr Twala's name, but heard him saying that he (Mr Nzuza) knows him; that he responded by saying that he did not know Mr Twala and only met him once when he wanted goggles from him and that he had threatened to get him fired; that after this discussion he left the Koppie and went to have a soft drink somewhere in Wonderkop; that he saw nothing that day that warranted Mr Twala being killed.

21) As is apparent from the aforegoing, it would appear as if Mr Twala was killed, execution style, by a number of strikers, apparently acting in concert, because of a suspicion that he was spying on them on behalf of their employer and / or NUM

22) As is also apparent from the docket, CAS 121/8/2012, a police investigation had been commenced at the time into the murder of Mr Twala and in the Commission's view the investigation should, in so far as it is necessary, proceed and the law be allowed to take its course.

CHAPTER 10

THE EVENTS THAT OCCURRED ON WEDNESDAY, 15 AUGUST 2012

The following incidents on the 15th call for consideration and evaluation:

A The Forum at 8;

B The visit by the two union presidents to Marikana;

C Debriefing of Mr Mathunjwa and Mr Zokwana; and

D National Management Forum.

A The Forum at 8

1) The conversation between Lieutenant General Mbombo and the Lonmin management terminated on the basis that the next day, Wednesday 15 August 2012, was to be 'D-Day', when the strikers either voluntarily laid

down their arms and left the koppie or were forced to do so as a result of police action.

2) In the result this did not happen on Wednesday 15 August 2012 for two reasons. First the police commanders appreciated that it would be a breach of faith, while negotiations were still proceeding, to launch the encirclement action which was phase 3 of their planned operation, the so-called 'tactical option'.[289]

3) Secondly, a new intervention, which it was hoped would solve the problem, was initiated as a result of the efforts of Mr Xolani Gwala, the presenter of the SAFM radio programme 'The Forum At 8', which was broadcast just after the 8am news on Wednesday, 15 August 2012. [290] The guests on the programme, which was dedicated to the situation at Marikana, were the presidents of the two trade unions whose members were on the koppie, Mr Senzeni Zokwana of NUM and Mr Joseph Mathunjwa of AMCU, as well as Mr Mokwena representing Lonmin. At the end of the programme the presidents of the two unions agreed to go to Marikana to talk to the workers and urge them to go back to work, while Mr Mokwena said that Lonmin wanted, to use his words, *'to use the structures of the unions to discuss any grievances or concerns in the most civilised manner without pangas and without guns*'. He added, '*we can do it now, we can do it as soon as possible'.*

[289] Consolidated Statement, Col Scott, HHH 20
[290] The transcript of the broadcast is exh LL

4) When the two Presidents and Mr Mokwena arrived at Marikana they were met by Major General Mpembe, who told them that SAPS required the intervention of the leadership of the two unions to go to the koppie, talk to the strikers and tell them to disperse and disarm. [291] He said that their intelligence revealed that some of the strikers belonged to NUM while others belonged to AMCU. He stressed that the police did not want to be seen as 'the police that is brutally killing people and at the same time we do not want to be seen as the police that is not complying with international standards'. He continued: *'We are policing in a democracy where negotiation [is] its weapon, not bloodshed.'*

5) Both Mr Zokwana and Mr Mathunjwa agreed to accompany the SAPS negotiation team to the mountain. The arrangement was that they would go in separate Nyalas and that they would address the strikers from within the Nyalas. Mr Mokwena was not prepared to go to the mountain. He reiterated Lonmin's stance that they would only negotiate in a controlled environment and only within established bargaining structures. He set out Lonmin's position to be conveyed to the strikers as follows:

> *'We are willing to engage our employees within the structures that are known. In a very safe environment where there are no weapons. Not on the mountain. So we are*

[291] Transcript of meeting between Maj Gen Mpembe, Mr Mokwena and the Trade Union Presidents, exh 004

willing to meet our employees through their structures, through their leaders to discuss any issue. Not when they are armed. Not when they are actually outside Lonmin property .

So when the workers are back, disarmed, tomorrow, tonight, through their leaders we will meet them. That is our position. So we are not against meeting, discussing issues with [our] employees through their right structures. We are prepared to do that.'

B The visit by the two union leaders at the koppie

1) The union leaders then were taken to the koppie in separate Nyalas. Mr Zokwana spoke first from within his Nyala through a loudspeaker. [292] The strikers refused to listen to him and he had to abandon his address. The AMCU delegation had a friendlier reception. An AMCU official in the Mathunjwa team started off by saying, 'Phantsi nge Gundwana phantsi', which loosely translated means, 'Down with traitors down' ('traitors' in this context clearly meaning workers who were not prepared to take part in the unprotected strike).

[292] Exhibit BB6, transcript of video of address by Zokwana and Mathunjwa at koppie on 15 August 2012,

2) Mr Mathunjwa told the strikers that he had asked the employer to give them a guarantee that if the strikers went back to work it would talk to their union, namely the structures the RDOs had chosen so that they could get what they wanted. He further advised the strikers that they should go back to work so that if the negotiations broke down they could approach the CCMA for arbitration so that any subsequent strike in which they might engage would be protected. According to him the strikers thanked him and told him that they understood the message from the employer but said that as it was getting dark he must come back in the morning and that they (i.e Mathunjwa and his team) would see how they would go back to work. There were two subsequent debriefing sessions thereafter, one between the police and the AMCU team, the other between the police and the NUM team. [293]

C Debriefing of Mr Mathunjwa and Mr Zokwana

1) At the AMCU debriefing Mr Mathunjwa came across as confident that the strikers would lay down their weapons the next day. Indeed it is correct to say that he was overconfident. But he did not give the police an unequivocal undertaking in this regard, as Major General Annandale conceded.[294] He said expressly that he did not have a specific answer as to what would happen the next day but he added that he believed that the next day would

[293] exh GGG 4, transcript of both debriefing sessions,
[294] Day 91, Maj Gen Annandale, p. 9710

be the day of joy for everyone. Major General Annandale also said that Mr Mathunjwa had asked the police for an undertaking that they would not take action against the strikers that night as the strikers wished to spend the last night on the koppie before discussions would resume at 09h00 the next morning.

2) At the debriefing between the police and the NUM team Mr Zokwana said that the strikers should not be allowed to remain armed. He also said that the culture of lawlessness could not, as he put it, be encouraged and promoted. Major General Mpembe in reply said:[295]

> *'I need to do my job and you also tell me to remove firearms. … I cannot go there and disarm people. It would be bloodshed. … I need to go in a specific house [and] disarm them. That is the only way. … You have your members there inside. … Beating this elephant bit by bit because me going there to the mountain, disarming people, it is going to be bloodshed. … That one I can assure you. … You have to give me – to say which houses, which people and I need statements. I need evidence that I should now start doing my work. … My job is to get these people disarmed. 24 hours I am here. I need to get that information. So as a union you need to work around the clock with that … Here it is that the police are shooting, are killing people and we do not want to go*

[295] Day 83 Annandale, p. 8792

> *that route but at the same time we are also not prepared that our members should die but we have a duty to disarm.'*

3) Later, after Mr Zokwana had said that the local leaders of NUM should be able to identify people who could assist and who offered co-operation, Major General Mpembe said:

> *'I cannot go to the mountain, it is not – has never been strategically in my training. How do I disarm somebody with an axe as I have a firearm. It will never work. There is no training in the whole world to be like that.'*

4) As the evidence leaders correctly submit,[296] 'Major General Mpembe clearly foresaw bloodshed if the police went in to disarm and disperse the strikers and he was realistic in that regard. Despite this foresight SAPS moved to the tactical phase without putting in place any substantive measures to mitigate against bloodshed and the loss of life. The SAPS leadership appeared to have reconciled itself to the notion that bloodshed was a real possibility, if not an inevitability.'

[296] ELs' Heads, para 591

D The National Management Forum

1) While Major General Mpembe was debriefing the NUM and AMCU teams at Marikana, the National Commissioner and Lieutenant General Mbombo were attending a meeting of the National Management Forum (NMF) of the SAPS, which was being held at Midrand. The meeting was also attended by the Provincial Commissioners of the other provinces as well as the Divisional Commissioner for Operational Response Services, the Deputy National Commissioner Operational Response Services and the Acting Divisional Commissioner Crime Intelligence.[297]

2) It is now common cause that the decision that the strikers would be forcibly removed from the koppie by the police on 16 August 2012 if they did not voluntarily lay down their arms was not taken by the tactical commanders on the ground at Marikana on that day but rather by Lieutenant General Mbombo and 'endorsed' by the SAPS leadership at an 'extraordinary session' of the NMF held after its ordinary meeting was over on the evening of 15 August 2012. Some of the members had left but those present apart from the National Commissioner, were all Provincial Commissioners and the Divisional Commissioner for Operation Response Services and the Head of Crime Intelligence.

[297] exh JJJ 177 Minutes, Extraordinary session of NMF,

3) The information made available to the Commission regarding this meeting is limited. In an endeavour to obtain more information on the point a questionnaire was sent to the members who were present there and they were asked to submit affidavits to the Commission answering the questions posed. Two of those members, both of whom are no longer members of the SAPS, failed to respond.

4) The answers that were forthcoming were correctly described by Advocate Budlender SC, the senior evidence leader, as a disgrace. He motivated his comment as follows:[298]

> *'Chair, if one analyses these statements one is left, to be absolutely blunt, with a feeling of absolute despair. These are the most senior people in the South African Police Service. They're asked some very important questions by a Commission which is investigating, as Mr Chaskalson put it, the greatest catastrophe since we achieved democracy, and the answers are evasive and they are non-responsive.'*

5) A very serious aspect of this matter is that it appears that SAPS deliberately attempted to withhold from the Commission information about this meeting

[298] Day 294, Submission by Mr Budlender SC, pp. 38686-38687

and concealed the fact, the very important fact, that the decision to go over to the so-called 'tactical option' was made not in the middle of the day on 16 August 2012 after the situation had 'escalated' to such an extent that the tactical option was the only appropriate way forward, but the day (or evening) before when it was not known what the situation on the ground would be when the 'tactical' operation commenced.

6) No mention of the meeting or the decision was disclosed in Exhibit L, the SAPS presentation document, or on the SAPS hard drive. According to Colonel Scott the meeting and the 'endorsement' of the decision on the evening of 15 August 2012 was not mentioned at the Roots conference, which began eleven days after the shootings took place. The existence of the meeting and the decision was brought to the attention of the evidence leaders by a third party and only after they had made specific enquiries about this meeting was the minute of the extraordinary session disclosed. This was months after the National Commissioner had completed her original evidence. In that evidence[299] she said that at the NMF meeting Lieutenant General Mbombo told her, as she put it, 'of a possibility of a peaceful resolution being reached'. She stated that Lieutenant General Mbombo said that she had been told that Mr Mathunjwa had promised that the strikers would lay down their weapons at the koppie at 09h00 the next morning and would thereafter leave the koppie. The Provincial Commissioner added that if this undertaking was not complied with, the police would have to disperse the crowd. The minute is Exhibit JJJ177: its

[299] Day 74, NC Phiyega, p 7943

terms appear to have been settled by the National Commissioner herself (this emerges from e-mails emanating from her own office). It reads as follows:

> *'The National Commissioner opened the meeting and requested the Provincial Commissioner North West, Lieutenant [General] Mbombo to brief the attendees on the issue of the labour unrest in Lonmin mine in Marikana, North West.*
>
> *After deliberations the meeting endorsed the proposal to disarm the protesting masses and further indicated that additional resources must be made available upon need identification by the Prov Comm, North West.'*

7) Because she had not mentioned the meeting or the decision the National Commissioner was recalled for further questioning on the point but what she said was singularly unhelpful.[300] She claimed to be unable to remember most of what was discussed. What does appear from her evidence is that:

[300] Day 288, Phiyega, pp 37392 et seq

(a) The meeting was told that it was hoped that Mr Mathunjwa might be able to persuade the strikers to lay down their arms and leave the koppie when he met them at 09h00 the next day;[301]

(b) The meeting was not told that it would not be possible to implement the existing encirclement plan after 09h00;[302]

(c) It is possible that the details of the plan to disperse the strikers were discussed at the meeting but she could not recall whether this happened;[303]

(d) She denied that the meeting endorsed Lieutenant General Mbombo's proposal without knowing what the details of the operation were;[304] and

(e) She suggested that there must have been a discussion in which an assurance was sought that the possibility of bloodshed had been adequately considered and that measures were in place to ensure any bloodshed would be kept to a minimum but she herself could not

[301] Day 288, Phiyega, p 37403
[302] Day 288, Phiyega, p 37404
[303] Day 288, Phiyega, pp 37409 - 37410
[304] Day 288, Phiyega, p 37418

say that was so, and added that she was 'not able to give those pedantic details';[305]

(f) The decision which was endorsed was to be implemented the following day but the National Commissioner when asked whether Lieutenant General Mbombo conveyed to the meeting any pressing reason why the operation had to be mounted the next day, answered 'not that I know of'.[306] Lieutenant General Mbombo was also not able to give much detail as to what was said and by whom during the deliberations at the extraordinary session. She said that the meeting was under an hour. She spoke for about ten minutes and briefed those present on the issues of the labour unrest and she told them, she said, that she 'had hoped that there would be a solution but if this [is] not successful [my] intention was that we take the weapons which are the result of the violence existing'. Those present who spoke said that they agreed with her decision. 'Those who were to assist with the necessary resources for this operation agreed then that they would do so.'

8) Immediately after the extraordinary session she telephoned Major General Annandale, Major General Mpembe and Major General Naidoo and told them of the decision that the strikers were to be disarmed the next day if they did not voluntarily lay down their weapons. [307] (The three generals

[305] Day 88, Phiyega, pp 37418 - 37419
[306] Day 88, Phiyega, p 37447
[307] Day 180, Mbombo, p. 21573

denied in evidence that they were informed by Lieutenant General Mbombo of her decision but, as the evidence leaders correctly submit, these denials must be rejected.[308] It is clear from the telephone records that Lieutenant General Mbombo telephoned them shortly after the meeting. Why would she not have informed them of the important decision she made, which they had to implement the next day? For what other reason would she have telephoned them? And, as will appear later, the first thing said at the JOCCOM meeting of 06h00 the next morning was that that day was to be D-Day.) Another telephone call she made was to Mr Sinclair of Lonmin.[309] It is overwhelmingly probable that she informed him also of her decision. At the meeting she had with the Lonmin management on 14 August 2012 she had stressed that she wanted the activities of Lonmin and the SAPS to be coordinated. [310] It is clear from the evidence that part of the coordination would have been the issuing by Lonmin of the ultimatum timed to coincide with the police action to resolve the situation. And indeed by 06h29 on Thursday 16 August 2012 Mr Mark Munroe, the Vice President of Lonmin, had conveyed to Lonmin executive managers that the ultimatum had to go out[311], suggesting that he already knew of Lieutenant General Mbombo's decision, something which is highly likely in view of the fact that Mr Sinclair reported to Mr Munroe. [312]

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[308] Day 149, Mpembe P. 17044; Day 87, Annandale p. 8662; Day 193, Naidoo, P. 23634; EL HoA para 596
[309] Exhibit ZZZ 11 page 36
[310] Exhibit JJJ 192 *bis*
[311] Exhibit WWWW 3, E-mail from Munroe to Mokwena and others
[312] Day 292, Mokwena p 38193

CHAPTER 11

THE EVENTS THAT OCCURRED ON THURDSDAY, 16 AUGUST UP TO SCENE 1

The following events on the 16th call for consideration and evaluation:

A The events and issues leading up to the JOCCOM meeting at 13h30;

B The JOCCOM meeting at 13h30;

C The briefing and operation leading up commencement of the uncoiling of the barbed wire;

D Bishop Seoka;

E The operation at Scene 1;

F Attack on Nyalas on northern end of small kraal;

G Intention of the strikers; and

H Stopping the operation after Scene 1.

A The events leading up to the operation at Scene 1

1) It is clear that Lieutenant General Mbombo's decision had been communicated to the operational leadership by 06h00 the next morning because the hand written notes taken by Captain Moolman (now Colonel) at the meeting begin with the word 'D-Day'[313]. These notes were first disclosed to the Commission more than a year after it was established. Initially the Commission was given a document which purported to be the typed minutes of the meeting but which did not mention that 16 August 2012 was 'D-Day'. On the contrary it said that phase 3 of the plan would be implemented if the situation escalated. This document, which is Exhibit TT4, which was given to the Commission as part of the SAPS hard drive, was prepared at the Roots conference. It does, however, say that if the strikers did not, as Mr Mathunjwa had indicated that they probably would, lay down their arms, what was described as a 'contingency' (by which was obviously meant a contingent plan) had to be in place and had to be prepared 'based on the intelligence brief'. (The intelligence brief, which was presented to the meeting, indicated that the strikers were in possession of spears, assegais and pangas, that they would decline to surrender them to the police, would not leave the koppie and were 'prepared to fight if their demands are not met which includes resisting the police'.) There is no reason to believe that the decision to have a contingency plan prepared was not made. Brigadier Calitz confirmed that this decision was made and agreed that Colonel Scott

[313] Exh JJJ 168, handwritten notes of JOCCOM of 06h00 on 16 August 2012

was the obvious person to draft this plan. [314] (It is probable, however, that this decision was not made at the JOCCOM meeting but sometime afterwards, because it is not mentioned in the hand-written notes.)

2) After the meeting the SAPS continued with phase 2, which had been implemented on the two previous days, with one significant difference, namely the Nyalas with the barbed wire trailers, which had been kept out of sight of the strikers so as not to provoke them were pre-positioned so that they could uncoil the wire if it was needed. At 09h30 Lieutenant General Mbombo addressed a press conference at which she said:[315]

> *'I think the question that relates to that I'm saying we are ending the strike today, what do I mean. I mean that remember that we said our intention to disarm the people, and also our intention to [inaudible] the people that they leave, that people don't gather in this area where they are, and that is what we wish to do today, and I said [inaudible] we wish that we will do that still amicable, meaning we will ask them to leave, but then I don't want to explain to you if they don't, what then. What I told you is today we are ending this matter.'*

[314] Day 177, Calitz pp. 21231-21232
[315] Exh AA 13, transcript of Lt Gen Mbombo's media conference

3) After the press conference she had an interview with eNCA in which she said:[316]

> *'The plan is that we intend to ensure that today we end this strike. If they resist, like I said, today is a day that we intend to end the violence.'*

4) It is clear that Lieutenant General Mbombo foresaw there was a high risk of bloodshed if her decision were implemented during the course of 16 August 2012 and it was clear, at some time after 09h00, that the voluntary disarmament Mr Mathunjwa had overconfidently predicted was not going to happen. Her conversation with the Lonmin management on 14 August 2012 seems to indicate that she was aware of the original phase 3 plan of encirclement. If so, it is probable that she knew that it could not be carried out if there were 3000 to 4000 strikers on the koppie. She should therefore have foreseen that the relatively risk free original phase 3 could not be implemented on 16 August 2012 after 09h00 and that as she herself had told the Lonmin management on 14 August an attempt to disarm the strikers would lead to 'blood'. She also said that before 09h00 on 16 August 2012 Major General Mpembe and Major General Annandale told her that there was a possibility of people being injured but she was assured that 'all endeavours would be made …to avoid spilling of blood.'[317]

[316] JJJ 92, video of Lt Gen Mbombo's interview with eNCA at 0.08 and 0.38
[317] Day 181 PC Mbombo pp. 21725 - 21726

5) It is also clear that the commanders on the ground at Marikana who were going to implement the decision taken the previous night by Lieutenant General Mbombo and endorsed by the extraordinary session of the NMF must have foreseen that there was a high risk of bloodshed. Reference has already been made to what Major General Mpembe had said the previous evening to Mr Zokwana and the intelligence information placed before the JOCCOM at its 06h00 meeting. Either Brigadier Calitz or Colonel Merafe ordered 4000 additional rounds of R5 ammunition for delivery to Marikana. The ammunition duly arrived at the JOC in the course of the afternoon but was sent back by Brigadier Pretorius because it was not needed. Colonel Merafe says that Brigadier Calitz placed the order[318], while Brigadier Calitz denies this.[319] It is not necessary for the Commission to endeavour to resolve this dispute of fact: what is significant is that one of them (it does not matter who) thought that they were needed. A further indication that a senior member of SAPS at Marikana foresaw a bloody confrontation is the fact that Colonel Madoda and Colonel Classens, at the instance of Brigadier van Zyl, requested the presence at Marikana of four mortuary vehicles (which would have provided for the removal of sixteen corpses)[320]. In the event only one hearse was available and it arrived at Marikana shortly after 13h00.

6) A particular problem with which the SAPS had to deal was the fact, as pointed out earlier that their plan for phase 3 (the encirclement plan) could

[318] Day 217, Merafe, pp 26693 – 26694 and Exh JJJ 186
[319] Day 156, Calitz, pp 17655 - 17662
[320] Exh HHH 66 and 67, Exhibits JJJ 180 to 184 and Exh JJJ 193

only be implemented early in the morning when there were relatively few strikers on the koppie. This plan was relatively risk free: it had been designed by Colonel Scott with the assistance of Colonel Merafe and other POPs officers and accepted by the JOCCOM, at a meeting attended by several POPs officers. Attempts were made by SAPS to indicate that it was abandoned before 16 August 2012 and replaced by a new plan, to disperse the strikers from the koppie and to disarm and arrest the more militant ones (what was referred to in the evidence as the 'DDA plan'). It was suggested, for example, that it could not be implemented because there was not enough barbed wire but the evidence indicated that the SAPS ordered more wire from Lonmin and that Lonmin had enough wire available to deliver to the SAPS as and when it was needed.[321] There also an absurd suggestion that it would have been inhumane to encircle the strikers who were on the koppie because that would have exposed them to the cold Highveld winter air – this in the case of strikers who had elected to spend the night on the koppie![322]

7) Colonel Scott testified that between 16 August 2012 and the Roots workshop he had recalled the discussions about difficulties with the encirclement plan taking place only on 16 August 2012 itself, after the 06h00 JOCCOM. At some stage at Roots or later he apparently became convinced that these difficulties had already been identified by Wednesday, 15 August. The Commission is satisfied that it is overwhelmingly probable that his original recollection was correct. A number of documents which he had prepared during the period from the evening of 16 August to 21 August relating to the

[321] Day 134, Scott, p 14246 and pp 14250 - 14251
[322] Exh JJJ 50 (slides 9, 10 and 13); Exh JJJ 100; Exh JJJ 43 (esp slides 12 and 13); JJJ 101A; Exh JJJ 102B1 and Exh JJJ 101 B (slides 24, 28 and 30)

operation were found on his computer which became available to the evidence leaders during the course of his cross-examination. All were consistent with the tactical plan having been changed after the 06h00 JOCCOM meeting and before the 13h30 JOCCOM meeting. The barbed wire Nyalas that were pre-positioned in a line in front of the koppie in a line stretching from the power station on to the south were placed on the line that was going to be used to encircle the koppie under the original encirclement plan and considerably closer to the koppie than would have been the case if they had followed the ostensible instructions relating to the DDA plan. [323]Colonel Scott, despite the fact that he had the whole morning from after he had finished working on the cordon and search application, at about 08h54, to work on the details of the new plan and to have a document prepared setting out the details for the use of the commanders, had no documents at all to give the commanders and merely briefed them off a single Google Earth diagram on the screen of his laptop. [324](A copy of the electronic file he used is reproduced in Exhibit L, slide 18; he used it without the text boxes and arrows which he added later.) When asked what he did during the morning he said he could not remember. He commented that he would have had printouts ready if he had received the instruction to draw up the plan earlier and he indeed conceded also that his earlier recollection may well have been correct.

[323] Exh L, slides 149 and 152 and Exh JJJ91
[324] Day 135, Scott, pp 14337 - 14338

8) The barbed wire Nyalas arrived at their positions on the field in front of the koppie between 10h34 and 10h44. The positions they took up were closer to the koppie than they were supposed to be, as indicated on a gridded map and reproduced on slide 149 on Exhibit L, and were in fact, as already stated, on the line that had been intended as the line along which they were, under the encirclement plan, to have encircled the koppie. The arrival of the barbed wire Nyalas provoked an aggressive response from the strikers, something which Colonel Scott had anticipated would be the case when he had originally directed that they remain out of sight of the strikers. The JOC Occurrence Book, in an entry made at 11h20, states that Brigadier Calitz reported that Mr Noki aggressively asked the SAPS to remove the barbed wire Nyalas and stated that he would not ask again. This appears to relate to an incident which took place at about 10h50 (shortly after the barbed wire Nyalas took up their positions) because Mr Noki can be seen on a video returning to the strikers at the koppie from the direction of Papa 1, the negotiation Nyala, at about 10h52 in a state of some agitation. Brigadier Calitz testified that he explained the purpose of the barbed wire to Mr Noki.

9) Shortly before midday Nyala 6, the last of the Nyalas pulling barbed wire trailers was moved on the instructions of Major General Annandale from its original position at the northern end of the line beginning at the power station to a position south of the small kraal. This was done because groups of strikers congregated directly opposite it and it was feared that it might be isolated in its original position. The moving of this Nyala subverted the logic of the SAPS plan, which had been to screen the strikers away from Nkaneng and to force them to move in a westerly direction off the koppie, by opening

up a route for the strikers from the koppie in an easterly direction, toward the neutral area and, if they wanted to go there, to Nkaneng. [325] As will become apparent later the moving of Nyala 6 was to have inadvertent but fatal consequences for 18 strikers.

10) As is set out in Chapter 21 of this report, Mr Mathunjwa did not go to the koppie at 09h00 and only went there at about 12h35. He and his colleagues left the koppie at about 13h25 and returned to the JOC at about 13h50 when the 13h30 JOCCOM meeting was still in progress. At about 12h25 Captain Dennis Adriao, the SAPS liaison officer, informed the two SAPS video operators, Warrant Officer Masinya and Warrant Officer Ndlovu, who were on the koppie, that the strikers had identified them as police spies and that they might be killed if they remained in the general media group. He told them that they should withdraw from that place. They accordingly left and went back to the JOC. [326] Why they went back to the JOC and did not go to the neutral area or into one of the Nyalas, where they would have been safe and able to take video footage of the strikers and their actions, was never explained. The absence of SAPS video footage of all phases of the operation has significantly hampered the Commission in its work. On 20 July 2012, just under four weeks previously, the National Commissioner had issued a national instruction, entitled 'Police Order Policing (POP): Use of Force During Crowd Management', in paragraph 3.3 of which POP Operational Commanders were instructed to ensure 'that video footage is

[325] Day 135, Scott, pp 14335 - 14336
[326] Exhibit L, slide 170; Exh HHH8, W/O Masinga

taken of the crowd through the phases and including during the use of minimum force'. [327]

B The JOCCOM meeting at 13h30

1) At the JOCCOM meeting held at 13h30 Major General Annandale raised several matters on a checklist so as to ensure that everything was in place. One of them was enough video operators to capture the sequence of events as it unfolded.[328] When asked in cross-examination who was responsible for ensuring that his instruction was carried out, he said that the two SAPS operators themselves were responsible for this.[329] When it was pointed out to him that they were not at the JOCCOM meeting he said that he assumed this instruction would be conveyed to them by Colonel Scott and Brigadier Pretorius during the briefings they were to give to the commanders after the JOCCOM meeting. When the matter was raised in cross-examination with the National Commissioner she said that she found the excuse given for the withdrawal of the video operators and the resultant absence of video material recorded by them to be acceptable.[330]

2) The failure by SAPS to record video footage of the briefings that occurred on 16 August 2012 and of the ensuing operation was in direct violation of the

[327] Exhibit S
[328] Exhibit EE
[329] Day 79, Annandale, p 8442
[330] Day 75, Phiyega, p 8067

national instruction referred to and that the excuse proffered therefor was plainly not acceptable.[331]

3) The original reason given by the SAPS for the calling together of the JOCCOM at 13h30 was the escalation of tension at the koppie and the need for a decision as to whether to proceed with phase 3, the so-called 'tactical phase' of the plan. As became clear once the Commission learnt about the extraordinary session the previous evening of the NMF and its 'endorsement' of Lieutenant General Mbombo's decision or proposal that the tactical phase was to be implemented on 16 August if the strikers did not agree to lay down their arms and leave the koppie, this reason is not the correct one. The original plan which had been on the table of the JOCCOM and approved by it could no longer be implemented. A new plan was needed. It is probable that the reason the 13h30 JOCCOM meeting was called was the fact that there was no sign that Mr Mathunjwa would succeed in persuading the strikers to leave the koppie and, if (as decided at the extraordinary session of the NMF) the tactical phase was to be implemented before the end of the day, it was important that this should happen while there was still enough light.

4) According to the minutes of the 13h30 JOCCOM meeting at the beginning of the meeting Lieutenant General Mbombo instructed Major General Annandale to proceed with the implementation of phase 3 of the operational plan. [332] She indicated (either at the beginning of the meeting as she said in evidence, or at the end (as the minutes say) – it is not necessary to make a

[331] Evidence Leaders Heads, para 656
[332] Exh EE

finding on which version is correct) that she had already informed the National Commissioner of the situation then current, that a deadlock was reached with negotiations and that phase 3 of the operational plan would be executed. Major General Annandale told the meeting that the approach would be as follows:[333]

(a) The group on the koppie would be communicated with to try again to negotiate with them to lay down their weapons and leave the koppie;

(b) They were to be asked to leave their dangerous weapons on the koppie as they were leaving it;

(c) After this was done the strikers who refused to leave would be searched on the koppie and the whole area was to be swept for dangerous weapons;

(d) If the strikers refused voluntarily to lay down their weapons and to leave the koppie, phase 3 of the operation would be implemented as a last resort.

5) According to the minutes he then instructed Colonel Scott to present the operational plan to the meeting.[334] According to Colonel Scott's evidence

[333] *Ibid*
[334] *Ibid*

[335]what actually happened was that Major General Annandale asked the members in the JOC at the outset how they were going to execute phase 3. At that stage the detail of how phase 3 was going to be executed was still something that had to be debated. According to Colonel Scott's understanding clarity was sought on the actual application of the strategy with regards to the implementation, which had not been discussed at that point. He concluded that though they had a dispersal and disarm strategy, 'detail hadn't entered the picture at JOCCOM'. He then asked if he might suggest a course of action whereupon he was given the floor to brief the JOCCOM. At that point none of the members with POP experience was there: they were all in the field. [336]

6) He then explained on the Google Earth satellite photograph he had printed out for the commanders that morning for the phase 2 deployment where he felt the dispersion should take place, with the different units in their different roles and areas of responsibility.[337] When he had finished Major General Annandale requested any further inputs and whether the concept was acceptable. None of the JOCCOM members present raised any objection and the concept was accepted. Those present made no further inputs.[338] The presentation included the following:[339]

[335] Day 135, Scott, pp 14315 – 7
[336] Day 135, Scott, pp 14317 – 8
[337] Day 135, Scott, pp 14316
[338] Day 135, Scott, p 14317
[339] Exhibit EE

(1) The repositioning of the barbed wire for the protection of the SAPS members and soft top vehicles;

(2) Stage 3 – Dispersion into smaller groups, encircle and disarm

- Phase 1 – Enclose SAPS safe area with barbed wire to prevent advancement onto the SAPS by militant protestors.

- Phase 2 – Form up two lines:

  - POPs and Nyalas with water cannons in the middle

  - Use of force continuum

    - Advance line

    - Move to water cannons

    - Stun grenade and tear gas

    - Rubber bullets

  - TRT to be deployed as a back-up for POP during dispersion and to execute arrests and secure high ground.

- STF, NIU and TRT to sweep koppies after POP dispersion.

- Phase 3 – Encircle and disarm
  - If protestors do disperse into smaller groups they must be encircled and isolated and all persons properly searched for dangerous weapons and arrests to be effected.

7) Colonel Scott was, as has been said, the only person who gave any detail to the plan at the meeting. He was not aware of Standing Order 262, the SAPS Standing Order dealing with Public Order Policing, nor of its contents.[340] After Colonel Scott's presentation Major General Annandale went through a check list to ensure everything was in place. He then instructed Colonel Scott to ensure that all commanders were briefed accordingly, the briefing to take place at FHA 1. Brigadier Pretorius was instructed to accompany Colonel Scott. Major General Annandale instructed them to report back to the JOC at 15h15 as he wanted the operation to commence at 15h30. The meeting then adjourned at 14h00.[341]

[340] Day 135, Scott, pp 14319 – 14320
[341] Exhibit EE

C The briefing and operation leading up to commencement of the unrolling of the barbed wire

1) Colonel Scott and Brigadier Pretorius arrived at FHA1 at 14h30. He did not brief them with any written materials but referred to the gridded plan he had handed out during the 06h00 JOCCOM,[342] which no longer reflected the position on the ground because, as said previously, Nyala 6 had moved in a south easterly direction, thus changing the shape and orientation to the barbed wire cordon and opening up the main road to Nkaneng.

2) Colonel Scott's briefing to the commanders at FHA1 was the first time that they were introduced to the new tactical plan. [343] He briefed the 20 commanders off a single Google Earth diagram on the screen of his laptop, while he sat inside a Mercedes Vito vehicle so that there was shade over the screen of the laptop. He pointed the screen out towards the commanders who had gathered around the vehicle and explained the plan with reference to the icons on his screen. [344]

3) The briefing lasted no more than 30 minutes. [345] The commanders had approximately 20 minutes to brief the members under their command and for this briefing they had no visual aids whatsoever, Captain Loest, the

[342] Exhibit HHH 20, Consolidated Statement of Col Scott, para 13
[343] Day 135, Scott, p 14329
[344] Day 135, Scott, p 14338
[345] Day 135, Scott, p 14340

commander of the neutral response team of TRT members described the briefing as inadequate. [346] It is clear that certain basic factors of the plan were not communicated to the commanders for example Brigadier Calitz was unaware that Colonel Scott required the six barbed wire Nyalas to uncoil their wire simultaneously: if that had been done the whole exercise would have taken approximately two minutes. Brigadier Calitz instructed that the wire be uncoiled consecutively, an exercise which took over nine minutes. Colonel Scott wanted a simultaneous roll out of the wire to prevent the strikers from crossing the line. [347] He was not aware of the fact that a simultaneous roll out was not practically possible and that the wire was going to be uncoiled consecutively.

D Bishop Seoka

1) Bishop Seoka, the Angilcan Bishop of Pretoria and the Chairman of the South African Council of Churches, arrived at the koppie at a time he estimated as being at about 13h00. [348] He spoke to some of the strikers' leaders, including Mr Noki. They asked him to secure the attendance of the Lonmin management to address them. He then went to the area near the JOC and met the Lonmin management to convey to them the strikers' request. Mr Kgotle said that the management would not meet with the

[346] Day 229, Loest, p 28352
[347] Day 154, Calitz, p 17248; Day 137, Scott, p 14564
[348] This estimation cannot be correct. The bishop must have arrived at the koppie after the end of Mr Mathunjwa's first visit, i.e., at some time after 13h30.

strikers as they were criminals and murderers in that they had killed their people and security personnel. Mr Mokwena asked the Bishop to accompany Lonmin management to Lieutenant General Mbombo and put his proposal. When he spoke to Lieutenant General Mbombo she was unfriendly, anxious and uncooperative. [349]

2) Mr Mokwena then told the Bishop to go back to the koppie and tell the strikers that Lonmin management would talk to them, but only if they surrendered their weapons, elected five to eight people to represent them and dispersed from the koppie. Just before the Bishop left for the koppie someone whispered in Mr Mokwena's ear, whereupon he told the Bishop he could no longer return to the koppie as it had been cordoned off and was now a security risk zone. The Bishop then left and returned to Pretoria without going back to the koppie. [350]

E The operation at Scene 1

1) At Scene 1 sixteen persons died consequent upon the events at the scene as depicted in the aerial photograph **Annexure I.**

[349] Exh M, affidavit of Bishop Seoka
[350] *Ibid*

2) The names of the deceased are -

(a) Michael Ngweyi (body N on the Annexure)\

(b) Patrick Akhona Jijase (body K on the Annexure)

(c) Bonginkosi Yona (body I on the Annexure)

(d) Andries Motlopola Ntsenyeho (body J on the Annexure)

(e) Mzukisi Sompeta (body G on the Annexure)

(f) Jackson Lehupa (body E on the Annexure)

(g) Mongezeledi Netenetya (body F on the Annexure)

(h) Mphangeli Tukuza (body D on the Annexure)

(i) Thobisile Zibambele (body C on the Annexure)

(j) Cebisile Yawa (body L on the Annexure)

(k) Mgcineni Noki (body B on the Annexure)

(l) Khanare Rlias Monesa (body A on the Annexure)

(m) Bongani Nqongophele (body M on the Annexure)

(n) John Kulwano Ledingoane (body O on the Annexure)

(o) Babalo Mtshazi (body N on the Annexure)

(p) Thembinkosi Gwelani (body P on the Annexure)

3) During the course of the day, and according to the SAPS witnesses, Mr Noki and another striker threatened violent action against the police. These threats would have been audible to at least some of the SAPS members in the field. There is objective evidence in respect of at least four of the threats made. This evidence is set out later in this Chapter.

4) The operation did not commence at 15h30 as General Annandale had instructed. This was because the police had to wait until Mr Mathunjwa left the area in front of the koppie after making his second impassioned appeal to the strikers to prevent the loss of blood and to go back to work. Mr Mathunjwa left just before 15h40. Shortly after he finished his address groups of strikers started to leave the koppie,[351] and some of them followed the route along the path running past the mouth of the kraal at scene one to gain access to Nkaneng. This path had been used by many of the strikers throughout their occupation of the koppie. On 16 August the SAPS allowed movement to and from the koppie up until about the time when Nyala 4 was uncoiling its barbed wire.

5) The operation commenced at 15h40 just after Mr Mathunjwa left when Brigadier Calitz gave instructions for the uncoiling of the barbed wire.

6) After Nyala 1 had started rolling out its barbed wire and while strikers were moving along the path to Nkaneng Nyala 6 moved from a position on the kraal side of the path to a position on what can be described as the 'SAPS side' of the path.[352] It was put in cross examination that the strikers may well have interpreted this as an indication that SAPS had no objection to their going along that route. The militant group of strikers remained at this stage

[351] His car can be seen driving away from the koppie and the strikers can also be seen leaving the area on Exh L. slide 193

[352] A comparison of Exh L, slides 191 (taken when Nyala 1 started uncoiling its wire) and slide 193 (taken when Nyala 1 has reached Nyala 2) shows the two positions of Nyala 6 at this time

in its position on the flat area in front of the koppie. The roll-out of the barbed wire proceeded as follows:

(a) Nyala 1 started to roll out its wire shortly before 15:42:35.

(b) By 15:46:28 strikers were already moving off koppie 1 in large numbers.

(c) By 15:46:40 Nyala 2 was rolling out its barbed wire and it reached Nyala 3 at 15:46:58.

(d) Less than a minute later Nyala 4 (which had initially been positioned to the south of a mast situated close to the line along which the wire Nyalas had been placed) started moving in a northerly direction from Nyala 3 and closer to Nyala 5. By 15:47:51 it was still however, a significant distance to the south of the mast.

(e) By 15:48:27 Mr Noki was leading what appears to be the militant group of strikers off the koppie. By 15:48:56 he had passed the mast and was therefore north of the mast. By 15:49:27 all but four of what may be described as the 'lead group' of strikers had passed the mast.

(f) At 15:50:08 Nyala 3 started rolling out its barbed wire and moving away from Nyala 2.

(g) At 15:50:22 it reached Nyala 4 at a position some distance south of the mast. At this stage most of the lead group of strikers had already moved around Nyala 5, which was slowly moving back into the neutral zone.

(h) By 15:50:50 Nyala 5 had moved some distance south of the lead group and had stopped within the neutral zone.

(i) At 15:50:52 Nyala 3 and Nyala 4, which had moved off together, stopped at the mast, where Nyala 3 remained.

(j) At 15:51:26 Nyala 4 started to roll out its barbed wire and had moved away from Nyala 3 at the mast.

(k) At 15:52:03 Nyala 4 reached the western edge of the kraal. To do so it cut off the strikers who had been proceeding slowly towards the point at which the path to Nkaneng passes the kraal on its western side.

(l) Neither of the water cannons had by this point moved from their starting positions in the SAPS vehicle area to the south of the neutral zone and no teargas or stun grenades had been used.

7) These findings are based on an exhaustive analysis of the video material placed before the Commission by the evidence leaders and the SAHRC together with the representatives of the families of 36 of the deceased, including the evidence of Mr Dagan, which provided the Commission with synchronised, chronological and time-coded footage of the events leading up to and at Scene 1. [353] The Commission has checked all the references given and satisfied itself that they are correct.

8) The SAPS case on the movement of the strikers from the koppie to the kraal is set out in Exhibit L, slides 194 to 204. In summary, the case presented was that the strikers made two attempts (called 'incidents 1 and 2') to enter the neutral zone while Nyala 4 was uncoiling its barbed wire but were repelled each time. 'Incident 1' allegedly consisted of an attempt by the strikers to enter the neutral zone in front of Nyala 4 before it started rolling out its barbed wire, which failed because Nyala 4 cut the strikers off by driving towards the kraal quickly, passing Nyala 5 while it was rolling out its wire. 'Incident 2' allegedly consisted of an attempt by the strikers to enter the neutral zone in front of Nyala 4 before it reached the kraal, which was foiled by POP members from Nyalas 3 and 4, who engaged the strikers with rubber balls and tear gas and were assisted by POP members from the northern flank (under Lieutenant Colonel Pitsi) and the negotiations/monitoring group (under Lieutenant Colonel Mere). It was

[353] Exhibit UUUU 10

further alleged that two water cannons on the scene started spraying the strikers to prevent them from entering the neutral zone, whereafter POP members applied non-lethal force in the form of stun and tear grenades and rubber bullets. As a result of this application of less than lethal force Nyala 4 had, so it was alleged, time to close the gap with the remaining barbed wire. It was also alleged that the strikers fired bullets at the police Nyala, described as 'Papa 5', which caused damage which can be seen in Exhibit L, slides 201 and 202.

9) The video evidence summarised above refuted the SAPS allegations in respect of 'incidents 1 and 2'. In addition not a single SAPS witness gave written or oral evidence to support the SAPS version as set out in Exhibit L as regards 'incident 1'. As far as 'incident 2' is concerned, the evidence of Captain Loest, Lieutenant Colonel Classen and Captain Thupe was that they were not aware of any confrontation between the police and the strikers at the point where Nyala 4 reached the kraal. The absence of teargas, stun grenades or water cannons at 'incident 2' was put to Brigadier Calitz on the basis of the video evidence provided by the Rowland Headgear Camera, Exhibit KKK9. The SAPS were invited to traverse the issue in re-examination if they found any basis to dispute that the video footage referred to showed that there were no stun grenades or teargas used at 'incident 2'. They did not do so. As regards the assertion that bullets were fired at Papa 5, videos of Papa 5 arriving at Marikana on 15 August were shown,[354] from which is appeared clearly that the damage in question was there already on

[354] These can be seen in the Evidence Leaders' presentation, Exhibit JJJ 194

15 August. No explanation was offered by SAPS as to how it happened that this damage was passed off as damage caused by strikers on 16 August.

F Attack on Nyalas at northern end of small kraal

1) There is a substantial body of affidavit evidence to the effect that a number of strikers attacked Nyala 11 at the northern end of the small kraal after the Nyala had proceeded up the passage way between the small kraal and the corrugated iron shack to the east of the kraal.

2) Although this evidence was not given orally and was not tested by cross examination, the Commission is satisfied that it can be accepted. It is noteworthy in this regard that when Brigadier Calitz gave evidence on the point, counsel for the Injured and Arrested Persons did not specifically challenge this evidence. He put Brigadier Calitz that Mr Magidiwana, like the other strikers, was simply on his way home and had no intention to attack anyone.[355] Furthermore, as the evidence leaders pointed out in paragraph 731.9 of their Heads of Argument ' this is evidence which has to be accepted even if one can discount the SAPS versions of attacks at 'incidents 1 and 2'. They pointed out in this regard (in footnote 1146) that a number of the deponents on this point 'testify to several facts than are plainly

[355] Day 170, Calitz, p. 20069-20071

adverse to the SAPS case' on other points. There is thus no reason to disbelieve what they say on this point.

3) Brigadier Calitz said that there was definitely a confrontation with the strikers and Papa 11.[356] They physically went past the vehicle, chopped at the vehicle and he could see it clearly from where he was in his vehicle as they went past Papa 11 in the direction of the kraal and that was when he gave the order that the vehicles must move in between the crowd to disperse them.[357]

4) Brigadier Calitz explained that he saw the attack on Papa 11 which was in front of him where the spears and the weapons were being struck against the Nyalas and tyres.[358] He also said that either stones were thrown at his Nyala or strikers had shot at it. He could hear the sounds but was not sure exactly what happened. He said that he realised that the POPS were already under attack and that is why they ended up throwing stun grenades and shooting rubber balls. He realised that these measures had no effect upon the strikers and that was why he gave the order for the Papa Nyalas to drive amongst them because they were not being dispersed by anything else. He said when they were shot with the rubber, it did nothing to them.[359] They held their weapons high and began to storm and nothing that they were doing had any effect upon them.

[356] Day 154, Calitz, p. 17318
[357] Day 154, Calitz, p. 17318
[358] Day 157, Calitz, p. 17805-17812
[359] Day 157, Calitz, p. 17812

5) Warrant Officer Dewald de Vries, stationed at POPS in Pretoria, said that he was the driver of Nyala P17 with the barbed wire trailer and he was under the command of Colonel Makhubela. He said when the second Nyala drove towards him, the crowd got very close to the police vehicles and threw stones at the Nyala. They struck the Nyala with spears and pangas and threw stones at those policemen who were outside the Nyala.

6) Sergeant Asay Dzivhani, stationed with POPS in Johannesburg, said that he was the crew of Nyala Papa 11 under Colonel Mere. They received an order from Colonel Mere to block so that they can disarm the strikers. On arrival next to the kraal, he saw Papa 11 being attacked with stones, pangas and axes and that some of the strikers tried to open the door of the Nyala. He was instructed by Colonel Mere to shoot rubber and he shot twelve rubber rounds to disperse the strikers.

7) Warrant Officer Joseph Nkosana, stationed at POPS in Johannesburg, says he was stationed in Papa 1. He had a shot gun and forty rounds. He was with the negotiators and Brigadier Calitz. He said that at 15h30, three persons came to Papa 1 and the person in the green blanket said that all Nyalas and vehicles must leave or the police are going to die. He said when the wire was deployed, the crowd moved forward and started to attack. He said Papa 11 moved in to assist and the crowd attacked Papa 11 with weapons. Papa 1 moved in to assist on the other side of Papa 11. He opened the door of Papa 1 and used a stun grenade to try and disperse the strikers but it had no effect on them and they carried on attacking Papa 11.

When the water cannon arrived and used water, he said the crowd attacked the water cannons as well and he shot rubber bullets through the port holes in the Nyala.

8) Constable Ronny Khose, a member of POPS, said that he was the crew in Nyala Papa 11. He was instructed by Colonel Mere to block. The crowd attacked the Nyala by throwing stones and hitting the Nyala with pangas, spears and axes and tried to open the Nyala door. He was instructed to use rubber by Colonel Mere and fired ten shots from his shot gun.

9) Warrant Officer Kanwanyamo, stationed with POPS in Potchefstroom, says that he was the driver of Papa 3, one of the front line Nyalas and he saw the attack on the Nyalas in front of him. He said the following members were outside: Warrant Officer Mayano, Constable Nhkadivet, Constable Ntuli, Constable Sephare and Constable Lethugile, who was the radio operator. He said when the crowd were attacking the barbed wire Nyalas, Colonel Mere instructed them to disperse the crowd and he instructed members to help those members who were on the ground to protect them by shooting the rubber. He called all the members back into the vehicle when he noticed that live ammunition was being used.

10) Constable Nkoko Mahwai, stationed at POPS in East Rand, said that he was in Nyala 6 and he saw Nyala 3 deploy the wire and the strikers come very close to his Nyala and even though tear gas canisters and stun grenades were thrown, they were still advancing towards the Nyalas. He fired eleven

rubber rounds at them but they still advanced to the Nyala and he withdrew back into his Nyala.

11) Constable Moses Malesa said that he was in the crew in Papa 11 and when they got the instruction from Colonel Mere that they must move right to block, they did so. On arrival, their Nyala was attacked with axes, stones, spears and pangas and the strikers tried to open the doors. Colonel Mere gave them orders to disperse with rubber and he shot eight rubber rounds. Colonel Mere then gave them instructions to move forward.

12) Constable Matharaha, stationed in POPS Diepkloof, said he was the driver of Nyala Papa 11 and as he drove to block, his Nyala was attacked with stones, live ammunition, tyres were stabbed at and they tried to open the doors.

13) Captain Ephraim Mathibela said he was stationed with POPS in Pretoria and he was in command of Papa 17, which is Nyala 4 with barbed wire. He said as Nyala 4 rushed to close the gap towards the crowd, the strikers were running towards the left of the Nyala, hiding from rubber bullets.

14) Constable Lawrence Mokganedi, stationed with POPS Rustenburg, said he was in Nyala BHL 093 B, under the command of Colonel Pitsi. He saw the crowd run towards the Nyala and a striker in a brown jacket fired six shots at the Nyala. The strikers ran towards members of SAPS who were on foot and he fired nine rubber rounds towards them.

15) Lieutenant SH Malobye, stationed with POPS at Rustenburg, said he was the driver of Papa 1, that is Nyala BHL 093 B. While advancing, he saw the strikers shoot at the Nyala and the windscreen and he saw them trying to damage the tyres of the Nyalas in front of them.

16) Captain Sefako Moselano, stationed with POPS in Pretoria, was the section commander in Nyala 3 with barbed wire under the command of Colonel Makhubela. He said as they finished deploying and Nyala 4 was ready, a group of strikers were very near them and he saw the attack on Nyala 4 about sixty metres away and members from Nyala 3 went to assist Nyala 4 to deploy.

17) Lieutenant Colonel Paulus Nthimkulu, stationed at POPS at Springs, said he was the assistant commander to Colonel Makhubela on six barbed wire Nyalas and their carts. As their wire was being deployed, his Nyala was surrounded by strikers with spears, assegais and fire arms. A striker with a red blanket produced a fire arm from under the blanket and shot at them. He returned fired with three 9mm rubber bullets. He said the Casspir driven by Captain Thulo, came to their rescue. He ran to the Nyala and moved forward to try to block them when he heard the sound of rifles shooting from the crowd.

18) Constable Talakani Ntakuseni Riusel, stationed with the TRT in Gauteng, says he saw three strikers with fire arms as they approached.

19) Constable Sakhile Philip Phakati, stationed with TRT in Soweto, said that he saw the crowd throwing spears and stones as they approached across the barbed wire and they were chasing the POPS to their Nyalas. He saw a striker with a red t-shirt with stripes with a fire arm shooting in his direction and he fired two shots.

20) Lieutenant Comfort Ramagogodi, said he is stationed with POPS in Rustenburg. He was inside a Nyala deploying barbed wire when one of the strikers in the crowd, who was about three metres away from his Nyala, was firing with a pistol.

21) Constable Joko Lukas Rapilana, stationed with POPS in Potchefstroom, was a crew member in Papa 2. He was on foot using rubber rounds but he had to return to the Nyala for cover because the Nyala was being shot at on the driver's door side and in the middle.

22) Constable Ramahoko Victor Seeko, stationed at POPS Johannesburg, Soweto, said he was a crew member in Papa 1 and he was there when the threat was made to kill the police. He said the crowd that approached the Nyalas was directed by the leader who had made the threats. He saw the crowd attack the Nyala, trying to stab and deflate the tyres and to open the door. He was instructed to assist and Warrant Officer Kgosa threw stun grenades to disperse them. Another group ran towards Papa 1 and he shot at this group with rubber bullets to try to divert them. As the group was

diverted, they turned to attack the water cannon and he also went to assist there.

23) Warrant Officer Nkululeko Kweyame of the STF in Durban said he was inside the Casspir under the command of Lieutenant Colonel Gaffley. At 15h20, Lieutenant Ntombela instructed the Casspir and the Scorpion to the scene where the negotiations were taking place. He was in the Casspir with the door closed, moving along the front of the Nyala laying barbed wire. Towards a corner, the strikers drew closer and threw objects and stones at the Casspir. Others went under and around the Casspir to where the police were on foot and that is when the shooting started.

24) Warrant Officer Marthinus Jacobus Parsons was stationed at POPS in Soweto and the driver of water cannon BRL 906 B with Warrant Officer CJ Kruger as commander and Warrant Officer Dicks as the operator. He said when the barbed wire was rolled out, the strikers moved alongside looking for a gap while he sprayed them with water along the wire. Closer to the kraal, he saw a gap between the Nyala and the kraal and moved in that direction to spray water so that they do not come through the gap. The strikers moved to the north of the kraal and he heard shots and he moved to the other side of the kraal to block. At some stage, he heard shots and felt as if something hit the roof of the water cannon which is not bullet proof so he moved immediately to the west of the koppie. This would seem to be at scene 2.

25) Johnson Makwena, the driver of Nyala Papa 9 was present when the threat was made by Mr Noki. He said as the razor wire was rolled out, the strikers were moving alongside. Brigadier Calitz gave the order to move to block and they did and a shot from a striker hit and damaged the right mirror of the Nyala. Because of the shots being fired, he shouted that the Nyala door should be opened to let the members outside jump in. He fired eight rounds from his pistol to keep the strikers away and he drove alongside the water cannon to the second scene.

26) Constable Mathavha stationed at POPS in Johannesburg, said that he was the driver of the Nyala and that he was instructed to drive the Nyala to block. The Nyala was attacked with stones and live ammunition and the strikers tried to stab the tyres and open the doors.

G Intention of the Strikers

1) After Nyala 4 reached the south western corner of the kraal and blocked the route to the neutral zone on that side the TRT members moved to form a line to block the gap on the other side between the kraal and a shack which was surrounded by a wire fence. [360] Captain Loest conceded in his evidence that they did this because it was clear to him that the strikers were coming round

[360] Day 229, Loest, p 28316

the kraal and that any threat from them would have been in that gap. Brigadier Calitz testified that the instruction to the TRT to form the line was given by the TRT commanders. [361]Captain Loest in his evidence said that when the TRT arrived at the koppie the TRT commanders received a further briefing from Brigadier Calitz, who told them that their members would at some stage get an instruction to form a basic line and they were to support the POP and if the strikers were to break through and the TRT stood their ground they would not get an instruction to shoot. [362] Lieutenant Colonel Classen testified that he heard Brigadier Calitz say 'TRT move in'. [363]Captain Loest said that he could not remember this (there were 'blanks' in his memory) but said that the order he gave to move in would not have been given unless he had been passing on an order from Brigadier Calitz. [364]The basic line was formed on the southern side of the road that ran past the gap to Nkaneng.

2) As stated above Nyala 4 had reached the kraal by 15:52:03, which meant that from then on the only route the strikers could take if they wanted to enter the neutral zone was to come around the kraal and move down the passage way between the eastern side of the kraal and the fence surrounding the shack opposite the kraal.

3) The evidence leaders submitted[365] there were two points where this route could have been closed off by the SAPS. This is depicted on a photograph in their Heads of Argument in paragraph 700. The first point, marked 'A',

[361] Day 155, Calitz, p 17574
[362] Day 229, Loest, p 28313
[363] Day 236, Classen, pp 29479 – 29488
[364] Day 229, Loest, p 28440
[365] ELs' Heads, para 700

was at the mouth of the passage way between the north east corner of the kraal and the corner of the fence surrounding the big kraal to its north. This is referred to as 'passage A'. The second point, marked 'B', was at the end of the passage way between the south east corner of the kraal and the corner of the fence around the shack. This is referred to as 'passage B'. The Commission agrees with the evidence leaders' submission [366] that an operational commander with knowledge of the terrain and an appreciation that he was dealing with a crowd that had the potential to attack the SAPS should have anticipated a possible need to seal off the neutral zone by closing passage A if the strikers attempted to advance into the neutral zone. As far as passage 'B' is concerned, the Commission is of the view that a block at passage 'B' would not have been appropriate, for reasons set out below.

4) Brigadier Calitz testified that a block of passages A and B was not part of the plan.[367] He should have realised that the wire rollout would take about 10 minutes and that there was a risk that the strikers would seek to enter the zone. The gap which would be available for the longest time for the strikers was the gap at the east of the kraal, which was never to be sealed by barbed wire in terms of the plan. It was therefore a gap which might have to be blocked. Even if that it was not foreseen originally it became foreseeable when it became clear that the strikers appeared to be intent on entering the neutral zone.

[366] ELs' Heads
[367] Day 159, Calitz, pp 18182 – 18183 and pp 18244 – 18245

5) It is not clear whether Brigadier Calitz issued an instruction to block passage 'A' (i.e. to close the gap in some way) when he realised that the strikers were moving round the eastern side. At some point in his evidence he testified that he did issue a command to block the strikers and indicated passage A as the place where this block was to take place. At other points he said that he had no intention and gave no instruction to block passage A.[368] In fact he testified that by the time he realised where the strikers were heading there was no time to issue a command to block them. [369]

6) If he did issue such an order it was either not heard or misunderstood. That this is so appears from the fact that it was not implemented. What did happen was that the Nyalas were arranged in a crescent shape which left open the entire passage way through passages A and B. Brigadier Calitz described the formation as a 'perfekte blok',[370] but could provide no explanation for its shape and positioning which far from blocking the strikers from entering the neutral zone had the effect, as things turned out, of encouraging the lead group to go through the passage towards passage B and ultimately into the fusillade of TRT fire. [371]

7) Counsel for the Families of 36 of the deceased argued that 'Scene 1' was a 'trap' in the sense that the strikers were channelled towards the TRT line so that the TRT would forcibly disarm and arrest them. They submit that it is unclear whether this involved a premeditated intent to kill the strikers and they say that it is not necessary for the Commission to come to this

[368] Day 159, Calitz, pp 18138 – 18143; p 18152; p 18182; p 18225
[369] Day 159, Calitz, pp 18105 – 18106; pp 18153 – 18154; p 18150
[370] Day 160, Calitz, p 18270
[371] Day 160, Calitz, pp 18271 – 18286

conclusion. Their contention on this part of the case is that in channelling them in this way 'SAPS acted with at least *dolus eventualis*'. For the reasons set out in the following two paragraphs, the Commission does not agree with this submission.

8) The SAPS witnesses did not explain why the Nyalas were ultimately positioned in the crescent formation, which had the effect of encouraging the strikers to move first towards the POPS members and if they did not stop them from advancing and withdrew, then toward the TRT line. The Commission accepts that the obvious inference is that this was done to achieve that effect. According to Captain Loest Colonel Scott said at the 14h30 briefing that if during the dispersion operation the POPs members could not contain the strikers and they 'broke through' then 'the TRT would form up in a basic line and stand their ground and by doing so discourage the [strikers] from resisting dispersion and disarming'. [372] When asked to explain how this was to happen, Captain Loest said in his evidence that what would have happened was that the TRT members, whose equipment and attire were different from that of the POP members, would have tried with their mere presence to discourage the strikers from carrying on with what they were doing.[373] Later he said that their 'only purpose was just to form a line and not to let the strikers proceed any further. [T]he way that we were dressed and our equipment would give a clear indication, towards the [strikers] that we are, I would say, a higher level of aggression and that we

[372] Day 229, Loest, p 28312
[373] *Ibid*

are able to use lethal force if need be'. [374] Further on in his evidence he said this:

> *'[B]asically like I explained before … the members of TRT would just form a line and keep them at bay.'*[375]

9) That, the Commission believes, is the most likely explanation of what the police had in mind. What is clear at this stage is that before the strikers reached passage 'A' eight Nyalas had travelled further in the passage way than they would have needed to travel to reach passage A and no more than six of them would have been needed to block passage A. (The width of passage A is less than 19 metres, a Nyala is about 2.5 metres wide and the standard blocking procedures require a 1 metre distance between Nyalas to allow members to debus.)

10) In relation to passage B there was of course more time to arrange a block because the strikers only reached passage B when the shootings took place, i.e., 15:53:50, almost two minutes after Nyala 4 reached the western edge of the kraal at 15:52:03. There were three different ways in which the SAPS could have blocked passage B:

(a) By using seven of the eight Nyalas available for blocking the passage A to block the 23 metre gap in passage B;

[374] Day 229, Loest, pp 28330 – 28331
[375] Day 229, Loest, p 28336

(b) Because passage B was accessible from open ground in either direction it would not have been necessary for the blocking Nyalas to be parked side by side, as in passage A: they could have formed a blocking line head to toe. As each Nyala is approximately 5 metres in length, only five would have been required for the blocking to be done in this way. [376] Thus only five of the thirteen armoured vehicles available at that scene could have blocked passage B.

(c) When Brigadier Calitz ordered Nyala 4 to make for the kraal he could have ordered Nyala 5 or Nyala 6 to make ready to uncoil its barbed wire to close passage B if there was a need to do so. This would have given the POPs team in one or other of these Nyalas time to remove the triangle behind the barbed wire trailer and have ample time to then unroll the wire over the 40 to 50 metres from where Nyala 4 had stopped up to the fence around the shack.

11) Brigadier Calitz responded to these suggestions by saying that a block at passage B would have been undesirable because (1) it would have created a risk of a stampede of strikers in a relatively small area enclosed with barbed wire; [377]and (2) it would have trapped the SAPS vehicles in the neutral zone and prevented them from getting out to perform their dispersion action, while isolating their colleagues on the other side of the block. [378]

[376] Day 137, Scott, p 14709
[377] Day 159, Calitz, p 18145
[378] Exh JJJ107, para 146, Affidavit of Brig Calitz

12) The Evidence Leaders argue that neither of these objections is valid. They contend that causing a stampede of strikers in a relatively small area enclosed with barbed wire would clearly have been less catastrophic than channelling them towards the fusillade of TRT fire at scene 1. That may be so, but the criticism loses sight of the potential danger to both POP members and strikers in the event of a stampede. Furthermore, it is clear from Captain Loest's evidence that the idea was not to expose the strikers to a fusillade of TRT fire, but as he says, to keep them at bay in the manner described.

13) The Evidence Leaders argue that the SAPS vehicles would not have been trapped in the neutral zone if the blocking had been done by using armoured vehicles; even if blocking were done with barbed wire, because, if need be, the SAPS Nyalas could have broken out of the neutral zone by driving through the fence around the shack (as his vehicle in fact did) and thus clearing a route for all SAPS vehicles needed in the dispersion action. In view of the fact that the Commission is satisfied that Brigadier Calitz's first objection cannot be dismissed as invalid, it is not necessary to consider this criticism.

14) By the time the strikers went around the kraal and could see down the passage way the basic TRT line was in place. The path to Nkaneng was open as the basic line was stretched out on the other side. A number of the strikers were carrying sharp edged dangerous weapons and as they passed

the POPs members one of them fired a shot towards some of the POPs members at about 15:53:40. [379]

15) Over 100 strikers approached passage A at 15:53:22.[380] Shortly thereafter the POPs members appear to have started the use of non-lethal force. Three stun grenades were fired, eight teargas canisters and both water cannons started spraying water. This all happened in the 20 seconds before the shootings at a time when the lead group of strikers was already moving down the passage way to the east of the kraal.[381]

16) The non-lethal POPs methods were used later than they should have been and were imprecisely directed. No water was shot at, or in front of, the lead group of strikers. All the teargas and stun grenades fired <u>before</u> the shootings were fired <u>behind</u> the leading group of strikers with the result that if they tried to move away from the teargas canisters and stun grenades they would have moved towards the TRT line.

17) An analysis of the footage of Exhibit JJJ194 reveals the following:

(a) Over 100 strikers approached passage A at 15:53:22.

(b) After 15:53:30, when the first stun grenade was fired, from those strikers who were ahead of the stun grenade a group of less than 40 split off and moved forward down the passage way away from the

[379] Exh UUUU 10.6
[380] Exh JJJ194, 116 01:09 (eTV 15.53:22)
[381] Exh FFF35, SAPS discharge report; Exh UUUU 10.5, Annexure V4

stun grenade. Those strikers who were behind the stun grenade had their progress down the passage way halted.

(c) The split off lead group of less than 40 appears to have been fragmented further by the use of non-lethal POPs measures because at the time of the shootings at 15:53:50 a video clip taken by an eTV camera operator (Exhibit JJJ194.17) shows a clear gap between Mr Noki's group of 11/12 strikers at the front ('the 11/12 leading strikers') and the rest of the group of 40 ('the kraal edge group'): the former have already passed across the JJJ194 line of camera through the gap between Papa 2 and Papa 4 and behind Papa 2, while the latter have not yet reached the gap and are behind Papa 4.

(d) The position of the places where the 16 strikers were killed are depicted in the aerial photograph marked **Annexure I.**

18) The kraal edge group appears to have been halted and pushed towards the kraal by the POP interventions (possibly by the teargas that can be seen rising from behind Papa 2 at the point of the split, possibly by a combination of that teargas and the teargas canister fired up against the POP Casspir shortly before the smoke becomes visible on the eTV clip at 15:53:42). A photograph taken just after the shootings[382] shows the leading group split into two sections: one on or around the path to Nkaneng (including Mr Noki and the other leading strikers), the other close to the entrance of the kraal.

[382] Exhibit JJJ10. 4542

19) The strikers who approached passage ‘A’ at about 15:53:22, as has already been stated, were halted in their progress once the POPs started using non-lethal force. The objective evidence as provided by video and photographs appears to show that if the non-lethal POPs measures had been used earlier and in a more focused manner designed to prevent the lead group of strikers from entering the passage way to the east of the kraal or proceeding any appreciable distance along it towards the TRT basic line it would not have been necessary to use lethal force at scene 1 and the deaths and injuries could have been prevented.

20) A major point of contention between the SAPS and some of the other parties appearing before the Commission related to the likely intention of the members of the group that advanced on the kraal. The SAPS’s case was that they were intending to attack the police and drive them away from the koppie so that they could remain in occupation of the koppie and in possession of their weapons. The case on the other side was that members of the group, under the leadership of Mr Noki, had decided to leave the koppie with their weapons and walk to Nkaneng along the path that had been used since they had started occupying the koppie. The evidence given by witnesses who gave direct evidence on the point was so extremely unsatisfactory on other issues that their evidence on this aspect of the case did not take the case much further. The evidence of Mr X on the police side said that it was the intention of the strikers to attack the police but his testimony has been fully dealt with elsewhere in this report and nothing

further need be said on this point. On the other side the evidence of Mr Magidiwana (who, for example, falsely denied that he had been on the koppie before 16 August) and Mr Nzuza (who, for example, falsely denied what he had already said in his statement that he was the deputy leader ('no.2') of the strikers) was also of poor quality.

21) It is necessary, therefore, to consider all the circumstances revealed in the evidence, particularly the objective evidence, in an attempt to come to a reliable conclusion on the point.

22) The evidence leaders have dealt with this topic very fully and fairly in paragraphs 719 to 732.9 of their heads of argument, which read as follows:

> ***'Evidence of intention by the strikers to attack the SAPS***
>
> *719. The events of the 16th cannot be viewed in isolation. As on previous days, on 16 August the strikers can be seen carrying dangerous weapons at the koppie.*
>
> *720. Col McIntosh reports that the leader of the group, Mr Noki approached Nyala 1 and said that the police must sign a piece of paper stating that "we are going to kill each other today".*
>
> *721. Col Mere too reports this incident. He states that Mr Noki went on to warn "these hippos would not leave this place and you will all die today".*

722. Mr Noki also gave a speech about two bulls in one kraal. The "two bulls" referred to the strikers and the police. According [to] Mr Mtshamba, Mr Noki meant that either the strikers or the police should leave the mountain. As the police found the strikers there, the police should leave. The police and the strikers were fighting for one territory.

723. The striker labelled in Exh L as protestor 6 (Kaizer) can be seen brandishing a panga on slide 172. At the speeches at the koppie at 1.00 on 16 August he said[:]

> *'the police officers who came from the homeland … will be left here….they will not be able to get into this hippo … we are going to finish them here. They must leave the place.'*

This speech would have been audible to at least some of the SAPS members in the field.

724.Mr Ntsenyeho delivered a speech when Mr Mathunjwa was at the koppie. His speech is captured in slide 163 of exhibit L (protester 1). He said:

> *" …We said that we would leave here, after getting the money we want. Otherwise, we will die on this mountain. None of us will be expelled, none of us will*

leave whilst we are here. We would rather die. There is no way that Lonmin can hire people while we are here. Otherwise, Lonmin must close. It must be finished with Lonmin, if it is finished with us. I am finished."

<u>The likely intention of the members of the group that advanced on the kraal</u>

725. At the outset, we emphasise that the question of the intentions of the strikers in the group that was ultimately shot at by the TRT cannot be answered in an undifferentiated fashion. The group of strikers that turned clockwise round the kraal after Nyala 4 closed the gap at the western side of the kraal may have comprised more than 100 people. It is tempting to impute a single common intention to each one of these people, but that cannot be done.

726. It may be that some members of the 'leadership group' intended collectively to attack the SAPS after Mr Mathunjwa left the koppie for the last time on 16 August, but there is not convincing evidence of such an intention, still less of a single common intention on the part of all members of the group that ultimately came around the kraal at scene 1. One cannot leap from the fact that people stayed behind together and then started moving as

a group, to the conclusion that they all had the same intention. Different members of the group will have had different intentions: some may have been looking to attack the SAPS, others may have been looking merely to get away from the SAPS and to safety in Nkaneng, others may have had intentions somewhere between these two positions – such as intending to escape to Nkaneng but being willing to shoot or hack their way through if the SAPS attempted to prevent them from doing so.

727. This position is quickly illustrated if we focus on the movements and responses of individual members of the group. Mr Ntsenyeho provides a good example of this purpose, because he appears to have played some leadership role in the strike and is readily identifiable by the yellow string backpack he was carrying through the week and the brown jersey he wore on the 16th with the light diamond pattern running down its front.

727.1 Mr Ntsenyeho is one of the strikers who spoke at the stand-off with Maj Gen Mpembe at the railway line on the 13th. On the day he was wearing a red brown long sleeved shirt/jersey with lighter brown horizontal stripes. His speeches in Fanagalo to Maj Gen Mpembe appear at 15:42 and 18:57 of

Exh Z1. the speeches were essentially conciliatory. A transcript of them is to be found in Exh QQ2 where Mr Ntsenyeho is described as 'Lonmin Worker 3' at p 7 and 'Lonmin Worker 2' at pp 9-10.

727.2 Mr Ntsenyeho also spoke at the koppie after Mr Mathunjwa's first address. He is 'Protestor 1' in Exhibit L, and his speech in SeSotho is recorded in slide 163. We have referred to this speech above. It is militant, in that it suggests that he is willing to die on the koppie, but it does not, itself, suggest an intention to attack the SAPS.

727.3 As the group of strikers moved away from the koppie in the direction of Nkaneng, Mr Ntsenyeho can be seen on the outside of the group closest to the SAPS on the left of the screen in JJJ194.11 at 0:36 seconds into the video (eTV 15:48:57). He is gesturing with his arm in a manner that may have been related to a marshalling role. He is not carrying any stick or weapon.

727.4 From the start of JJJ194.12 he is again visible by his yellow backpack. He is walking

on the outside of the group closest to the SAPS as the strikers move past the mast. He passes behind the mast at 0:04 of the video (eTV 15:49:10).

727.5 On JJJ29.121 (eTV 15:51:20) his yellow backpack identifies him on the outside of the group closest to the SAPS. He is facing (and apparently moving) parallel to the boundary of the police area in an easterly direction.

727.6 Ten seconds before the shootings, he is visible on JJJ194.17. He comes into sight from the right at 0:04 of the video (eTV 15:53:40) just at the point that a striker a few yards ahead of him shoots at the SAPS. He is clearly visible for the next three seconds because he is standing tall while most of the strikers around him are bending forwards making themselves smaller now that the POPS are shooting rubber bullets at them. Both of Mr Ntsenyeho's hands are visible and he is clearly not carrying any weapons in his hands.

727.7 By his yellow backpack, he is briefly identifiable again at 0:10 if the same video

(eTV 15:53:46), still striding forward and walking tall before he disappears behind Papa 2.

727.8 Shortly after Mr Ntsenyeho disappears behind Papa 2, Mr Noki and the other strikers in the group of 12 leading strikers at the front are visible moving towards the TRT line across line of camera through the gap between Papa 2 and Papa 4.

727.9 Mr Ntsenyeho never crossed the gap between Papa 2 and Papa 4. It seems likely that shortly before the TRT shooting broke out, he (along with most of the strikers in the kraal edge group) moved away from the teargas at Papa 2 and the POPS Casspir towards the edge of the kraal.

727.10 Mr Ntsenyeho was shot through the neck and through the thigh with two R5 bullets. He died towards the back of the pile of bodies alongside the kraal. His body is identifiable by the yellow backpack on the aerial photographs of Lt Col Vermaak JJJ10.4541 and 4542 which were taken before the SAPS had moved the bodies.

727.11 It is clear that when Mr Ntsenyeho approached the kraal, he had no weapons in his hands. In the circumstances, he personally could hardly have been intending to attack the heavily armed SAPS members.

727.12 It is, of course, possible that Mr Ntsenyeho may have intended [to attack] or foreseen that other strikers in the group would attack the [SAPS members] and may have been content to leave it to his armed colleagues to execute the attack, but if he did have that intention it would have been anomalous for him to put himself unarmed in the middle of a group that was about to engage in a battle with the SAPS (in this regard his position on the 16th is clearly distinguishable from that of Mr Nzuza, who was also an unarmed leader, but did not join the group that moved around the kraal).

728. In contrast to Mr Ntsenyeho,

728.1 Mr Noki and 'Kaiser' both made speeches at the koppie at 1.00 which, if they are not to be dismissed as meaningless bravado, suggested an

intention earlier in the day, either to attack the police or violently to resist any attempt by the police to interfere with the strikers' occupation of the koppie; and

728.2 the striker who fired at the SAPS at the very least showed an intention or willingness to attack the SAPS members, either as an objective in its own right or as a necessary step to achieve another objective.

729. We argue below that immediately prior to the firing of the first shots, individual members of the TRT at scene 1 might have reasonably believed that they or their colleagues were about to come under attack. In the circumstances, we submit that, quite apart from the fallacy of an approach which imputes a single intention to the crowd, the question of the intention of the strikers is a red herring.

730. In the circumstances, we submit that any finding as to the 'intention' of the group of strikers at scene

1 would be both inappropriate and irrelevant. Nevertheless, in discharge of our duties as evidence leaders we draw attention to the following contradictory evidence regarding the motives and behaviour of the members of the crowd so that the Commission can take it into account if it does not accept our submission not to make a finding in respect of the 'intention' of the crowd of strikers:

731. In support of the notion that some members of the crowd may have sought a confrontation with the SAPS there are

731.1 the motive that strikers would have had to fight off the SAPS and thus prevent them from interfering with the manner in which the strike was being organised (and enforced) at the mountain.

731.2 the speeches of Mr Noki and 'Kaiser' described above;

731.3 the other militant and confrontational speeches at the koppie around midday:

731.3.1 'Protestor 2' warned black policemen to 'sign' and take a decision so and they would see what was going to happen in an hour's time. He then threatened that

those who had signed must continue with their signatures, that the strikers were going to climb of top of them and eat them, and they (those who had signed) will eat the strikers.

731.3.2 'Protestor 4' said it is either them (the strikers), or the police.

731.4 the killing by SAPS of Mr Jokanisi, Mr Mati and Mr Sokanyile on 13 August, which may have given the strikers a revenge motive, and the killing by the striker of W/Os Monene and Lepaaku, which may have emboldened them in confrontation with SAPS;

731.5 the threats made by Mr Noki earlier on 16 August;

731.6 the fact that the strikers could have reached Nkaneng without crossing into the SAPS area, and the false evidence of Mr Magidiwana when confronted with this fact;

731.7 the fact that most (but by no means all) strikers in the group that came around the kraal were armed with sharp edged weapons;

731.8 the video evidence of the striker shooting at the SAPS west of the kraal; and

731.9 the clear evidence of attacks before the shootings on SAPS vehicles to the east of the kraal – this is evidence which has to be accepted, even if one can discount the SAPS versions of attacks at incidents 1 and 2 (see above).

732. Pointing in the opposite direction is the following evidence

732.1 While strikers would have had a motive to fight off the SAPS and thus prevent them from interfering with the manner in which the strike was being organised (and enforced) at the mountain, they would equally have had a motive to beat a strategic retreat to Nkaneng so that they could regroup away from the SAPS to keep the strike going;

732.2 Whilst the strikers could have reached Nkaneng without crossing any SAPS lines, the route that they followed was one which had been taken by individual

strikers to and from the koppie right through the 16th and had been allowed by SAPS even as late as 10 minutes before the shootings. It also offered their leaders a way of saving face whilst effectively retreating.

732.3 From the video recording of Mr Mathunjwa's last address at the koppie at approximately 15h30, it appears that the mood at the koppie had changed significantly in the preceding 2½ hours. None of the bravado of the first speeches is evident – the mood is more one of resignation, and the strikers are singing a lament;

732.4 If the strikers were intending to attack the SAPS members, they would have had ample opportunity to break into the SAPS zone because there was no barrier between them and this zone for almost 10 minutes from the point that the barbed wire roll out began shortly before eTV 15:42:35 and the point at which Nyala 4 closed off the route past

the kraal with its barbed wire at 15:52:01. Even after they moved off the koppie at eTV 15:48:22, they had almost 4 minutes to enter the SAPS zone before it was sealed off by Nyala 4 at 15:52:01.;

732.5 If the strikers were intending to attack the SAPS members, it is difficult to explain why they chose a route that went out of its way to go around Nyala 5;

732.6 Similarly, the strikers at the head of the group that came around the kraal appear deliberately to have kept their distance from the POPS members and their Casspirs in the crescent formation to the East of the kraal;

732.7 Because the TRT opened fire before the lead strikers had reached the path to Nkaneng, we will never know with certainty whether they intended to turn left along the path or to cross over into the SAPS zone to attack the SAPS;

732.8 At the point at which the TRT opened fire, the lead group of 12 strikers approaching the TRT line had their heads down and blankets over their heads. Their position was that of people trying to protect themselves from SAPS members firing rubber bullets and stun grenades in their direction, rather than that of assailants about to launch an attack;

732.9 There was a significant gap between the lead group of strikers approaching the TRT line and those behind them. So whatever intention the 11/12 leading strikers may have had, the strikers behind them posed no imminent threat to the SAPS.'

23) In paragraphs 729 and 730 the evidence leaders submit that the question of the intention of the strikers is a red herring and that any finding as to the 'intention' of the strikers at scene 1 would be irrelevant. They also argue that an approach which imputes a single intention to the crowd is fallacious.

24) While the Commission accepts that the imputation of a single intent to a crowd is fallacious it is possible and presumably occurs in some cases that

every member of a crowd may have the same intention, e.g., to burn a building or kill someone.

25) The evidence leaders' submission that a finding as to the intention of the strikers would be irrelevant is based on the fact that they submit later in their heads that individual members of the TRT probably held the reasonable belief that they or their colleagues were about to come under attack.

26) The SAPS contention on this part of the case is that its members are not liable for the shootings (1) on the grounds that they were acting in self or private defence because they were, *inter alia*, being attacked and had reasonable ground for thinking that they were in danger of death or serious injury; or (2) on the ground that they acted in putative self or private defence because, *inter alia*, they reasonably believed that they were in such danger even though they were not in fact in such danger.

27) The point made by the Evidence Leaders amounts to this: it is not necessary to decide if the TRT members were under attack because they will still not be liable if they reasonably believed that they were, provided of course that they did not exceed the bounds of self defence.

28) The Commission agrees with the evidence leaders' submissions that the TRT members (and Warrant Officer Kuhn) had reasonable grounds for believing they were under attack in circumstances which justified them in defending themselves and their colleagues. It is in the circumstances not necessary to decide whether they were actually facing an attack, an issue in respect of which there are arguments of great cogency on both sides.

29) Ten seconds after the man in the brown jacket fired his pistol shot, as the leading group continued to advance towards the TRT basic line, 47 of the TRT members opened fire with their R5's towards the advancing strikers. Warrant Officer Kuhn, a member of POP also fired at the advancing strikers with an R5. The evidence leaders submit that the individual SAPS members in the TRT line would have had reasonable grounds to believe they were facing an imminent attack. (The same point would apply in the case of Warrant Officer Kuhn.) The grounds for this submission are set out in paragraph 733 of the evidence leaders' heads, which read as follows:

'The reasonable perception of the SAPS members facing this group

733. Whatever the true intention of the strikers coming around the kraal, it is our view that the individual SAPS members in the TRT line would have had reasonable grounds for believing that they faced an imminent attack:

733.1 Those members all would have been aware that strikers advancing in a group armed with traditional weapons had killed[:]

733.1.1. Armed Lonmin security guards on 12 August, and

733.1.2. Armed SAPS members on 13 August.

733.2. They would have been aware of the fact that many of the strikers were armed with traditional and dangerous weapons.

733.3. In this context, they would also have seen strikers apparently advancing on them at speed from a short distance away in circumstances where they would not have had time to identify that the strikers were bent over with blankets over their heads and were quite possibly trying to protect themselves from rubber bullets and stun grenades behind them.

733.4. Nor would they have had time to see the true scene developing. Because of the last minute move of Papa 10 (Papa19), many of the TRT members would not have had any view of the advancing strikers until they were at close quarters.

In all these circumstances, it would not be reasonable to criticise individual TRT members for thinking that they were facing an imminent attack.'

30) The SAHRC's counsel took a broadly similar line. They submitted that the evidence allows the Commission to conclude that some of those who fired

their weapons at scene 1 may have had a reasonable belief of an imminent threat to life but the evidence does not allow the Commission to conclude that there was in fact such a threat. The Commission agrees with the evidence leaders' submissions and finds that those who shot at scene 1 had reasonable grounds for the belief that their lives and those of their colleagues were under imminent threat. It bases this submission not only on the facts set out in paragraph 733 of the Evidence Leaders Heads of Argument but also on the facts that they knew that some of the strikers were in possession of firearms and ten seconds before they started firing they heard two shots, at least one of which was fired by one of the advancing strikers, the man in the brown jacket, which would have led them to fear further shots from the side of the strikers, who from that point on were rushing towards them. The SAPS members who shot knew that teargas and stun grenades had been fired which apparently had not had any effect in stopping the advancing strikers in their tracks.

31) Counsel for the Injured and Arrested Persons, the families of the deceased, the LRC and AMCU submitted that the evidence leaders were incorrect in submitting that the individual SAPS members in the TRT line would have had reasonable grounds for believing they faced imminent attack. This argument is based *inter alia* on the contention that it was impossible for the Commission to find that on the basis of the statements of the TRT members that the shooters at scene 1 were genuinely in fear of their lives. In ***S v De Oliviera*** ***1993(2) SACR 59 (SCA)***, a decision in which the court distinguished between actual and putative self- and private defence, the conduct of the accused, who did not testify, was assessed with reference to

objective evidence. In the present case, apart from the objective evidence to which the evidence leaders referred, evidence on the shootings at scene 1 was given by Captain Loest, who commanded the TRT members at the scene, Captain Thupe and Lieutenant Colonel Classen, all of whom say that in their view the TRT members had feared for their lives and that of their colleagues. In the circumstances the Commission finds that the members who did not testify in all probability saw the situation as their commanders did.

32) The counsel for the Families, the LRC, AMCU and the Injured and Arrested persons also submitted that the TRT members did not fire because they were in fear of their lives but because they were ordered to do so. They contend that they opened fire in response to an order from Brigadier Calitz to 'engage, engage, engage', which according to Mr Botes of Lonmin, who was in the JOC at the time, was followed 'basically immediately … seconds'[383] by the shooting. Captain Loest said that Brigadier Calitz's instruction, which Lieutenant Colonel Vermaak repeated, was directed at the POP members and not the TRT members. Whether the TRT members heard it and thought it was directed at them does not, in the Commission's view, take the matter any further because it is clear on the evidence of Lieutenant Colonel Classen and Captains Loest and Thupe that they perceived the members to be under threat so they would on the probabilities have fired in any event.

33) The counsel for the Families, the LRC, AMCU and the Injured and Arrested parties also referred to what they call 'a number of objective indicators that

[383] Day 266, Botes, pp 33640 – 33641

the TRT did not open fire because they were afraid but rather on the basis of instructions to do so'. The 'indicators' on which they rely are the following:

(a) The TRT line was called forward.

(b) As they came forward they can be seen drawing and cocking their guns.

(c) They formed up before the strikers came around the kraal.

(d) They all braced themselves at the same time.

(e) Certain hand signals can be seen including form the line and hold the line.

(f) Brigadier Calitz stated that the shooters acted after 'the *command was given* by their commanders as well as some of them *to act in self-defence*.'

(g) The TRT members were in a position to observe the movements of the strikers for more than 10 minutes and therefore knew that the strikers had actually avoided confrontation with the police and were following the many other strikers who had escaped to Nkaneng.

(h) The TRT line was able to see that the strikers had covered their heads and were assuming a defensive rather than an attacking posture.

(i) By running towards the 'danger', breaching the 100 metre rule, chasing the media away, forming a basic line and 'stretching it out' and cocking their R5's, the TRT members had voluntarily assumed the risk of an attack and unnecessarily so in the circumstances'.

34) As far as 'indicators' (1) to (5) are concerned it is clear on the evidence that the TRT line was formed, as Captain Loest said, to prevent the strikers proceeding further, 'to keep them at bay', by what amounted to a show of what he called 'a higher level of aggression', and that drawing and cocking their guns, is how they are trained to deploy. 'Indicators' (7) and (8) certainly did not cause Lieutenant Colonel Classen and Captains Loest and Thupe to realise that they and their colleagues were not under threat and there is no reason to believe that any of the other TRT members would have seen the situation differently. 'Indicator' (9) is at variance with the facts. The TRT members ran forwards, as has been said, to discourage by their presence the further advance of the strikers. The '100 metre rule' applied when there was a line of POP members stretched out before them: this did not apply when the basic line was formed as all the POP members except Warrant Officer Kuhn had taken refuge in or behind the Nyalas. Far from being chased away, representatives of the media were still very much on the

scene and much of the photographic and video material of the shootings comes from them. There is no basis for saying that by complying with the order to form a basic line for the reasons indicated they voluntarily assumed the risk of being attacked.

35) 'Indicator (6)' is based on a mis-statement of the evidence. In his address to the assembled members on 18 August 2012 Brigadier Calitz said 'When they become under attack that is when the command was given by their commanders, as well as some of them act in self-defence'. [384]When cross-examined on this passage in his address by Mr Budlender, Brigadier Calitz, who said he had not seen this incident himself and was talking about what he learnt afterwards, explained that the command to which he was referring was that given by the TRT commanders to their members to 'keep the basic line, keep the basic line' while the words 'as well as some of them act in self-defence' referred to what he was told thereafter by the members that they acted in self-defence. [385] It will be noted that the insertion of the word 'to' has been inserted in 'indicator (6) before the words 'act in self-defence' significantly alters the meaning if what Brigadier Calitz said.

36) According to the SAPS 328 rounds of live ammunition were fired at scene 1 over the course of eight or twelve seconds. (It is not necessary to decide which is correct.) It is apparent from the video material that three strikers fell in the first three seconds of the volley and thus after that stage no conceivable threat existed. [386] Also during the first four seconds an

[384] Exh JJJ82, address by Brig Calitz on 18 August 2012
[385] Day 157 , Calitz, pp 17855 – 17858
[386] Exh UUUU 10.6 Video Annexure V5 Part 3

appreciable number of shots were fired as warning shots, into the ground, some possibly into the air, others certainly into the ground in front of the advancing strikers. As a result of this a dust cloud arose four seconds from the beginning of the volley which made it impossible for the TRT members to see what was happening. [387] By this time it appears that all of the front group of 10/11 strikers had either fallen down or turned around before the dust cloud obscured them. It is common cause that some members went on firing multiple rounds for at least another four seconds after this. Mr Gary White, the policing expert called by the SAHRC, referred to this footage and said, correctly, that it showed that, 'a large number of the shots continued to be fired into what was essentially a dust cloud without sight of any specific target'[388]. This, he said, was reckless and unjustified. Regard being had to the fact that according to the measurements made on Google Earth photographs the distance from the TRT line to the front line of the strikers when the shooting started was about 18 metres, the Commission is of the view that Mr White's opinion in this regard is correct. After 9 seconds Captain Loest raised his fist into the area and shouted 'cease fire', after which he did not observe any threat existing that necessitated the use of either R5 rifles or 9 mm pistols, although for some time some of the members continued firing.[389]

37) As the evidence leaders point out, the video evidence is clear that after the first shot was fired, there was, as they put it, 'simply no opportunity for any of the strikers in the leading group to avoid the bullets by changing direction or

[387] Exh RRR17, Reuters footage
[388] Exh JJJJ17.8 Final Statement of Gary White, para 7.5.10(c)
[389] D 229, Capt Loest, p 28406

indicating that they were surrendering'. It would not have helped a striker to fall to the ground because it was likely that he would have been hit by bullets aimed low. Turning his back to the shots would also not assist, as indeed happened to one of the strikers seen in the video, nor would throwing (or dropping) his weapon have helped as happened with another striker seen in the video. [390]

38) The evidence leaders make the further point that it is not clear that any individual TRT member who fired at this start of the shooting could reasonably have fired warning shots that would have given the strikers the chance to indicate that they did not (or did not any longer) pose a threat to the SAPS.[391]

39) A number of the shooters may have exceeded the bounds of what can be regarded as reasonable self- or private defence. Many of the strikers who were killed or injured have wounds on their chests or heads. In some cases these wounds may have been occasioned by shots fired in the direction of feet and legs, which hit victims who had already lain or fallen down. But as the evidence leaders point out 'the number of these lethal and potentially lethal wounds is too large to be explained away in this way'.[392]

40) There is video evidence of shooting at head or chest height. Several TRT members can be seen on the Reuters footage shooting at a potentially lethal height. [393]

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[390] ELs' Heads, para 746
[391] ELs' Heads, para 747
[392] ELs' Heads, para 749
[393] Exh UUUU10.2 Annexure V1.7

41) Several of the TRT members who fired at scene 1 admitted in the statements they made that their rifles were on automatic fire. [394] Lieutenant Colonel Classen confirmed that in his view this was grossly negligent [395]and Mr Cees de Rover, the policing expert called by the SAPS, said that in his view automatic rifle fire has no place in law enforcement. 'You still at every pull of the trigger need to prove the existence of an imminent threat to life or serious injury'.[396]

42) The evidence indicates that R5 bullets tend to disintegrate when entering the body of a victim. This is what happened at Marikana. As a result it is not possible on the ballistic evidence to connect any member who shot at Marikana with any person who died. In the case of certain shooters there is *prima facie* evidence that the members concerned may well have been guilty of attempted murder but it cannot be said that any shooter is guilty of murder because it cannot be shown which of the shooters actually killed anyone. In the case of those shooters who exceeded the bounds of self- or private defence, the most they can be convicted of is attempted murder.

43) Counsel for the Families, the LRC, AMCU and the Injured and Arrested persons also contend in the alternative that the TRT members acted unreasonably in believing they were under imminent attack and that the Commission should find a *prima facie* case that their conduct constituted culpable homicide. This contention overlooks the fact that there is no such

[394] Exh ZZZZ3.152 (Cst Kunene); Exhibits VVV6.6 and 6.7 (Cst Medlapho) and Exh ZZZZ3.334 (Cst Modisekeng)
[395] Day 236, Classen, p 29546
[396] Day 286, De Rover, p 37134

crime as attempted culpable homicide: see ***R v Kadongoro 1980 (2) SA 581 (R) and S v Ntenzi 1981 (4) SA 477 (N).***

44) When the shootings stopped at scene 1 twelve bodies were lying on the ground near the kraal. Eleven grouped together in the middle of the entrance to the passage between the kraal and the fenced road to Nkaneng: this group is the group described earlier in this report as 'Mr Noki's group' and 'the 11/12 leading strikers'. The second group, described earlier as 'the kraal edge group', were piled up together near the entrance to the kraal.

45) The latter group included seven strikers (four of whom had died) who had suffered injuries from shotgun pellets. The four who died were Cebisile Yawa, Bongani Mdze, Bonginkosi Yona and Mphangeli Tukuza. The kraal was on their right hand side and the injuries were all on the other side, i.e., their left hand side. [397] This was the side where, apart from strikers and journalists, members of the SAPS were to be found. There is no evidence to suggest that any Lonmin security officers were there.

46) The question to be considered is: who fired the shotgun pellets at the kraal edge group?

47) Shot gun pellets have been withdrawn from operational use by SAPS members although they were still being used for target shooting practice and were thus still available at various SAPS police stations.[398] It is not clear

[397] Exhibits KKK11 and VVV9
[398] Day 199, Naidoo, p 24407; Day 204, Naidoo, p 25110

where the pellets used on 16 August came from: members could have had access to the stockpiles kept for training purposes, or bought them on the open market or got them from Lonmin security, which uses birdshot for crowd management purposes.

48) Major General Naidoo suggested in his evidence that the shotgun injuries at scene 1 could have been caused by 'friendly fire' from strikers using shotguns stolen from the Lonmin security guards on 12 August 2012.[399] The Commission does not find this suggestion to be an acceptable one. The pellets were clearly fired from the left hand side of the victims, near the fenced area containing the shack, where the SAPS vehicles were parked. There is no evidence to support the theory that strikers fired pellets towards the kraal edge group. No-one saw them doing so in the passage and the possibility that a striker or strikers somehow placed himself or themselves on the eastern side of the police vehicles which were parked there and fired pellets at the SAPS members sheltering behind those members, which pellets missed the members, went through the gaps between the vehicles and hit the victims on the other side of the passage, is not supported by the evidence of any SAPS member or any other witness for that matter nor is there any photographic or video material showing this. The Commission is accordingly satisfied that Major General Naidoo's suggestion in this regard can be rejected.

49) During his cross-examination of Mr Botes, a Lonmin Security official, counsel for the Families suggested that the pellets shot at scene 1 were probably

[399] Day 199, Naidoo, p 25119

shot from Nyalas 5 or 19.[400] It was also suggested that it was possible that Lonmin officials were inside one or both of these Nyalas or that Lonmin security officials gave shotgun pellets to the police for use in the operation. There is no evidence whatsoever to support this submission.

50) Apart from the members of Mr Noki's group and the kraal edge group who were lying dead or wounded at scene 1 when the shooting was over, there were four other strikers who were to be seen lying on the ground at or near scene 1. They were Mr Ledingoane, Mr Mtshazi, Mr Nqongophele and Mr Gwelani.

51) Messrs Ledingoane and Mtshazi were killed in a position about 45 metres away from the closest point to the TRT line. [401] Both were incapacitated by the shots that killed them, Mr Ledingoane by a single R5 shot through his spine[402] and Mr Mtshazi by a single R5 shot through the neck[403]. Mr Ngongophele was killed by a single R5 bullet that ricocheted and hit him close to his right eye and injured his brain. [404] He appears to have survived for at least an hour because he received medical treatment at scene 1, an intravenous line being inserted into his arm. [405] His injuries were of such a nature that it is not likely that he could have moved after being shot. [406] Mr Gwelani, who was unemployed, was not a striker. According to his family he went on to the koppie on 16 August to take food to his uncle, who was a

[400] Day 265, Botes, p 33547
[401] Exhibit B, pp 15 and 16 (Mr Mtshazi's body was body N and Mr Ledingoane's body was body O on these plans)
[402] Exhibit A, pp 600 (a) – 603; Exhibit A*bis* pp 215 – 228, esp at p 221
[403] Exhibit A, pp 616 – 618; Exhibit A*bis* pp 229 – 237, esp at p234
[404] Exh A *bis*, p 199, para C.1A; Exh FFF20, p20 Item 26
[405] Exh A *bis* p 198, para 4B. No paramedics reached the scene in the first hour after the shootings
[406] Exh A *bis,* p *202*

striker. [407] His body was found on the path to Nkaneng north of the koppie more than 250 metres away from the TRT line but within the funnel of fire. [408] His injuries are consistent with his having been shot where his body was found as he walked along the main path to the northern part of Nkaneng, away from the koppie and away from the SAPS.[409] He was shot through the back right hand side of the head and would have been immediately incapacitated and dead almost immediately after he was shot. [410]

52) These four victims, who were all shot at substantial distances from the TRT line could not possibly have been perceived as presenting an imminent risk to the safety of anyone else. As the evidence leaders put it '[a]t best for the SAPS these are victims who were accidentally killed in the TRT volley'.[411]

53) The evidence leaders also say, correctly in the opinion of the Commission, that Mr Gwelani's case 'provides the clearest illustration (if any are needed) of why the use of military assault rifles should be banned in public order situations'.[412]

H Stopping the operation after Scene 1

[407] Day 273, Gwelani family presentation, pp. 34952 - 34953
[408] Exh ZZZZ12
[409] *Ibid*
[410] Exh A pp 631 – 633 (a); Exh A *bis* pp 239 – 145; Exh FFF20 p 20 Item 29 (DR593)
[411] ELs' Heads, para 751
[412] ELs' Heads, para 752

1) Mr White and Mr De Rover agreed that the operation should have been halted after the shootings at scene 1[413] and Major General Mpembe said that he would have done so if he had known of the shootings at scene 1. [414] The SAPS commanders' response to the argument that the operation should have been stopped after the shootings at scene 1 was they were not aware of what had happened at scene 1 until some time afterwards. Brigadier Calitz claimed not only that he was wholly unaware of the shootings at scene 1 but also that he was unaware of the shooting at scene 2 until after they happened. He said that he first became aware of the shootings at scene 1 at 16h47 when he spoke to Major General Annandale.[415]

2) There are numerous items of evidence which indicate clearly that the commanders, *viz* Lieutenant General Mbombo, Major General Mpembe, Major General Annandale and Brigadier Calitz must all have known before the shootings at scene 2 commenced that live ammunition had been fired at scene 1 and some strikers had been killed or seriously injured. Mr Botes, the Lonmin security official who was in the JOC at the time said that he heard on the radio the sound of shooting, a lot of firearms being fired. He agreed that what he heard could be described as a fusillade or volleying and that it must have been obvious to everyone in the JOC that something quite serious had happened. [416] Captain Kidd, who was at FHA 2, also said that he heard the shooting on the radio, which he described as follows:[417] *'I heard commotion, the firing of ammunition, people screaming.'*

[413] White: Exh JJJ172, final statement of Gary White, para 7.6.2; De Rover: D 286, De Rover, p 37157
[414] Exhibit GGG12 Statement by Major General Mpembe paragraph 57
[415] Day 154, Calitz, p 17353
[416] Day 266, Botes, p 33643
[417] Day 232, Kidd, p 29004

3) He also said that what he heard was sharp ammunition being fired from an R5 rifle and that anyone listening to the radio would have heard that.

4) Shortly before the shooting took place Lieutenant Colonel Vermaak said over the radio that the strikers were attacking the TRT and just after that there were 18 bodies down and the TRT were staying behind at the scene. [418] Regard being had to the fact that the commanders knew that if the TRT members were attacked they would only be able to defend themselves with R5 rifles it must have been obvious what the shooting which was audible over the radio was all about and the further information just after the shooting that there were 18 bodies lying on the ground and the medical assistance that was being called for would have made what had happened ever clearer than before.

5) Three things happened thereafter which remove any doubt that there may be on the point. The first is the SMS message Brigadier Pretorius sent from the JOC to Mr Molatedi of IPID at 16:03:34. It reads as follows:[419]

> *'Having operation at Wonderkop. Bad. Bodies.*
> *Please prepare your members as going to be bad.'*

6) The second is the sending by Lieutenant General Mbombo of an SMS to the National Commissioner at 16:02:19. [420] The National Commissioner did not

[418] Exh FFF25, entry 1018
[419] Exh UUUU7, Statement of Molatedi Molatedi
[420] Exh LLL3, Lt Gen Mbombo's phone records

receive the SMS until some time after the shootings and Lieutenant General Mbombo says that she cannot remember what the SMS was about. She claims that she did not hear the radio at the relevant time because she was standing outside and that no-one told her at the time what had been heard. [421] The Commission does not accept this evidence. It is highly unlikely that she would not have been told about what had happened (if she really was outside in the passage) and the most likely reason for her SMS to the National Commissioner at 16:02:19, just over a minute before Brigadier Pretorius's SMS to IPID, is that she knew or had been told of the shooting heard over the radio. The third was a telephone call Captain Loest made to Brigadier Pretorius, 2 minutes after the call to IPID where he gave her what can be called a quick situation report. Thereafter she telephoned him twice, at 16:08:54 and again at 16:13:52. [422] During one of the calls Brigadier Pretorius made to Captain Loest (he cannot remember which) he also spoke to Major General Annandale and gave him a situation report. [423] Major General Annandale's claim in his evidence that those in the JOC were unaware that anything had gone wrong at scene 1 until approximately 16h20 is clearly incorrect.

7) Major General Mpembe testified that he was listening to the radio continuously from 15h30. He said he had decided to fly over the area in a helicopter to get a better view of what was happening. On his way to the helicopter he heard Lieutenant Colonel Vermaak's report about the strikers moving towards the TRT line (although he thought this was a mistake and

[421] Day 181, Mobombo, pp 21805 – 21815
[422] Day 229, Loest, pp 28355 - 28356
[423] Day 229, Loest, pp 28435 - 38436

the strikers must have been moving towards the POP line) and his report about bodies down. [424] He must also have heard the 'commotion, the firing of ammunition and people screaming' that Captain Kidd heard. It is thus clear that he also was aware of the shootings as and when they took place.

8) Brigadier Calitz's evidence that he was not aware of the shootings at scene 1 at the time and indeed not until 16h47 is clearly not correct. He conceded that when the lead group of strikers passed out of his sight down the passage way to the east of the kraal a confrontation between them and the SAPS members trying to prevent them from entering the neutral zone was probable. [425] He anticipated, he said, that the TRT would form up where they did and also said that he heard Lieutenant Colonel Vermaak report that there were 18 bodies lying on the ground but stated that he thought that Lieutenant Colonel Vermaak was talking about strikers who had been injured by rubber bullets. [426] According to his evidence he left the vicinity of scene 1 just after giving instructions to the POP members to engage, in order to drive after the strikers who had decided to escape from or avoid scene 1 and to proceed to koppie 2, where his vehicle was stationary for about seven minutes. [427] It is improbable that he would not have heard the more than 300 shots fired at scene 1. Even if he did not hear the shots directly he must have heard them over the radio because he was sitting at the commanders' radio in Papa 1. If he was able to hear Lieutenant Colonel Vermaak's report about the 18 bodies lying on the ground, he must have heard the volley described by Mr Botes.

[424] Day 106, Mpembe, pp 11472 - 11475
[425] Day 159, Calitz, pp 18111 - 18113
[426] Day 154, Calitz, p 17341
[427] Exh CC22, Protea Coin video at 6:21 at Exh CC38, Flir camera at 16:09:13

9) His explanation that he thought Lieutenant Colonel Vermaak, when he spoke of bodies lying down, was describing strikers injured by rubber bullets is also unacceptable. He knew that the POP members had retreated and that the strikers were advancing to where he thought the TRT members had taken up their position. He must have realised that it was highly probable that the TRT members would defend themselves and their colleagues from what they would see as an attack and that the only way they had to do this would be by firing their R5 rifles. In the circumstances, there was a strong possibility that of the bodies lying on the ground some would be those of strikers who had been injured, in some cases fatally, by TRT fire. If he was not sure that any of the strikers were dead or injured one would have expected him to have asked over the radio for a report of what had happened, in which event he would have learnt the facts from someone such as Captain Loest.

10) There is a further item of evidence which points strongly in the direction of showing that he was well aware of what had happened at scene 1. That is an instruction he gave to the members under his control after the stand off at koppie 2 when the SAPS operation started to roll forward towards the strikers fleeing in the direction of koppie 3. The instruction was as follows:[428] *'No lethal firearms now unless the target engage you. No need to shoot while they are running unless the target engages you.'*

11) The evidence leaders point out that 'it is difficult to imagine that Brigadier Calitz would have seen a need to caution against the use of lethal firearms

[428] Exh CC22, Protea Coin video, 07:10 – 07:19 transcript Exh 00012 at p2, first item

when the SAPS were rolling forward towards scene 2 if he had not been aware of the fact that lethal firearms had already been used at scene 1'.[429]

12) It is very significant that when he testified in chief about this instruction he said it was directed towards the POP members and referred to the use of shotgun rubber balls. This is patently incorrect because he spoke of *'lethal firearms'.* When he gave this evidence in chief the Commission had before it an incorrect transcript of the instruction: the words 'lethal firearms' were transcribed as 'no need for firearms'.[430]

[429] ELs' Heads, para 769.4.3
[430] See original transcript, Exh GGG35 at p2

Chapter 12

The events that occurred on Thursday, 16 August 2012 at Scene 2

The following incidents on the 16th call for consideration and evaluation:

A The Evidence;

B The Killing of Mr Mpumza;

C The Killing of Mr Mkhonjwa;

D Command and Control;

E Ballistics and Medical Evidence;

F Delay with medical assistance to Scene 1;

G Crime Scene 2 and Investigations;

H Independent Police Investigative Directorate; and

I Referral and Recommendations.

At Koppie 3 fourteen persons died on the scene[431]and three died later in hospital. The names of the deceased are -

a) Dumisane Anele Mdizeni (body A)

b) Thabiso Johannes Thelejane (body B)

c) Nkosinathi Xalabile (body O)

d) Tokoti Mangcotywa (body D)

e) Raphael Jeneveke Liau (body E)

f) Mpumzeni Nxande (body K)

g) Stelega Meric Gadlela (body L)

h) Henry Mvuyisi Pato (body M)

i) Thabiso Mosebetsane (body G)

j) Fezile David Samphendu (body J)

k) Mafolisi Mabiya (body H)

l) Ntandaso Nokamba (body I)

m) Thobile Mpumza (body C)

n) Makhosandile Mkhonjwa (body N)

o) Telang Vitalis Mohai (who died in hospital)

p) Modisaotsile Van Wyk Sagalala (who died in hospital)

q) Molefi Osiel Ntsoele (whodied in hospital).

The positions where those who died on the scene were killed are depicted in Annexure J, as is the position where Mr Mohai sustained his fatal injuries. It has not

431. Exhibit B47, Mohlaki, p. 675, *et seq*

been possible to ascertain precisely where Messrs Sagalala and Messrs Ntsoele sustained their fatal injuries.

Introduction

1) After Scene 1, Brigadier Calitz stopped at the dry river bed to re-organise the operation. He then proceeded in a northerly direction to a position some one hundred and fifty metres north of Koppie 3 to supervise the arrest of strikers fleeing in that direction. At the same time, the NIU under Colonel Modiba approached Koppie 3 from the north east, the TRT under Captain Kidd approached Koppie 3 from the south west and Major General Naidoo with the K9 and other units approached the Koppie from the south. This led to the position where three separate units converged on Koppie 3 without informing either Brigadier Calitz or the JOC.

2) There was shooting from various members of each of these units in the direction of the koppie where the strikers had gathered. This resulted in 17 strikers being killed. There were 14 bodies found at Scene 2 and three strikers who were wounded subsequently died in hospital. Ten of them were killed in what can be described as a crevice in a rocky area inside the koppie where they appear to have sought refuge during the operation.

3) The Commission heard evidence regarding the deaths of two strikers, Mr Mpumza and Mr Mkhonjwa. There was no evidence adduced as to the specific circumstances in which any of the other deceased were killed.

4) SAPS stated in their opening statement that they would have difficulty justifying all of the deaths that took place at Scene 2.[432]

A The Evidence

1) Brigadier Calitz said that after the dispersal at Scene 1, Lieutenant Colonel Vermaak was directing the water cannons towards Koppie 3 and he thought that with his experience of some twenty years in POP, he was the appropriate person to take the members forward and to task them.[433]

2) He saw at that stage the larger group of the strikers going to the north west, one group going north and a group that went to Koppie 3. He took his vehicle towards the larger group that was running in the westerly direction. He said that about twenty to twenty nine arrests were made. They then had to wait for the canter to arrive. Warrant Officer Nong climbed out of the Nyala to take photographs of the arrested persons.

3) At that stage, Lieutenant Colonel McIntosh screamed at him and said that one of his members was under attack. Lieutenant Colonel McIntosh said that he was going to jump out of the vehicle because he saw a striker running towards a police official and he was just a few metres away.

[432] Exhibit FF9 page 19
[433] Day 154, Calitz, p 71346

Brigadier Calitz said that he shouted at Lieutenant Colonel McIntosh not to get out of the vehicle but he had already done so. He also shouted at Warrant Officer Nong to get back into the vehicle to get closer to see what was going on. He did not witness the incident.[434]

4) At some stage he heard Lieutenant Colonel Vermaak saying over the radio that the people are encircled and this was one of many instructions that Lieutenant Colonel Vermaak gave to get the vehicles into position. He said that while he was moving north, he heard Lieutenant Colonel Vermaak directing the Nyalas and the water cannons, and thought that while he was busy with the dispersal action, they were busy on the other side, as the people were encircled and boxed in. He thought that the Nyalas and the water cannons had helped with that. He then gave the instruction over the radio to the Papa Nyalas that they must get out of their vehicles, out of protection, and engage at koppie 3.

5) Warrant Officer Nong drove a few metres to where he could see Lieutenant Colonel McIntosh bending over a person. Lieutenant Colonel MacIntosh said that the person was already dead. He said that he saw the TRT members there and was surprised to see Captain Kidd there because according to the briefing, he was posted at FHA 2. He was supposed to have a filtering line in place so that the strikers who were moving in that direction could be searched. He told Captain Kidd immediately to find out what was happening with his members there and to report immediately to the JOC.

[434] Day 154, Calitz, p 17349

6) He was told by Lieutenant Colonel Vermaak that the people were encircled and he gave instructions to the Nyalas to go and engage with the dispersion action and the arrest. From the position that he was in, he could see that there was movement and he could see that there were a lot of people who were busy with the arrests, so he went towards koppie 3. This was just before 17h00. At koppie 3 he found a number of strikers lying on the ground under arrest, with their hands behind their heads. He noticed that the water cannons, the canters and the Nyalas were there.[435] He said that by the time he got to koppie 3, all the shootings had already taken place.[436]

7) He met Major General Naidoo at koppie 3 at 16h45. He said that he was not expecting to see him there because he was in command of FHA 1 and he was in control of the medical personnel, the detectives, the criminal record centre people and the dog unit. In particular he expected that the dog unit would be busy with the sweeping of koppies 1 and 2 but he did not expect him at koppie 3.[437]

8) He said that when he arrived and saw the weapons on the scene, he understood that the medical personnel needed to be safe and he cautioned the members to remember that it was a crime scene and they should try as far as possible to preserve the crime scene because it was very large and complex and not a simple crime scene.

[435] Day 154, Calitz, p. 17353 – 17355
[436] Day 154, Clalitz, p. 17358
[437] Day 154, Calitz, p.17355

9) Lieutenant Colonel Vermaak said with regard to the video[438]that he saw the strikers entering koppie 3 and he brought in the water cannons and the Casspirs. He also said that he saw that the strikers moving out of the koppie and other strikers leaving the koppie towards the south west. The strikers were going in the direction of the second informal settlement in the south west which was where the FHA 2 was and where Captain Kidd was supposed to be.

10) He said at that stage, the water cannons were brought in from both directions to encircle the koppie according to the original plan. He communicated to Brigadier Calitz where the water cannons were and also the position of the armoured vehicles for the protection of the water cannons.[439] He noticed that there were strikers who were running out on the western side of the koppie. He reported this to the JOC and to Brigadier Calitz. This is with reference to his saying "they going to break through". He said that he also saw people in the middle of the koppie at that stage.

11) He then saw two bodies down at the back of the koppie which he reported. He could not see how they were injured because of the distance. At some stage, while the water cannon was spraying water, he said he noticed that there were policemen on foot and he told the water cannons to stop spraying water because the koppie was encircled by policemen and they were going to be carrying out arrests.[440] He said he saw a group near a dry dam and

[438] Exhibit CC22
[439] Day 206, Vermaak, p. 25407
[440] Day 206, Vermaak, p.25417

the people were moving in that direction and that was when he said they were going to break out.[441]

12) He recalled that Brigadier Calitz said there were several people hiding in the small koppie. He said at page 4 of the transcript it is Brigadier Calitz's voice that says "live fire, live fire".[442] Brigadier Calitz in his evidence denied this was his voice and stated that he was not aware of the shootings at koppie 3.

13) Lieutenant Colonel Vermaak confirms that he did not know Major General Naidoo had arrived on the scene.[443] He saw people being arrested and he needed to bring in the canters. There were some problems with their getting the canters in because nobody was aware of the kind of terrain that they would have to traverse.[444] There was some trouble with communication with the vehicles and getting them to go in the right direction.

14) Lieutenant Colonel Vermaak said that he was never appointed to an aerial command post and he did not perform the function of an aerial commander.[445]

15) The evidence of Brigadier Calitz was put to Lieutenant Colonel Vermaak that he in effect gave him control or rather he asked him to play the 'eye in the sky' role for him and to take control and command for him over koppie 3.[446] Lieutenant Colonel Vermaak said at no stage was any direction or instruction given to him that he must take control or command of a group of

[441] Day 206, Vermaak, p. 25419
[442] Day 206, Vermaak, p. 25427
[443] Day 206, Vermaak, p 25425
[444] Day 206, Vermaak, p. 25433
[445] Day 206, Vermaak, p.25440
[446] Day 206, Vermaak, pp.25441 and 25442

vehicles. He said he was asked to assist to take the vehicles in to where they were needed for a specific task.

16) It was put to Lieutenant Colonel Vermaak that Brigadier Calitz said that he was informed while they were standing there stationary and they were communicating on the radio that he requested him to take the vehicles in and to command from the air.[447] Lieutenant Colonel Vermaak disagreed with that.[448]

17) Lieutenant Colonel Vermaak said that at no stage was command given over to him and, if that were so, a note would have been made at the JOC in their records.[449] The role that he played, he said, was to get the vehicles in to execute the plan of dispersing and encirclement and there was no other order given to him except to give directions from the air as to what routes the vehicles should follow. He made an important point when he said that there were many instances where he communicated with the vehicles and that Brigadier Calitz thereafter confirmed the order that he had given. Lieutenant Colonel Vermaak said that the control that he had was only of taking the vehicles into the area and reporting their positions because it was not possible for Brigadier Calitz, who was on the ground, to see and to realize where all the vehicles were.[450]

18) He played the role of the 'eye in the sky' and he reported back to the operational commander where his resources were and where his people were on the ground so that he could make operational decisions. He said in

[447] Day 206, Vermaak, p 25443
[448] Day 206, Vermaak, p.25445
[449] Day 206, Vermaak, p.25445
[450] Day 206, Vermaak, p.25446

this instance where there were many problems with radio communications, it often happened that if it appeared to him that the people on the ground did not hear Brigadier Calitz's instructions, he repeated them. Lieutenant Colonel Vermaak described how he made the comment that the water cannon must wait, the people are encircled and that was conveyed to Brigadier Calitz, who then gave orders, "ok water cannons hold back, guys get out of the Nyalas under protection. Get out there and engage.[451] ." Brigadier Calitz, he said, gave orders on the basis of the information he was giving to him.

19) Captain Kidd said that on the 16th, he was deployed at FHA 2 under the command of Lieutenant Colonel Pitsi. In August 2012, he was a member of the TRT, stationed at Johannesburg. At about 10h00 Lieutenant Colonel Pitsi was redeployed by Brigadier Calitz to the frontline and he left with forty POP members, four Nyalas and one Casspir. He said that he remained with fifty five TRT, twenty nine POP and six Dog unit members.[452]

20) He attended the briefing at FHA 1 at 14:30, where he was told that the task of his group stationed at FHA 2, would be to protect the informal settlement situated close by and to make a filtering line so that whoever was leaving the koppie area could be searched and disarmed. Their members were specifically tasked to move in a straight line to form a barrier between the koppie and the informal settlement once the incoiling of the barbed wire had commenced. They were to protect the informal settlement from attack and to

[451] Day 206, Vermaak, p.25456
[452] Day 232, Kidd, pp. 28992-28993

disarm strikers approaching the line, to confiscate any dangerous weapons in the possession and thereafter to allow them to proceed.[453]

21) He said that he returned to his members at FHA 2 and briefed them in terms of the briefing given to him. His members had certain queries about what type of weapons or firearms they would be encountering and he said to them that firearms had been taken from the police at the incident on the 13th as well as from security personnel prior to that. He indicated on Exhibit L181 his position as a diagonal line on the photograph with the informal settlement behind him.[454] He understood the koppie to be where Scene 1 took place.[455]

22) At about 15h40, he heard an instruction over the radio that barbed wired should be deployed, and he instructed the members with him to climb out of their vehicles, to form the basic line and to move forward to form a barrier.[456]

23) He said that before they reached their intended position, he heard over the radio that the police were under attack. At this stage he was about half way to his intended position. He said that he heard a commotion on the radio, the firing of ammunition and people screaming but he could not identify the voice of the person that made the report that the police were under attack. He tried calling Brigadier Calitz, the JOC and Lieutenant Colonel Vermaak on the radio just to get some response but had no success.

24) He said that he could hear on the radio that the live ammunition being fired was from R5 rifles and that a volley was being fired. He said that he could

[453] Day 232, Kidd, pp. 28993-28995
[454] Day 232, Kidd, p. 28997
[455] Day 232, Kidd, p. 28999-29000
[456] Day 232 Kidd, p. 29001

differentiate between the sound of rubber balls being fired from shotguns and sharp ammunition from R5 rifles.[457] He repeatedly called on the radio but there was no response. He consulted with Captain Ryland and they made the decision to move forward towards the koppie and not stop where they had intended to stop. He made the decision because he thought it was necessary to give other members support.

25) He and Captain Ryland both had cell phones but neither of them thought of trying to contact the JOC or Brigadier Calitz by cell phone.[458] He said further that he did not have the telephone numbers of the JOC or Brigadier Calitz because when he went to FHA 2, he was just a group commander and not in charge of the whole of FHA 2. That was the task of Lieutenant Colonel Pitsi who would have had the numbers on him.[459] He agreed that it would have been sensible for him to inform the JOC as well as the operational commander of his intentions to go towards the koppie so that the actions of the group could be coordinated.[460]

26) Whilst conceding that neither the JOC nor Brigadier Calitz knew that he was approaching Scene 2, he said that he thought Lieutenant Colonel Vermaak had a bird's eye view and while they were listening to the radio communication, they could hear Lieutenant Colonel Vermaak directing people on the western side to go forward. It occurred to him that the people listening to the radio would know from the radio communication that they were there on the western side.

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[457] Day 232 Kidd, p. 29003-2004
[458] Day 232, Kidd, p.29005
[459] Day 233, Kidd, p.29016
[460] Day 232 Kidd, p. 29006

27) He said that while they were moving in the direction of the koppie, hundreds of strikers were approaching the line from the direction of koppie 1. They were allowed to pass after laying down the dangerous weapons in their possession. The weapons that they put down were a variety of spears, axes and sticks. None of the strikers refused to lay down his weapons when instructed to do so.[461]

28) He said that there was a chopper hovering in the air and a police woman waving to them to move to the left hand side. (This would appear to be Sergeant Venter who was in Brigadier Fritz's helicopter.) At that point, he also heard an instruction from Lieutenant Colonel Vermaak that they must move to the side. He understood this to mean to move to the left hand side and he heard Lieutenant Colonel Vermaak saying "the people on the west move to your left, move to your left". He thought this was the same instruction that the lady in the helicopter was indicating to them.[462]

29) He said that as a result of these instructions, his basic line that extended over 150 metres, split up into three different groupings. He remained in the middle group where the majority of the members were. He said that with the splitting up he was no longer in control of everyone. Each of the units had its own commander because the TRT units were from Pretoria, Johannesburg and Honeydew. He expected that each commander would command his group. He conceded that practically he could exercise no control whatsoever over the other two groups that had split away from his group.

[461] Day 232, Kidd, pp. 29007-29010
[462] Day 232, Kidd, pp. 29011-29015

He conceded as well that at the time that the group split up, he could have designated the commanders who were in charge of each of the groups to stay in touch with each other by cell phone, but did not do so.[463]

30) He said that as they were approaching the koppie, he thought that this was koppie 1 and that everything was happening just on the other side of the koppie. This was, he said, because when they were shown a photograph of the area, it did not appear as though there were different koppies. There were just bushy areas with a couple of rocks and he could not see the difference in the height or the difference in how big the koppies were.[464] This is an indication of the inadequacy of the briefing received.

31) He said he heard the sound of gunfire and the sound of bullets flying over their heads, coming from the direction of the koppie in front of them.[465] There was not much cover and a lot of members ran to rocks and took cover there on the western side. He said that the firing that came from the koppie sounded like small calibre firearms.[466] From where he was taking cover, he could see into the open area inside koppie 3 and he saw a group of strikers running around inside the koppie.[467] He said that they gathered together in a group, and they were making a hissing sound, banging their weapons together.[468] He said the group approached the members on the western side and stopped near the bushes. He said the policemen were shouting at the strikers, telling them to put down their weapons and to come out

[463] Day 233, Kidd, pp. 29017-29024
[464] Day 233, Kidd, pp. 29020-29021
[465] Day 233, Kidd, p.29021
[466] Day 233, Kidd, pp. 29029-29027
[467] Day 233, Kidd, pp. 29029 29030
[468] Day 233, Kidd, pp.29032 -29033

repeatedly. He said all the strikers did was to tap their weapons twice and point them forward towards them. They were chanting and singing and repeatedly tapped their weapons and pointed them towards the policemen.

32) He said that suddenly, two of the strikers from the group charged the police members who were positioned on his right hand side. The two strikers were shouting something which he did not understand. The police shouted at them to drop their weapons but they proceeded to charge towards the members, who were lying near a small rock. They rushed out into a flat open area between the spot where they had been and the spot where the policemen had taken cover.[469]

33) He said the expressions on the faces of the strikers were that of persons who were very focused. They were looking straight at the policemen and they were not blinking their eyes. They were just looking, tapping their weapons and pointing repeatedly. Some of the group at the back were standing still and those in the front were crouched down, but the two that ran out were totally upright with their arms raised above their heads, holding weapons and they were shouting something.[470]

34) As the two ran out shouting, the policemen were shouting at them to drop their weapons but they did not. Shots were fired from the policemen towards the two strikers. One of the strikers was shot and fell to the ground. The other, who was dressed in a red shirt stood for about three to four seconds, turned around and ran back to where he had come from. He thought that

[469] Day 233, Kidd, pp 29037-29038
[470] Day 233, Kidd, pp.29039-29040

the striker had been hit but when he saw him run back, he thought that he had misjudged the position. He said he did not know at that stage which policemen had been shooting, but realised subsequently that they were mainly POP members because there were no TRT members on the ground who fired there. Again, he did not know what they fired with at the time but found out later that they fired 9mm pistols as well as rubber balls from shotguns. No R5's were used at that stage.

35) About twenty seconds later, the same striker came out acting in much the same way with his weapons raised above his head. Again, the policemen shouted at him to stop, but he continued towards them. More shots were fired and this time the striker fell to the ground. Thereafter, he seems to have crawled back in the direction from which he had come. At the time the police shot at the strikers, the one striker was about ten metres away and the other about five metres away.[471]

36) The striker in red, Mr Gadava, was injured. Mr Mkhonjwa died at the scene.[472] After the shooting, he saw that the strikers that who were in the koppie carried on with their singing and chanting and moved deeper into the bushes behind the rocks until he could not see them anymore. [473]

37) While he was in that area, he did not notice any of the other members in the three groups who were there, shooting.

[471] Day 233, Kidd, pp. 29040-29043
[472] Day 233, Kidd, pp. 29048 29049
[473] Day 233, Kidd, p.29053

38) He said that on his left hand side, he noticed one of the strikers come running from behind the bushes armed with two spears in his hand.[474] At that stage, he was about twenty five to thirty five metres from him. He said that the striker looked in his direction, saw him and changed his direction to go towards the far left where policemen were standing there in the open. He shouted at them to watch out. Some other members also shouted at them to look out that there was someone running towards them on the left. That was when those policemen started looking at the person who was running.

39) Captain Kidd said he also started running in the same direction[475] to see where the striker was going to, except that he was on the other side of the bushes, parallel to the path taken by the striker. Captain Kidd said he stopped screaming at them because they had seen the striker and were shouting at the striker to drop his weapons.

40) He said he heard shots fired. He saw the striker as well as a policeman fall to the ground. He did not see whether the striker had been shot because he was some distance behind. It looked to him as if the striker fell on top of the policeman. At the time that they fell, it was the member who fell who fired. He then stood up and Captain Kidd saw that he was unharmed but the striker had been shot and was lying on the ground. When he got closer, he noticed that he had a spear in one hand and what looked like a knobkierie in the other. His hands were still moving and he was still alive at that point. The person on the ground was the deceased Mr Mpumza.[476]

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[474] Day 233, Kidd, p.29054
[475] Day 233, Kidd, p.29057
[476] Day 233, Kidd, pp.29061-29065

41) He then saw Lieutenant Colonel McIntosh arrive and attend to Mr Mpumza. He did not know what happened to the weapons that were in the possession of Mr Mpumza. He said that while he was at the scene, various other members arrived. He told them to go back and do whatever they could to assist in the operation. He then left and went to the scene where the strikers had been arrested and were lying on the ground where paramedics were attending to the injured.[477]

42) He mentioned that Mr Mpumza had a rope fastened around his upper arms and knees and that someone said that he should not touch it because it was some form of muti used by sangomas.[478]

43) Under cross examination, he said that he did not give an instruction to the group he was in command of to split when the helicopter came along and gestured to them. He said that everything was fine until the helicopter came along and they received the instruction from Lieutenant Colonel Vermaak. He did not have time or opportunity to discuss with anyone or to give any orders as to how the group should move forward. He said 'events just took over'. He said the following day he mentioned that at a meeting where Major General Annandale and Brigadier Calitz were present. He said that communication was impossible. He conveyed to them that he had tried repeatedly to call on the radio but he was being cancelled out. He said he was told on two occasions when they were moving forward that his line had to split and go to the left.[479]

[477] Day 233, Kidd, p.29066
[478] Day 233, Kidd, p. 29068
[479] Day 233, Kidd, pp. 29077-29079

44) He said that although he heard Brigadier Calitz say "water cannons move in, water cannons move in" he did not actually see the water cannons deploying water. [480]He said that he had not paid much attention to the role of the water cannons because it was not part of his brief in the operation. [481]

45) It was put to him that there were two cannons spraying water in a westerly direction trying to disperse the strikers and move them to the west. That would be precisely where his line ended up and where he and his men were blocking the escape route for the strikers. He said that there were lots of people that passed, and whoever wanted to leave was allowed to leave provided they put down their weapons. Whoever wanted to stay behind on the koppie, did so. He said that the people who stayed on the koppie would have been able to see how he dealt with the people who had left.

46) It was put to him that the strikers who were being sprayed by the water cannons and driven to the west could see the TRT either on the south west or the west in the group that he was in and think that they were not able to pass through and that their escape route was blocked. He said that because the area was so big, if someone wanted to come out, he could have laid down his weapons and walked through the filtering line.

47) It was put to him that the strikers who were in a position to witness the shooting of Mr Mkhonjwa, Mr Gadava and Mr Mpumza would have thought that the western exit and the south western exit from Koppie 3 were blocked. He did not agree because it was being said to the people at all times "lay

[480] Day 233, Kidd, p. 29081
[481] Day 233, Kidd, p.29084

down your weapons and come out". This was being said in English and in various other languages. He said if anyone had laid down their weapons and come out he would have been allowed to pass even after the shooting. Those members that came out from the Koppie and put down their weapons were also searched because he bore in mind that he still had to protect the informal settlement behind FHA 2.[482]

48) He said that at the time he spoke about the shots flying over his head, he thought that the shots were fired by the strikers on the koppie because there was about three or four shots from small calibre firearms and it was not a burst of fire or from high calibre weapons.[483]

49) It did not occur to him that it might be the police that were shooting because they were the first group to arrive there. As far as he was concerned, he had only heard about the water cannons being told to move in but he did not know that there were any other police units at koppie 3. The first time that he became aware that there were different units present was when they were lying there and he saw members of the NIU from the eastern side.[484]

50) He said that he saw the NIU coming from the eastern side after the shooting of Mr Mkhonjwa but before the incident with Mr Mpumza. There were less than ten NIU members walking and they were also shouting at the strikers. They were not in a line because it was a very rocky area.[485] He said that POP members started arriving in a Nyala on the western side. He could not

[482] Day 233, Kidd, pp.29085-29089
[483] Day 233, Kidd, pp.29092-29093
[484] Day 233, Kidd, pp. 29089-29090
[485] Day 233, Kidd, pp.29093-29094

say quite when it was that the POP members arrived.[486] He said that he first observed K9 members (members of the dog unit), when he went back to his line and where the body of Mr Mkhonjwa (body N) was found. Warrant Officer Swartz told him that he had also discharged a firearm at someone and he said that there were more incidents around the corner where the dog unit and other TRT members were.[487]

51) He said that he did not hear continuous shooting for the twenty minute period on koppie 3. He heard shots and a period of quiet and again shots being fired. They sounded like low calibre shots and R5 shots. He said he would be surprised to hear that there were more than 250 rounds fired at the koppie.[488]

52) Under cross examination by both counsel for the Families and the Injured and Arrested Persons, it was put to him that the strikers were tapping their weapons repeatedly and pointing at the police in an effort to tell them to get out of their way because they wanted to emerge from the koppie.[489] His response was that they free to come out at any stage and would be allowed to pass, as long as they put down their weapons.

53) Colonel Modiba said according to the plan he was stationed with the NIU to be positioned behind the POP and the TRT to sweep the koppies. When the TRT line fired at Scene 1, he was about eighty to one hundred metres behind them. He instructed his unit to do a sweep of koppie 1 as instructed and went with them through a gap between a Nyala and its empty wire

[486] Day 233, Kidd, p. 29095
[487] Day 233, Kidd, pp.29096-29097
[488] Day 233, Kidd, p.29100
[489] Day 234, Kidd, p.29331

trailer. Because the TRT were busy at Scene 1, he instructed Colonel Nkebe to sweep koppie 2 and Captain Cwinyane with nineteen members to sweep koppie 1.[490]

54) He proceeded towards koppie 3 in his formation, with Colonel Nkebe on his right. Just before they entered koppie 3, armed strikers emerged from behind the rocks and charged at their line. They were in possession of an assortment of dangerous weapons such as assegais, axes and knobkieries.[491] At the same time, he heard the sound of firing from the mountain and assumed it was from koppie 3. He could not distinguish the calibre of the shots but confirmed that it was not automatic fire.[492]

55) When the armed group was about fifteen to twenty metres away, he shouted at them to stop but they did not. He and other members of his unit fired warning shots and some of the group returned to koppie 3, but others continued to charge while he was firing into the ground.[493]

56) As he moved closer, and near a large rock, he saw the body of Mr Anele Mdizeni (body A) and some other persons but could not make out whether they had been killed as well.[494]

57) At some stage he saw Major General Naidoo with less than ten policemen with him and there was firing from the southern side. He saw Major General Naidoo climb over the rocks. At that stage, Colonel Modiba entered koppie 3. Because there was shooting from the western side, he waited until it

[490] Day 242, Modiba, pp.30487 to 30489
[491] Day 242, Modiba, pp.30494 to 30496
[492] Day 242, Modiba, pp.30497 to 30499
[493] Day 242, Modiba, pp.30500 to 305004
[494] Day 242, Modiba, p. 30504

stopped. He could see strikers charging and running and he heard gun shots coming from that direction.[495]

58) As he walked around, he saw Mr Thelejane (body B) lying there. He had no idea who had shot either of the deceased persons and conceded that it was possible that they were shot by members of his unit when they were firing warning shots.[496]

59) The approach to koppie 3 by the NIU on foot without any armoured vehicle cover from the east resulted in an engagement between the members of SAPS and strikers on the eastern side of the koppie. The discharge list indicates that they shot one hundred and fifteen rounds of live ammunition of which one hundred and three were R5 rounds.[497]

60) The evidence leaders set out Mr White's criticism of the risk as being twofold, in that, the NIU members were placed at risk because they formed a large target if the strikers on Koppies 2 and 3 were violent and armed with firearms and also that if the strikers resisted arrest the NIU were armed with only live ammunition to ensure compliance.[498]

61) Major General Naidoo said he was deployed at FHA 1 from Tuesday, 14 August 2012 with members of the STF, NIU, POP Reserve Forces, the K9 Unit, the Mounted Unit, the Detectives, the Crime scene Investigators, Medical Emergency Personnel from Rescue 911 and Fire Fighters.[499]

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[495] Day 242, Modiba, pp.30506 to 30509
[496] Day 242, Modiba, pp.30514 to 30516
[497] Exhibit FFF 8
[498] Evidence Leaders Heads of Argument paragraph 835
[499] Day 188, Naidoo, p. 22876

62) On the 16th, because of various deployments, his contingent comprised the K9 Unit, the Mounted Unit, the Crime Scene Investigators, Medical Rescue Personnel, Fire Fighters and POP in soft vehicles.[500]

63) He said that his role in the operation was to provide support, which entailed releasing medical personnel, fire trucks and other support functions as and when required.[501] He clarified that the K9 Unit was to conduct a sweep of the area after the dispersal to find any weapons, especially firearms which may have been discarded in the bushes and the rocks. They were also to provide an escort service for the emergency personnel.[502]

64) He said that he briefed all his commanders as well as the K9 personnel in terms of the briefing in the morning and moved his entire reserve forces, besides the Mounted Unit, to Immediate Response Area 1, closer to Koppie 1.[503]

65) He said that around 15h40 he was listening to the radio where Brigadier Calitz was reporting that the crowd was moving towards the negotiation group and discussions about the roll out of the barbed wire were taking place with his various commanders to repel or block off the group that was trying to get through the police lines. He could not see any of this. There was frequent communication between Brigadier Calitz and Lieutenant Colonel Vermaak. At some stage, he heard on the radio that the negotiation group were under attack by the crowd. He heard the sound of gunfire erupting as

[500] Exhibit JJJ 108 paragraph 53
[501] Day 189, Naidoo, p.22900; Exhibit JJJ 108 Paragraph 55
[502] Day 189, Naidoo, p. 22901
[503] Exhibit JJJ 108 Paragraph 57-58

well as the sound of stun grenades being deployed. He said that the volley of live ammunition that he heard was unexpected.[504]

66) At that stage, he was still at Immediate Response Area 1 and he heard Lieutenant Colonel Vermaak say that people were down at koppie 1 and that he should get medical assistance to them. The picture that he had was that of people being injured during dispersal and stampeding. He was also told that the veld had been set alight and that he had to deploy the fire trucks.[505]

67) In response to the radio message, Major General Naidoo moved with the K9, medical personnel and the fire personnel, in the direction of the small power station, moving towards koppie 1. He turned into a small road on the side of the power station which was the most direct route to get to the injured persons, but found that they could not traverse that road and the column of vehicles had to turn around.[506] He said that they used the road around the electricity sub-station to pass koppie 3 to move towards koppie 1. As he came around the substation, he heard heavy gun fire that sounded like someone using automatic weapons. It sounded like several automatic firearms firing at the same time at short intervals. He asked the main body of the reserve group to stop in that area and moved towards the direction of the firing where he had also observed certain SAPS personnel.[507]

68) As he approached, he saw a line of NIU members to the right of the Koppie moving in a westerly direction from Koppie 1 towards koppie 3. They were more than a hundred metres from him at that stage. He stopped about two

[504] Day 188, Naidoo, pp.22906 to 22909; Exhibit JJJ 108 Paragraph 59
[505] Day 189,Naidoo, pp.22909 to 22911
[506] Day 189, Naidoo, pp.22911 to 22912
[507] Day 189, Naidoo, pp.22913-22915

hundred metres away from koppie 3. He saw an STF Casspir on the scene and a water cannon being escorted by a Nyala in front of the Casspir. He also saw veld fires directly behind the Nyala.[508]

69) At that stage, he could not see any people in koppie 3 as he could just see dense bush. He saw a group of TRT members moving from the west. He thought the firing that he heard was coming from the east and feared that there was an exchange of fire. He saw many strikers dispersing in a westerly direction who went through the filtering line that the TRT, approaching from the west, had formed.[509]

70) He said that he moved forward with the K9 and POP members to ensure that the area was secure for the deployment of emergency services.[510] He said that the reason for moving to koppie 3 instead of koppie 1, where he was supposed to be going, was that the route towards koppie 1 would have to go past the area of koppie 3 and he could not guarantee the safety of the emergency personnel whilst there was a discharge of firearms in that area. He said it was obvious to him that he needed to determine why the shooting was taking place because he could see SAPS members there and he needed to address the issue of the shooting and clear the route for the emergency vehicles.[511]

[508] Day 189, Naidoo, pp.22917 – 22921
[509] Day 189, Naidoo, p 22922 to 22924
[510] Exhibit JJJ 108 paragraph 65
[511] Day 189, Naidoo, pp.22925-22926

71) Approximately a hundred and fifty metres away from the koppie, he stopped the vehicles and asked the members to hold the line while he moved to the right of Koppie 3 where he had seen the NIU members.[512]

72) He saw some strikers between the rocks and trees at the koppie and was under the impression that there were a few strikers there with firearms, who were refusing to disperse or surrender their arms. He approached the koppie with Sergeant Harmse to where the NIU members had taken up position. He came across three armed strikers in the middle of the veld. He arrested them and put them into a vehicle. He went to Colonel Modiba and his team who had taken cover behind one of the rocks. At that stage, he could not tell what the size of the group of strikers was as he could only see a few of them at the foot of the koppie.[513]

73) He said when he brought his vehicles to a halt, and he went with a sergeant from the dog unit, he saw dust puffs around his feet and realized it was bullets that were striking the ground.[514] Sergeant Harmse was about two paces behind him at the time. He knew that the members had taken cover at the vehicles and he heard some shooting from the K9 members. His impression was that they were returning fire to whoever was firing at them and they were firing in the direction of the koppie.[515] He could not say how many rounds were fired but he thought that they were fired from R5 rifles.

74) He saw about three to five strikers running along the top of the koppie, and he had no idea how many were inside the koppie or in the bushy area. He

[512] Day 189, Naidoo, pp.22926-22927
[513] Day 189, Naidoo, pp22927 -22929
[514] Day 189, Naidoo, p.22931
[515] Day 189, Naidoo,p. 22933

thought he saw one of them, in possession of a long barrelled firearm running in a westerly direction. He was clearly visible running on the rock and he was about 200 to 300 metres away at that time. The firearm was clearly distinguishable because of the shape. He said that other persons with him also saw the firearm. When he assessed the situation, he saw that there were several strikers lying on the rocks above the police officials.[516] He instructed his personnel to reform the line so that they could continue to move forward in a sweeping action to clear the rocks as the NIU had been doing before the shooting.

75) He said as they approached the rocks, they came under fire. At that stage, there were three or four police officials together with Sergeant Harmse of the dog unit with him.[517] He could not see how many people were inside the koppie, he could only see two people behind the rock and there was a tree in front of the rock. A bullet that was fired from that direction narrowly missed him and struck the rocks behind him.[518] He said that he immediately returned fire discharging two rounds from his 9mm pistol at the individual whom he could see with a firearm in his hand firing at him. At that stage several other members from the NIU also simultaneously returned fire in the direction from where those shots had come. He thought that about two or three people were shot and that about five shots were discharged from R5 rifles. The firing from inside the koppie stopped immediately.

[516] Day 189, Naidoo, p. 22935
[517] Day 189, Naidoo, p. 22938
[518] Day 189, Naidoo, p. 22939

76) He said when the NIU line reached the rocks from where the shots had emanated, they did not find anyone there to engage.[519] As he approached he saw several of the strikers running away. He did not follow them. As he approached the rocks, he saw several strikers, about three or four, inside the crevices in the rocks. They were armed with traditional weapons, pangas, spears and sharpened pieces of iron.[520] He confronted them together with members from the NIU. They instructed them to drop their weapons and they were removed individually, placed under arrest and secured by cable ties. He heard sporadic firing but he could not give the direction from where it emanated, nor did he think he was under any specific threat from that fire.[521]

77) At some stage he came across policemen including public order policemen who were shouting at the strikers to put down their arms. The strikers emerged in twos and threes. They were confronted, their weapons were dropped and they were then arrested.[522] Once the area was secured, he ordered the medical personnel under escort by the K9 to attend to the injured persons on the scene.[523]

78) He then informed the JOC by telephone what had happened. He said this was the first time he was able to communicate with the JOC as he could not do this previously because of the radio traffic and the movement that he was executing.[524]

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[519] Day 189, Naidoo, p. 22940
[520] Day 189, Naidoo, p. 22944
[521] Day 189, Naidoo, p. 22946
[522] Day 189, Naidoo, p.22948
[523] Day 189, Naidoo, p.22949
[524] Day 189, Naidoo, p.22949

79) He called in the crime scene experts and the detectives to take over the scene and process it. He said this was the first time that he met up with Brigadier Calitz. They assessed the situation with regard to securing and transporting of the arrested strikers and instructed the K9 members to sweep the scene in terms of the plan. Various weapons and firearms were found. The injured were taken to hospital and the crime scene was evacuated to allow the crime scene personnel to do their work.[525]

80) He said that because the number of medical personnel under his command was so small, and because of the number of people that were injured and killed, a large number of further medical personnel were brought to the scene escorted by Lonmin security. He was instructed by the JOC to return to FHA 1 to meet with the IPID team. Whilst there, he received a report from the JOC that the strikers were attacking and burning property and vehicles in an area about one hundred metres behind him. He responded together with POP and Mine Security and secured the premises where four motor vehicles had already been burnt. When he returned to the FHA 1, he discovered that the IPID team had already moved to Scene 1.[526]

81) With regard to the criticism that he ought not to have moved to koppie 3 without the command of Brigadier Calitz and if he had proceeded with the medical personnel to Scene 1, lives could have been saved, he responded that an instruction to engage would be normal for the deployment for tactical units. However, with the deployment for emergency services, the

[525] Day 189, Naidoo, pp.22950 to 22951
[526] Day 189, Naidoo, pp.22955 to 22957

international expectation was that they would respond appropriately to ensure people received treatment and services. He said it was very clear to him from the radio conversation that Brigadier Calitz was not aware of the need for medical attention until Lieutenant Colonel Vermaak raised the issue for emergency services to respond. He did not in those circumstances expect Brigadier Calitz to command him to do so. He also said that he agreed that swift medical attention at Scene 1 could have saved lives but emergency services personnel will not deploy if the police cannot ensure their safety. He said ensuring that the area was safe was a priority. He made mention of back up medical personnel responding to Scene 1 being stoned on their way to Scene 1.[527]

82) Under cross examination and with regard to the volley of firing that he said he heard, he conceded that there was a distinct possibility that people had been injured by the firing.[528] He said he did not exclude the possibility that people had been injured by R5 bullets and had to treat it as a worst case scenario.[529]

83) With regard to the confusion about the shortest route to Scene 1 and the time wasted with ascertaining the correct route, he said that he had engaged the services of a driver from the area and worked on the basis that the person who knew the terrain would take them to where they were required to be deployed. Lieutenant Colonel Tongwane of the Mounted Unit of Rustenburg was the designated driver and he was also present at the

[527] Day 189, Naidoo, pp. 22977 to 22978
[528] Day 190, Naidoo, pp.23083 to 23085
[529] Day 190, Naidoo, pp. 23088

briefing by Colonel Scott at 14h30 and knew where the operation was going to take place. He said that he trusted him to pick the best route to get to koppie 1 and did not do a reconnaissance himself or task anyone to do so.[530]

84) The difficulty of emerging on the police side of the barbed wire with the route he took was put to him. He said he did not communicate to the driver specifically on which side of the barbed wire he wished to be and was under the impression that he would take the shortest route to Scene 1. The driver informed him that the route that he took was a better road but he would not know if that was correct. At some stage, he thought that they would be able to breach the barbed wire at the power station but did not apply his mind to it any further.[531]

85) Under cross examination he said that there was a twofold purpose for approaching koppie 3, the first to get information about the safety of the area and the second to support the police operation there.[532] He said the assessing of the situation was to decide whether it was safe to take the medical personnel through. He said that if there was no threat to the medical personnel in getting to Scene 1 but a need for the police operation to be supported at Scene 2, he would have tasked one of the K9 groups under the command of Colonel Mopedi to assist at koppie 3 and since he was responsible for the safe keeping of the medical personnel, he would have gone with them to Scene 1.[533]

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[530] Day 190, Naidoo, pp.23115 to 23116
[531]Day 190, Naidoo, pp. 23122 to 23125
[532] Day 191, Naidoo, p. 23167 and p. 23170
[533] Day 191, Kidd, pp.23174 to 23176

86) He said that when he got to koppie 3 he saw that people had been shot. Because one of the primary focus areas for him was to ensure that medical attention was taken to whoever needed it, it was clear to him that people who had been shot needed attention. It was put to him that he knew some thirty minutes previously that he had been asked to bring medical personnel to the area where the volley of R5 fire had been and that he should have taken the medical personnel to that scene first. He said had he done that, he would no doubt have been called upon to answer why he did not attend to the injured at Scene 3 to whom he was closest. He had three paramedics with him and he conceded that he could have made a decision to use one at Scene 2 and send two on to Scene 1.[534]

B The Killing of Mr Mpumza

1) Constable Sebatjane is a member of the TRT who was under the command of Captain Kidd on 16 August 2012. He was on the extreme left of the basic line and when the groups split, he went into the northernmost group. He said he ended up on the north western side of the koppie where he met some POP members arresting some of the strikers. He and some of his unit assisted in protecting the POP unit.[535] At some stage, he heard bullets flying over his head.[536] He was not able to see where the shots were coming from.

[534] Day 191, Kidd, pp.23177 to 23179
[535] Day 237, Sebatjane, pp 29648-29649
[536] Day 237, Sebatjane, p.29649

2) When he finished helping members assist and load suspects into the truck and as he approached the koppie, he saw a striker with dreadlocks wearing a white jacket come running out towards the direction of Captain Kidd. This was Mr Mpumza, who suddenly made a turn and ran in his direction where he was with Constables Mabe and Buthelezi. Captain Kidd started screaming at him. Constable Mabe shouted out instructing the striker to drop his weapon.[537] The striker stopped running and started walking slowly towards them.[538] He said that all three of them shouted at Mr Mpumza to drop his weapons. He knelt down as if he were putting them down. Constable Sebatjane said that when he was about three paces away he walked behind the striker and was about to put his firearm in his holster and take out his hand cuffs when the striker stood up, turned and faced him, picked up his left hand in which he had a weapon and tried to stab him. He indicated that he came forward more or less at shoulder height and just missed his neck by about three or four inches. He said he drew his firearm with his right hand and began to fire when he was about two or three paces from him. He fired one round into his chest and does not know if he hit him. The striker came running towards him, holding up his spear in his left hand and wanted to stab him.[539] He said that in his left hand he had the spear with which he was trying to stab him and in his right hand he had a piece of iron.[540] In total he fired nine rounds. He said that the striker tried to stab him about four or five times while he was on his feet.[541]

[537] Day 237, Sebatjane, pp.29650-29653
[538] Day 237, Sebatjane p.29655
[539] Day 237, Sebatjane pp. 29663-29664 and pp.29667-29669
[540] Day 237, Sebatjane p. 29670
[541] Day 237, Sebatjane p.29670

3) He could not say that all the shots that he fired struck the striker.[542] He thought he was the only person who had shot at that stage as he did not hear any other shots being fired.[543] He subsequently heard that Constable Mabe had discharged his R5 in defending him.[544]

4) Under cross examination, it was put to him that the injuries documented in the post mortem report were inconsistent with his version in that all the injuries were described as having been caused by high velocity firearms and there was no indication that the shots were fired at close range.

5) The post mortem report records that most of the twelve entrance wounds are consistent with being fired from high velocity firearms. There is no evidence of any entrance wounds caused by the 9mm pistol used by Constable Sebatjane. There is no indication as to the distance from which the shots were fired.

6) Constable Mabe said that he fired four shots at the legs and lower body of Mr Mpumza in private defence.[545] A bullet and two bullet fragments were retrieved from the lower limbs of Mr Mpumza. There is no explanation as to who fired the other shots that inflicted the other wounds described as being caused by high velocity gun shots. This merits further investigation.

7) Captain Ryland captured this incident on video on his cell phone and confirms that there was an attack on Constable Sebatjane.[546]

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[542] Day 237, Sebatjane p. 29695
[543] Day 237, Sebatjane p. 29697
[544] Day 237, Sebatjane pp. 29698-29699
[545] Exhibit WWW 5
[546] Exhibit 12

C The Killing of Mr Makhonjwa

1) This incident is described in detail by Captain Kidd in paragraphs 32 to 38 above.

2) There is no evidence of the identity of the person who shot Mr Mkhonjwa. The positions of the cartridges found on the scene by Captain Mohlaki do not assist in identifying the person who shot him.

3) The post mortem report records a single distant perforating gunshot wound entering and exiting the left arm and re-entering the chest. Paragraph 4.3 describes a concentric ring of abrasion on the lateral aspect of the left forearm, presumably the entrance wound.[547] In view of the fact that the main post mortem finding records a distant entrance wound, the Commission is unable to determine the distance from which the shooter fired. Because of the paucity of evidence the Commission is unable to find whether the shot was fired in self- or private defence.This incident too, merits further investigation.

[547] Exhibit A page 91

D Command and Control

1) Major General Mpembe testified that on 16 August 2012, whilst he was in the JOC and they were receiving feedback over the radio about the implementation of stage 3 and before the dispersal process had started, he went to Major General Annandale and asked for a chopper so that he could fly over the area, together with Brigadier Tsiloane and get an aerial view of what was going on. Whilst he was on the way to the chopper, he heard over the radio that there was a line of strikers moving towards TRT. He said that he thought that could not be so and that the strikers must have been moving towards POP. This, according to the time line, was at 15h53.[548]

2) He said that being able to see what was happening on the ground from the chopper would enable him better to perform his functions as an overall commander. He was asked whether while in the helicopter, he would have directed the operation if he thought that it was not going according to plan and whether he would then give orders from there because he was in a better position to see what was happening. He said that operationally speaking, once the operation had commenced, it was in the hands of the operational commander. If he heard on the radio or if he saw that there was something going wrong, he could intervene without any help being sought from him. However he would expect that the operational commander would communicate with him in this regard.[549]

[548] Day 106, Mpembe, pp.11475-11477
[549] Day 107, Mpembe, pp.11487-11488

3) He said that he heard Brigadier Calitz asking why the TRT and the STF are not moving and that there was a response from the chopper saying that there were bodies lying down.[550] He said that was an indication to him that there was something wrong. He tried to communicate with the operational commander but because there was very high radio traffic between Brigadier Calitz and Lieutenant Colonel Vermaak, he was unable to communicate with Brigadier Calitz and ordered the pilot to take him back to the JOC.

4) He said when he heard about bodies down, he had not heard a report of any shooting. He said whilst in the chopper he heard the conversation between Brigadier Calitz and Lieutenant Colonel Vermaak. He said he heard Brigadier Calitz giving dispersal instructions and giving orders to the water cannons. He remembers as significant that he heard him say "do not engage the target before the target engages you".

5) He said he was in the air for about twenty minutes. When he got back to the JOC he learnt that there had been a shooting and that people had died.

6) Under cross examination by Mr Madlanga, Major General Mpembe said that when he was in the air for about some twenty minutes, he could follow what was going on from the reports on the radio and see some of the dispersal action but could not see whether people were lying on the ground.[551]

7) He said that he did not even think of calling Brigadier Calitz on the cell phone. It was put to him that he deprived himself of the opportunity of

[550] Day 107, Mpembe, p.11489
[551] Day 112, Mpembe, pp.12064-12066 and p.12070

considering what appropriate action to take after Scene 1.[552] He said that he thought that there might be problems with the electricity lines in the area and that might affect the mobile phone signals.[553] In his statement at paragraph 51, General Mpembe says that at all times including when he was in the helicopter for about twenty minutes, he was accessible by radio to the operational commander Brigadier Calitz and to the JOC. As the overall commander, he could only give direction when it was sought from him, either from the operational commander or the JOC. Neither sought direction from him. He said it is not the function of the overall commander to usurp the functions of the operational commander when he was better positioned as being on the ground and experiencing the action first hand.

8) It occurs to the Commission that the aerial view that Major General Mpembe had placed him in a more advantageous position to assist the operational commander on the ground, who might have had a somewhat restricted view, given the size and nature of the terrain over which the operation was being rolled out. The Commission does not understand why he, as the overall commander, would expect to be *invited* to assist.

9) Under cross examination, Major General Mpembe said that at Scene 2 there were five units with five commanders converging on koppie 3 and at that time they should have been coordinated by the operational commander, Brigadier Calitz.[554]

[552] Day 112, Mpembe, p.12073
[553] Day 113, Mpembe, pp. 12087-12088
[554] Day 125, Mpembe, p.12964 day 125

10) He said that Lieutenant Colonel Vermaak was in the helicopter as an aerial post for Brigadier Calitz who could not see on the other side of the mountain and Brigadier Fritz was also in a chopper and he was also to act as the operational commander's 'eyes in the sky'.[555]

11) He said that Major General Naidoo was in charge of the members of FHA 1, Colonel Gaffley was in command of the STF, Colonel Modiba was in command of the NIU, Captain Kidd and Lieutenant Colonel Pitsi was in charge of the TRT.[556] Major General Mpembe said that from the briefing that he received from these members on the late afternoon of the 16th [557], it appeared as though as they had acted on their own initiative and that their actions were not coordinated by Brigadier Calitz.[558]

12) Major General Mpembe said that he did have a discussion with Brigadier Calitz about his not coordinating all the units at Scene 2, and Brigadier Calitz said that he was not aware at the time that there were people that went there on their own initiative.[559]

13) It was put to him that there are statements of several members of SAPS saying that they were unaware of the presence of other units on the other side of koppie 3 and that the gunfire that they heard and thought had come from the protestors might in fact have come from other SAPS members.[560] He replied that he was unaware of these statements.

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[555] Day 125, Mpembe, p.12966
[556] Day 125, Mpembe, p.12962-12963
[557] Day 125, Mpembe, p.12964
[558] Day 125, Mpembe, p.12940
[559] Day 125, Mpembe, p.12975
[560] Day 125, Mpembe, p. 12977

14) He said that when any officer does anything on his own initiative, it is normally expected of him to communicate that to the operational commander.[561] It was specifically put to him that if Captain Kidd went to koppie 3, he should have communicated that to Brigadier Calitz. He agreed and added that when he raised it with Captain Kidd, he raised the problem with radio communication. He also agreed that if Captain Kidd had informed the operational commander by radio then the JOC would have got to know that he was taking the initiative to go to koppie 3.

15) It is clear from the evidence that the overall commander Major General Mpembe had absolutely no command and control of Scene 2.

Did Brigadier Calitz hand over control to Lieutenant Colonel Vermaak?

1) The evidence relating to this issue is set out in detail in paragraphs 1 to 7 and 10 to 19 above.

2) In the Commission's view, Lieutenant Colonel Vermaak appears to have assisted Brigadier Calitz in directing the water cannons, the Nyalas with POP members and the canters in and around Scene 2. The Commission has no hesitation in finding that Brigadier Calitz did not hand over command and control to Lieutenant Colonel Vermaak.

[561] Day 125, Mpembe, pp.12978 -12979

3) Brigadier Calitz has been criticised by the Evidence Leaders for failing to issue any warning to the strikers at the stage when they were surrounded in koppie 3.[562] They argue that those strikers who wished to surrender peacefully were not given an opportunity to do so before steps were taken to disperse them which might include the use of force. Sections 9(2) (a) and (b) of the Regulation of Gatherings Act 205 of 1993 apply.[563] The Commission agrees with this submission.

4) The Commission also agrees with the further criticism that Brigadier Calitz failed to order the use of tear gas to force the strikers out of their hiding places at koppie 3, which process had far less risk involved to both members of the South African Police Services and the strikers.[564]

5) According to Brigadier Mkhwanazi the responsibity of the operational commander is to coordinate the entire operation as set out in Standing Order 262.[565] He said the operational commander is the main person who will be in charge of the operation and who will co-ordinate all the issues of the operation.

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[562] Evidence Leaders Heads of Argument Paragraph 815.1

[563] Section 9 (2) (a) and (b) states: (2) (a) In the circumstances contemplated in section 6(6) or if a member of the Police of or above the rank of warrant officer has reasonable grounds to believe that danger to persons and property, as a result of the gathering or demonstration, cannot be averted by the steps referred to in subsection (1) if the gathering or demonstration proceeds, the Police or such member, as the case may be, may and only then, take the following steps: (i) Call upon the persons participating in the gathering or demonstration to disperse, and for that purpose he shall endeavour to obtain the attention of those persons by such lawful means as he deems most suitable, and then, (ii) in a loud voice order them in at least two of the official languages and, if possible, in a language understood by the majority of the persons present, to disperse and to depart from the place of the gathering or demonstration within a time specified by him, which shall be reasonable.
(b) If within the time so specified the persons gathered have not so dispersed or have made no preparations to disperse, such a member of the Police may order the members of the Police under his command to disperse the persons concerned and may for that purpose order the use of force, excluding the use of weapons likely to cause serious bodily injury or death.

[564] Evidence Leaders Heads of Argument paragraph 815.2

[565] Exhibit SS 2

6) The Commission must accept that because of the large area and the nature of the terrain, an operational commander on the ground would have a very limited view of what was happening on all sides of the koppie. Lieutenant Colonel Vermaak was in the best placed position to see who was converging on koppie 3, but makes no mention of any of the units moving towards koppie 2 on the radio. Brigadier Fritz was equally suited to see what was happening on the ground, but completely neglected to advise either the JOC or Brigadier Calitz as to what was happening on the ground.

7) The evidence does establish that when Brigadier Calitz was regrouping, and could not see the TRT line behind him, he asked Lieutenant Colonel Vermaak to check where they were. Once Brigadier Calitz was aware, as he obviously was from the radio traffic, that there were police units in the area, it was incumbent upon him throughout the operation to check with each unit where it was, or if unable to do so, to ask Lieutenant Colonel Vermaak and Brigadier Fritz on the radio, to report on where the various units were and what they were doing.

8) Brigadier Calitz said that he was not aware of the shooting at Scene 2. The Evidence Leaders contend that this is as implausible as his claim that he was unaware of the shootings at Scene 1. In paragraph 769 of their Heads of Argument they submit that his Nyala was not moving at any stage during the shooting at Scene 2, and the only noise would have been the noise of the vehicle idling. The doors of the Nyala were open while it was stationary and they submit the sound of the two hundred and ninety five gunshots would have been audible through the open doors. They said that Brigadier

Calitz conceded that he got out of Papa 1 on several occasions while he was but one hundred and fifty metres away from Koppie 3. The shooting at Koppie 3 was heard by Warrant Officer Mamobolo, the Commander of Papa 11 which was parked with Papa 1 at the scene and if he could hear them, then Brigadier Calitz must have heard them.

9) The Commission agrees with these criticisms and find support for these contentions in the transcript of the radio conversation between Lieutenant Colonel Vermaak and Brigadier Calitz.[566]

10) Major General Naidoo conceded that as the senior ranking officer at Scene 2, he was in command and control of all the police units there.[567]

11) The Evidence Leaders criticised Major General Naidoo for having participated in a chaotic free for all which cost sixteen people their lives without exercising any command and control and without taking any steps to stop the shooting and isolate the problems.[568] We agree with these criticisms.

12) Captain Kidd's explanation was that he was unable to command those members under him once the orders were received from Lieutenant Colonel Vermaak and Sergeant Venter in the helicopter to move left and his group split in three different directions. In view of his concession that when the groups split up, he could have designated commanders to be in charge of each of the groups and to stay in touch with each other by cell phone but did not do so, his explanation is unacceptable

[566] Exhibit OOO 11
[567] Day 194, Naidoo, pp.23707 to 23708
[568] Paragraphs 819 to 822

E Ballistics and Medical Evidence

1) It has been suggested by SAPS that their members came under fire from the strikers at the koppie. Three firearms were recovered from the strikers. One firearm had a full magazine and appears not to have been fired on 16 August. Another had a cartridge holding six rounds and one empty cartridge in its magazine with a capacity for seven rounds. The last had two rounds in a magazine with capacity for eight rounds. There does exist a possibility that there might have been further firearms in the possession of the strikers on the koppie that were either hidden on the koppie and not recovered or concealed on the persons of the strikers when they left the area.

2) According to Exhibit L just under a third of the cartridges for the two hundred and ninety five shots fired by the members of the South African Police Services at Scene 2 were recovered. No cartridge cases for any shots fired by strikers or anybody else was found. This is an indication that only a few shots could have been fired by the strikers.

3) Apart from the circumstances set out above, there is no other evidence about the deaths on koppie 3. A reconstruction of scene 2 was done by Mr De Rover and he sets out his views in his supplementary statement.[569] He testified that he went to Marikana with the members who were involved in the operation. He asked each of the members to place himself where he was at the time of the shooting, with each member confirming the correct position

[569] Exhibit FFF (A)

of those who were to his left and right. The members pointed out where they were when they fired shots and their reasons for doing so.[570]

4) Regrettably, the Commission is not privy to the workings and details of the reconstruction and has not been furnished with any documentation or diagrams to show the process followed in arriving at these conclusions. It is not possible for it to assess the merits of his conclusions.

5) A detailed report integrating the ballistics and medical evidence compiled by Dr Naidoo and Mr Steyl is instructive.[571] The Commission notes that many of the ballistics reports referred to, emanate from the South African Police Services.

6) The evidence leaders submit that firing from the K9 members under the command of Major General Naidoo and the NIU members from the east, is most likely to have caused the death of those strikers killed in the area among the crevices and rocks.[572]

7) They based this on the trajectories plotted by Dr Naidoo and Mr Steyl and set out their detailed conclusions as follows:

(a) Mr Mangcotywa appears to have been shot from the rocks over which the NIU came with Major General Naidoo, but could also have been shot from the direction of the K9 vehicles and members.

[570] Day 285, de Rover, pp.36884 to 36885
[571] Exhibit ZZZ5
[572] Evidence Leaders Heads of Argument paragraph 870 and 871

(b) Mr Liau was shot with a single 9 mm bullet. The bullet was found but could not be linked positively to any firearm handed in for analysis. It is possible that Mr Liau was shot from a position on top of the rocks over which Major General Naidoo came with the NIU.

(c) Mr Mosepetsane was most likely shot from the direction of the K9 members.

(d) Mr Mabiya was also most likely shot from the direction of the K9 members.

(e) Mr Nokamba may have been shot from either the rocks over which Major General Naidoo came with the NIU or from the position of the K9 members.

(f) Mr Saphendu was also probably shot either from the rocks over which Major General Naidoo came with the NIU or the position of the K9 members.

(g) Mr Ngxande appears to have been shot from the rocks over which Major General Naidoo came with the NIU members.

(h) Mr Gadlela may have been shot either from the rocks over which Major General Naidoo came with the NIU or from the position of the K9 members.

(i) Mr Pato is likely to have been shot from the rocks over which Major General Naidoo came with the NIU.[573]

8) The South African Police Service postulated various scenarios surrounding the deaths of the deceased, relying in some instances on an analysis of the shooters' statements against the background of the ballistics analysis of Mr Steyl and the reconstruction by Mr De Rover. The Commission is not convinced that these scenarios are correct.[574]

9) Apart from the evidence of a reconstruction of the scene by Mr De Rover, the South African Police Service provided no details of what happened with regard to the deaths of most of the deceased at Scene 2. Where it does provide evidence pertaining to the deaths of some of the deceased, their versions do not, in the Commission's view, bear scrutiny when weighed up against the objective evidence.

10) The Families, in their detailed analysis of the evidence given at the hearings and the affidavits placed before us against the background of the medical and ballistics evidence, submitted that all the killings at Scene 2 were unlawful. They submitted that there were no attacks by any of the deceased on the members of SAPS, that SAPS members did not act in private defence and that their response was disproportionate to any perceived threat.[575]

11) The SAHRC was equally critical of the evidence surrounding the deaths at Scene 2, as was the Legal Resources Centre. Their analyses pointed to the

[573] Exhibit ZZZ5
[574] SAPS HOA Paragraphs 212 to 237
[575] Families HOA Paragraphs 416 to 609

improbabilities in the versions proffered by SAPS as to how the deceased were shot. An important point that resonates with the Commission is the criticism of the lack of information in the statements provided by members of SAPS that deal with the shootings.[576]

12) In view of the recommendations the Commission make with regard to Scene 2, it is not necessary to deal with these submissions in detail, save to say that the Commission is alive to the merits of the submissions made.

F The Effect of Major General Naidoo's Actions

1) The approach by Major General Naidoo and K9 from the south towards koppie 3 effectively blocked one of the dispersal routes for the strikers on koppie 3, the others being blocked by Captain Kidd and his members and Colonel Modiba and his members. This hampered the dispersal of the strikers by the POP members from the terrain of koppie 3 into open ground where the strikers could have been disarmed by the tactical teams.

2) The shooting by Major General Naidoo and the K9 members placed the members of the STF at risk causing Colonel Gaffley to desist from attempting to sweep the koppie with his STF members. It is submitted correctly by the Evidence Leaders that the unit best qualified to sweep the

[576] SAHRC HOA Part Twelve; Legal Resources Centre Heads of Argument paragraphs 238 to 310

koppie and disarm the strikers was prevented from doing so by the shooting of the members with Major General Naidoo.[577]

3) Major General Naidoo is criticised for his failure to exercise control at Scene 2. It is submitted by the evidence leaders that as most senior officer at Scene 2, he did nothing to stop the firing of two hundred and ninety five rounds of ammunition at the strikers in the koppie. He failed to ascertain what the problems were and in so doing, completely failed to exercise any command and control at the scene. The Commission agrees.

G The shooting by Major General Naidoo

1) The Evidence Leaders point out that Major General Naidoo's version of the shooting in self-defence is contradicted by the statements of the occupants of Papa 11, namely, Warrant Officer Mamabolo and Constables Dzivhani, Zondi, Khosa, Malesa, Mathabha and Mokoyama. The version in these statements is to the effect that Major General Naidoo and other police officers were seen emerging on the top of the boulders from the direction from where the firing came. Warrant Officer Mamabolo says that he shouted at them to cease fire but the shooting continued. None of them noticed any shooting by the strikers. There is also no corroboration for Major General Naidoo's version from Sergeant Harmse who was very close to him.

[577] Evidence Leaders Heads par 818.2
Exhibit FFF10

2) They also submit that his description in oral evidence of the shooting is different from the versions in his statement. They attribute this change in version to the belated finding by the ballistics expert that a cartridge case linked to Major General Naidoo's firearm was found on top of the rocks, because at the time of making his statements he was not aware of this ballistics evidence.

3) They also criticise that he only belatedly submited his own firearm for investigation by the ballistics experts.[578]

4) The Commission is satisfied that the anomalies in his evidence as well as the fact that his version is contradicted by other evidence, warrant the circumstances surrounding the shooting to be referred to the Director of Public Prosecution for further investigation.

H Medical Attention at Scene 1 and 2

1) It is common cause that there was no medical attention provided at Scene 1 for about an hour. The paramedics under the protection of Major General Naidoo at FHA 1 were diverted to Scene 2. The justification proferred by him for so doing was that there were injured persons at Scene 2 who needed medical attention.

[578] Evidence Leaders Heads of Argument paragraphs 824 to 829

2) Whilst there might be some merit in attending to those injured persons in the closest proximity to the paramedics, he must be criticised for not conveying to the JOC or to Brigadier Calitz that he was unable to bring the paramedics to attend at Scene 1. Had he done so, there would no doubt have been other measures that could have been put in place to remedy the situation.

3) The Commission finds unacceptable his version that he could not have used his cell phone to communicate with the JOC because he was busy with the interventions at koppie 3. It is the Commission's view that he should have made notifying the JOC of his inability to bring the medical personnel through to Scene 1, a priority.

4) However, the delayed medical attention at Scene 1 cannot be entirely because of his omission. Captain Loest testified that he telephoned Brigadier Pretorius around 16h05 and asked her to arrange medical personnel as soon as possible.[579] He said that he had to call on the cell phone because communication by hand held radio was not possible.

5) There is a note in the JOC records that he reported twenty eight strikers injured.[580] Brigadier Pretorius and other senior officers in the JOC would have known that there were only three paramedics at FHA 1 with Major General Naidoo. The report by Captain Loest must have alerted them to the fact that those three paramedics would not be sufficient to attend at Scene 1 even if they did arrive timeously.

[579] Day 229, Loest, p.28323
[580] Day 229, Loest, p.28357

6) There has also been evidence that medical emergency services were stationed at the JOC and according to the evidence Brigadier Pretorius did arrange for other medical assistance to be sent to the scene. The Commission has not heard evidence as to why they were unable to attend timeously given that they were closely positioned to Scene 1.

7) In view of the fact that it was foreseen that four hearses were required and four thousand extra rounds of ammunition was ordered, the question arises as to whether in the planning of the operation arrangements were made for sufficient medical personnel to attend.

8) Under cross examination by Mr Chaskalson, it was put to Major General Naidoo that medical personnel arrived by chopper at Scene 2 at about the same time that the medical personnel with him were at Scene 2. It has not been explained why if the response time to Scene 2 was so short that it was not so as well with Scene 1.

9) The medical evidence before us is that timeous medical assistance could have saved the lives of some of the deceased.

10) Major General Naidoo is also criticised for being unable to explain why he stopped at various instances en route to Scene 1 thus wasting time and failing to prioritise the taking of the medical personnel to Scene 1.

11) The Commission recommends that the circumstances surrounding the delay caused by Major General Naidoo in bringing medical attention to scene 2 should be forwarded to the Director of Public Prosecutions for further investigation to ascertain whether there is a basis for prosecution.

H Crime Scene 2 and Investigations

1) Captain Mohlaki and his team, consisting of Warrant Officer Thomas, Warrant Officer Molefe and Warrant Officer Henderson, are all members of the South African Police Services, and were the first investigators to attend at the crime scene. The IPID investigators arrived some two hours after Captain Mohlaki and his team had been processing the crime scene.[581]

2) Captain Mohlaki said that both Scenes 1 and 2 were very large areas and that he was at a disadvantage with a team of only four members. He said that the terrain was not friendly to work in and that while he was trying to process the scene, there were still activities ongoing. Motor vehicles were moving all over the terrain where he had to look for cartridges. Medical personnel and other police officers were walking all over the place that he had to examine.[582] He conceded that the scene was corrupted to a great extent.[583] He said that he did not and could not collect all the cartridge cases on the day in question. A number of them were recovered subsequently and as late as 1 October 2012 during the inspection in loco.[584] Some cartridge cases were also recovered by IPID on the scene.

[581] Day 7, Mohlaki, p.775 to 776
[582] Day 7, Mohlaki, p.819 following
[583] Day 7, Mohlaki, p.821
[584] Day 8, Mohlaki, p.859

3) Warrant Officer Breedt, said in his statement[585], that he removed weapons from the persons and vicinity of injured and deceased to enable the paramedics to attend to the strikers in a safe environment. This was his own initiative. He was asked to replace them by someone that he could not identify, but who he thought was from the Local Criminal Record Centre. He made no record of where the weapons were prior to removing them and conceded that in replacing the weapons, he might have done so incorrectly.

4) The evidence leaders criticise the inadequacy of the explanation by Warrant Officer Breedt,[586] and ask the Commission to condemn in strong terms the placing of weapons on the deceased persons by members of the South African Police Services. They point out that a similar incident occurred on 13 August 2012 in the case of Mr Sokanyile.

5) The possession of weapons and the types thereof is particularly relevant where members of the South African Police Service allege that they fired in private defence and in the face of attacks with sharp weapons or firearms.

6) The Commission is unable to rely on the evidence in the photographs and videos of scene 2 depicting the bodies of the injured and deceased persons and the positions of the weapons on or in proximity to their bodies, to ascertain whether any injured or deceased person may in fact have been in possession of a particular weapon, because of the actions of Warrant Officer Breedt and because of the failure to those in command to preserve the crime scene.

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[585] Exhibit GGG 14
[586] Evidence Leaders Heads of Argument paragraphs 1116 to 1121

7) There is no explanation forthcoming why photographs were not taken prior to the weapons being removed from the scene, to preserve some degree of accuracy as to the evidence. Whilst the Local Criminal Record Centre personnel might not have been at the scene, and there might have been some urgency with having the medical personnel attend to the strikers in an area free from weapons, nothing precluded photographs being taken with a cell phone camera. Major General Naidoo said that the priority at a crime scene is to save lives and arrest suspects. It would have been preferable, he said, if photographs had been taken prior to weapons being removed so that the integrity of the crime scene could have been preserved. Practically, that did not always happen.[587] It is extremely unfortunate that this did not happen in this case.

I Independent Police Investigative Directorate

1) The evidence leaders criticize the handling of the crime scene by IPID particularly with regard to their lack of personnel and lack of experts.[588] They correctly aver that IPID relied on the South African Police Services' ballistics and crime scene experts.

[587] Day 195, Naidoo, pp.23863 to 23865
[588] Heads of Argument paragraphs 1150 to 1158

2) The Independent Police Investigative Directorate Act[589] (the IPID Act) sets out as one of the objects of the Act in section 2(d), the provision of independent and impartial investigation of identified criminal offences allegedly committed by members of the South African Police Services.[590]

3) Section 4 of the Act specifically states that the Directorate functions independently from the South African Police Service.[591] IPID did not function independently in all respects in these investigations.

4) Section 24(5) states that no self-incriminating answer or statement made by any person to an investigator will be admissible in criminal proceedings against such person, except in criminal proceedings for perjury.[592]

5) The paucity of information in the statements of many of the South African Police Services members involved at the scene, failed to convey a full picture of what transpired. Whilst the Commission appreciates that many of the statements were in the nature of warning statements, it was open to SAPS to place before the Commission more detailed versions, to assist it. The fact that none of the information contained in the statements furnished to the Commission in these proceedings of the Commission may be used in any criminal prosecutions, ought to have encouraged full disclosure.

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[589] Act 1 of 2011

[590] IPID Act: Section 2 (d) The objects of this Act are to provide for independent and impartial investigation of identified criminal offences allegedly committed by members of the South African Police Service and Municipal Police Services

[591] IPID Act: Section 4 (I) The Directorate functions independently from the South African Police Service. (2) Each organ of state must assist the Directorate to maintain its impartiality and to perform its functions effectively

[592] Section 24(5): No self-incriminating answer given or statement made by any person to an investigator exercising powers in terms of this Act will be admissible as evidence against that person in criminal proceedings instituted against that person in any court, except in criminal proceedings for perjury.

6) Many of the statements taken by IPID are in the nature of warning statements and are lacking in clarity and detail.

7) The warning statements do not inform the suspect of the protection afforded to him in terms of section 24(5). The lack of clarity and detail might not have existed had the provisions of section 24(5) been explained to them by the IPID investigators at the time of the taking of the statements. It is unfortunate that the printed form used by IPID for warning suspects does not contain the provisions of section 24(5) and inform the suspect of his rights in terms of that section.

8) For understandable reasons the IPID investigations have not proceeded during the proceedings of this Commission. A perusal of the dockets indicates that there is a great deal of investigation which is still outstanding.

J Referral and Recommendations

1) The lack of clarity around the death of the 17 deceased persons at Scene 2, places the Commission in the difficult position of not being able to make findings as to the circumstances surrounding the death of each deceased. To accept or reject any version, with any degree of certainty, requires further interrogation of many factors.

2) In the Commission's view, the ballistics evidence, the medical evidence and the eye witness accounts require to be interrogated alongside a reconstruction of the scene involving independent specialists in each of these disciplines. It would be particularly apposite for trajectories and distances to be plotted and measured, to facilitate an understanding of where the shooters were in relation to the persons who were shot. These issues cannot be determined simply by plotting the position of the cartridge cases in relation to the bodies of the deceased and the positions of the injured persons and without full explanations from the shooters of their actions.

3) Accordingly, in terms of paragraph 5 of the Commission's Terms of Reference, the Commission refers the circumstances surrounding the injuries and deaths of all persons at scene 2 to the Director of Public Prosecutions of the North West Province, to exercise his powers in terms of section 24(1)(c) of the National Prosecuting Authority Act 32 of 1998[593], to supervise, direct and co-ordinate a specific investigation into the events at Scene 2.

4) It is recommended that for the purposes of the investigation, a team is appointed, headed by a Senior State Advocate, together with independent experts in the reconstruction of crime scenes, expert ballistic and forensic pathologist practitioners and Senior Investigators from IPID, and any such further experts as may be necessary. The investigators from IPID are

[593] NPA Act: Section 24(1)(c) Subject to the provisions of section 179 and any other relevant section of the Constitution , this Act or any other law, a Director referred to in section 13 (1) (a) has, in respect of the area for which he or she has been appointed, the power to supervise, direct and co-ordinate specific investigations

required to specifically explain section 24(5) to the members of the South African Police Services when obtaining statements. The Commission recommends a full investigation, under the direction of the Director of Public Prosecutions, with a view to ascertaining criminal liability on the part of all members of SAPS who were involved in the events at Scene 2.

CHAPTER 13

The Plan, its Defects and Execution

1) As counsel for the SAHRC pointed out in their heads (in section 6: at pp[ ]) 'expert evidence is both necessary and required to assist the Commission and enable it to fulfil its Terms of Reference'.

2) This is because good and effective policing requires expert knowledge acquired by training and practical experience. Furthermore public order is a field of particular expertise. This is recognised in Standing Order (General) 262, which deals with crowd management during gatherings and demonstrations. It provides that the senior officer responsible for designating the commander of the joint operational centre (the 'CJOC') which is activated at the scene of an incident or event must ensure that the CJOC 'is conversant with [the Standing] Order and relevant legislation and is well trained to take responsibility for the operation (para 8(1), read with the relevant definitions in para 2).

3) The Commission had the benefit of the evidence of three external expert witnesses on policing matters, Mr Eddie Hendrickx (who was called by the Legal Resources Centre), Mr Gary White (who was called by the SAHRC) and Mr Cees De Rover (who was called by SAPS). All have considerable domestic and international experience and expertise in policing matters. Mr Hendrickse was the manager of the first phase of a technical co-operation agreement between the South African and Belgian governments from 1996 to

2000, when he worked with the Police Development Services on the restructuring of the Internal Stability Units into the Public Order Policing Services. He returned to South Africa in 2004 as the head from 2004 to 2008 of a team of international experts responsible for monitoring and evaluating the management of the changes in the SAPS. Mr White was a member of the police service in Northern Ireland for over thirty years and was involved for a considerable period as the district commander in the North and West Belfast area, which was and is considered one of the most difficult policing environments in Northern Ireland because of the sustained amount of public disorder experienced. In his last three years in the service he was the Chief Superintendent in charge of the operations department. He has extensive experience of commanding public order policing operations in the area concerned. Mr De Rover, who hails from the Netherlands, also has considerable experience and expertise in public order policing and has been involved through the United Nations in advising government all over the world.

4) The expert opinions of Messrs Hendrickx and White were broadly consistent. Although this only became apparent when he gave oral evidence Mr De Rover also agreed with them on all the major issues. On one issue, whether it is possible, in present circumstances, for the SAPS to meet a standard of compliance with international benchmarks against which Mr White assessed the SAPS performance at Marikana, Mr De Rover disagreed with Mr White. The Commission is of the view that that is not a matter on which it needs to make a finding.

5) The plan which Lt Col Scott suggested to the 13h30 meeting of the JOCCOM, and which was accepted is well summarised by the evidence leaders in paras 636.1 to 636.16 of their heads as follows:

'636.1. The aim of stage 3 of the plan was to disperse the strikers from the Koppie area into smaller groups towards the west where the police, after regrouping and reorganising, could disarm and arrest fragmented groups of armed strikers.

636.2. Stage 3 was to be broken up into three phases. The first phase involved the rolling-out of the barbed wire cordon between the police and the strikers. The plan required all vehicles to roll out their barbed wire simultaneously, so that the process would be quick and the strikers would not have advance notice of the intention of the SAPS. Once the barbed wire cordon had been rolled out, it would serve to direct the strikers towards the west and away from the east where the police and media area was.

636.3. Phase 2 of stage 3 was the dispersion action. The dispersion was to take place towards the west with movement to the east blocked by the razor wire, and to the north blocked by police armoured vehicles.

636.4. In advance of the dispersion action, a verbal warning was to be issued to the strikers by the Operational Commander. Strikers who heeded the verbal warning to disperse were not to be pursued in the field. There was to be a follow-up action,

phases 5 and 6 of the plan, to retrieve their weapons from their places of residence.

636.5. It was anticipated, however, that not all strikers would heed the

verbal warning. In particular, Col Scott anticipated that the 'militant group' would remain. He envisaged that this group, or its members, might respond in three different ways :

636.5.1. they might close the ground on the POP line to confront them with their traditional weapons,

636.5.2. they might take refuge on the higher ground between the rock crevices and bushes on Koppie 1 to ambush any police officials who attempted to approach them there, or

636.5.3. after confrontation and being disorganised by the water cannon and teargas, they might retreat to regroup on the open fields to the west.

636.6. The dispersion objective was to drive the strikers into the open fields to the west. This would enable the police to approach the scattered strikers on open ground to effect arrests. The police dispersion line would form up to the north of the koppies and push from the north to the south, turning

the dispersion line towards the west and the open fields. The dispersion line would split into three parts to take three different paths determined by the terrain: the lower path would turn around the back of Koppie 1, the middle path would turn between Koppies 1 and 2, and the upper path would cross above Koppie 2.

636.7. Once the dispersion action had been initiated and the three dispersion movements had passed the koppies, the SAPS would stop and reorganise along the dry river bed running from north to south between Koppies 1 and 2 to the east and Koppie 3 to the west.

636.8. In order to mitigate possible risks, the plan made certain specific provisions :

636.8.1. One water cannon was to stay behind the razor wire line to protect the safe area with the POP members who had deployed the barbed wire. These POP members would have some of the TRT members as back-up, focusing on the gaps between the barbed wire Nyalas and their trailers which were a potential weak point in the cordon. The water cannon could also be used from the eastern flank to spray at any strikers who did not heed the verbal warning to disperse and remained on the koppie.

636.8.2. POPS members were to retreat into the Nyalas if at any stage they came under violent threat. Teamwork was emphasised, as was the need to hold the line according to tactics so that colleagues were not isolated in a manner that would make them targets for militant strikers as had taken place on Monday 13th.

636.8.3. The TRT line would form up behind the POP dispersion line to protect any POP members who found themselves isolated and under threat.

636.8.4. The TRT would follow the POP dispersion formation at a distance of not more than 100 metres, and the STF and NIU would form up behind the TRT line.

636.8.5. When the TRT line turned west towards Koppie 2, the STF/NIU line with the armoured vehicles in support would move towards the bigger Koppie 1, where it was anticipated that some of the militant strikers would take rfup position. The STF was specifically tasked to clear Koppie 1 of strikers who had taken refuge there. It was to be flanked with NIU members on its left and right. The STF would be responsible for high risk arrests of belligerent armed strikers in the vicinity.

636.9. Stage 3 of the plan involved the reorganisation action that would take place at the dry river bed. It provided a point for the SAPS to regroup and to identify striker groups or individuals who remained to be targeted for disarming and arresting. The Operational Commander would reallocate tasks at the reorganisation point so that the SAPS resources could be used most effectively to disarm and to arrest the remaining strikers. Again it was anticipated that POP members involved in the disarming and arrest process would have their armoured vehicles as safe havens as well as protection from TRT, NIU or STF members.

636.10. The role of the members at forward holding area 2 was to secure the small settlement to the south-west of the koppies, to prevent any violence being visited on the residents of that settlement and to strop strikers using the settlement as a sanctuary or a base from which to launch new attacks on the police.

636.11. The SAPS teams at forward holding area 1 were instructed to move closer to immediate reaction area 1 on the southern side of the power station. This would place them out of sight of the strikers and would also enable the emergency medical and fire services to respond quickly to emergency situations where time would be of the essence.

636.12. K9 members at FHA 1 would be brought in to search the rock crevices for illegal firearms and other weapons that

might be hidden. They might also be called in to assist with higher risk arrests. They were not to play any role in the POP dispersion action.

636.13. The mounted unit was to patrol the safe environment behind the POP and tactical forces to maintain a police presence and to maintain domination of that area.

636.14. The medical services and fire brigade were to be employed as instructed, but only when cleared to do so either with an escort for their safety or on the basis of a determination by the Operational Commander that the area where they were needed was safe.

636.15. The force continuum to be used would start with a POP dispersion line advancing on foot and would then proceed through the use of water cannons, teargas, stun grenades, and rubber bullets, in that order and only to the extent that escalating force was necessary.

636.16. Once the forces had regrouped at the reorganisation line, the further implementation of the operation in the field would be left to the discretion of the Operational Commander. He would, however, be assisted by Col Vermaak who would be his 'eye in the sky' in Chopper 1961 and the aerial commander, Brig Fritz, who would be above the operation in Chopper 2 and would direct the tactical forces to areas where they were required.'

6) As the evidence leaders point out in para 637 of their heads, there were 'a number of obvious weaknesses' in the plan Lt Col Scott put together in the short time period available to him prior to the 13h20 JOCCOM meeting.

7) The first two, which explain the tragedy on scene 1, are set out in para 637.1 and 637.2, as follows:

> *'637.1. First, the plan depended on a simultaneous roll-out of the barbed wire Nyalas. This was necessary, because in the absence of a speedy and simultaneous roll-out of the barbed wire, there was an obvious risk that the strikers would observe the barbed wire rolling out slowly in front of them and attempt to break through the path of the barbed wire before it had been rolled out. However, the technical difficulties of rolling-out barbed wire from trailers attached to Nyalas precluded the possibility of a simultaneous roll-out. This was apparently known to all POPS Commanders, but not to Lt Col Scott. Because there were no POPS Commanders involved in the formulation of the plan and no POPS Commanders who were present at the 13h30 JOCCOM, this obvious shortcoming of the plan was never pointed out to Lt Col Scott.*
>
> *637.1.1. Brig Calitz who testified after Lt Col Scott, attempted to minimise this problem by suggesting that common crowd behaviour is not*

to attempt to break around a barbed wire barrier while that barrier is being rolled-out.

637.1.2. This reasoning, however, ignores a crucial fact which animated Lt Col Scott's planning, namely that by the time that SAPS commenced with the roll-out of the barbed wire Nyalas, on their own version, they had been subject to threats from Mr Noki and other strikers that the strikers would attack them. Thus Lt Col Scott stated – 'Now by the time that the Phase 3 that we are speaking about, the detail thereof is discussed at the 13h30. The threats had been made towards the police already, so in my mind I, at that time, if we were going to go now to Phase 3, it's amongst others because there are threats against the police from my understanding. And that we needed to do that rapidly as well, so it is so that I didn't want the strikers to see that the police are starting to rollout the barbed wire slowly and then start building contingency plans against what the police were doing, to try and counter what the police were doing.'

637.1.3. Statements about the ordinary behaviour of crowds in these situations thus do not address the particular risks that confronted SAPS in this

operation. Indeed, common sense suggests that a crowd as hostile as the crowd with which SAPS was dealing on 16 August was most unlikely to stand by idly as it saw what it perceived to be a barbed wire cage rolling-out around it.

637.1.4. The reasoning of Brig Calitz is also difficult to reconcile with the common cause fact that prior to 16 August 2012, SAPS had taken a deliberate decision not to place the barbed wire Nyalas in a position visible to the strikers because it thought that they would be provoked by the sight of the barbed wire Nyalas, and the video evidence that the appearance of the barbed wire Nyalas in the morning of 16 August 2012 did elicit an aggressive response from Mr Noki.

637.2. The next major shortcoming of the plan was the absence of any measures between POPS members with teargas, rubber bullets and two water cannons, and a TRT line of sixty members armed with R5 weapons and effectively operating as a firing squad. The failure to designate individual shooters within the TRT line was a tragic shortcoming of the plan.'

8) Mr White was particularly critical, and rightly so, of what the evidence leaders call 'the absence of any measures between the POPs members [using less than lethal force] and a TRT line of sixty members … operating

as a firing squad'. He referred to the fact that there was, as he put it, 'no challenge process' when Lt Col Scott laid out his plan. The plan was for the TRT members to engage the crowd if the POP members moved out of the way for their own protection. It was said that they would do this 'proportionately'. Mr White said (on Day 249, at p 31406):

> *'I kept looking for someone to say, so what does this mean? Let's put it into plain English. If they only have R5 rifles – so what we're talking about is shoot people. That seems to be what's going to happen … if it's not an inevitability, a high likelihood that there are going to be very high levels of force used in this. …*
> *What is the position we're putting these police officers in? What do we think they're going to do? I see that as the challenge process, which didn't happen, and to be honest with you, I was actually shocked in terms of reading the evidence.'*

9) The Commission agrees with Mr White's comments. It is also of the view that both of the defects to which the evidence leaders refer would have been obvious to experienced POP commanders who could have raised them at the JOCCOM meeting.

10) The encirclement plan, which was replaced by the new plan at the 13h30 meeting of the JOCCOM because it could not be implemented that day, was substantially less risky. It, unlike the 13h30 plan, had been drawn up by Lt

Col Scott with inputs from experienced POP commanders and was approved by a full-strength JOCCOM including more POP commanders.

11) The decision not to implement it was clearly dictated solely by the earlier decision that Thursday, 16 August, was to be D-Day. That decision, for which Lt Gen Mbombo and those present at the extraordinary session of the NMF on 15 August 2012 must accept responsibility, was the decisive cause of the 34 deaths on 16 August.

12) In addition to the encirclement plan, there was also the possibility of executing a cordon and search operation once sufficient information was available as to the whereabouts of the militant group who did not stay overnight on the koppie but returned, presumably to their homes, with their weapons each night.

13) In order to get this information, a team of detectives from Gauteng had been working since Tuesday, 14 August, with staff members of Lonmin in identifying the armed members who could be seen on the videos. In addition, it will be recalled, Mr Zokwana had promised the previous night that NUM members would assist with information regarding the names and addresses of strikers with the dangerous weapons. From the nature of things, this information was not available on the Thursday morning.

14) The Commission agrees with the contention raised by the SAHRC (in para 4.1.5 at p 313 of its heads) that the operational command should have

explained to Lt Gen Mbombo and the National Commissioner the risks that the order carried and explained to them that – on the basis of those risks – four mortuary vans had been requested in advance of the operation. In this regard it is relevant to note that according to Lt Gen Mbombo (at pp 21717 – 21726, Day 181) before 09h00 on the morning of Thursday, 16 August, Maj Generals Mpembe and Annandale warned her that there was a risk of bloodshed if the operation took place that day but that they would use every endeavour to reduce it to the absolute minimum. If they had had a proper challenge process with experienced POP commanders present at the 13h30 meeting and the points made by Mr White had been raised, and they had put them to her, she would, according to her evidence (at p 21716, D 181), have been open to a postponement to Friday, 17 August.

15) The SAPS contended that the fact that there was no comprehensive written plan did not create a problem for its members because a 'disperse, disarm, arrest' order is well-known to POP members. But as counsel for the SAHRC pointed out in para 4.1.8 of her heads this was no ordinary POP 'disarm, disperse, arrest' operation. She referred to Lt Col Scott's statement, Exh GGG39, para 6, where he said:

> *"'I am not aware that the SAPS has ever been confronted with a situation of the kind with which members were confronted on the ground on 16 August 2012. The plan or strategy that I prepared and proposed for adoption by the JOCCOM was the first of its kind. Neither the crowd management strategies for which Standing Order 262 provides, nor the hostage management*

strategies were appropriate in isolation. I thus had to devise what I considered at the time to be an appropriate plan for an unprecedented situation, being on which had to encompass the principles of Standing Order 262 but moving beyond the restrictions of the Standing Order to effectively plan for the disarming of the protestors while considering the protection of the police officials and the community in the area when dealing with a belligerent armed group numbering up to 3000 persons who were choosing to contest the request to disperse and/or disarm, demonstrating a clear defiance towards the law and the enforcers of the law with aggressive action should they be approached – as demonstrated on Monday 13th August 2012."

16) She also referred to Mr White's discussion of the point in paras 2.3.11 and 2.3.12 of his supplementary statement, where he said:

'2.3.11 As a general point, this approach appears to contradict the requirement of SO262 for a comprehensive written operational plan, as well as the requirement for unit commanders to prepare detailed written plans on their specific tasks. At paragraph 6.6.4 of my Final Statement I set out the importance of plans provided by unit commanders to ensure that briefing has not only been given, but also understood. So on a general basis, I consider that SAPS policy does not support the contention made at 3.10 of

Annexure GW8 (a). But I have a particular disagreement with the SAPS response in the specific context of the operation at Marikana.

2.3.12 The SAPS have described the situation they were facing as "unprecedented". The decision to move to a proactive, tactical phase to disperse, disarm and arrest potentially hundreds of people within a crowd numbering in the thousands, meant that this was the most high risk stage of the whole operation. It involved the co-ordination of a range of units including the POP, TRT, NIU, STF, K9, Mounted Unit, Air Wing, and other supporting units including medical and fire teams. It was important that these various disciplines worked in harmony. In order to be able to do this it was vitally important that each unit and each officer understood their role, but also the role of others as well. The absence of a written plan increases the risk for instructions and directions to be misheard or misunderstood, both in relation to what each unit should be doing, but also in relation to what other units should be doing. There is significant evidence to suggest that a number of people within the operation had misunderstood what was required of them.'

17) The National Commissioner testified (Day 286, pp 7127 – 7128) that she thought that the plan was a good one and that the tragic outcome, which was not intended, was the result of the 'disruption' of the plan. (The disruption to

which she refers is the fact that the strikers started leaving the area where they were while the wire was being uncoiled and some of them advanced towards the police, giving rise to the belief on the part of the police that they were going to attack them). But that overlooks the fact that the plan provided for possible attacks on the POP members, which would be repulsed by TRT members, 60 of them, using R5 rifles, which is what happened.

18) Mr White also criticized the way the briefing took place and said that the SAPS failed properly to ensure that the people on the front line understood the plan. Mr White explained (in para 6.6.1 of his final statement, Exh JJJ178) the importance of effective briefing, as follows:

> *'6.6.1 Effective briefing in an operation of this type is essential. Officers need to understand exactly what is required of them, what they are required to do, what they are entitled to do and what they should not do. There is an old adage in planning for operations that "if the people on the front line don't know what the strategy is, then there is no strategy". That adage is reflected in the SAPS document "Crowd management for Platoon Commanders - Briefing and Debriefing" which notes: "A good briefing is as important as a good plan, because if there is no clarity and common understanding during the briefing, the operation is doomed to failure".'*

19) In her heads (para 5.1.2 at p 324) counsel for the SAHRC summarized the main points made by Mr White in his final and supplementary statements in this regard. Her summary reads as follows:

'a. The problematic nature of the briefing by Lt Col Scott, where he briefed from the back of a van, with 20 commanders crowded around a small laptop screen, and spoke to a single Google Earth plan. The commanders were provided with no written material to take away with them and did not take any notes. The gridded maps provided that morning in relation to the Stage 2 deployment no longer described the situation on the ground because Nyala 6 had moved. Despite it being the first time the DDA plan was described, Lt Col Scott did not recall any questions being asked by commanders at the briefing; and

b. The absence of any detailed written plans furnished by unit commanders on their specific tasks. As Mr. White noted, their absence is important: the provision of detailed written plans from section commanders allows the overall commander to confirm that each commander has fully understood his or her role in the operation. It is a means to ensure that not only has the briefing been given, but also that it is understood. In the absence of these plans, there is no way to be sure that a briefing has been properly understood.'

20) In para 5.1.3 of her heads (pp 325 – 6) she highlighted 'some of the more significant examples of misunderstood or absent briefings', as follows:

'a. Lt Col Vermaak was never briefed on the operation prior to his deployment as the "eye in the sky". Consequently, when the operation commenced, he believed he was still implementing a plan to encircle the strikers in the Koppie.

b. The operators of the JHB water cannon, W/Os Dicks and Kruger did not attend the briefing in advance of the operation and were not provided with a radio. This explains why the JHB water cannon was so delayed in deploying prior to the events at Scene 1 and why W/Os Dicks and Kruger were surprised to find barbed wire preventing them from driving straight to the Koppie.

c. There was significant misunderstanding over the purposes of the barbed wire:

i. Brig Calitz did not understand that Lt Col Scott's intention was for the barbed wire to be rolled out simultaneously. Consequently, a key aspect of Lt Col Scott's plan was not implemented and Lt Col Scott was not informed that it would not be implemented, so could not amend the plan;

ii. Col Makhubela, who was in charge of the barbed wire nyalas, appears to have believed its purpose was to encircle the Koppie. That view was shared by others; and

iii. Capt Thupe appears to have believed the purpose of the barbed wire was to channel the strikers towards the informal settlement.

d. Capt Kidd was unsure of the role the water cannons would play in the operation because he did not pay attention to that part of the briefing. Consequently, at Scene 2, as the water cannons sought to drive the strikers towards the west of Koppie 3, Capt Kidd's TRT members blocked what Mr. de Rover described as "the intended pathway out of the Koppie'

21) In a section in their heads on expert policing issues with which the Commission is in entire agreement, the evidence leaders deal with the following topics: contingency planning; the adequacy of Standing Order 262; Recording of radio communications; the use of R5 rifles; radio equipment and other equipment; intelligence; first aid; designated shooters where shooting may be necessary in violent crowd situations; the role of political decision-makers; militarization and demilitarisation; and SAPS accountability and 'lessons learned' on reluctance to admit error. These topics are dealt with in paras 1025 – 1106, which read as follows:

'Contingency planning

1025. The experts expressed a good deal of criticism of the planning of the operation at Marikana.

1026. Mr Hendrickx was asked to comment on the plan presented by Lt Col Scott to the JOCCOM on 14 August 2012 (Operation Platinum). He criticised it as not addressing "prevention" or conflict resolution – for example by meeting with and negotiation channels between the different parties and the SAPS, patrolling the area, etc. In this respect, his evidence was similar to that of Mr De Rover, who spoke of the need for the police to be able to act as facilitators and as a conduit, rather than as the mouthpiece in the "bearer of the bad news" that no-one else would be coming to talk to the strikers. Mr De Rover referred, too, to the need for the SAPS to have had a "bargaining chip" in order to be able to fulfil this role, and to find ways to relieve the pressure and the tension, in order to create "an atmosphere that would make it possible to have a conversation rather than an adversarial stand-off. Similarly, Mr Hendrickx stated that:

> *"There was no real negotiation or dialogue with the crowd. The SAPS issued an ultimatum but were not able to offer anything to the crowd in response to its demand to meet with Lonmin management."*

1027. Mr Hendrickx said that the events of 13 August had marked a turning point which altered the course of the operation at Marikana. Previously, the situation had been managed predominantly as a POP operation. There was a change in the command structure, with the designation of Maj Gen Annandale

as the Chief of Staff and Lt Col Scott as the Chief Planner, and with formal representation of the NIU and the STF at the JOCCOM. There was a change in the composition of the SAPS units, with the specialised or tactical units now outnumbering the POP units and taking priority roles in the operation. The operational strategy was developed and presented by Lt Col Scott, a member of the STF. And SAPS witnesses gave evidence that the situation was regarded as "unprecedented", requiring an operational strategy that moved beyond the limitations of Standing Order 262.

1028. He contended that the shift away from crowd management was inappropriate. He said that the crowd management regulatory framework and Standing Order 262 were applicable to the situation at Marikana, and that POP units are trained to manage situations such as that at Marikana. He disputed the contention that the situation was unprecedented.

1029. Mr De Rover stated that with an operation of this kind you do not plan half of it and hope that half will suffice, and that if you need more than that you are going to go back and envisage what other eventualities could occur. He would be surprised if a plan completing Phases 3, 4, 5 and 6 was only thought of at 1.30 on 16 August: "That would be a serious worry". He agreed that for an operation of this kind there was a need for a written plan, and

the plan must cater for a variety of contingencies – the best case and the worst case scenarios. That needs to be accompanied with a probability estimate.

1030. *That was a necessity identified in the report* Towards Peaceful Protest in South Africa*, which was produced by the multi-national expert committee appointed by the Goldstone Commission, and under the leadership of Prof Philip Heymann. The report formed the foundation for the drafting and enactment of the Regulation of Gatherings Act. The expert committee report as follows, under the heading "Command and control of police":*

> *"It is of the utmost importance that the policing of public order operations is characterised by thorough planning and preparation. Senior officers must consider and make contingency plans for various scenarios from those thought to be highly probable through to those considered possible, however unlikely. Through these means the police will avoid being surprised by unexpected events and thus retain maximum control over their own officers and the events themselves."*

1031. *Mr De Rover was asked whether he had seen such a plan. He said that he had done so. He was asked to make this plan available to the Commission, and subsequently made available*

a document headed "Annexures Thursday 2012-8-16". It is the source file for the last few pages of Exhibit SS3. It was created on 14 December 2012, four months after the events. Lt Col Scott explained that he had prepared it in accordance with a brief to reverse engineer the plans as they were for the Commission, while Brig Mkhwanazi was testifying. It is therefore not a pre-prepared written plan of the kind that Mr De Rover considered necessary.

1032. We submit that none of the plans made available by the SAPS meets the criteria set out by the expert panel of the Goldstone Committee, and also identified by Mr De Rover, particularly with regard to contingency planning, and dealing with best case and worst case scenarios. This is not simply a matter of formality: the failure to consider and plan for alternative scenarios led to the fatal results of 16 August.

1033. We do not criticise Lt Col Scott for not preparing an adequate plan: he was placed in an impossible position by the precipitate decision to implement the tactical phase. It is not difficult to infer from the conduct of Maj Gen Annandale, who insisted that an entry be made in the Occurrence Book that this decision had been made by Lt Gen Mbombo, that he was well aware of the dangers inherent in the implementation of this decision.

The adequacy of Standing Order 262

1034. There was considerable debate during the hearings as to the applicability of Standing Order 262 to events of the kind which took place at Marikana during August 2012. On the one hand, it was contended that Standing Order 262 is intended to deal comprehensively with "Crowd Gatherings and Demonstrations", and that the conduct of the SAPS should have been governed accordingly. On the other hand, it was contended that Standing Order 262 is not appropriate to deal with crowds that are armed and potentially or actually violent, and also not intended to deal with operations in which specialist units such as the NIU and STF (as opposed to just the Public Order Police) are involved.

1035. The fact that there could have been such debate, demonstrates the inadequacy of Standing Order 262. There is a need for complete clarity on this matter. The applicability of Standing Order 262, or any successor which may be prepared, governs critical questions, for example, who should be in charge of the SAPS operations, and whether the use of sharp ammunition is prohibited in all circumstances. The failure of Standing Order 262 to make any provision at all for the use of sharp ammunition invites the response from the SAPS that Standing Order 262 is therefore no applicable in operations with crowds that are armed and potentially or actually violent. This in turn leaves space open for argument as to what prescripts, if any, apply in such

situations with regard to the preparation of written plans, briefing, debriefing, and generally the issue of spontaneous events".

1036. Given the large number of gatherings and demonstrations which actually or potentially involve violence, it is a matter of great urgency that Standing Order 262 be revised to address explicitly such gatherings and demonstrations. The Standing Order should specifically address the question of when tactical units may be involved in dealing with gatherings and demonstrations, who is to be in overall command in such situations, and what prescripts apply to the use of sharp ammunition. It should be made clear that the usual prescripts relating to planning, briefing and debriefing are applicable to all such operations.

Recording of radio communications

1037. One of the matters which has given rise to difficulty in establishing the truth of what happened at Marikana is that the SAPS did not record and keep a recording of the radio exchanges. This was identified by Mr White. The Chair suggested that an elementary principle was that there should be a tape recording made of all traffic on the radio. Mr De Rover agreed with this.

The use of R5 rifles

1038. One of the first recommendations Mr De Rover made to the National Commissioner was to withdraw R5 rifles from the Public Order Police, and not to permit them to be used in crowd control. He gave her this advice between 28 February and 8 March 2013. When the National Commissioner gave evidence on 10 September 2014, almost eighteen months after she had received this advice from Mr De Rover, she said that R5 rifles are still being used in public order operations, and that SAPS is still considering the matter. We submit that given the urgency of the matter, which is demonstrated by the high number of public protests and demonstrations in South Africa and the fatal shootings at Marikana, that is simply not good enough.

1039. Mr De Rover said there is ample literature on the use of military weapons in a law enforcement context, and there are rules of international law that address the use of assault rifles in law enforcement, generally stating that this should be discouraged. He said that a .556 round fired at close range is "virtually and per definition a kill shot". The R5 is "guaranteed deadly". As to having the TRT armed with R5 rifles, in the operation, he said he thought the question turned on:

"Was it reasonably foreseeable that they would be forced in that position and did they contemplate that that could occur, and if you have it occurring, the thing is that it then almost follows: you put them in that position, all they carry is that R5, so then it ends up being used".

1040. He said that R5 rifles do not belong in public order management. If you take away the possibility for them to be used, then you do not have to deal with the consequences of the reality that they are used. Automatic rifle fire does not have a place in law enforcement. He said that people had admitted to him that they had fired inadvertently on automatic, and that a burst went off that might well account for five or six rounds on one pull of the trigger. That was an "utter reality" that one must contend with, whether it is the result of ineptitude or stress.

Radio equipment and other equipment

1041. The SAPS leadership repeatedly attributed what happened at Marikana to a lack of adequate communication, and in particular the difficulties with the radio system – there was only a single channel in operation, and most of the airtime was taken up by Brig Calitz and Lt Col Vermaak.

1042. Mr White stated that in his experience of large public order operations, problems with radios arise very frequently. When a single channel is being used without an override button, it can be difficult to get on the radio to make a transmission. But he also made the point that this was a foreseeable problem in an operation such as the one which took place at Marikana. Given the circumstances, it was almost inevitable that there would be difficulties communicating easily by radio. As this was foreseeable, alternatives needed to be arranged and used, included through cell phones or in person, if necessary via a third party.

1043. We endorse these views. We submit that it would be a huge mistake to blame the outcome on the communication problems. If that is done, and attention is not given to the underlying problems of the lack of adequate planning, the lack of adequate briefing, and inadequate command and control, then tragedies of this kind are likely to occur, whatever communication system is purchased by the SAPS.

1044. The same applies to the broader question of deficiencies in equipment. As Mr White pointed out, the SAPS have identified difficulties with the camera technology, the use of high velocity ammunition rather than lower velocity ammunition, the absence of teargas masks at Scene 1, and the need for less than lethal

options. We endorse what is said by Mr White in this regard: the tragedy did not occur because the SAPS were not issue with the correct equipment. It occurred because of poor planning, poor briefing and poor decision-making.

Intelligence

1045. Both Mr White and Mr Hendrickx criticised the quality and extent of the intelligence that the SAPS collected and made available to the decision makers.

1046. Mr Hendrickx contended that the SAPS should have prioritised information gathering in the operation. During cross-examination, he was questioned intensively on this issue. The practical difficulties involved in obtaining information were pointed out. Mr White and Mr Hendrickx both accepted that there were difficulties in gathering intelligence. They both suggested however that there were opportunities for better intelligence to be gathered.

1047. We make the following submissions in this regard:

1047.1 There were indeed practical difficulties in obtaining reliable intelligence. Under the prevailing circumstances, potential informants would have

been afraid of the consequences if they provided information. The murder of Mr Twala by certain of the strikers, apparently because he was suspected of being an informer, testifies to the reasonableness of such a fear.

1047.2 The intelligence was indeed very thing. However, it was consistent, and accurate, in respect of probably the single most important piece of information – namely, that if the strikers were confronted at the koppie they would stand their ground, and a conflict would ensue (see for example exhibit TT5).

1047.3 Mr De Rover said that he was told that the police intelligence showed that there was a likelihood of confrontation with the strikers on 16 August because some of [them] might refuse or be reluctant to disarm, and there might even be conflict if they were engaged by police. That information came from Maj Gen Annandale and Lieutenant Colonel Scott.

1048. While it can fairly be said that the intelligence was very thin indeed, the real problem was not the quality of the intelligence: it was the failure of the plan, the decision-making, and the

implementation of the plan to have regard to the intelligence which had consistently been provided, and which was accurate.

First Aid

Delay in arrival of the first aid specialists

1049. After the shootings at Scene 1, no medical attention was provided to those who had been wounded for nearly an hour. The television footage shows SAPS members grouped around the dead and wounded, not providing any assistance at all to those who had been wounded for a very long period. There was similarly a substantial delay in providing medical attention to the wounded at Scene 2.

1050. Even if the delay in providing expert medical attention can be justified on the grounds that the scene first needed to be secured, there is no evidence that suggests that there was any lack of safety for such a long period. At best, the lack of safety was for a few minutes while the SAPS took control at the scene.

1051. Mr White asserts that in planning an operation where there is a high likelihood of the use of force, "it is a matter of good practice and recognised as in compliance with human rights' standards, that adequate first aid arrangements should be factored into the plan". It is striking that in recognition of the high likelihood of the

use of force, an attempt was made to have four mortuary vans brought to the scene on the morning of 16 August. That action speaks volumes for the fact that shooting and death (and therefore injury) must have been anticipated at a senior level.

First aid training and obligations for non-specialist SAPS members

1052. Brig Breytenbach gave evidence on the training of members of the SAPS. For this purpose he used a slide presentation, Exhibit Q. Slide 79 of Exhibit Q described certain aspects of the training of NIU members. In the rural phase (phase 2), the matters on which training is provided include "first aid level 3".

1053. Gen Phiyega was asked whether the police are expected to assist injured people with first aid or any other such assistance, while waiting for more professional assistance to arrive. She in effect declined to answer. She stated that SAPS counsel had indicated that a witness would be called who would testify how such issues are treated "and I'd like to leave that question to that environment".

1054. The matter was examined more fully when Maj Gen Naidoo gave evidence. He was asked whether, in terms of SAPS protocols, if one or more of the group of police members arriving at a scene had been trained in first aid, it would have been

expected of them to administer first aid to those who had been shot and injured. He said that he did not know the answer.

1055. He was then asked whether he accepted that there should be a protocol which states that SAPS members with first aid training who are on the scene of an incident where first aid is called for, should administer first aid. After some debate, he stated that this would make sense, but that the policy would need to be followed with proper infrastructure and backup to ensure that the policy was effective.

1056. He said however that the police member would potentially be conflicted, on the one hand carrying arms and possible using force, and at the same time having to render assistance to a person who was injured. We submit that there should be no such conflict. A police official is required to take reasonable measures to prevent an offence being committed. If the would-be offender is injured or incapacitated in the process, there is no conflict involved in the police officer then giving that person first aid. The "policing" purpose will have been achieved. There would be no conflict in then giving assistance to the person concerned to the extent that this was possible.

1057. It was subsequently pointed out to Maj Gen Naidoo that the policy on crime scene management provides that the first

member upon arrival at the scene, must, with due consideration of the integrity of physical evidence, "assist the injured within the limitations of his or her training as a matter of priority".

1058. In his final statement, Mr White stated that he was not able to understand why SAPS members on the scene had not at least attempted to administer first aid, pending the arrival of the medical teams. He stated that in the Police Service of Northern Ireland, all officers are trained in basic first aid. Specialist firearm officers receive additional training in administering first aid for those with bullet wounds. This is done on the principle that if you provide an officer with a firearm, you increase the likelihood that gunshot injuries might take place, and that to mitigate this, the police should therefore provide those officers with the basic first aid skills to assist any person that they have been forced to shoot with that firearm. He considered that in planning an operation where there is a high likelihood of the use of force, it is a matter of good practice and recognised as compliant with human rights standards, that adequate first aid arrangements should be factored into the plan. He had been advised that the training records of those in the TRT line at Scene 1, showed only two who had records of such training. He concluded that if the training records were complete, and this conclusion was correct, then that was a significant omission and one which, if not addressed, was bound to lead to avoidable

deaths. In the Recommendations which were invited by the evidence leaders, he recommended that firearms should be provided with the basic first aid skills needed to deal with gunshot wounds.

1059. We endorse this recommendation.

Designated shooters where shooting may be necessary in violent crowd situations

1060. We have submitted above that it is reasonable to accept that when the group of strikers came around the kraal at Scene 1, moving in the direction of the TRT line, some members of the TRT line may have had the apprehension that they or their colleagues were under attack, and needed to be protected in self-defence or private defence. Whether or not their apprehension was correct, there were grounds for such an apprehension.

1061. That, however, did not provide any justification for a fusillade of fire, by multiple members of the TRT, using high velocity weapons, some of which may have been on automatic. If shooting was necessary and justified, the justification was limited to identifying and dealing with particular members of the approaching group who posed a direct threat, and doing so in a

manner which was aimed not at killing them, but at incapacitating them. Instead, what happened was a fusillade of uncoordinated shooting, some of the shots being fired at a time when it was impossible to see precisely what was happening and whether was actually still a threat, and some of it plainly going well beyond the time when there was any conceivable threat of imminent harm or danger to life.

1062. We submit that this was at least in part the result of what Mr De Rover described as "associative threat perception": a police officer perceives that a colleague of his or her is under attack, and that his or her duty is to back up that member in order to protect his or her life. The police official observes that another member of the SAPS is shooting, assumes that there is a threat which justifies this, and then starts shooting as well. What this means is that police members shoot not because they have themselves perceived a threat, but because another member of the SAPS has apparently done so and is shooting.

1063. Mr De Rover said that he saw evidence of "associative threat perception" at Scene 1, namely officers firing because others were doing so, without necessarily having perceived the threat themselves. That would not provide any justification for that use of force.

1064. The evidence of Mr White was that this situation can be avoided by designating particular members of the unit or the line as having responsibility for identifying particular members of a crowd who are a threat to life, and giving them the responsibility of dealing with that. We submit that this would be the appropriate approach: while there may always be some threat of "associative threat perception", identifying the members of the tactical unit who have specific responsibility for dealing with such threats would limit the risk of an undifferentiated volley of fire from police members who did not themselves identify a threat, and in fact may not even have been clear what they were firing at, except in the general direction of the "target" group.

The need for operational officers to have control over operational decisions

1065. After some prevarication, the SAPS version became that the decision to implement the "tactical option" on 16 August was taken by the Provincial Commissioner on 15 August, with the support of the National Commissioner.

1066. The Provincial Commissioner, Lt Gen Mbombo, joined the police force in 1980. After training she performed crime prevention duties in Umtata from 1980 – 1981. That is the full extent of her operational experience. Thereafter, as she moved through the

ranks, she held positions in administrative and financial management. At all times she had an administrative job (a desk job). In 2005 she was appointed Provincial Commissioner in the Northern Cape. Thereafter she was appointed as Provincial Commissioner in North West. She has had no experience of ever commanding any Public Order Policing, whether as a unit commander, operational commander or overall commander. She has in fact never worked in Public Order Policing at all except for once when she was young, when she was a constable in Umtata.

1067. It should be self-evident that the Provincial Commissioner did not have the training, the skills or the experience to enable her to make decisions as to what should be done in the complex and difficult situation at Marikana. She was simply unqualified to do so. Despite this, she made two critical decisions with regard to the operation. First, on 15 August, she made the decision that the "tactical option" would be implemented the next day, if the strikers did not lay down their arms and leave the koppie that morning. That decision was inexplicable, and no real attempt has been made to explain or justify it. It was frankly reckless. Second, at 13h30 on 16 August, she made the decision that it was now time to move to phase 3 (the tactical phase). This too was a reckless decision. She had been informed of the risks of the operation, but nevertheless proceeded, at a time when there

was no reason to do so. It is not surprising that Maj Gen Annandale required that it be recorded in the Occurrence Book that the decision had been hers.

1068. The National Commissioner was, if anything, in an even worse position. She had been appointed to head the SAPS just a few months earlier, after receiving professional training in social work and having had a professional career focused largely on human resources and on the management of state enterprises. She had no policing expertise and experience whatsoever.

1069. The consequence of this situation is that the two senior officers in the decision-making line were entirely unqualified to make any decisions at all bearing on police operational matters.

1070. In his Recommendations, Mr White fairly put it as follows:

> *"The officer in overall command of the operation (Lt Gen Mbombo) had no relevant Public Order Policing experience. The officer given responsibility for planning (Lt Col Scott) had limited experience in Public Order Policing operations and no knowledge of the SAPS policy on policing of protests. Very few of the senior command team for the operation had recent and relevant training in respect of the policing of protests. Critical decisions were*

taken without reference to what had been 'planned' and therefore what was reasonably foreseeable. A direction to initiate 'stage 3' was issued by the Provincial Commissioner before it had been planned by Lt Col Scott. This critical decision resulted in an unrealistic time frame being imposed that prevented proper planning. No critical examination took place of the plan in the form of a 'challenge process' to the efforts of the planning team."

1071. To this may be added the fact that the designated Overall Commander, Maj Gen Mpembe, was himself not a trained public order policeman.

1072. Under these circumstances, it is hardly surprising that events took such a catastrophic turn when the operation was implemented.

1073. The tragedy at Marikana illustrates the need to operational officers with the necessary training, skills and experience, to have control over operational decisions. We accept that in a major operation of this kind, there is an appropriate decision-making role for the police officers at the top level. However, that must be subject to two qualifications. First, the officers at the top level need to have training, skills and experience in policing. Running a police service is not simply a managerial job: it

requires a high degree of skill in policing operations. This was totally absent in the two key positions at the time of this operation. Second, they should not take operational decisions. Those matters should be decided by the operational officers on the ground.

The role of political decision-makers

1074. We have analysed elsewhere the question of political influence in policing decisions. It is plain that there is an appropriate role for political decision makers. It is also inevitable that in practice, they will play a role. What is necessary is that this should be transparent and accountable. That has been lacking in this instance.

1075. In his recommendations, Mr De Rover recommended as follows:

> *'Where large and special operations (e.g., the Marikana protests) are high public interest/significance and/or present significant risks to safety and security, it is essential that clear policy guidance be given to the Police Service for the conduct of its operations. This policy guidance should identify strategic objectives and formulate desired and acceptable outcomes of any such operations. That policy guidance should be provided in a*

timely manner and should be appropriately and securely recorded, preferably through real time audio and visual recording. Subject to security and other operational requirements it should also be made public. The latter two requirements will serve to minimise the risk of political or other interference in public order management. Equally it will serve to manage public expectations with regard to police capabilities and anticipated police responses.'

1076. We endorse that approach.

Militarization and demilitarization

1077. The National Development Plan was published by the National Planning Commission during November 2011. Chapter 12 of the Plan deals with 'building safer communities'.

1078. The National Planning Commission found that after 1994 there had been a decision to demilitarise the police force. However, there had been a remilitarisation of the police in recent years. Mr Hendrickx found that there had been a remilitarisation of the police since the time when he worked with the SAPS. He explained what is meant by militarization, in a report which he

submitted to the Commission titled 'Notes on Militarization and De-militarisation of the Police'. He stated as follows:

> *On the organisational level, the traditional view on the role and position of the police in society implies that the police are being managed as an army … This may lead to characteristics such as army officers and command, military rank and hierarchy. Military discipline, military training, military culture, and the restriction of rights and liberties of personnel. On the operational level this traditional view may lead to an operational militarization of the police, define as performing military duties and or implementing military principles in performing police duties. The implementation of military principles in the performance of police duties leads to the use of violence and arms as an appropriate means to solve problems; thinking in terms of 'enemies' resulting in an approach that does not solve problems but only combats systems. These principles are mostly applied and highly visible in public order policing and the reactive style of police in interventions performed as fire fighters.'*

1079. The National Planning Commission summarised its conclusions in this regard as follows:

'The decision to demilitarise the police force, moving away from its history of brutality, was a goal of transformation after 1994. The remilitarization of the police in recent years has not garnered greater community respect for police officers, nor has it secured higher conviction rates. Certainly a paramilitary police force does not augur well for a modern democracy and a capable developmental state. The Commission believes that the police should be demilitarised and that the culture of the police should be reviewed to instil the best possible discipline and ethos associated with a professional police service.

1080. The Commission then dealt with this subject in more detail. It stated as follows:

"Civilianising a highly militarised and politicised police force was a transformation objective after the 1994 elections. It was considered necessary to professionalise the police, establish a rapport with communities, develop confidence and trust in the police, and promote positive community-police relations. The goal was to transform the police from a paramilitary force to a police service that meets all the criteria of a civilian professional entity. Demilitarisation required changes in police insignia,

military ranks and force orders to create a civil police service as the first phase of community policing. The second phase consisted of changing policing methodologies from a 'kragdadige' style to one which placed the community at the centre of policing through community policing …

"From 2000 however, the police service gradually started resembling a paramilitary force. This process was formalised with the reintroduction of military ranks in 2010. It took place against the backdrop of increasing violent crime, high levels of community frustration and fear, and a perception that the old military police ranks would command greater respect from communities. However, these arguments are inconsistent with the police's mandate in a modern democracy. They also neglect the challenges of developing greater competence and skills in the police to respond to growing complexity and changing patterns of crime.

1081. The Commission quoted a work by R Balco, which has a strong resonance with what happened at Marikana:

'The most obvious problem with the militarisation of civilian policing is that the military and the police force have two distinctly different tasks. The military's job is to seek out, overpower, and destroy an enemy. When those soldiers attempt to avoid them, collateral casualties are

accepted as inevitable. Police, on the other hand, are charged with 'keeping the peace', or 'to protect and serve'. Their job is to protect the rights of the individuals who live in the communities they serve, not to annihilate the enemy.'

1082 We deal elsewhere in these submissions with the conduct of the police on 16 August 2012. The conduct of the SAPS at Scene 2, in particular, is typical of a military rather than a police response. 295 rounds of live ammunition were fired at the strikers at Scene 2. At the very most, 14 rounds of live ammunition were fired at the police at Scene 2.

1083. Firing hundreds of rounds into the koppie is typical of a military action, aimed at overpowering and destroying an enemy. A policing operation would be limited to firing shots at particular members of the group on the koppie who posed an imminent threat to life. With the exception of those few with whom there was an engagement at close quarters, the only strikers who could have been a threat of imminent danger to life would have been those who were shooting firearms, as they were all at some distance from the police. It is clear from the evidence that either none, or very few, of the strikers who were killed had been shooting at the police. The obvious question, then, is why they were shot. The explanation is that this was a paramilitary operation, with the aim of annihilating those who were perceived

as the enemy. Mr De Rover stated that he agreed "absolutely" with the view of Lt Col Scott that once it was clear that the strikers had holed themselves up at koppie 3, it would have been preferable to retreat rather than firing 295 live rounds into the koppie.

1084. The events at Marikana underline the correctness of the analysis of the National Planning Commission.

1085. The National Development Plan holds as follows:

> *'The South African Police Service has been under strain as a result of serial management crises over the past few years. Coupled with organisational rank changes to military ranks without any or further training in judgement, discretion and professional conduct,' these crises have had a detrimental effect on police culture and subcultures… The Commission therefore recommends that the South African Police force be demilitarised. This is a short term objective which should happen in the immediate term. Furthermore, the organizational culture and subcultures of the police should be reviewed to assess the effects of militarisation, demilitarisation, remilitarisation and the serial crises of top management.'*

1086. The National Planning Commission submitted a draft of its report to the SAPS for its comments, before it finalised the National Development Plan. The SAPS was invited to make comments. Those comments were placed before the Commission. In its response, the SAPS did not take issue with the contention of the Commission that there had been a remilitarisation, and that demilitarisation was necessary, including in relation to ranks. Rather, it commented:

> *'This should not be confined to police insignia, military ranks and force orders but should address the training and development curricula with a view to effecting a mental change required for policing today and future.'*

1087. The National Commissioner first gave evidence during March 2013. She stated that she was aware of the recommendations of the National Planning Commission. She was then asked whether she agreed with them. This led to a very lengthy answer, which appeared to culminate in a statement that she did agree with them:

> *"So I understand and I think it's a journey that we will all try and travel."*

1088. The senior evidence leader and then the chair both tried to get an answer from her as to whether she agreed that the demilitarisation was "a short term objective which should happen

in the immediate term". There efforts met with little success. The closest she came to answering this question was to say:

> *"I may not be having the end times but this work in progress is pumping and it's very active."*

1089. It is now three years since the National Planning Commission published the National Development Plan, and more than two years since the report was handed to the President. It is of course correct that the reintroduction of military ranks into the SAPS is only one manifestation of the remilitarization which took place after 2000. However, it is an important signifier and symbol.

It is a matter which can be readily addressed, through regulations made in terms of the SA Police Service Act. It is inexplicable that three years after the National Planning Commission published its report – with which the SAPS has never expressed any disagreement – the military ranks still remain in place, and no indication can apparently be given as to when, if at all, this issue will be addressed.

1090. We have drawn attention above to the finding by the National Planning Commission that one of the characteristics of the police force under apartheid was that it was "a highly militarised and politicised police force", and that civilianising the force was a transformation objective after the 1994 elections. Regrettably,

it has to be said that if depoliticisation did take place at the same time as demilitarisation, the remilitarisation has been accompanied by a repoliticisation. We refer elsewhere in these submissions to the improper and inappropriate political considerations which guided the conduct of both the National Commissioner and the Provincial Commissioner. This too is a matter which requires urgent attention. The National Planning Commission recommended 'the professionalisation of the police by enforcing the code of conduct and a police code of ethics, appointing highly trained and skilled personnel, and establishing a body to set and regulate standards'.

1091. This is an urgent priority, and it has to start at the very top. Other senior officers and rank and file members of the SAPS can hardly be expected to see the need for the SAPS to act in a non-political manner, and to act accordingly, if the example set by their most senior leaders is exactly the opposite.

1092. In Recommendations which he submitted to the Commission, Mr De Rover made the following comment:

> *'In most modern democracies the appointment of police leadership is an executive function – ensuring an appropriate separation from the political process. Most modern democracies also require that police leaders are experienced law and justice practitioners. There has also*

been a clear departure, in recent years, from the paramilitary style of police organisation, which is characterised by military ranks and hierarchical, centralised decision-making. On all three matters South Africa has taken a rather different approach: senior police appointments are highly politicised, non-experts are appointed; and the organisation is paramilitary in structure and functioning.'

1093. He somewhat tactfully concluded:

"It is well beyond my remit to make a judgment on the success or otherwise of that approach. However the Commission's work may have provided some insight into issues around leadership that could be usefully addressed in its recommendations. As a minimum, SAPS requires consummate professionals on [in?] key strategic positions to provide the organisation with the effective leadership it desperately needs.

SAPS accountability and "lessons learned": a reluctance to admit error

1094. Mr White concluded that there did not appear to have been any serious attempt by the SAPS, through debriefing or otherwise, to identify mistakes made and lessons learned in the events of 9–

16 August. The 9-day conference at Potchefstroom (Roots) was aimed at preparing a presentation for the Commission, and not at identifying errors or lessons learned. From the outset, he contended, the SAPS at a corporate level adopted a defensive approach, setting out a justification for the deaths caused, before a full investigation was conducted into the facts. He contended that this approach in the aftermath of the shooting incidents may have set a tone which discouraged proper reflection and internal examination of what had gone wrong, and "potentially encouraged the adoption of a robust defensive stance". He questioned whether the SAPS leadership and/or unit commanders made any serious attempt to encourage their members to provide full, detailed and frank accounts of what happened. The evidence of the senior police officers who were involved in the operation revealed a distinct unwillingness to engage with the tragic consequences of the police action, and a failure to acknowledge errors or accept responsibility for the deaths which occurred. Such evidence as that of the internal of review of the events, showed only a very limited internal review focused predominately on technical inadequacies rather than the key strategic and tactical errors which led to the tragedy.

1095. We submit that all of these criticisms are fully justified – both by the evidence to which Mr White refers, and by the other evidence

to which we refer in these submissions. His conclusions are if anything understated in certain respects.

1096. On a number of occasions, the SAPS undertook to provide the Commission with a document setting out what lessons the police considered they had learned from the events at Marikana, and what steps they were taking in this regard. The Chair stated that it was not good enough to wait until the report of the Commission was produced, because incidents might take place in the interim. Mr De Rover took a similar view: he said one of the first things he did when he came to South Africa was talk to the National Commissioner and point out that having regard to the circumstances that produced the outcome at Marikana, the least that the SAPS should try to do is alter its method of operation to prevent a similar occurrence from simply happening again, because such things could happen again while attempts were being made to establish what had gone wrong and how it went wrong.

1097. Maj Gen Annandale had said (on 15 May 2013) that the SAPS would produce a document setting out the lessons learnt from Marikana. On day 173 (23 January 2014), the leader of the SAPS legal team informed the Commission that SAPS had informed him the previous day that Mr De Rover was working on it. Asked by the Chair when the Commission was likely to receive it, the leader of the SAPS team said that he had been

told the previous day that his clients had made contact with Mr De Rover to establish 'the timelines for that report to be here'.

1098. When this was put to Mr De Rover, he stated that he had never been requested to prepare a report. What SAPS said, namely that he was working on it, was not correct. The SAPS has not explained how and why this incorrect information was given to the Commission.

1099. The SAPS repeatedly undertook to produce a document setting out the lessons learned from what happened at Marikana. Ultimately, at the very end of the Commission's hearings, the SAPS produced Exhibit YYYY, headed 'Lessons Learnt Marikana: A Submission to the Farlam Commission'. It is a highly technicist report. A particular concern is that by the time SAPS produced exhibit YYYY, it had had access to the detailed and penetrating analysis of the operation which had been prepared by Mr White. Yet it did not address the fundamental issues in the operation which had been identified by Mr White:

1099.1. Overall lack of accountability and failure to accept responsibility;

1099.2. Poor audit trail of decision-making, and poor recording of the operation;

1099.3. A mindset which treated the crowd as a single violent entity rather than a grouping of different individuals;

1099.4. Absent or reckless planning;

1099.5. Inadequate briefing of SAPS members;

1099.6. Errors of strategy, tactics and proportionality at both scenes 1 and 2;

1099.7. Absence of timely first aid to those shot at scene 1.

1100. Mr De Rover stated that his experience of his meetings with the SAPS, where he pressed them to identify the lessons learned from what happened at Marikana, was that there was a genuine reticence to do so, because of the fear that identifying lessons learnt would amount to an acknowledgement that mistakes had been made:

> *'I felt there was that equation of a lesson learned is a mistake made and not a more positive approach that when you conduct any operation of any kind, whether successful or not, you try and draw from that operation the positive and negative points that facilitate the learning organization experience so that you retain what was good and that you seek to remedy what went wrong.'*

1101. It is understandable that an institution would attempt to shield itself from criticism in a situation such as this, and that it would

be reluctant to invite criticism by explicitly or implicitly acknowledging mistakes that were made. That, however, is what is required of the SAPS. It has a duty of public accountability and truth-telling, because it exercises force on behalf of all South Africans, and all South Africans are entitled to know whether what was done in their name was justified.

1102. This reluctance to admit mistakes must have been fuelled by the statement of the National Commissioner to the police parade on 17 August, to which we refer elsewhere in these submissions, that:

> *'Whatever happened represents the best of responsible policing. You did what you did, because you were being responsible.'*

1103. Such a statement will inevitably lead to a closing of ranks, and an unwillingness to admit error. It is not surprising that in his dealings with the SAPS, Mr De Rover experienced a reticence to identify lessons learnt, for fear of admitting that a mistake had been made. This attitude is the best explanation for the nondisclosure of evidence to which we refer elsewhere in these submissions.

1104. This raises a structural issue which was identified by Mr De Rover in his evidence. He said that a problem arose from the

fact that very shortly after the events, SAPS members who had fired shots were required by IPID to make 'warning statements'. He had seen many statements that fell far short of the requirement of explaining what was the imminent threat to life or serious injury, in order to enable one to judge whether such fear existed and whether there was an imminent threat that warranted and necessitated the response:

> *'…The explanation I was given for that is IPID's involvement, where people are no longer witnesses of truth that because of their public office can help you and assist you and should assist you to piece together in detail what happened, but now they are suspects, because these warning statements basically accuse them, you know, tell them you're a suspect of murder now and you are advised to avail yourself of legal support. You are advised of the fact that you do not have to say anything if you do not wish to do so. Now personally I think well, if I can't really oversee [foresee?] the consequences of speaking with that warning being, I'd rather say nothing for the time being, and I think many SAPS members elected that path, even when I tried to engage them.*
>
> *"…The first session I held with the people for scene 2 necessitated a general to come in and give them an order*

to speak to me because nobody was prepared to answer. Not even a question as to where were you."

1105. He said of the statements of those who had fired shots on 16 August:

> *'They all sing much of a tune and they don't offer you much of clue. And where they do offer a clue I'd actually want detail, the same detail that you want. So they're a frustrating bunch of statements in that sense and that is a given.'*

1106. As Mr De Rover repeatedly said, it is a fundamental necessity that police members should be "witnesses of truth". That requires that they speak freely and frankly. The achievement of that goal in relation to truth-seeking and accountability is, however, undermined by the well-intentioned IPID process. There clearly is a need for alleged police misconduct to be investigated by an agency which is independent of the SAPS, and IPID is intended to perform that function. However, the manner in which the system operates appears to be counter-productive, at least in instances where a substantial public interest is involved such as is the case with regard to Marikana.'

CHAPTER 14

THE SAPS PARADE ON 17 AUGUST 2012

1) On the afternoon of 17 August the National Commissioner and the Minister addressed a parade of SAPS members.[594]

2) The National Commissioner's speech contained the following:

> *"I come before you to actually say, trying as it may be, mourning as we are, let us take note of the fact that whatever happened represents the best of responsible policing.*
>
> *You did what you did, because you were being responsible, you were making sure that you continued to live your oath of ensuring that South Africans are safe, and that you equally are a citizen of this country and safety starts with you.'*[595]

3) When one bears in mind that the statement was made on the day after 34 civilians had been killed by members of the SAPS and the President announced that a Commission of Inquiry would be established, the statement that 'whatever happened represents the best possible policing' was singularly inappropriate because it set out what was from then on to be the official police line: that no blame at all attached to the police for what

[594] Affidavit by National Commissioner, Exh FF2, para 27
[595] Transcript from video recording VVVV5

happened because they had been responsible in doing what they did. This was calculated to effect a closing of the ranks, encouraging those who had participated in the operation to withhold contrary information from the Commission and indeed to deny that mistakes had been made and things had been done that could not be described as 'the best of possible policing'.

4) The National Commissioner clearly did not, and to be fair, could not know all the relevant facts and she exposed herself to a cross-examination in which she cut a sorry figure when things that had happened and which were recorded on video or in photographs were shown to her and she was asked whether they represented 'the best of responsible policing'.

5) After she had finished the Minister spoke. His speech was short and, like the National Commissioner's, communicated unequivocal support for the actions of the SAPS. It contained the following:[596]

> *You must know that as your Minister and on behalf of the Government, the Executive as a whole, on behalf of the President of the Republic, Commander in Chief of all the armed forces in this country, we are all behind you. We know what we have gone through this period, this week and we would want you to continue ensuring that lives are saved,*

[596] Exhibit CCCC 7 and CCCC 8.1

property is protected against anybody who would want to do bad things in this country.…

There will be criticism [inaudible – of lives?] lost but here as your leadership we are confident that what you have done you did it in trying to ensure that the rule of law reigns in South Africa. We are not going to allow anybody to run amok in the country, to want to turn South Africa into a banana republic. It would be painful and it is painful that in the process life is lost but we are a professional force and we must keep to that. We must ensure that at all times we do everything in our power so that anarchists do not think that SA is their stage. From the bottom of my heart as your Minister, I want to thank you on behalf of our government. I want to thank you and commend what you are doing. Continue to protect your country. Continue to protect the citizens of South Africa. It is your duty. It is your constitutional obligation. And I thank you.'

6) He did not go as far as heaping praise on the SAPS for 'the best of responsible policing', but his exhortation to the police 'to continue ensuring that lives are saved [sic]' and his words of commendation for what they were doing were also calculated to bring about a closing of the

ranks and to discourage any SAPS member who was minded to tell the Commission that things had not gone as well as they must have hoped they would. The Commission appreciates that the Minister and the National Commissioner may well have been confronted with what appeared to be a serious lack of morale on the part of those involved in the operation and that they would have considered it necessary to address that. But it was, in the Commission's view, a serious error of judgment on their part to go as far as they did in giving what would have been understood to be an unqualified endorsement of the police action.

7) While the Commission cannot find, as the evidence leaders suggest, that it is likely that the Minister and the National Commissioner discussed the approach in advance, it is firmly of the view that his remarks and her remarks were ill-advised and may well have had the result of hampering the Commission in its work for the reasons stated above.

CHAPTER 15

The report submitted to the President and the media statement made by the National Commissioner on 17 August 2012

1) When the shootings took place the President was at a SADC meeting in Mozambique with the Minister of International Relations, who requested the National Commissioner to have a report prepared so that the President could decide whether to continue attending the SADC meeting.[597]

2) A report was prepared very late on 16 August and sent to the Minister of International Relations in the early hours of 17 August.[598] A copy of the report was handed in as Exhibit FFF4.

3) On the morning of 17 August the National Commissioner held a media briefing at which she read out a statement which is Exhibit FFF5.[599] The information in this document was obtained from the commanders at Marikana.[600]

4) Both statements were drafted by a communications team consisting of Brig Mashego, the head of SAPS Public Relations and Capt Dennis Adriao, the

[597] Day 64, Phiyega, pp 6834 - 6838
[598] Day 64, Phiyega, pp 6834 - 6835
[599] Day 64, Phiyega, p 6838
[600] Day 64, Phiyega, p 6839

police's media liaison officer, who collated the information, provided by the commanders and drafted the statements. [601]

5) Exhibit FFF4, which records the death toll as 29, was clearly drafted before FFF5, which reflects the death toll as 34. Although the wording of the two statements is for the most part identical, there is (apart from the different death toll figures), a very material difference.

6) FFF4, the report to the President and the Minister of International Relations, makes it clear that there were two separate incidents in which the strikers were shot and killed. The relevant part reads as follows:

> *'When the Police started deploying the barbed wire fencing, a militant group from the protesters armed with weapons, pangas, spears, axes and firearms, hastily flanked the vehicles deploying the wire. They were met by members from the Police who tried to [riposte] the advance with stun grenades. The attempt was unsuccessful and the Police members had to employ force to protect themselves from the charging group. This resulted in the death of 16 protesters with 13 wounded at that scene.*
>
> *The dispersion action had commenced at this time and the protesters were driven from their stronghold to a high bushy*

[601] Day 105, Phiyega, pp 11351 - 11352

ground in the close vicinity. The Police members encircled the area and attempted to force the protesters out by means of water cannons, rubber bullets and stun grenades. The Police advance to arrest the armed protesters resulting in Police officers having to again employ force to defend themselves at close quarters. This resulted in 13 more protester deaths with 15 more wounded at the second incident.

More people were reported to have died after being taken to the Mine hospital.

The total death toll of the protesters currently stands at 29 with more than 71 critically injured and others being treated for minor wounds.'

7) It is thus clear that when this report was prepared the compilers knew that there had been two separate shooting incidents at different places, which came to be known subsequently as scene 1 and scene 2.

8) FFF5, the media statement prepared later, does not disclose this. It creates the impression that there was only one shooting incident, which culminated in the police having to defend themselves with maximum force against a storming group of strikers who fired shots and wielded dangerous weapons.

9) The relevant parts of this statement reads as follows:

> *'When the Police started deploying the barbed wire fencing, the group of protesters armed with dangerous weapons and firearms, hastily flanked the vehicles deploying the wire. They were met by members of the Police who tried to [riposte] the advance with watercannon, teargas as well as stun grenades. The attempt was unsuccessful and the Police members had to employ force to protect themselves from the charging group.*
>
> *The dispersion action had commenced at this time and the armed protesters were driven from their stronghold to a high bush ground in the close vicinity. The Police members encircled the area and attempted to force the protesters out by means of water cannons, rubber bullets and stun grenades. The militant group stormed towards the Police firing shots and wielding dangerous weapons. Police retreated systematically and were forced to utilize maximum force to defend themselves.*
>
> *The total death toll of the protesters currently stands at 34 with more than 78 injured.'*

10) The statement (in FFF4) that 13 strikers had been killed before the dispersion actions started was excised as was that separate death and injury toll at scene 2. In addition an allegation that at the end of the engagement the police had to deal with the militant group which stormed at them, firing shots and wielding dangerous weapons was added to the statement.

11) The effect of these changes in the statement issued to the public was materially misleading because it created the impression that there had been only one shooting incident, which led to the deaths of the strikers. The public who had seen on television the shooting at scene 1 would inevitably have concluded that all the deaths had occurred while the police were defending themselves against 'the militant group [which] stormed towards the police'. The changes were clearly not accidental because, as has been said, the wording of the relevant parts of the statement was otherwise virtually identical.

12) The National Commissioner when asked to explain the difference was unable to do so, except to say that it was 'important for us not to be putting in detail that may not have been fully confirmed'.[602] But that answer is not a valid explanation of the changes. In fact she conceded [603] that it was fair to say that she could not explain the reason for the changes. She added, however, that she was 'the owner and reader of the statement'.[604]

[602] Day 105, Phiyega, p 11360
[603] Day 105, Phiyega, p 11361
[604] Day 105, Phiyega, p 11361

13) The Commission agrees with the evidence leaders' submission[605] that 'the most reasonable conclusion is that the report which had been prepared for the President and the Minister was deliberately amended when it was reformulated into a media statement in order to obscure the fact that there had been two shooting incidents, separate in time and space. This resulted in a deliberate misleading of the public, who were brought under the impression that all of the deaths had been caused at the confrontation as scene 1 which they had seen on television'.

[605] Evidence Leaders Heads, para 891

CHAPTER 16

Brig Calitz's briefing to SAPS members at a parade on 18 August

1) Before operations commenced on 18 August Brig Calitz addressed a parade of SAPS members to brief them on the tasks they were to perform that day. Although the briefing was recorded by the SAPS on videotape, the videotape was initially not disclosed by the SAPS. It was not on the SAPS external hard drive which was provided to the Commission, despite the fact that videos in the same sequence before and after it were on the hard drive. The indications are that it was deliberately concealed.

2) Brigadier Calitz clearly did not want members of the media to record what he said. He instructed police officials to take a camera from a member of the media who was present, to check the recording that had been made and to record over it if necessary.[606]

3) The address he delivered contained the following:

> *'I have seen yesterday afternoon and I see that again this morning, the morale of the people is very high. So from the management side thank you. I believe most of you have listened to what the Minister have said. Yesterday after we went from here we were*

[606] Exh JJJ82, Transcript of Brig Calitz's address, p3

addressed by the President himself. Myself, the National Commissioner and all the Lt Generals here we were addressed by the President. We gave him a full presentation …then he announced that there will be a board of inquiry. Some of you might wonder what is now going to happen. Remember, after any action, there is now a board of inquiry that will sit and then take it frame by frame, minute by minute of what happened …

The police, we will give our 100% operation. Okay. At this stage we did nothing wrong. From the planning to the execution was 110%. Exactly how we plan it and it is not often that this happens in this large group. I have to congratulate you. Exactly how we planned it and we briefed the commanders, exactly we executed in that line. The force continuum, we did the water cannons, we did the stun grenades, we did the tear smoke, we did the push-back, we tried. When it was ineffective the guys run back. Né?

We tactically retreat, and you have to face the Nyala in order to get in there. So it is right, your actions was completely right. By retreating and going back to your safe haven. Therefore we got over to the second phase and that is where the TRT line and the

> *NIU line was formed. And when they become under attack, that is where the command was given by their Commanders as well as some of them act in self-defence. Alright? So on that, nothing, nothing, nothing was wrong. Okay? You acted? It was justified and that is exactly the commitment and co-operation that we are going to give the people. So those people that still needs to fill the …….and say how many rounds'.*[607]

4) While the Commission understands that he must have felt the need to bolster the morale of the members present and does not criticise him for that, many of the remarks he made were inappropriate.

5) Paragraph 11(3)(a) of Standing Order (General) 262 contains the following:

> '(3) If the use of force is unavoidable it must meet the following requirements:
>
> (a) the purpose of offensive actions are to de-escalate conflict with the minimum force to accomplish the goal *and therefore the success of the actions will be measured by the results of the operation in terms of cost, damage to property,*

[607] Exh JJJ82, p2

injuries to people and loss of life.' [The Commission's italics.]

6) Using that measure one can see that the operation was not a success: it was in fact a disaster of monumental proportions.

7) When asked how he could have said 'from the planning to the execution was 110%. Exactly how we plan it', he said that he was aiming to motivate the police who had to go into the field again and that what he meant was that the wire was uncoiled, the vehicles had moved in a line and the dispersion line and basic line were correctly formed. [608]

8) This explanation is clearly unacceptable. The big question engaging all minds at the time was whether the killings were justified. The statement that 'from the planning to the execution was 110%' would have conveyed to his listeners that their conduct on 16 August at scenes 1 and 2 was in order and that similar conduct, if repeated in the operation they might well have to undertake that day, would also be in order.

9) There is a further problem with his speech to the members. Like the speeches of the previous day by the Minister and the National Commissioner it was likely to have the effect of a closing of the ranks and discouraging SAPS members who knew of mistakes made from disclosing the truth to the Commission.

[608] D157, Calitz, pp 17829 - 17831

CHAPTER 17

The Roots Conference

1) The call up instruction for the Roots Conference dated 25th August 2012 states that it is a call up for debriefing and preparation for the judicial commission of an enquiry.[609] The conference was held between 27th August and 8th September 2012 at Potchefstroom. Colonel Van Graan was appointed as a convener of the conference. Colonel Scott was responsible for collating all the video and photographic material and Colonel Visser compiled the narrative, all of which subsequently became the presentation to the Commission as Exhibit L.

2) It is clear from the evidence that the conference was not a debriefing as envisaged in Standing Order 262, but rather a preparation of the presentation for the purposes of the Commission.[610]

3) The SAHRC submitted that the failure to hold debriefings led to the SAPS not engaging in the process of identifying the lessons that were learnt or the mistakes that were made during the operation.[611] They quote Mr White's comment that they were perhaps justified in foregoing a debriefing session in order to avoid the appearance of collusion in advance of the Commission.

[609] Exhibit GGG 3
[610] SAHRC Heads of Argument paragraph 1.3.5.
[611] SAHRC Heads of Argument Paragraph 1.3.4

However they submit that justification as not holding true in the light of the meeting that was held in place of the debriefing.

4) They submit that while the approach was not necessarily inappropriate, in that the SAPS did need to collate material and present evidence to the Commission, they level substantial criticisms against the manner in which the meeting was held, and which might be perceived as an opportunity to collude.[612] They cite as an example that many of the statements of the senior officers of the SAPS were compiled after or towards the end of the Roots Conference.

5) They submit that the SAPS did in fact use Roots as an opportunity to collude in that various aspects of the case of the South African Police Services are materially false and that the South African Police Services failed to comply fully with its discovery obligation to discover vital documents relevant to the process.

6) They suggest that steps should have been taken to record and minute the meetings at Roots and they should have invited independent parties and a senior official from IPID to attend. This seems to be a most prudent suggestion.

[612] Heads of Argument paragraph 1.3.7

7) The Evidence Leaders in their Heads of Argument set out in a crisp analysis, their criticisms of the product of the Roots Conference.[613] Many anomalies only became known to the Commission after Colonel Scott made his hard drive available to the Evidence Leaders in September 2013, a year after the Commission had commenced hearing evidence. They submit:-

(a) that there is a complete absence of any self-criticism in Exhibit L and that Roots turned into an exculpatory exercise.

(b) that the version constructed with regard to the strikers changing direction towards the informal settlement on the 13th and which resulted in the South African Police Services having to intervene to prevent an attack, was sharply contradicted by the evidence before the Commission.[614]

(c) that in Exhibit L, the presentation was that the South African Police Services plan had been carefully worked out in consultation with POP officers and had been in place since Tuesday, 14 August 2012. The evidence was, however, that the plan had been compiled by Colonel Scott on the morning of 16 August 2012 without the participation of any POP officers.

(d) that the decision to move to the tactical phase of the plan was stated as arising because of the escalation of the risk of violence on 16

[613] Heads of Argument paragraphs 913 to 929
[614] Heads of Argument paragraph 919

August, whereas the evidence was that the decision had already been taken at a meeting of the NMF on the evening of 15 August 2012 without reference to those officers on the ground at Marikana. Further, that the original tactical plan for encirclement of the koppie was abandoned at the JOCCOM meeting at 13h30 on 16 August 2012.

8) The evidence leaders submit that because of these constructed versions, the South African Police did not disclose the full minutes of the JOCCOM meetings on the 15 and 16 August 2012 and submitted instead tailored versions which would be consistent with the versions constructed. They cite as an example the failure to disclose the contemporaneous notes kept in the JOC during the meetings of the JOCCOM on 16 August 2012 and the manuscript notes taken by Captain Moolman where the 16th was referred to as 'D Day' and which was not reflected in the the typed minutes.

9) They also criticise the failure to disclose the holding of the extraordinary meeting of the National Management Forum Meeting and the failure to disclose the recording of Major General Mbombo's meeting with Lonmin on 14 August 2012.

10) The Evidence Leaders submit that there was a deliberate removal of material from a draft of Exhibit L which inadvertently included footage of the

Provincial Commissioner's statement at 09h30 on the morning of 16 August to the effect that 'today' they were ending this matter.[615]

11) They submit that both the National and Provincial Commissioners had seen the presentation prior to being submitted to the Commission and they would have been well aware of some of the omissions and misleading information contained therein.

12) The Commission is in agreement with these various criticisms levied against the SAPS. We note that their failure to disclose much of the abovementioned information caused inordinate delays and waste of time in trying to establish the correct circumstances surrounding the events.

[615] Heads of Argument Paragraph 926

CHAPTER 18

The Review panel headed by Brigadier Mkhwanazi

1) The first call up notice signed by the National Commissioner on 27 August 2012 required Brigadier Mkhwanazi, Brigadier Hunter, Colonel Mokhari, Colonel Twala and Colonel Siva to attend a work session on Operational Response Service Policies for the period 29 August to 31 August 2012.[616]

2) The second call up notice signed by the Deputy National Commissioner, Operational services, Lieutenant General Masemola on 30 August 2012, included Major General Geldenhuys from Legal Services, and the work session was to continue from 3 September 2012 to 7 September 2012.[617]

3) The third and fourth call up notices extended the periods of the work sessions from 10 September 2012 to 16 September 2012 and from 16 September to 20 September 2012. They included Captain Percy Govender and Mr Ally from the Secretariat of Police.[618]

4) Each of the notices was copied to the Provincial Commissioners of Gauteng, Kwa Zulu Natal and Northern Cape, as well as to the Divisional Commissioner of Operational Response Services and the Executive Legal Officer.

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[616] Exhibit JJJ203
[617] Exhibit JJJ203
[618] Exhibit JJJ203

5) Brigadier Mkhwanazi did not disclose the existence of this work session to the Commission when he testified, although he did comment extensively on the plan and the incidents of the 13th and the 16th. He specifically said under cross examination that no review process had taken place, and there was no document in existence to indicate the results of any such review should it have taken place without his knowledge.[619]

6) This evidence was tendered on 21 January 2013. The work sessions had taken place between 29 August 2012 to 20 September 2012, some three months prior to his testifying and would have been fresh in his mind. It is remarkable that he chose to deny that any such process had taken place.

7) Colonel Scott was the first witness to disclose that he attended what he called the task team. He said that he thought that one of the purposes of the work session was for the policies of SAPS to be analysed and for the operation to be weighed up against the background of those policies.[620]

8) Brigadier Calitz testified that he attended this meeting where he was shown a map which little wooden blocks to represent the vehicles and he was asked to show where in relation to koppies 1,2 and 3 he and the various vehicles were positioned. This exercise was not restricted to the 16th but included the events of the 13th as well. He was not told the purpose of the exercise. He noticed that notes were kept while he was speaking. He was

[619] Day 28, Makhwanazi, pp. 3540 to 3542
[620] Day 136, Scott, p. 14510

also asked at what stage he moved his vehicles, where he moved them to and why he made certain decisions.

9) He was not told what the purpose of the meeting was. He said that the members of the panel concentrated on what had actually happened during the operation and not on the policies. He thought, at the time, that they were going to draft a report as a result of these work sessions.[621]

10) The National Commissioner denied any knowledge of these work sessions.[622] Provincial Commissioner Mbombo said that she attended the work session on the first day and was told by the members present that the National Commissioner had tasked them to ascertain whether the operation had been in accordance with policies.[623]

11) Major General Naidoo said that he came to know of the parallel process of a policy review whilst he was at Roots and attended one of the sessions.[624]

12) Various other officers testified that they appeared before the task team.

13) An undated document headed 'Final Interim Report'[625] was handed in as being the product of these work sessions. In the first paragraph, it is specifically stated that the document does not represent the debriefing of Marikana Operations as the full debriefing will be done after the commission

[621] Day 155, Claitz, pp.17508-17519
[622] Day 76, Phiyega, p.8100
[623] Day 184, Mbombo, p.22146
[624] Day 194, Naidoo, p.23696
[625] Exhibit LLL 11

finalized its work. There appears to be no detailed analysis of any of the policies and the content of this document does not assist the Commission at all.

14) It is not clear why the work sessions were originally not disclosed to the Commission. The Commission requested the notes made by the members of the panel but no notes were produced.

CHAPTER 19

MR CYRIL RAMAPHOSA

1) During August 2012 Mr Matamela Cyril Ramaphosa, who is now the Deputy President of South Africa, was a non-executive director of Lonmin, having been appointed in July 2010. His appointment to the board followed the acquisition by a company of which he was the founder and chairperson, Shanduka Group (Pty) Ltd ('Shanduka'), through a wholly-owned subsidiary, of 50.03% in another company, Incwala Resources Ltd, a black economic empowerment company which owns an 18% shareholding in two Lonmin subsidiaries, Western Platinum Ltd and Eastern Platinum Ltd. As a result Shanduka Group (Pty) Ltd owns an effective 9% in Lonmin. He subsequently resigned from the board with effect from 31 January 2013. [626] In August 2012 he was also a member of the National Executive Committee of the African National Congress. He was not, however, a member of the government in 2012.

2) During the period 11 to 15 August 2012 e-mails were exchanged between Mr Ramaphosa and Lonmin personnel which formed part of the bundle of documents relevant to phase 1 of the Commission which was submitted to the Commission by Lonmin. They recorded that Mr Ramaphosa had conversations relating to the events at Marikana which are being

[626] Exh FFF29, Statement by Mr Ramaphosa

investigated by the Commission with the then Minister of Police Mr Nathi Mthethwa and with the Minister of Mineral Resources, Ms Susan Shabangu.

3) Counsel for the Injured and Arrested Persons referred to some of these e-mails in his opening statement and characterised them as a long line of e-mails and said that they effectively encouraged 'so-called concomitant action to deal with these criminals whose only crime was that they were seeking a wage increase'. [627] Subsequently, when he cross-examined Mr Zokwana, the President of NUM, he said that he intended to argue that the e-mails were evidence of 'concerted pressure that was being put, among others, on the police – well firstly on the government not to call the strike a strike or not to call it labour related but to call it so-called criminal action and that was a platform from which it would be easier to inflict violence on strikers'. [628] When Mr Ramaphosa testified before the Commission counsel for the Injured and Arrested Persons sought to show a causal connection between Mr Ramaphosa's intervention and the killing of strikers by the police on 16 August.

4) In argument at the end of the hearings counsel for the Injured and Arrested Persons submitted that Mr Ramaphosa's intervention 'triggered a series of events which determined the timing of the massacre. He knew exactly what he was doing and he is the cause of the Marikana massacre, as we know it. It was demonstrated that he has a case to answer on 34 counts of murder

[627] Transcript, opening statement by counsel for Injured and Arrested Persons
[628] Day 42, Zokwana, p 4806

and many counts of attempted murder as well as intent to do grievous bodily harm'.[629]

5) Mr Ramaphosa's counsel submitted that his 'testimony and the evidence given by his interlocutors [the two ministers] to the Commission shows that the accusations ... that were made against him on the strength of the e-mail correspondence and his account of his interactions with the Ministers are groundless'.[630]

6) Mr Ramaphosa first learnt on Saturday, 11 August, about the strike by the RDOs at the mine when he received an e-mail from Ms Thandeka Ncube, Shanduka's representative on the Lonmin Executive Committee. [631] On Sunday, 12 August 2012, at 13h16 he received an e-mail from Mr Albert Jamieson, the Chief Commercial Officer of Lonmin, which was attached to an e-mail Mr Jamieson had earlier sent to Mr Thibedi Ramontja, the Director General of the Department of Mineral Resources, informing him that a 'terrible and distressing situation had developed at Marikana which had resulted in the violent deaths of two Lonmin security officers [Messrs Mabelane and Fundi] with attacks and disruptions continuing. Mr Jamieson told Mr Ramontja that 'at this stage it is clear that probably only a massive police and possibly army presence will stop us having a repeat of recent past experiences or nearby, we simply do not have the capability to protect life

[629] Heads on behalf of Injured and Arrested Persons, para 772
[630] Submissions on behalf of Mr Ramaphosa, para 8.2
[631] Day 271, Ramaphosa, p 34410; Exh FFF29

and limb and I urge you to please use your influence to bring this over to the necessary officials who have the resources at their disposal. We need help'.[632]

7) Mr Ramaphosa told the Commission that after he read this e-mail he felt it 'necessary to respond to the concern [Mr Jamieson] was raising in his e-mail, particularly in relation to the people who had either been injured or had been killed'. He said that he realised that Mr Jamieson was concerned that this could result in more violence and more deaths. [633]

8) He accordingly sent a text message to Mr Mthethwa in the course of the afternoon. Mr Mthethwa telephoned him back just over two hours later and they had a conversation which lasted for just under five minutes. He testified that during that conversation he raised the concern that Mr Jamieson had raised, that people had died and were dying and that the situation was getting worse. He mentioned that Mr Jamieson had requested that the police presence be increased so as to prevent further loss of life. He informed the Minister that the situation he had been told about on the ground was 'such that they need help, they need more police presence on the ground'.

[632] Exh JJJJ2, e-mail from Jamieson to Ramaphosa
[633] Day 271, Ramaphosa, p 34418

9) He then asked the Minister if he could do something about it. He did not, however, suggest to the Minister what steps should be taken. All he communicated he said, 'was the concern Jamieson had raised and that they needed more help and police presence on the ground would help'. The Minister's reply was that he would look into it, he would talk to his people on the ground and hear for himself what was actually unfolding. [634]

10) Mr Ramaphosa's evidence on the point was confirmed by the testimony of Minister Mthethwa who said:

> *'I spoke to ... Mr Ramaphosa, who had called earlier, or had left a message and I then returned the call. He explained to me that the situation in Marikana is bad. I'm not quoting his exact words, but he says he's concerned because people are dying there, property is being damaged there and as far as he can see there are no police, or adequate police on the ground.'*[635]

11) Mr Ramaphosa said that he understood Mr Jamieson's reason for forwarding to him his e-mail to Mr Ramontja, the Director General of the Department of Mineral Resources, was to seek his assistance because, as he put it, [636]'he [i.e., Mr Jamieson] knew that I knew the Minister of Police and I knew some of the people in authority and as he needed, as the manager on … the

[634] Day 271, Ramaphosa, pp 34418 - 34419
[635] Day 255, Mthethwa, p 32079
[636] Day 271, Ramaphosa, pp 34420 - 34421

ground, assistance he knew that I could communicate a message to the Minister of Police, which I did'.

12) At 21h09 that evening Mr Mokwena sent to Mr Ramaphosa a press release issued by Lonmin, which recorded the deaths of the two Lonmin security officers, Messrs Mabelane and Fundi, and reported other criminal actions which had taken place, including incidents of intimidation and violent action against employees who wanted to report for duty. [637] Early the next morning, at 02h34m, Mr Ramaphosa replied to Mr Mokwena, mentioning that he had a further conversation with Mr Mthethwa, in which, he said, he 'stressed that they should immediately take steps to ensure that they protect life and property and bring those responsible for the terrible acts of violence and deaths to book. H [i.e., the Minister] said that they were working on it'.[638]

13) In his evidence before the Commission Mr Ramaphosa explained what he had meant when he made this request:

> *'When I said that they should be brought to book, I had anticipated and expected that those who were responsible would be identified and they would be arrested which is what I expect the police to do normally in pursuing their tasks and duties. … It occurred to me that where these incidents had occurred, one got the full details thereof, police presence*

[637] Exh JJJJ5, Media release, 'Lonmin condemns fatal attacks'
[638] Exh JJJJ4, e-mail, Ramaphosa to Bernard and others

was either absent or very minimal and that is why I felt these people were being attacked and being killed in the way they were.'[639]

14) He was then asked if the Minister conveyed anything more to him than that the police 'were working on it'. His reply was that the Minister did not convey anything to him other than that and that he had just said that they were working on it and were aware of the unfolding situation.[640]

15) In his evidence Minister Mthethwa stated that during one of his two conversations with Mr Ramaphosa on 12 August Mr Ramaphosa said that he did not think that what was happening was 'pure industrial action in the true sense of the word: It had criminality on it and violence'. [641] The Minister added that when Lieutenant General Mbombo spoke to him he tended to understand where Mr Ramaphosa was coming from 'because industrial action as you would understand it is that the Constitution and the Gatherings Act allow people to picket, to march, to demonstrate and do all sorts of things unarmed. Now, if there's an action, a protest action or industrial action, and lives of people are lost that's criminal so I understood where they [Mr Ramaphosa] and Mr Zokwana, [who also spoke to the Minister on 12 August] were coming from.'[642]

[639] Day 271, Ramaphosa, p 34424
[640] *Ibid*
[641] Day 255, Mthethwa, p 32091
[642] Day 255, Mthethwa, p 32092

16) Mr Ramaphosa did not mention this detail in his testimony in respect of either his conversations with the Minister but in an e-mail he sent to Mr Jamieson at 12h18 on 15 August, which will be dealt with more fully below, he said, 'all government officials need to understand that we are essentially dealing with a criminal act. I have said as much to the Minister of Safety and Security'.[643] This is clearly a reference to what he said to Minister Mthethwa on 12 August because he had no further interaction with him before the tragic events of 16 August.

17) In her evidence Lieutenant General Mbombo said that she received a telephone call from Minister Mthethwa on the evening of 12 August in which the Minister told her that he had received a report from Mr Ramaphosa, asking if he knew about what was happening at Marikana and stating 'this appears to be a problem, he [the Minister] should please look carefully at it'.[644]

18) In her conversation with Lonmin management on the afternoon of 14 August, which was recorded without her being aware of it and which is dealt with in the Chapter 9 above, she referred to this telephone call and said that the Minister 'mentioned a name to me that is also calling him, that is pressurising him … Cyril Ramaphosa'. [645] Lieutenant General Mbombo said that the word 'pressurising' was hers and not the Minister's.[646]

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[643] Exh BBB4.2, e-mail Ramaphosa to Jamieson
[644] Day 178, Lt Gen Mbombo, p 21321
[645] Exh JJJ192 *bis*
[646] Day 178, Lt Gen Mbombo, p 21323

19) At 14h48 on Monday 13 August Mr Ramaphosa received a further e-mail from Ms Thandeka Ncube in which she summarised what had happened at Marikana since the events of the morning of the previous day and mentioned the killing of two more Lonmin employees 'which brings us to a total of four dead employees'.[647]

20) On Tuesday, 14 August, at 16h28 Mr Roger Phillimore, the chairman of Lonmin, sent an e-mail to, among others, Mr Ramaphosa attaching a note from Ms Tanya Chikanza, the Head of Investor Relations at Lonmin, which summarised the current situation at the mine.[648] Mr Phillimore referred to 'the massive police intervention' which 'had a significant effect' and added 'the challenge will be to sustain it'. He also said that his attempts to speak to 'the Minister' had not yet succeeded. It does not appear from the e-email to which Minister he was referring but Mr Ramaphosa said that he thought that it was the Minister of Mineral Resources.

21) Later that day, at 18h35, Mr Ramaphosa had a telephone conversation with the Minister of Mineral Resources, Ms Shabangu. At 00h47 the next morning Mr Ramaphosa sent Mr Phillimore an e-mail in which he summarised this discussion. The summary reads as follows:

[647] Exh JJJJ6, e-mail Ncube to Ramaphosa
[648] Exh BBB41, e-mail Phillimore to Ramaphosa and others

'Discussion with Minister Susan Shabangu – I called her and told her that her silence and inaction about what is happening at Lonmin was bad for her and the Government. She said that she was going to issue a statement. She was going to be in Cape Town to attend a Joint Parliamentary Session and would be back in Johannesburg later today to attend to the Lonmin matter. I told her that I would also be in Cape Town and suggested that we should have a discussion and see what she needs to do.'[649]

22) Mr Ramaphosa's account in his evidence of this conversation reads as follows:[650]

'The discussions I had with Minister Shabangu who was then the Minister of Mineral Resources, were that the situation at Lonmin was deteriorating, more and more people were getting killed and injured and that was a matter of great concern to me because I knew how this type of situation can just escalate into more and more violence and I was saying that we need to make sure that at a government level we sensitise people so that the

[649] Exh BBB4.1, e-mail Ramaphosa to Phillimore
[650] Day 271, Ramaphosa, pp 34431 - 34432

Minister of Police can be of assistance and deploy more police who can protect life and property.

MR UNTERHALTER SC: Yes, it appears also from the summary and point 1 [a reference to Mr Ramaphosa's email at quoted above], that you had indicated that inaction and silence was not desirable. Did you raise this matter with the minister?

MR RAMAPHOSA: Yes, I did because being the minister responsible for these matters I felt that she needed to be communicating a government view and I have said that to her even on a number of occasions, whenever there are mining accidents I am one of those who often say, Minister, people have died on the mines, you as the minister concerned need to be making a statement and taking a position, it is your responsibility to be heard because she is in a leadership position.'

23) At 09h43 the next day, 15 August, Mr Jamieson sent an e-mail [651] to Mr Ramaphosa in which he thanked him for his help so far but mentioned 'two areas of concern, *viz.:*

[651] Exh BBB4.2, e-mail Jamieson to Ramaphosa

'…

The Minister was on radio today saying she'd been briefed that this was a wage dispute and management and unions should sit down and sort it out. Not sure who's briefed her, we are waiting to talk to her (Roger), and although not too damaging it's also not too helpful. I've had two discussions with the DG and in each case have characterised this as NOT an industrial relations issue but a civil unrest/destabilisation/criminal issue that could not be resolved without political intervention and needs the situation stabilised by the police/army. I think on both occasions he agreed with me and it reflected what was in our letter but now I'm not sure – I have a call in to him this morning.

We are grateful the police now have c.800 on site. Our next challenge is sustaining this and ensuring they remain and take appropriate action so we can get people back to work. It would be good to have some independent confirmation the police have plans to sustain a presence for at least a week and numbers don't wane by the weekend.

If you can talk to the Minister please could you influence these things with her and encourage her to make time to talk to Roger?

24) At 12h18 that day, before he had seen Minister Shabangu, Mr Ramaphosa replied to this e-mail and sent an e-mail, [652]part of which has been quoted above. The full text reads as follows:

> *'…*
>
> *Thank you for your email. I am currently in Cape Town and will have a discussion with her.*
>
> *I thank you for the consistent manner in which you are characterising the current difficulties we are going through.*
>
> *The terrible events that have unfolded cannot be described as a labour dispute. They are plainly dastardly criminal and must be characterised as such. In line with this characterization there needs to be concomitant action to address this situation.*
>
> *You are absolutely correct in insisting that the Minister and indeed all government officials need to understand that we are essentially dealing with a criminal act. I have said as much to the Minister of Safety and Security.*
>
> *I will stress that Minister Shabangu should have a discussion with Roger.*

[652] Exh BBB4.2, e-mail Ramaphosa to Jamieson and others

…'

25) Not long after sending this e-mail Mr Ramaphosa met with Minister Shabangu and had a discussion with her after which, at 14h58 he sent another e-mail [653] to Mr Jamieson, Mr Mokwena, Ms Ncube, Mr Phillimore and Mr Farmer, the CEO of Lonmin, which read as follows:

> *'I have just had a discussion with Susan Shabangu in Cape Town.*
>
> *She agrees that what we are going through is not a labour dispute but a criminal act. She will correct her characterisation of what we are experiencing.*
>
> *She is going into Cabinet and will brief the President as well and get the Minister of Police Nathi Mthethwa to act in a more pointed way.*
>
> *She will be in Johannesburg by 5pm and would be able to speak to Roger.*
>
> *Let us keep the pressure on them to act correctly.'*

[653] Exh BBB4, e-mail Ramaphosa to Jamieson and others

26) Mr Ramaphosa [654] testified that he saw her very briefly and 'more or less repeated precisely' what he had said to her the previous evening during their telephone conversation. He said that Minister Shabangu said after hearing the number of people killed, that she conceded that it was no longer just a labour dispute but that there was criminal activity involved 'because why would people just be targeted like this and be killed'.[655]

27) Mr Ramaphosa explained what he meant by his use of the phrase 'in a more pointed way' as follows:[656]

> *'I meant that what we wanted to communicate to government that we're dealing with people who are being killed and what we need to do is to prevent further deaths occurring, and acting in a pointed way would mean that those who are perpetrating those acts should be arrested so that that comes to a stop and does not carry on any further. That is acting in a pointed way.'*

28) He was then asked:

> *'As far as continuing to contain the situation, did you have anything else in mind as far as how the*

[654] Day 271, Ramaphosa, p 34432
[655] *Ibid*
[656] Day 271, Ramaphosa, pp 34443 - 34444

police should go about ensuring that there was no further escalation?'

29) He replied:

No, I did not have anything further in mind except that the police need to do their job and as I understand it their job is to have a presence where acts of criminality are taking place, to prevent further acts of criminality and to arrest those who they know have perpetrated such acts so that they do not carry on perpetrating those acts. That is the sum total of what I expect the police to do.'

30) In answer to a question as to whether the problem would have gone away, without police intervention, if management and workers had got together and sorted the matter out, he replied:[657]

'… if that track had been pursued it could have borne some fruit, but what was of prime importance then was that we were dealing with a situation that was highly volatile where people were getting killed, and for good or bad reason we felt that we needed to

[657] Day 271, Ramaphosa, p 34594

stabilise the situation first, that we should prevent further people from being killed and in my view that does not exclude the fact that once the situation is stabilised, or as you stabilise it you will be able to talk to people and negotiate.'

31) In her evidence Minister Shabangu said that she met Mr Ramaphosa when she was on her way to a meeting of a Cabinet Committee and that the discussion they had lasted about five minutes. According to her, the meeting was not in the early afternoon between 12h18 and 14h58, the times of Mr Ramaphosa's two e-mails, but in the morning before 10h30. [658](Regard being had to what Mr Ramaphosa said in the two e-mails it seems as if Mr Ramaphosa's recollection as to the time of the meeting is to be preferred to Minister Shabangu's, but nothing turns on the point.)

32) She admitted that she told Mr Ramaphosa that she was going to raise the matter with the President and the Minister of Police. As it turned out the President was not available that day and the Minister of Police was not there either. [659] (According to his evidence he was travelling around in KwaZulu Natal in the course of his duties and he never got any message of that kind.)[660]. She said that she had already decided to raise the violence at Marikana with them and that Mr Ramaphosa did not raise the matter with

[658] Day 278, Minister Shabangu, pp 35552 - 35554
[659] Day 278, Minister Shabangu, pp 35582 – 35583
[660] Day 255, Minister Mthethwa, p 32084 - 32371

her: on the contrary she raised it with him and told him that she intended raising the issue with them. [661] She also said that she first raised the question of a criminal element being involved with people dying and said that Mr Ramaphosa agreed with her. [662] She denied that she said to him that she was going to correct her characterisation of what was being experienced or that he had persuaded her to do so. She also denied that she had said that she would get Minister Mthethwa to act in a more pointed way or that she had said that it was not a labour dispute.[663] She agreed, however, that Mr Ramaphosa shared his view that what was happening in Marikana could no longer be characterised as a labour dispute. [664]

33) She agreed that in an earlier radio interview she had characterised the matter as a labour dispute [665] and that only after her discussion with Mr Ramaphosa was a statement made by her department in which it was said that she was gravely concerned about what was happening at Marikana and would engage the Minister of Police. [666]

34) Counsel for the Injured and Arrested Persons raised the contention quoted in paragraph 3 above. Earlier in his argument counsel submitted that Mr

[661] Day 278, Minister Shabangu, p 35587 and pp 35590 - 35591
[662] Day 278, Minister Shabangu, p 35593
[663] Day 278, Minister Shabangu, pp 35592 - 35595
[664] Exh CCCC5, statement of Minister Shabangu, para 11(b)
[665] Day 278, Minister Shabangu, p 35592
[666] Exh QQQQ1.3, statement by DMR

Ramaphosa's intervention was, as he put it, 'infested with a litany of conflicts of interest'. [667]

35) During his cross-examination [668] the e-mail he sent to Mr Jamieson at 12h18 on 15 August was cited as indicating that he had wrongly referred to the labour dispute as being 'dastardly criminal', and had said it had to be characterised as such and had to be addressed by 'concomitant action'. It is clear that the 'terrible events' to which Mr Ramaphosa referred were the serious criminal offences, including murders which arose from attempts to enforce the unprotected strike by violence and intimidation. These events arose in the context of a labour dispute which resulted in the strike. But Mr Ramaphosa's reference to the 'terrible events that have unfolded' cannot reasonably be construed as a reference to the labour dispute or the strike. As the evidence leaders correctly submitted 'the words plainly refer to the murders and other acts of violence which had taken place. Those were indeed criminal acts and they did indeed need to be addressed in that fashion'.[669]

36) The Commission is in full agreement with the evidence leaders' submissions contained in paragraphs 972 to 981, as follows:

[667] Heads on behalf of Injured and Arrested Persons, para 6421
[668] Day 271, Ramaphosa, p 34762
[669] ELs' Heads, para 971

'972. It is not in dispute that Mr Ramaphosa said to Minister Shabangu that these events went beyond a labour dispute, involved criminal conduct, and required the involvement of the police. She then expressed a similar point of view, and did so publicly after the meeting. Not much turns on whether she reached the view of her own accord or a result of Mr Ramaphosa's attempt to persuade her of this. It can hardly be contended that the killings and damage to property were not a police matter, or that it would have been improper to attempt to persuade Minister Shabangu of this. By this time, ten people had been killed. If one excludes for the moment the clash between the strikers and the members of the SAPS on 13 August, to which particular considerations apply, five of the deaths had been the result of murders committed during the course of the strike. It cannot be contended that this was not a serious criminal matter, or that it was improper or inappropriate to seek to persuade the government to see the matter in that light.

973. It is certainly true that the underlying labour dispute also needed to be addressed. It can be contended that Mr Ramaphosa, as a non-executive

director, was insufficiently attentive to the underlying labour dispute. His response to this contention was that this was a matter for management (including Shanduka's representative on the management committee, Ms Ncube) to deal with. We submit elsewhere in this submissions that Lonmin management did not respond adequately to the violently conflictual situation which had arisen. It may well be that the directors, and perhaps particularly Mr Ramaphosa given his background, should have appreciated the need for urgent action to address the underlying labour dispute, and should have intervened actively to ensure that management took such action. While the matter had to be dealt with in part as a policing matter, that was not likely to be sufficient. It was also necessary to address the underlying labour dispute. There was certainly no reason to be confident that if some strikers who had allegedly committed the murders had been identified and arrested, that would have brought an end to the violence.

974. However, we submit that it cannot be fairly suggested that the call for 'concomitant action' to be taken in respect of murders and violence, involves the

exercise of inappropriate political influence, or an attempt to have the police brought in to break the strike. In Mr Ramaphosa's capacity as a director of Lonmin, he may well have had a legal obligation to take what steps he could to prevent the killing or injuring of Lonmin's employees, the damaging of its property, and the damaging of its business.

975. It follows, we submit, the Mr Ramaphosa's intervention with the Ministers was not inappropriate or inadmissible. We deal below with the consequences of that intervention.

976. We submit that it is self-evident why it was Mr Ramaphosa, and not another Lonmin director or a Lonmin executive, who made the call to the Minister of Police on Sunday 12 August, and who met Minister Shabangu on Wednesday 15 August. He was a senior office-bearer of the African National Congress, and he knew the Ministers and other key role-players in government. As a result, he had access to them and influence with them. Suggestions to the contrary, for example that he had no greater access or influence than ordinary members of the people, are plainly fanciful. This is demonstrated by what happened in this

instance. Lonmin's previous attempts to gain access to Minister Shabangu, for example by approaching the Director-General, had met with no success. Mr Ramaphosa was able to gain access by telephoning her.

977. The question which arises is whether it was improper or inappropriate for Mr Ramaphosa, in his capacity as a non-executive director of Lonmin, to use his political influence, political access, and personal connections in this manner.

978. It was suggested in cross-examination of Mr Ramaphosa that he had a conflict of interests in this regard. This was because he was 'wearing more than one hat' when he initiated the conversation.

979. A conflict of interests arises when an individual has more than one interest, and one of the interests is incompatible with one or more of the others. In that situation, it is not possible for the person concerned to be loyal to both sides. The individual concerned must either declare the conflict and say that he or she is acting only in a particular capacity, or recuse himself or herself from the matter.

980. In this instance, Mr Ramaphosa wore the 'hats' of non-executive director or Lonmin, a significant shareholder in Lonmin (through its shareholding structures), and a senior member of the ANC, the governing party. He also had personal connections with some of those involved in government. If what Mr Ramaphosa did was attempt to persuade the Minister to ensure that there should be greater police presence on the ground so as to prevent further loss of life, there was no incompatibility in the interests which he had in the matter. The interests of Lonmin, the African National Congress, and the interests of those with whom he had personal relationships, were not incompatible: they all had an interest in putting an end to the killings which had taken place. The only people who had an interest in a continuation of the killings were those who were carrying them out.

981. The various interests might fairly be described as a confluence or an overlapping of interests. Mr Ramaphosa was correct in saying that if someone is trying to help solve a situation, which would save lives

or would advance the common purpose of everyone, it should not be seen as a conflict of interests.'

37) The evidence leaders point out (in para 1004 of their heads) that the objective evidence shows that Mr Ramaphosa was not aware of the decision made on Wednesday, 15 August to move to the tactical option if the strikers did not lay down their weapons and leave the koppie. They develop the point further in para 1005 as follows:

> *'However, it is likely that the precipitate (and still unexplained) decision of 15 August, to move to the 'tactical phase' the following day if the strikers did not lay down their arms and leave the koppie, was at least partly the consequence of the senior police officials feeling the need to act and be seen to act. The telephonic discussion which Mr Ramaphosa had with the Minister, and the discussions which the Minister then had with Mr Zokwana and with the National and Provincial Commissioners, are likely well have been a factor in that decision. Mr Ramaphosa's call to the Minister may be seen as the first in this chain of calls. However, there is no evidence which suggests that Mr Ramaphosa knew or should have anticipated that the SA[P]S would act as precipitately as a result of his call to the Minister, or that he should have anticipated that*

> *the consequence of his call on the police to deal with the murders and violence would be that they would kill 34 people. His evidence was that his concern was to prevent a situation where 'more and more people would be killed'. There is nothing which he said or did, which suggests the contrary. At the time of the Impala strike, he had intervened by speaking to Minister Mthethwa, and saying to him that the weak police presence had resulted in deaths. That did not result in events of the kind which took place at Marikana.'*

37) While the Commission does not disagree with what is said by the evidence leaders in this regard it must be borne in mind that there is no reason to believe that the SAPS would have reacted to the events during the period 11 to 16 August any differently if Mr Ramaphosa (and for that matter Mr Zokwana) had not contacted Minister Mthethwa. In view of the serious crimes committed by some of the strikers, the fact that they were not willing to lay down their dangerous weapons, despite the fact that their continuing possession thereof was an offence, and the daily coverage in the media of what was happening at Marikana, it was inevitable that the SAPS would bring in extra members in an attempt to bring the situation under control and restore law and order. It was also inevitable in the circumstances that Minister Mthethwa would have been in touch with the National Commissioner and Lieutenant General Mbombo to keep himself informed as to what was happening and to satisfy himself that the SAPS were adequately

dealing with the situation. The Commission is of the view that it cannot be said that Mr Ramaphosa was the 'cause of the massacre'.

38) There is no basis for finding that Mr Ramaphosa's evidence as to what he did and said in his interaction with the Ministers was inaccurate. It is important to note in this regard that Mr Ramaphosa reported regularly by e-mail to the management of Lonmin on the interactions and that his evidence is entirely consistent with the e-mails sent by him.

39) He had no reason to believe that the SAPS would launch the precipitate, ill planned and poorly commanded operations, which caused the deaths of 34 strikers on 16 August. In fact he in his e-mail sent at 00h47 [670]on 15 August to Mr Phillimore he stated that he had spoken to Mr Zokwana, the President of NUM, who said that he and Mr Frans Baleni, the Secretary General of NUM, wanted to meet him and Mr James Motlatsi, a former NUM President, on Friday, 17 August, 'to discuss what they should do as a union going forward'. This indicates that he did not envisage any sudden operation such as in fact took place on 16 August. This is also demonstrated by Mr Jamieson's e-mail sent at 09h43 to Mr Ramaphosa where he said that 'it would be good to have some independent confirmation the police have plans to sustain a presence for at least a week and numbers don't wane by the weekend'.[671]

[670] Exh BBB4.1, e-mail Ramaphosa to Phillimore
[671] Exh BBB4.2, e-mail Jamieson to Ramaphosa

40) There is no basis for the Commission to find even on a *prima facie* basis that Mr Ramaphosa is guilty of the crimes he is alleged to have committed.

41) The Commission agrees with the submissions by Mr Ramaphosa's counsel that the accusations made against him by counsel for the Injured and Arrested persons are groundless.

MINISTER NATHI MTHETHWA

42) Counsel for the Injured and Arrested Persons submitted that the Commission should recommend to the National Director of Public Prosecutions that he should consider prosecuting Minister Mthethwa for the murder of the 34 strikers who were killed on 16 August at Marikana.

43) Counsel for Minister Mthethwa submitted on the other hand that her client cannot be held liable for the tragic loss of lives at Marikana and that no such recommendation should be made.

44) In order adequately to deal with the contentions raised in this regard it is necessary to consider what the role of the Minister of Police is under our Constitution and the relevant legislative provisions.

45) The relevant section of the Constitution is Section 206, which is headed 'Political responsibility'. Subsection (1) reads as follows:

> *'A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.'*

46) If follows from this that the Minister has two functions: to be 'responsible for policing' and to 'determine national policing policy'. This implies that his or her functions are not limited to purely policy matters.

47) Section 207(2) of the Constitution deals with the functions of the National Commissioner. It provides that he or she 'must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing'.

48) Thus the Minister is not only responsible for policy but may also issue 'directions' to the National Commissioner.

49) As the evidence leaders submit,[672] this scheme contemplates a division of powers between the Minister and the National Commissioner. The Minister has political responsibility, must determine national policing policy and may issue directions. Operational and managerial control of the police falls within the functions of the National Commissioner.

50) The Commission also agrees with their further submissions [673]that 'it would … not be correct to assert that it would be improper or inappropriate for the Minister to intervene in policing matters by making contact with the National Commissioner (or for that matter a Provincial Commissioner), expressing concerns about a particular situation which has come to his or her notice, and instructing that the matter must be attended to. It would however be improper and inappropriate for the Minister to issue directions as to how a particular operation is to be carried out. This does not fall within the Minister's function and it is likely to be a matter in respect of which the Minister has no experience of skill'.

51) Minister Mthethwa testified that he had three telephone conversations with the Provincial Commissioner during the period in question. The first, which lasted for just over five and a half minutes was at 18h47 on 12 August 2012, after he had spoken on the telephone to Mr Ramaphosa and Mr Zokwana, the then President of NUM, who both told him what had happened earlier that day and that it appeared that there were not adequate police on the

[672] ELs' Heads, para 960
[673] ELs' Heads, para 962

ground. In his conversation with the Provincial Commissioner he sought to ascertain whether the reports Messrs Ramaphosa and Zokwana had made to him were correct and to find out what the SAPS were doing about the matter. Lieutenant General Mbombo confirmed the correctness of the reports and told him what the SAPS was doing and what was happening. [674]

52) The Minister's second conversation with Lieutenant General Mbombo, which took place the next day, 13 August, at 18h36, lasted just under six minutes. She briefed him on the events of the day, told him what the SAPS was doing and said that she did not consider the SAPS incapable of managing the situation and that more members had been deployed to the area. [675]

53) His third telephone conversation with Lieutenant General Mbombo occurred at 06h50 on the morning of 15 August: it lasted just under three minutes. He asked whether there was anything he needed to be briefed on before he commenced his duties that day and was told that the situation was still the same. [676]

54) Minister Mthethwa also testified that during the period from 12 August to the shootings on 16 August he had one conversation with the National

[674] Day 255, Minister Mthethwa, pp 32078 - 32081
[675] Day 255, Minister Mthethwa, p 32093
[676] Day 255, Minister Mthethwa, p 32096

Commissioner. [677] This conversation, which last two minutes and 39 seconds, took place at 19h52 on 14 August. She told him what had been happening and gave him the assurance that the SAPS had the required capability to handle the situation. The next conversation he had with her was on 16 August after the shooting, at 17h00, when she telephoned him and briefed him about the tragedy. Subsequently that evening he had three further conversations with her, when she provided further information about what had happened. [678]

55) He repeatedly insisted that at no stage did he place any pressure on either Lieutenant General Mbombo or the National Commissioner to take any form of action. As regards his conversations on 12 August with Mr Ramaphosa he said that he did not regard him as having endeavoured to put pressure on him.[679]

56) When the e-mail Mr Ramaphosa sent to his Lonmin colleagues at 14h58 on 15 August in which he reported on his conversation with Minister Shabangu and said that she had said she would brief him, Minister Mthethwa, 'to act in a more pointed way', he said that he was not in Cape Town that day but was completing his ministerial work in KwaZulu Natal, which started three days earlier and that no-one prevailed upon him on 15 August to act in a pointed

[677] Day 255, Minister Mthethwa, pp 32094 - 32095
[678] Day 255, Minister Mthethwa, pp 32097 - 32099
[679] Day 255, Minister Mthethwa, p 32112

way. [680] According to his telephone records he did not have any conversations with Minister Shabangu.[681]

57) The National Commissioner, as the evidence leaders put it, [682] 'threw no light on what role, if any, the Minister played in relation to the events of 16 August. Repeated attempts to get her to say what the Minister did before the events of 16 August produced no satisfactory answer'. Among other things she said of the Minister, 'he's a political leader. He gives us leadership in that space and support'. [683] When asked what specific support the Minister gave before the shootings on 16 August she said: [684]

> *'… he is our political leader. He took, gave us politic(al) support. He gave us that leadership because I do not have the responsibility of communicating in that space or dealing with issues in that regard, and that is the best answer I can give you.'*

58) Mr Madlanga SC, who was the senior evidence leader at the time, asked:

[680] Day 255, Minister Mthethwa, p 32084
[681] Exh CCCC para 85
[682] ELs' Heads, para 984
[683] Day 65, Phiyega, p 6870
[684] Day 65, Phiyega, p 6872

> *'So must I take your best answer to be that you cannot be specific on the political direction nor can you be specific on the support the Minister gave you?'*

59) The National Commissioner's answer was:

> *'I have said he has given us leadership, he has given us political support, and that enabled us to do our work.'*[685]

60) The evidence leaders correctly submit [686] that these 'answers were not only unhelpful, they were distinctly evasive. It is not clear why she wished to be evasive'.

61) The decision made on 15 August, allegedly by Lieutenant General Mbombo and 'endorsed' at the extraordinary session of the NMF that the tactical option would be implemented the next day if the strikers did not lay down their arms voluntarily remains inexplicable. No explanation was given as to why it was necessary that it be implemented in the course of the day on 16 August, some time after 09h00 when it became clear that the strikers were not prepared to lay down their arms, at a time therefore when the number of

[685] Day 65, Phiyega, pp 6872 - 6873
[686] ELs' Heads, para 987

strikers on the koppie was likely to be at its highest. Four possible reasons are suggested by the evidence: the desire to pre-empt intervention by Mr Malema to defuse the situation (a motive suggested by Lieutenant General Mbombo in her conversation with Lonmin management on the previous day); or the rising costs of the operation (a factor mentioned by Lieutenant General Mbombo when she saw Mr Mathunjwa before he went to the koppie for the first time on 16 August); or to break the strike (as Lieutenant General Mbombo said in her media conference at 09h30 on 16 August and in her interview with eNCA shortly after); or pressure or guidance from the executive; or a combination of two or all of these reasons.

62) The fourth possible reason, pressure or guidance from the executive, was suggested in the course of his evidence by Mr De Rover, the expert called by the SAPS. After saying that he had heard of the meetings of the NMF 'as a rumour' [687]in his first week in South Africa, he said:[688]

> *'One thing I do know is that in no democratic country an incident that doesn't only have national security ramifications but definitely serious economical dimensions, does a police force decide that it is time for whoever is there to go. That decision comes and originates from somewhere else and it may well be that then becomes the subject for a discussion in a*

[687] Day 286, De Rover, p 37070
[688] Day 286, De Rover, p 37071

management forum of the police but it's an order that comes from the executive and the police must implement that order.'

63) The Chairperson then asked him:[689]

'When you say that it was an order from the executive, are you basing it on something you were told at the time you heard the rumour or what is the basis of your saying that?'

64) Mr De Rover's answer was:[690]

'Now if you call that meeting, and with what I have said about police forces in a democratic society, I would be very surprised that SAPS would have been permitted to make that decision on its own alone and not guided or would not have actively sought the guidance of the executive on this prior to doing it …

[689] Day 286, De Rover, p 37073
[690] Day 286, De Rover, pp 37075 - 37080

You cannot have a police force essentially deciding on issues that have such ramifications attached to it and consequences as Marikana, on its own

[W]hat I maintain as my opinion is that I would expect a political direction to a situation of this kind … If it's an incident that puts at risk the interests of a big international enterprise, that obviously is of economic important to South African police, if it puts at risk lives and communities and if it occasions now with regularity death and injury, I can't imagine that just to be policing questions and that directions and choices that are made are not subject to political scrutiny or political advice, at least to a National Provincial Commissioner, and I remember at least from the early days of the Commission that a lot of discussion was held about who called whom, what phone calls were made, what e-mails were sent, who engaged themselves on this issue … I think the problem for me is that it is less than transparent who involved and engaged themselves because – and it's simply on my expectation of having been in so many countries around the world, that operations of this kind are not left to the police to run there because the policy that would underpin the action needs the sanctioning from

the executive and the judiciary. It can't be the police alone.'

65) He said that he asked Lieutenant General Mbombo why the decision was taken by the NMF to 'endorse' her 'proposal' and said she told him that after the meeting a few of the members remained behind and then 'we had that discussion'. He stated that he had a problem accepting this 'as an utterance of how modern democracies work because the ramifications of such an action would invariably come back on the government as they did after Marikana. So to imagine in reality that that was given a go-ahead or left to go-ahead without the government having its say on it but still being confronted now with the consequences of it … I just can't imagine a reality where that is par for the course'.[691]

66) He said that he put this problem to the SAPS officers who were instructing him. He had lengthy discussions on the topic with Major General Mpembe and Major General Annandale, who told him that they shared his view. They were, however, not privy as 'eye-witnesses or witnesses of fact' to any information that helps in this regard. All that they said was that they shared his view. [692]

[691] Day 286, De Rover, p 37082
[692] Day 286, De Rover, p 37083

67) He said that he also put this view to the National Commissioner, who gave him 'a diplomatic answer'. When the Chairperson asked whether by 'diplomatic' he meant evasive, his reply was: 'Ja'.[693]

68) The evidence leaders made energetic but unsuccessful efforts to obtain the original audio record of what was said at the NMF meeting. Mr Budlender raised this matter in an open session of the Commission on 17 January 2014. He said that the evidence leaders had been attempting to obtain materials relating to the NMF meeting on 15 August 2012 from the SAPS for the purposes of the evidence of Lieutenant General Mbombo. Among the materials sought was the tape recording of the meeting. He said that they were told that the meeting was recorded and that the recording had been preserved. He stated that they had requested in on 17 November 2013 and again since then but had not received it. He said that the legal team acting for the SAPS had, so the evidence leaders believed, attempted to secure the materials sought. He added that they had tried to resolve this by other means but these attempts had not succeeded. He asked the Commission to intervene and address the matter. The chairperson then asked Mr Semenya, the leader of the SAPS team, to see to it that the evidence leaders received the materials sought. He said that if the materials were not made available he would expect the National Commissioner to appear before the Commission in person, not to give evidence but to explain the reason for this lack of co-operation. Thereafter the materials sought were provided to the evidence leaders except for the original recording which it

[693] Day 286, De Rover, pp 37083 - 37084

was said had been lost. A copy made on 21 August 2012 was furnished but this did not contain a recording of the extra-ordinary session, which it was said was not recorded. This is unlikely as the main part of the meeting was recorded and the discussion thereafter was clearly regarded as part of a meeting of the NMF because it was included in the draft minutes as a discussion of item 7 on the agenda.

69) According to the evidence of Major Gugulethu Lethoko, of the Section: Executive Secretariat and Information Management in the office of the National Commissioner, she attended the meeting of the NMF on 15 August but left before the extraordinary session. [694] A memory stick on which the proceedings were recorded was, she was told by Sergeant Cedrick Matthys, of the South African Police Service Division: Supply Chain Management (who was present at the meeting on 15 August), handed for safe-keeping to Brigadier Ledile Sheile Malahlela, the head of the section: Executive Secretariat Risk and Information Management, who took it to her home. [695]

70) On 17 August, Major Lethoko, while preparing the minutes, realised the need to listen to the audio recordings. As the memory stick had not been brought to the office she sent an e-mail to Brigadier Malahlela, asking for the memory stick to be made available to her so that she could load it on to her computer for compiling the minutes and filing (She stated that the original recordings were generally filed in a locked cabinet in her office after their contents were

[694] Day 270, Major Lethoko, p 34374
[695] Day 270, Major Lethoko, p 34377

downloaded onto her computer.)[696]. She did not receive a reply until midday on Sunday, 19 August, when she received an e-mail from Brigadier Malahlela telling her she would leave it for her secretary, Kagiso Tlale to collect from her house.[697] As Major Lethoko had not received it by the morning of Tuesday, 21 August, she sent an e-mail to Kagiso Tlale, asking him to collect it if Brigadier Malahlela had not already given it to him. Major Lethoko received the memory stick later in the day.[698] It appears that it did not contain a recording of the discussions during the extraordinary session.

71) According to Major Lethoko memory sticks containing recordings of meeting of the NMF are generally kept in a file in a locked cabinet in her office. The memory stick containing the recording of the NMF meeting of 15 August 2012 was not kept in the locked cabinet but given, after its contents had been downloaded, to Brigadier Mahlahlela's secretary to be returned to her. Major Lethoko said that she could not remember why she returned it to Brigadier Malahlela but that she thought it was because it appeared to be the property of Brigadier Malahlela or 'maybe it had other files'.

72) When the evidence leaders asked for the memory stick which was returned to Brigadier Malahlela to have it examined to ascertain if it had contained a recording of the discussions of the extraordinary session they were told that the stick had been lost after being returned to her. As the stick contained

[696] Day 270, Major Lethoko, p 34363
[697] Day 270, Major Lethoko, pp 34379 – 34380
[698] Day 270, Major Lethoko, pp 34382 - 34383

top-secret information it would appear *prima facie* that Brigadier Malahlela is guilty of contravening section 4(1)(b)(dd) of the Protection of Information Act 1982 for neglecting or failing to take proper care of the memory stick. As far as the Commission has been able to ascertain, no disciplinary or criminal proceedings have been instituted against her arising from the loss of the memory stick. She herself, the Commission was told, was not fit enough to testify before the Commission because she was suffering from a stress disorder. Major Lethoko said that Brigadier Malahlela had been off sick for some time but had returned to work about a month before Major Lethoko gave evidence before the Commission.[699]

73) The Commission is satisfied that those who attended the extraordinary session of the NMF should have been able to tell the Commission the reason or the reasons why the decision to implement the tactical option on 16 August if the strikers did not lay down their arms was taken and the only reasonable inference to be drawn from their failure to do so is that they are hiding something. This inference is fortified to some extent at least by the evidence relating to the missing memory stick.

74) The Commission is not able to find that the fourth possible reason for the decision to 'endorse' Lieutenant General Mbombo's alleged proposal, namely what Mr de Rover called 'the guidance of the executive', was not one at least of the factors on which the decision was based. If guidance of the executive played a role, then it is probable that such guidance was conveyed to the NMF by Minister Mthethwa.

[699] Day 270, Major Lethoko, pp 34400 - 34402

75) The Commission wishes to emphasise that it is not finding that such 'guidance' was given. It is, however, unable in the light of what has been said above to find positively in Minister Mthethwa's favour on the point.

Minister Shabangu

76) Counsel for the Injured and Arrested Persons suggested in his heads of argument that the Commission should recommend that the DPP should consider prosecuting Minister Shabangu on charges of corruption and perjury.

77) The Commission does not agree with this suggestion. There is no basis on which it can find that Minister Shabangu passed on to the President (who was not available on 15 August), the Cabinet (which was not sitting) and Minister Mthethwa (who was away on Departmental business in Kwazulu Natal) what Mr Rhamaphosa had put to her. According to her evidence Mr Ramophosa's conversation with her was not the reason for the statement she issued on 15 August in which it was said that the events at Marikana had escalated into a security or policing matter.[700] As the evidence leaders submit[701] ' nothing much turns on whether she reached that view of her own

[700] Day 278 Shabangu pp 35637-35642
[701] EL HOA paragraph 972

accord or as a result of Mr Ramaphosa's attempt to persuade her of this'. This is because the killings, assaults and damage to property *were* serious criminal matters requiring police action.

78) In the circumstances, even if Mr Ramophosa did persuade her to change her stance on the issue, it is difficult to see how any question of corruption can arise. As far as the suggestion that she should be prosecuted fopr perjury is concerned, it is not possible in the Commission's view to find that on the issues where there were differences between her evidence and that of Mr Ramophosa (if one accepts, as the Commission is inclined to do, that Mr Ramophosa'a version is the correct one) she was guilty of anything other than faulty recollection. As has been said, nothing turns on the points where her evidence differs from that of Mr Ramophosa.

79) As far as concerns her statements[702] as to whom she had in mind when referring in a speech she made to a meeting of NUM shop stewards in May 2013 to 'forces determined to use every trick in the book to remove you from the face of the earth'[703], the question as to whether she meant Lonmin or AMCU is so far remote from the issues covered by the Terms of Reference that the Commission does not consider it appropriate to make any recommendations about it.

[702] Day 178 Shabangu pp 35621 - 35625
[703] Exhibit QQQQ1.8, paragraph 5

80) In his oral submissions counsel for the Injured and Arrested Persons submitted that she should be referred to the Ethics Committee of Parliament.[704] The Commission is satisfied that there is no substance in this submission either.

[704] Injured and Arrested Persons HOA para 566

CHAPTER 20

Lonmin's inadequate protection of its employees

1) As early as 20 December 2011, Mr Albert Kent, then acting manager of mining security, addressed a letter to Mr Sinclair in which he raised a grave concern about the safety of security officials and he highlighted how violent unrest situations had become.[705] He stated that Lonmin security personnel are usually the first to arrive on a scene and have to manage a scene until SAPS arrive. He stated that while Lonmin had issued their personnel with riot helmets, bullet proof vests and riot shields this was usually not adequate to protect employees should protestors decide to launch a full scale attack on them. Mr Kent pointed out that they needed armoured vehicles in order adequately to protect members.

2) Mr Blou testified that in 2011 Lonmin had taken a decision to change its approach to security from a paramilitary approach to a softer user-friendly approach. This low-key user friendly approach required that Lonmin security patrol in soft skin vehicles and not in armoured vehicles. Mr Blou stated that the reduction in manpower coupled with Lonmin's disposing of its armoured vehicles limited Lonmin security in its ability to control unrest.[706] Mr Blou conceded that Lonmin had reduced its capacity to such an extent that it was no longer able to deal with serious violence and unrest.[707]

[705] Exhibit FFFF3
[706] Exhibit RRRR1.4 para 35
[707] Day 282, Blou, p. 36240

3) With reference to an e-mail dated 25 August 2011 from Mr Blou, where he enclosed a motivation for a Nyala to be acquired and where he said that the security members remain extremely vulnerable specifically because the vehicles that they were using were soft skin vehicles, Mr Sinclair said he considered the request, had a discussion with Henry Blou and senior managers and then forwarded the request to Mr Frank Russo-Bello.[708]

4) He said the report back was very clear that Lonmin did not want to have hard skin vehicles in their security fleet. He was told that if hard skin vehicles were required, they could be obtained from the security service providers. He said that he did support the acquisition of a Nyala in his personal capacity and he did vocalise that. He said there was no reason forthcoming from Lonmin management for their reluctance to acquire the hard skin vehicles.[709]

5) With regard to armoured vehicles provided by independent contractors, prior to 12 August 2012, one of Protea Coin's two armoured vehicles had caught alight en route to Mooi Nooi. The second vehicle was riddled with mechanical faults. These facts could not have gone unnoticed by Lonmin and should have alerted them to a potential problem with their resources. Mr Botes testified that on the 12th, when he got into the Protea armoured vehicle in order to go to the assistance of Mr Mabelane and Mr Fundi immediately after the attack, the driver could not get the armoured car into gear. When asked whether he was aware whether these mechanical problems played

[708] Day 268, Sinclair pp. 34046
[709] Day 268, Sinclair, p. 34038

any role in why the 'Mamba' was not there in the first place, Mr Botes said that he could not confirm that but he expected that was the case.[710]

6) Mr Blou said that even if there were more security officers, he did not think that they would have been effective in being able to disperse a crowd of 3 000 because of a lack of capacity.[711]

7) Mr Sinclair said that although there were various arrangements made to patrol the areas, the areas were so vast that with their limited resources they could protect some of their workers and some of their routes but not all. He conceded that where there was a strike across the whole of the Lonmin property, they did not have the resources to protect the whole of that property.

8) Mr Blou said that on the 10th and as the crowd were dispersing, he heard threats from various people in the crowd with suggestions that this was not the end of the matter and, whilst he could not point to any specific individuals who uttered the threats, there were voices from the crowd with a level of aggression which he had not previously heard expressed at the mine. The number of people in the crowd was also unprecedented.

9) Under cross examination, he agreed that there was clearly a significant change of mood which required an appropriate response from Lonmin.[712] Mr Blou said that for him that was a game changer at that point. He said that,

[710] Day 265, Botes, p 33425
[711] Day 281, Blou, p. 36225
[712] Day 281, Blou, pp.36154 to 36155

although the crowd had dispersed, it had become apparent that there was a need for Lonmin to establish a JOC which combined the efforts of Lonmin security and the Emergency and Disaster Management to monitor all the developments and to coordinate all the responses.[713]

10) Mr Blou said that a JOC was set up on the afternoon of 10 August 2012 and that this is an important facility which centralises all communications pertaining to a specific event and where stratergic decisions are taken.[714]

11) Under cross examination by counsel for NUM, Mr Blou agreed that it was an alarming assessment that he and Mr Sinclair made at the time on the 10th[715] and that they did ensure that they brought in extra resources to manage the unfolding events. He said they had conversations with private security, Protea Coin Security, and engaged with their counterparts at processing to give them more security to manage the strike. He said that they would later that evening have assessed the situation further and seen whether the people had dispersed completely.

12) Mr Blou said that after the strikers had dispersed, they received information later that afternoon that they wanted to target employees that were not participating in the strike. He had been informed of incidents at Rowland Shaft of employees being intimidated and where security officers had to intervene to protect these employees.

[713] Day 281, Blou, p. 36176
[714] Day 281, Blou, p.36142/3
[715] Day 281, Blou, pp.36176

13) Mr Blou said that on Friday evening, they had security deployments in the area of Wonderkop, Rowland Shaft and Western Platinum Mine. They believed that those deployments were sufficient to prevent intimidation and to protect the employees who wanted to go to work and to protect their property. However, in spite of these arrangements, the people at Wonderkop were intimidated and security was required to intervene.[716]

14) Counsel for NUM referred to paragraph 8.1.3 of Exhibit XXX 8, where it is required that all situations must be closely monitored in order to determine the mood of the people taking part in the industrial action in order to predict possible consequences which may lead to business interruptions or disruptions, intimidation, injury to people, damage to property or disruption of external services.[717] Mr Blou agreed with counsel for NUM that what seemed to be critical in terms of the protocol in this paragraph, was that the mood of the people taking part in the action was a vital tool in order for the security leadership to be able to predict possible consequences. He said that the assessing of the mood included taking note of such things as change of mood.[718]

15) It was suggested by counsel for NUM that a strategic session of comparing notes about the aggression of the crowd and their disturbing behaviour might have produced an appreciation of the scenario that the crowd might take action against people who continue to work and might take action against

[716] Day 281, Blou, pp.36188 to 36199
[717] Day 281, Blou, p. 36147
[718] Day 281, Blou, p.36153

NUM, because NUM had expressed its opposition to the strike.[719] Counsel said that if there had been some sort of examination and discussion of what had happened, then the march to the NUM office on the morning of the following day might not have been that unexpected.[720] Mr Blou said that they did have the strategic session which lasted for about an hour or less, but there appears to be no record of it in the Lonmin logbook.[721]

16) With regard to their assessment of the mood of the crowd and a prediction of what might happen, Mr Blou was asked what arrangements they put in place to deal with a large gathering or another march wherever it might be intending to go and whatever it might be intending to do.[722] Mr Blou replied that their security was at all times concerned with protecting the property and the people of Lonmin and that whatever public gatherings would take place, or what would flow out of that public gathering e.g. public violence, would be a matter for the SAPS to deal with, and they had consistently engaged with the police during that period.

17) Mr Blou agreed that with regard to the place of SAPS in their planning, that when they sought the intervention of the appropriate SAPS personnel, they needed to be able to tell SAPS what it is that they expected. The scenario planning was not only for Lonmin Security but also necessary to tell SAPS

[719] Day 281, Blou, p.36179
[720] Day 281, Blou, p.36181
[721] Day 281, Blou, p.36183
[722] Day 281, Blou, p.36203

what they expected would happen and what they expected SAPS should do to deal with the situation.[723]

18) Counsel for NUM gave an example to Mr Blou that on 10 August 2012, they had information of a large gathering that would move to the LPD offices. They communicated that definite prospect to SAPS, who were able to react by providing four Nyalas, many soft vehicles and a large number of SAPS members, which he said was a significant security presence.[724]

19) He was asked whether he conveyed to SAPS in any meaningful way after the dispersal of the march on 10 August 2012, that this was the largest number of marchers that they had ever had, that the level of aggression was the most intense, that they thought that they might attack Lonmin facilities or the NUM offices in large numbers and that they might need the services of the Public Order Policing unit. Mr Blou said that on the evening of the 10th, they were in conversation with members of SAPS giving them all the necessary information to prepare.[725]

20) Counsel for NUM specifically asked Mr Blou whether he and his colleagues in Lonmin Security identified the possibility of another large gathering of strikers in the course of the early morning of Saturday, 11 August 2012. Mr Blou said that they had received information that the workers, when they dispersed, were not going to go to work. So he knew that they were gathering in the form of a strike and that they would toi- toi, have a gathering

[723] Day 281, Blou, p.36204
[724] Day 281, Blou, pp.36205 - 36206
[725] Day 281, Blou, p.36208

and they would march as well. He agreed[726] that the march would go somewhere by definition. He was asked whether he and his colleagues had, as at 10 August, in the afternoon or the evening, specifically planned for the eventuality that they would have another large march on Saturday morning, 11 August.[727] He eventually did concede that on the evening of the 10th, they must have foreseen that there might be an unplanned march the following morning.[728]

21) He said that what was conveyed to SAPS was that while they anticipated the strike to continue the next day, they would assess the seriousness of the situation and would then communicate it to them. This in effect would mean that they would monitor the situation and then communicate their assessment to SAPS.[729]

22) Under cross examination by Ms Baloyi who appeared for SAPS, Mr Sinclair said that in one of the briefs that he sent to Mr Russo-Bello on the 10th of August 2012, he stated that there was information that was filtering through that employees would not be reporting for work on Saturday, 11 August 2012.[730] He agreed that, if at the time of writing the brief, he had received information that the strikers would be marching to the offices of NUM to attack or to confront them, such information would have been contained in the report.[731]

[726] Day 281, Blou, p.36029
[727] Day 281, Blou, p.36209
[728] Day 281, Blou, p.36211
[729] Day 281, Blou, p.36213
[730] Exhibit FFF 6
[731] Day 283, Sinclair, p.36519 and 36520

23) Mr Blou agreed with counsel for NUM that in the last 10 years or so industrial action in South Africa has very often been accompanied by quite high levels of violence, and that a good deal of that violence is directed towards those who do not participate in the strike.[732]

24) Mr Blou also said that he was aware that on 8 August 2012, there was a NUM mass meeting at Lonmin where NUM had spoken against participation in that strike action and urged employees to go back to work.[733] Mr Blou said he was aware that opposition by NUM to the strike might promote some anti-NUM sentiments amongst those who were intending to embark on the strike action.

25) As to whether he was aware that there would be an attack on the NUM office, Mr Blou[734] answered that they had never before experienced any attack specifically on NUM offices. Their considerations were that they would attack Lonmin property and intimidate people. Consequently, their strategy was to protect their immediate areas in the vicinity like the power stations and the hospital. He said that he had not been aware that the NUM office at Impala had been attacked at some previous stage.

26) With regard to the incidents at the NUM offices on 11 August 2012, Mr Blou said that all the two security officers, Mr Dibakoane and Mr Motlogeloa,

[732] Day 281, p.36151
[733] Day 281, Blou, p.36169
[734] Day 281, Blou, p.36182

could do on the morning was to go to the NUM offices and tell the occupants to vacate the premises, but they could not protect them, nor could they prevent any sort of burning of the buildings or vehicles. Mr Blou said that this was the standing practice that if a large crowd was going towards a building, they instruct the occupants to vacate the place for their own safety.[735]

27) The intelligence received on 11 August 2012 after the incident at the NUM offices and where Mr Mabuyakhuku and Mr Dhlomo were shot is well documented. There was a report by a Lonmin security guard who went undercover to the meeting of the strikers and reported that the strikers had used the services of an inyanga to help them with a planned retaliation against NUM, and that they believed that after the rituals the bullets fired at them would turn to water and the firearms would not be able to shoot bullets. The information was that they were preparing for war.[736] Mr Sinclair's briefing makes it clear that Lonmin security had intelligence available about the serious risk posed by the strikers, and found it appropriate to increase the security status to double red.

28) Mr Blou said he was aware of the information about the group undergoing traditional rituals and of the information that the rituals were in order to turn bullets to water and in preparation for an attack.[737] Nevertheless, there was no anticipation on his part that there would be a repeat attack on the offices

[735] Day 281, Blou, pp. 36218 to 36219
[736] Exhibit RRR2.4 p2
[737] Day 282, Blou, p.36301 and 36302

of NUM on 12 August 2012.[738] He remained of that view until the killing of Mr Fundi and Mr Mabalane on the 12th and never anticipated that such an event might take place.

29) His attention was drawn to an entry in the Lonmin Logbook where it reads that there might be a fight between NUM and AMCU and where the possibility of a conflict and a confrontation had clearly been anticipated and identified. Mr Blou said that they underestimated the militancy of the strike and therefore did not think that the action of the strikers would be on the scale that happened during that weekend.[739] He never anticipated that the strikers would attempt to attack the NUM offices for a second time.

30) Mr Blou was unaware that after the incident on the 11th, there was a debriefing session where it was discussed that there might be a possibility of another move by the strikers on the NUM offices on 12 August 2012 as retaliation for the shooting of two members of the crowd by members of NUM.[740]

31) Mr Sinclair said that it was a very important factor in scenario planning that they had been aware at 07h30 in the morning on Sunday, even before the group started to gather at the koppie, that there was a potential for a revenge attack to take place. He could not explain why it was that Mr Blou was not aware of this information. He agreed that indeed everyone in security ought to have been aware of this information. He also could not explain why it was

[738] Day 282, Blou, p.36295
[739] Day 282, Blou, p.36297
[740] Day 282, Blou, p.36301

that Mr Blou did not know about the double red security status. He said that it should have been brought to the attention of all management and security personnel.[741]

32) Mr Sinclair said that he agreed that the revenge that had been planned would have been more likely against NUM, considering the background to the matter, rather than against Lonmin structures and key points as Mr Blou said. He said that, practically, the deployments of security resources would, as a result of the information, cater for the revenge factor.[742]

33) Mr Sinclair[743] agreed that what happened on the 12th was not a surprise event, as the violence had started on the 10th already and there was an escalation of that violence over a few days and there was sufficient intelligence to assess the extent of the threat. This was with particular reference to the information supplied by the undercover agent that there was a large number of strikers turning violent, preparing for war. Mr Sinclair said that they did take cognisance of the information coming through and did their very best to do what they could.

34) Mr Sinclair agreed that there was a duty on Lonmin when they knew about the attack on Mr Louw and Mr Vorster to inform Mr Mabelane, Mr Fundi and other security personnel about what had happened so that they could make a judgment based on the information placed before them. Mr Sinclair said

[741] Day 283, Sinclair, pp.36549 - 36555
[742] Day 283, Sinclair, p.36557
[743] Day 283, Sinclair, p.36603 to 36604

that he did not know if they got the message but they should have got the message.[744]

35) He agreed that there was a lack of communication from the JOC to the security personnel on the field on the 12th. Mr Sinclair said that the crucial warnings of Mr Louw and Mr Vorster conveyed to the JOC of the attack upon them and that the strikers were very dangerous were not conveyed to the members of the protection services on the ground to give them warning that the strikers were aggressive and posed a threat to them. At page 36606, he conceded that there was a breakdown in communication and that the warnings of Mr Louw did not reach Mr Mabelane or any of the other security personnel. He said that this should have been done and did not understand why it had not been done.[745]

Lonmin's call to employees to go to work

36) In the Lonmin Logbook[746] an entry on 12 August 2012 at 07h40 records that a message was broadcast on Radio Mafisa and Radio North West FM that employees should go back to work.

[744] Day 283, Sinclair, pp. 36628 - 36629
[745] Day 283, Sinclair, pp.36600 - 36601
[746] Exhibit EEEE1.9

37) In the security briefing that Mr Blou held at 06h00 on the morning of 12 August 2012, he emphasised that the personal safety of the security officers was paramount and that they should not endanger their lives in order to protect Lonmin property. He advised them that the strikers were dangerous and they had attacked the NUM office on 11 August 2012.[747] He also explained to them that since it was a Sunday they did not expect any incidents but that they should be careful. He said that they had never previously had any sustained or persistent strike action on Sundays. He thought that the strikers, it being a Sunday, would gather, make a show and then disperse.

38) It was put to Mr Blou that, in circumstances where he had noticed an alarming change of mood, an attack upon the NUM office and intimidation the previous evening, he should, when he saw the gathering at the koppie, have assessed the situation and discussed whether this might not perhaps be preparation for another attack on the NUM office. Mr Blou conceded that they should have, at the time, taken a different view but did not.[748]

39) Mr Jamieson, the Chief Commercial Officer, and a member of EXCO, agreed that Lonmin management was well aware from reports of widespread intimidation that had come in of the dangers faced by its employees who were trying to go to work during the strike. They were also aware of the ongoing threat to the lives and safety of those reporting for duty. He agreed that in view of this Lonmin would have been aware of the need to be very

[747] Day 282, Blou, p.36314 to 36315
[748] Day 282, Blou, pp. 36317 to 36319

careful about calling on workers to report for duty in view of this inherent and serious risk.[749]

40) He agreed that Lonmin should not have encouraged workers to come to work if it had not been confident that it was safe for them to do so, and that to encourage them to come to work in circumstances where Lonmin was unable to adequately protect them would have been reckless.[750]

41) Whilst that was the position early in the morning, even after the killing of Mr Fundi and Mr Mabelane later that morning, Lonmin did not convey to the employees that the violence had escalated since the last radio broadcast and that it was not safe for them to come to work.

42) In an e-mail dated 12 August 2012, Mr Jamieson, in documenting the violence, attacks and disruptions that were taking place, remarked that the situation can neither be described as stable nor under control.[751] He agreed that this remark was made in the context of his describing the violence that had occurred at Lonmin and the intimidation of workers who were reporting for duty. This, he said, was his view as at midday on 12 August 2012.[752]

43) Mr Jamieson said that he had no knowledge of the radio broadcast. He agreed that because two security guards had been murdered already on the 12th, it was not at that stage safe for the employees to go back to work and

[749] Day 287, Jamieson, pp.37295 - 37296
[750] Day 287, Jamieson, p.37300
[751] Exhibit VVVV 1.2
[752] Day 287, Jamieson, pp.37293 - 37294

that the premises were not safe. There was, he said, a heavy duty on Lonmin to contact Radio Mafisa and Radio North West FM to say specifically that employees should disregard their previous communications and not come to work.[753]

44) He said that any member of management who had caused the radio message to have been broadcast early that morning requesting employees to come to work should have after the violence of the morning of the 12th ensured that employees were told about the dangers and that they should not come to work.[754] Mr Jamieson agreed that it was reckless for Lonmin to encourage workers to come to work and also not to discourage them from coming to work.[755]

45) With regard to whether the mine ought to have been closed,[756] Mr Jamieson agreed with the proposition that even if employees did not come to work, essential service people could have been told to come and that the security operation could have focused on protecting them, instead of the thousands of employees who were encouraged to come to work.

46) Mr Sinclair agreed that there was a deliberate campaign from Lonmin encouraging its workers to go to work in circumstances where there were specific threats made in relation to employees at Saffy, K4 and other

[753] Day 287, Jamieson, p.37303
[754] Day 287, Jamieson, p.37304
[755] Day 287, Jamieson, p.37312
[756] Day 287, Jamieson, p.37308

shafts.[757] He said this was in spite of Lonmin's being unable to protect all of the workers and all the routes that employees would travel. He could not explain why in the light of the information that the strikers were planning for war and the realization that non-striking workers could be injured and possibly killed, messages were sent out over the radio encouraging employees to come to work.[758]

47) Mr Sinclair said that the realisation that they did not have the capacity to protect those workers who had been asked to come work had been conveyed up the line in one of his briefs to management.[759]

48) The Lonmin Logbook[760] recorded intelligence coming through of intimidation and possible attacks on K4 Shaft and Saffy Shaft on the 10th and 11th. No specific action seems to have been taken by Lonmin Security based on the intelligence reports.[761] It was put to him that in spite of that not much was done to double up the security at K4 Shaft. He agreed with the proposition put to him[762] that there was not a very effective focus on employee safety at K4 Shaft and that a serious judgmental error was made by Lonmin security in assessing the danger to K4 Shaft.

[757] Day 283, Sinclair, p.36575
[758] Day 283, Sinclair, pp.36580 to 36581
[759] Day 283, Sinclair, p.36582
[760] Exhibit EEEE 19
[761] Day 283, Sinclair, p.36591
[762] Day 268, Sinclair, p.34068

49) Mr Sinclair said that the security at the shafts, including K4 shaft, was outsourced to Protea Coin Security.[763] The risk assessments of the access control points to the shafts were done by Mr Henry Blou and his team but the guarding of those access points was done by an independent contractor. There was surveillance as well at the shafts and that was also done by an independent contractor. He said that co-ordination of all these various aspects would have been done by a designated security manager, who would in this case be Henry Blou.

50) In the light of his broad risk assessment of double red at Lonmin Mines on 12 August 2012, he was asked whether an instruction was conveyed to Protea Coin Security to increase the security measures in place at K4 Shaft.[764] He was unable to answer the question and could not say whether any of these dangers had been communicated to Protea Coin Security. [765]

51) Mr Sinclair agreed that in the light of the fact that their resources were stretched and that they were not able adequately to protect the area around K4 Shaft or the employees working there, they should have either closed the shaft or not allowed the workers to come to work. He also agreed that Mr Mabebe and other employees should have been told in advance that they should not come to work.[766]

[763] Day 268, Sinclair,p. 34050
[764] Day 271, Sinclair, p.34570
[765] Day 268, Sinclair, p.34070
[766] Day 283, Sinclair, pp.36593 and 36595

52) Mr Botes under cross examination about entries in the Lonmin Log Book[767] that indicated that an attack on K4 shaft was likely maintained that, despite these indications, Lonmin did not anticipate that the K4 shaft would be attacked.[768] Mr Botes stated that it was a grave concern that security guards were deployed at K4 shaft without firearms to protect themselves in the event of an attack.[769]

53) The attorney for the Mabelane, Mabebe and Langa families enquired of Mr Sinclair why Lonmin had not informed the police that there was an impending attack on K4 and why the K4 shaft was not determined to be a hot spot. Mr Sinclair said that he expected that information would have been passed on to the police and it should have been but because there are not any minutes he could not categorically state that it had been passed on.[770] It seems unlikely that this happened as Lonmin themselves did not appreciate the dangers to K4 shaft.

54) With regard to the death of Mr Langa, Mr Sinclair was referred to reports received at Lonmin on the 12th that the crowd would be mobilising to Saffy Shaft on the 13th because the workers are still working there.[771] He was referred to a further entry at 14h22 where a report was received that when the workers were going to work that night (the 12th) they would be shot. It was put to him pertinently that even at this stage by the 12th [772], and after the

[767] See Exhibit EEEE19.2.
[768] Day 265, Botes, pp 33459 - 33464
[769] Day 265, Botes, pp 33464 - 33465
[770] Day 283, Sinclair, pp 36621 - 36625
[771] Exhibit EEEE 19 at 13h35
[772] Day 283, Sinclair, p.36547

incidents of violence and murder, Lonmin was still encouraging employees to come to work.[773] Mr Sinclair conceded that these were very specific reports which should have raised very serious concerns about employees who were to report to duty at Saffy Shaft.

55) Mr Blou[774] said that the Counter Industrial Action Response Procedure Document for Lonmin, which was signed off and put into operation, contained a number of regulatory provisions about how security matters were to be managed.[775] Under cross examination by counsel for NUM[776], Mr Blou agreed that the procedures set out therein serve as a guideline for managing industrial action as each individual type of incident warrants the manager of mining security to apply his or her discretion on how effectively to manage the situation.[777] He also agreed that implicit therein is that each industrial action situation will have individual characteristics, implications and security requirements and are not to be treated as duplicates of one another. He admitted that he is the person that must apply his discretion for the proper management of the situation.[778] As the manager of mining security, he was responsible to conduct effective and detailed planning and briefing sessions.

56) Mr Blou agreed that someone with his seniority should have conveyed to the members on the ground that people had been attacked and nearly killed,

[773] Day 283, Sinclair, p.36573 and 36574
[774] Day 281, Bou, p.36124
[775] Exhibit XXX 8
[776] Day 281, Blou, p.36128
[777] Day 281, Blou, p.36128
[778] Day 281, Blou,p. 36129

and that everyone should either back off or get out of the situation and wait for SAPS to arrive. They should not, he said, have been required to respond to the call for backup. Mr Blou agreed that that was a critical managerial intervention which should have taken place in the JOC on the basis of the information received. He said that it was critical that that call was made at the JOC. It should have been escalated to everyone in management. He agreed that that did not happen.[779] Mr Blou said that even he did not receive a call to say that Mr Louw and Mr Vorster had tried to contain this crowd and were attacked and almost died.

57) It was put to Mr Sinclair that there seemed to be a lack of contingency planning and execution by Lonmin Security based on the specific intelligence reports that were coming through and he agreed that if action had been taken upon the intelligence received, then they would have been better prepared for the events of 12 August 2012.[780]

58) Mr Sinclair said that his guidance to his security personnel was that they had at all times the right to withdraw immediately to a place of safety.[781] It was put to him[782] that that right to withdraw could hardly apply when the security members were under a full scale attack. He replied that often he would notice that the manner in which the vehicles had been parked did not make for an easy withdrawal from the scene of an incident. He did not ensure that

[779] Day 282, Blou, pp.36345 - 36346
[780] Day 283, Sinclair, p. 36590
[781] Day 268, Sinclair, p.34040
[782] Day 268, Sinclair, p.34042

any training followed upon these observations to assist the security officers to correct what they had been doing.[783]

59) Mr Motlogelwa testified that there was no planning before the incident of 12 August and there was no briefing as to what to expect.[784] As a result, the response of Lonmin security to the march on 12 August was haphazard and disorganised. This left security officials vulnerable to attack when carrying out their duties.

60) Mr Masibi said in his statement that the manpower was not enough to disperse the crowd. They were unprotected and the crowd could have overpowered them. They needed armoured vehicles to deal with such a crowd. In retrospect he thought that they should not have attempted to engage the crowd but retreated until backup arrived.[785]

61) Under cross examination by counsel for NUM, Mr Sinclair conceded that, because of the rapid and changing conditions and the circumstances surrounding the unrest at Lonmin, the scenario planning that was done was not as comprehensive as it ought to have been. He admitted that they omitted to do quite a few things that they could have done.

62) Paragraph 4.4.4 of the security protocols set out in Exhibit XXX 8 requires that deployed members must be briefed on the latest situation when reporting on duty and debriefed when reporting off duty. Mr Blou agreed that

[783] Day 268, Sinclair, pp.34042- 34044
[784] Day 264, Motlogelwa. pp. 33288 – P33290
[785] Exhibit AAA37

the important purpose of this was that when security members were deployed and put into the field they must be fully briefed with what the latest facts are concerning the situation and the security issues. Similarly, when they come off duty, they need to be debriefed so that security management can be aware of what their experiences have been and what the observations have been and what their perceptions might be in respect of the future developments of security and threats.[786] This was clearly not done.

63) The witnesses from Lonmin security conceded that their management of the situation, in the light of the circumstances prevailing, left much to be desired. Mr Sinclair agreed that Lonmin was partially to blame for the deaths of their employees.[787]

64) The evidence leaders correctly, in the Commission's view, submitted that Lonmin did not use the intelligence available, did not properly formulate plans for dealing with the strikers, did not ensure that there were adequate security resources at its disposal and did not properly brief members.

65) The Commission agrees with their submissions that Lonmin had a duty to ensure that it had adequate security arrangements in place at Saffy, K4, and other shafts to protect workers. Their failure to insist on and ensure heightened security arrangements in view of the intelligence information available to them at the time is inexcusable.

[786] Day 268, Blou, p. 36134
[787] Day 267, Sinclair, p. 33985

66) In the Commission's view, this duty is not confided to the shafts, but extends across the board to all their employees. Lonmin's reckless actions in urging employees to come to work in circumstances where they were aware of the potential dangers to them and in the full knowledge that they could not protect them, falls to be condemned in the strongest terms. Lonmin must, in the Commission's view, bear a measure of responsibility for the injuries and deaths of it's employees and those of its sub-contractors.

ICAM Report

67) Lonmin commissioned an internal investigation in order to identify the causes and contributing factors which led to the violence at the mine in August 2012. The ICAM report[788] identified some of the following factors which contributed to the deaths of various employees of Lonmin during the period 10 to 14 August 2012.

(a) Inadequate intelligence network;

(b) Lack of consideration of risk associated with supplier and contractor equipment services;

[788] Exhibit DDDD4

(c) Ineffective contingency plan for this type of situation;

(d) Absence of a system to ensure that training requirements are managed so that employees and contractors are competent to meet the risks applicable to their responsibilities;

(e) Lack of awareness by employees to provide correct information about incidents;

(f) Lack of management commitment to safeguard employees from industrial action related violence

68) The extensive criticisms in the report do not require to be repeated here. Suffice to say that they are detailed and require Lonmin to take steps to address the shortcomings identified.

CHAPTER 21

LONMIN'S INTERACTION WITH SAPS

1) Mr Blou, under cross examination by Ms Baloyi for the SAPS, and with regard to his evidence that on the 10th he informed SAPS that he expected that there would be another march on the 11th, said that this evidence was not contained in any of the Lonmin documents nor any statement or the Logbook and certainly not in Mr Sinclair's statement. He could not explain why this was so.

2) With regard to the meeting that took place at 14h00 on 11 August 2012, which was actually a briefing by Mr Blou and Mr Botes, there was no mention of the fact that one of the problem areas to look out for the following day was the NUM office. He agreed that SAPS were not informed to look out for an attack on the NUM offices on the 11th.[789]

3) On the 12th, what he relayed to SAPS was what had happened the day before, but also said that because of his assessment, he did not expect an attack on the 12th and that they should do patrols. He agreed that what would have been conveyed to SAPS was that they did not expect any incidents because it was a Sunday and also because there was no history of

[789] Day 282, Blou, pp.36402 - 36403

attacks on NUM according to him. He agreed that such communication to SAPS would influence how they would allocate their resources.[790]

4) He said he did not have any prior warning, that there would be a march to the NUM on the 12th and he could not have therefore conveyed this to the SAPS. Similarly with the attack on the security, this was not foreseen and therefore could not have been conveyed to SAPS to be present to protect them.[791]

5) It was put to him that he said that the POP stationed at Rustenburg would take about an hour to arrive on the scene, those stationed at Klipgat would take about 30 minutes, and those stationed at Bethanie would take about half an hour. It was put to him that on the 11th, when calls were made to SAPS at Marikana, the expectation would be that VISPOL would respond. He agreed with that as being the first line of communication. Ms Baloyi said that if one phoned Marikana Police Station, what one would get would be Vispol. And when one phoned Rustenburg, one would ask for POP, who would respond in about an hour, similarly with Bethanie, the earliest response would be about thirty minutes away. With reference to the entries in the Lonmin Logbook and specifically that contact was made with the police at 08h40, that there was no way that POP Rustenburg could have been at Lonmin to assist to disperse the mob that were on their way to the NUM offices in the time frame available. Mr Blou agreed with this

[790] Day 282, Blou, p.36405
[791] Day 282, Blou, p. 36406

proposition put to him.[792] He agreed that there were no telephone calls to the police while the incidents were taking place on the 12th to attend the scene.

6) Captain Govender, who was in charge of visible policing, said he was not aware of the contingency plan of the 10th of which a large component was visible policing. It is difficult to understand why a plan signed by senior officers of POP and in existence from the 10th did not come to his attention. There were no visible police from the 10th nor was the JOC set up as detailed in the plan. It is not as though there were inadequate resources because the deployment on the 10th was substantial.

7) Brigadier Engelbrecht, having received intelligence from informers of impending attacks on NUM and the workers reporting for duty at K4 shaft, conveyed this information to Major General Mpembe, who, because he was on leave, conveyed this to Major General Naidoo. The latter claimed not to have received any such information or the request for visible policing.[793]

8) Major General Mpembe testified that he was disappointed at the lack of visible policing deployed despite his request.

9) It is submitted by the Evidence Leaders that adequate deployment of visible policing might have prevented the situation at Marikana from spiralling out of control. They submit that the failure to attend to ensuring that the information was communicated and that the looming threats were attended

[792] Day 282, Blou, pp. 36393 - 36396
[793] Day 198 Naidoo, pp 24275 - 24278

to is a matter that merits further investigation with a view to holding disciplinary procedures.

10) The Commissions agrees with these submissions and so recommends. It is also recommended that the investigation should enquire into the protocols surrounding the communication of these issues and if they are found to be lacking, there should be strict measures put in place to ensure compliance.

CHAPTER 22

COULD NUM HAVE PREVENTED THE STRIKE?

To answer this question, it is necessary to look at some of the background to collective bargaining and negotiations by NUM, a topic alreadt dealt with in Chapter 3.

1. NUM's conduct in the handling of the RDO demand has been criticized on various levels. Mr Setelele confirmed that at all times NUM was aware that RDOs at Lonmin were being underpaid. They were aware that the RDOs complaints were legitimate.[794] Mr Setelele confirmed that NUM had tried to address the plight of the RDOs within the bargaining system but were unsuccessful in securing the kind of increases they demanded.[795]

2. It will be recalled that clause 12.3 of the wage agreement,[796] provides as follows:

> *"All proposals and demands on which agreement was not reached, or which were withdrawn by the unions or the company, are regarded as having been settled and may not be subject to strike action until this agreement lapses on the 30th of September 2013."*

[794] Day 38 Setlele p 4123/12-22
[795] Day 38 Setelele p 4124/1-5
[796] Exhibit XX2 p19

3. In terms of the wage agreement, NUM could not call on its members to go on strike. However, there was a course of action that NUM could follow if it wished to address the issues raised by the RDOs. NUM could have approached Lonmin in a bid to open up talks on amending the wage agreement. This course of action was open only to NUM given their position at Lonmin at the time. This was however never done. Although an agreement may have a two year period, Mr Gcilitshana confirmed that it was nevertheless possible for the parties to amend it by agreement if necessary. In fact, this had previously happened at Lonmin.[797]

4. Mr Setelele, under cross examination, said that NUM could not have approached Lonmin to open negotiations on a possible amendment of the wage agreement because they did not have a mandate to do so, and argues that the RDOs demand forR 12 500 excluded them.

5. Mr Setelele testified that the RDOs refused to talk to NUM about their demands. They were therefore not in a position to obtain a mandate from the workers.[798] He said that NUM had no access to the workers and could neither discuss the demand with them nor obtain a mandate to take the demand up on their behalf.[799] The workers were adamant that they wanted to raise the demand with the employer themselves.[800]

[797] Day 36 Gcilitshana pp. 3951 – 3952
[798] Day 38 Setelele, p 4134/16-25
[799] Day 38 Setlele, p 4135/6-13
[800] Day 38, Setlele, p. 4140/1-3

6. Mr Mabuyakhulu confirmed that the position of the RDOs was, from the very start, and at the latest from 21 June 2012, that they did not wish any unions to be involved in their advancement of their demand for R 12 500. This corresponded with his own experience of the attitude of the RDOs throughout the period under discussion.[801]

7. Mr Gcilitshana established that the decision of the RDOs to march to Mr Da Costa at Karee in order to convey their demand for a basic wage of R12 500 was taken independently of NUM and that NUM was neither informed nor involved.[802]

8. Mr Mathunjwa testified that the demand came from the RDOs and not any union. He said that AMCU had played no role whatsoever in it and that he had first heard about it on 13 August 2012.[803]

9. The evidence leaders and AMCU submitted that NUM did fall short in that it incorrectly reported to workers that they could not raise the demand for R12 500 because of the two year wage agreement. Mr Setelele testified that this was conveyed to workers on 8 August.[804] He also conceded that NUM was wrong in conveying to the workers that it would be a breach of the agreement for the fresh demands to be raised during the two year term of the agreement.[805]

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[801] Day 48 Mabuyakhulu pp. 5322 – 5323
[802] Day 35, Gcilitshana, pp.3820 – 3821; Day 37 Gcilitshana pp. 4020: 8 – 4021
[803] Day 21 Mathunjwa pp. 2241 – 2243
[804] Day 38 Setelele, p 4143
[805] Day 38 Setelele, p. 4142

10. Under cross-examination by counsel for AMCU, the witness agreed, when it was put to him, that after what happened at Implats NUM knew that a very similar thing was very likely to happen at Lonmin as it could in any of the other mines.[806] In those circumstances, she asked whether NUM should not have approached Lonmin at that stage and said that there was a need to re-open the agreement, as RDOs at Lonmin had been and were being under-paid and that, as a result of what had happened at Implats, they should not just have sat back and let the same thing happen at Lonmin but should have revisited the agreement and reached some consensus with regard to an amendment.

11. Mr Gcilitshana said that they had discussions internally and their approach was to discuss this with the captains of industry because they could not reach it at the negotiations.[807] When he was asked pertinently whether he approached Lonmin and said 'let's amend the agreement in order to give rock drillers a decent increase', he said that they had not.[808] He was then asked him whether there was there anything preventing him from doing that. His answer was that there were still discussions within the organisations and when pressed about what these discussions were, he said it was to engage the captains of industry because it would not only be an issue for Lonmin, but it could also have been raised by Anglo Platinum.

12. He was again asked whether[809] it was said to the captains of industry that they needed to sit down and amend agreements and give RDOs an

[806] Day 36 Setelele, p. 3963
[807] Day 36, Gcilitshana, p. 3963
[808] Day 36 Gcilitshana p.3963
[809] Day 36 Gcilitshana p. 3964

increase. He said that he was not sure of what had happened because those sorts of issues were normally handled by the General Secretary and the President. He conceded that the General Secretary and or the President may have done that. He agreed, that in principle, there was nothing wrong with such an approach being made to management to amend the agreement as necessary.[810]

13. Counsel for AMCU put to Mr Gcilitshana that generally when bonuses or allowances may need to be increased or altered, a task team is set up to look at these matters and NUM would be represented on such a task team.[811] He agreed with this proposition. She then put to him that at the very least what should have happened before Lonmin offered an allowance to the rock drill operators was that a task team should have been set up on which NUM would have been represented in order to consider and decide upon the matter. He said that he did believe that Lonmin should have called the stake holders who were involved in the agreement and put the proposal forward for the intended allowance. He said that none of this had been done in this case and Lonmin had simply acted unilaterally.

14. Counsel said that in relation to the unilateral action by Implats, which triggered the Implats strike, he had said that NUM had been outraged and she put to him that NUM would have been similarly outraged about Lonmin's

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[810] Day 36, Gcilitshana p.3965
[811] Day 36 Gcilitshana p. 3877

unilateral action in this case. He agreed with that as being a correct proposition.[812]

15. Counsel put it to him that it was difficult to understand that if NUM was outraged by unilateral action on the part of management why there was no objection from NUM.[813] Mr Gcilitshana said that the matter was discussed internally and they tried two terms of negotiations but failed but that was not really an answer to the question put.

16. Mr Budlender, in cross examination put to Mr Gcilitshana the following proposition[814]: What would NUM's response have been if the police had sat together with NUM and Lonmin on either the 15th and the 16th and sought to resolve the dispute about the RDO wages, in view of the fact that the RDOs had said that they would leave the koppie if the management came and talked to them. Mr Gcilitshana said that as NUM had agreed that even beyond the shootings to sit down and he had believed that they would have agreed before the shootings to sit down with the company and see how they could resolve the problem before the shootings. Mr Budlender specifically put to him,[815]

> 'Would you have agreed to an attempt being made to resolve the dispute outside the NUM bargaining processes in mid-August 2012?'

[812] Day 37 Gcilitshana p. 3978
[813] Day 37, Gcilitshana p. 3982
[814] Day 35, Gcilitshana, p. 3775
[815] Day 36 Gcilitshana p. 3876

and Mr Gcilitshana said that that was correct and that they would engaged in a process of trying to resolve the problem.

17. It is not clear whether if the workers had been advised that negotiations could be re-opened, the strike could have been averted, given Lonmin's position about negotiating and the amount. What it might have done, would have been to get management involved in talks with the union. Again, whether the outcome of those talks would have appeased the workers and prevented the strike is a matter on which the Commission is not able to make a finding.

NUM's actions in encouraging the employees to go to work

18. Mr Gcilitshana said that on 9 August 2012, NUM convened a mass meeting at the Wonderkop Hostel, where NUM conveyed to the members who attended, that NUM did not support the unprotected strike, and that workers should report for work. He said that if they experienced any difficulties reporting for duty, they should report to the NUM office at Western Platinum for assistance. He said that he had heard that NUM had in fact visited the nearby village and other hostels and conveyed the same message to employees.

19. The Lonmin Log Book records that at 08h00 on 11 August 2012, NUM requested intervention by Lonmin security to use a loudhailer around Wonderkop to urge employees to go to work, while they did the same at Wonderkop village. This request could not be carried out.

20. He referred to various instances in the Lonmin Security Log Book of NUM members having discussions with security about escorting employees to the various shafts. He also said that during the evening of 10 August 2012 and the early hours of 11 August 2012, NUM assisted numerous employees with transport so that they could report to their workplaces in spite of the wide-spread intimidation.[816]

21. He said on 14 August 2012, a meeting was convened by NUM at Eastern Platinum where again NUM cautioned the workers on the issue of violence that was prevailing and the intimidation at the time and also the ultimatum issued by Lonmin that employees will be dismissed if they did not attend or report to work.

22. Under cross examination by Mr Budlender, Mr Gcilitshana said that on 16 August 2012, he attended a meeting at about 07h30 in the morning for the purposes of ascertaining what measures were taken to protect those persons who were going to work and also what the security situation was.[817]

[816] Day 35, Gcilitshana p. 3839
[817] Day 36, Gcilitshana, pp. 3861 - 3864

23. Very much like Lonmin, NUM encouraged employees to report to work with the full knowledge of the intimidation and violence that prevailed during that period. Members of NUM were present at many of the briefings by Lonmin Security, as appears from the Log Book, and could not have been unaware of the seriousness of the incidents of intimidation being reported. Whilst they did attempt to protect and convey some of the employees to and from work, it must have been abundantly clear to them that they did not have the capacity to protect all the employees. Their actions, were, in the circumstances, reckless and ill considered.

Mathunjwa And Amcu's Role In The Marikana Tragedy

1. Mr Mathunjwa said that he first heard about the demands of the RDOs relating to the wage increase towards the end of July 2012 when he was telephoned by Mr Barnard Mokwena of Lonmin.

2. Mr Mokwena informed him that there were rumours that there was going to be a march by employees of Lonmin to bring a memorandum to the management in respect of wage demands.[818] He told Mr Mokwena that arrangements for an urgent meeting for all stakeholders, namely AMCU, NUM, Solidarity and UASA, should be made. Mr Mokwena responded that

[818] Day 21, Mathunjwa, p. 2243-2244

he would communicate with the General Secretary of NUM, Mr Frans Baleni, and revert to him. Mr Mokwena, however, did not revert to him.

3. Mr Mathunjwa said that he received a further telephone call from Mr Mokwena on 10 August 2012 when he was away from his office. During their conversation Mr Mokwena informed him that the employees were going to present a memorandum, to be received by SAPS. Mr Mathunjwa then informed Mr Mokwena that it should be emphasised to the employees that receipt of such memorandum by the police should not construed as constituting a precedent and that its contents would have to be dealt with by the structures within the company.

4. After this conversation and on the same day Mr Mathunjwa wrote a letter to Lonmin in which he repeated what he had said over the telephone, namely, that:

(d) Receipt of the memorandum by the police should not constitute a precedent;

(e) An urgent meeting of all the stakeholders should be called by Lonmin;

(f) The contents of the memorandum should be communicated by the management to the respective recognised unions so that they could be discussed at a meeting;

(g) The management should not take extreme measures in addressing the predicament of the employees by giving undue recognition to '*these sinister forces',* which he claimed were behind the situation.[819]

5. As has been said Mr Mathunjwa was out of office on 10 August 2012. He was informed by his office that Lonmin had served papers for an application for an interdict in the Labour Court. He did not know anything about the strike and only came to know of its details on 13 August 2012. AMCU did not oppose to the application for an interdict. In any event, he could not have done so as he was not in the office when papers were served.

6. On Monday, 13 August 2012, he received a phone call from Mr Jomo Kwadi, one of the senior managers of Lonmin, who wanted him to intervene at Lonmin. Mr Kwadi stated that there was violence at the mine and that something had to be done to stop it. He told Mr Mathunjwa that there were leaders of the other organisations who had attended a meeting on 12 August 2012. Mr Mathunjwa was surprised that a meeting had been held to which he was not invited as he had previously requested. He noticed, however, that there was a text message which had been sent to him and which referred to a meeting.

7. After the telephone call from Mr Kwadi he requested the General-Secretary and National Organiser of AMCU, Messrs Jeffrey Mphahlele and Dumisani Nkalitshana, to proceed to Lonmin to investigate the situation. On the following day, 14 August 2012, he received a report from them.

[819] Day 21, Mathunjwa, pp2248-2250; Annexure 001

8. On the same day AMCU called a press conference and issued a media release.[820] The main point in the media release was that AMCU distanced itself from the demands and the violence which was perpetrated by the employees. Mr Mathunjwa appeared to blame NUM as being behind the situation and referred to them as 'sinister forces'. In that statement the violence that took place near the NUM offices on 11 August 2012 was not correctly reported. What was said was that the employees were proceeding to the stadium where the memorandum was to be handed over and while they were passing Wonderkop mine, people came out of the NUM office wearing NUM tee-shirts. They opened fire on the marchers, killing one of them on the spot and wounding others who were taken to hospital. He claimed that it was that incident that led to the eruption of violence and more deaths at the mine.[821]

9. It is clear that this report was inaccurate and not in accordance with the evidence heard in the Commission. As appears from the video footage of 16 August 2012 and exhibit 009 Mr Mathunjwa repeated the same accusation about NUM but said that NUM killed two employees.

10. As set out previously in this report, on 15 August 2012 Mr Mathunjwa and Mr Zokwana, the President of NUM went, on the suggestion of Mr Xolani Gwala of the SABC, to Marikana to address the strikers.

11. After Mr Mathunjwa addressed the strikers on 15 August 2012 he requested a meeting with the management at 08h00 the following day so that he could

[820] Exhibit 001
[821] Exhibit 001 paragraph 5

get an advice from the management that *'if the workers happened to agree to return back to work, where are they supposed to report.'*[822] 'He said that the management agreed to this request. He stated that he '*was very much optimistic'.*[823] The police were very impressed and General Mpembe gave him a salute for the work he had done.

12. On the following day he was, however, late and arrived at Lonmin at 08h20. He met Mr Kwadi in the foyer and reminded him that they had spoken the previous night and that he wanted to know the response of the management. Mr Kwadi responded by saying that he was still going to consult with the management. According to Mr Mathunjwa there was no need for a consultation. All what was needed was *"for him just to tell me where the workers should report."*[824] He then saw Mr Mohammed Seedat, a director of Lonmin at the time. Their conversation was limited to the incidents of violence and the strike only. [825]

13. Mr Kwadi returned to him and reported that the management was no longer prepared to engage with the strikers as they had the two year collective agreement in place. Consequently they were not prepared to commit themselves with the workers.[826]

14. According to Mr Mathunjwa Lonmin management had committed themselves the previous day to engage with the strikers' grievances once they had

[822] Day 22, Mathunjwa, p2328
[823] Day 22, Mathunjwa, p.2328
[824] Day 22, Mathunjwa, p.2332
[825] Day 22, Mathunjwa, p.2334
[826] Day 22, Mathunjwa, p.2335

renounced violence, left their arms and returned to work peacefully.[827] Accordingly management was, he said, now reneging from that commitment. He felt betrayed.

15. He stated also that Mr Mokwena came and handed him a cellphone, saying that there was someone who wanted to speak to him. This person was the North West Provincial Commissioner, General Mbombo, who was very much agitated. She reminded him that he had promised the strikers that he would report to them at 09h00 and that he had failed to do so. Mr Mathunjwa explained to her that he was late because the management had reneged from its commitment. General Mbombo informed him that she did not care about that and pointed out that he should go to the mountain as promised.[828]

16. He then spoke to General Mpembe, who told him that he was no longer in charge and that the Provincial Commissioner was now in charge of the operation. He went to the JOC and met the Provincial Commissioner, who spoke to him and said that she did not like people who were not committed and that he had failed to go to the koppie at 09h00. He stated that the Provincial Commissioner confirmed that she was in charge of the operation, which had to be finished that day and that he was late and she was not interested in excuses. Major-Generals Mpembe, Annandale and Naidoo were at the JOC. According to his statement she said that '*this thing must end today it is costing the State a lot of money'*.[829]

[827] Day 22, Mathunjwa, p.2335
[828] Day 22, Mathunjwa, p.2338
[829] Exhibit NN, Affidavit by Mr Mathunjwa, para. 8

17. After some time he asked for transport to go to the koppie but could not get a vehicle from the police. He then informed them that he was going to use his own vehicle and that he only needed security. He and his colleagues waited until they decided to go to the koppie on their own without security.[830] He then proceeded to the koppie in his own vehicle and arrived there at about 12h00 in the company of Dumisani Nkalitshana.

18. At the koppie they addressed the employees. Mr Dumisani Nkalitshana addressed them first. He said "*This NUM". "How are we going to kill it, this NUM. We hate NUM."*[831] Mr Mathunjwa then addressed the strikers. The strikers replied that they wanted the employer to come to the koppie to address them there. The contents of the addresses are contained in exhibit 009.

19. After addressing the strikers Mr Mathunjwa went back to the JOC and met General Mpembe. He said that General Mpembe allegedly confirmed that the Provincial Commissioner was still in charge but had left for an ANC torch bearing ceremony in North West.

20. Mr Mathunjwa then telephoned Mr Kwadi, who told him that management was not prepared to meet with him. He then tried to contact Mr Seedat. When he did so he was informed by Mr Seedat that he would try his best but he was not in control.

21. After all failed and in despair he sent a text message to Major General Annandale, saying: *'since no person is available to give feedback to, we are*

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[830] Day 22, Mathunjwa, p.2344
[831] Day 22, Mathunjwa, p.2358; Exhibit OO9 Day 22, pp.2358-2359

going back to the employees to inform them no one is available. We have tried our best without cooperation from anyone. Let peace prevail.' Major General Annandale replied that he was always available and the SAPS were also available. He then proceeded to the koppie to report back to the strikers.

22. At the koppie he told the strikers that they were going to be killed by the police and that they should leave the mountain. He gave the example of a ram and said that when a ram retreats it is not that it is failing and being defeated but it is just to get more energy. When it comes back it will hit hard. The strikers were not prepared to accept his advice and told him that they were prepared to be killed there at the mountain. They said they were not going away from the mountain and that they wanted to talk to their employer. Despite his attempts to persuade them to leave they would not listen.

23. He concluded his evidence in chief by stating that he was one of the signatories to what one may call the 'peace accord' in September 2012.

24. Mr Mathunjwa did not fare well under cross-examination. He was asked by lead counsel for SAPS as to whether he told members of AMCU at the mountain that they should disarm and put their weapons down on the ground so that he could then talk to the employer. He replied that he did say this.[832] The video clips and exhibit 009 do not bear him out in this regard. When he was confronted with the fact that such utterances do not appear in the video clips he stated that there were other video clips which were not shown. When it was put to him that if he had said that they should disarm and put

[832] Day 23, Mathunjwa, p.2419

their weapons down, then they had disobeyed him. His reply was that he did not want to speculate.[833]

25. Although in his evidence in chief he had testified that the essence of his address at the koppie was that the strikers should *'return back to work and hence to lay down, if they've got any weapons with them,'*[834] the request to lay down any weapons is not apparent from the video clip as translated in exhibit 009.

26. He was confronted by the fact that one of the strikers threatened inhis presence to finish the police coming from the homelands and that despite his assertion that AMCU renounces violence he did nothing to correct or stop the strikers from threatening violence. He failed to answer the question.

27. His best answer was *'yes I was saying earlier on, that people they were exchanging the platform or- as they were talking, different workers. It might not, that I've said it to a specific person, but I did renounce violence'.*[835]

28. When he was cross examined by counsel for Lonmin, he was challenged to explain the use of the phrase '*sinister forces'.* It was suggested that he was referring to NUM. He denied that it was referring to NUM.[836] He said he did not know who the sinister forces were. If regard is had to exhibit 009 paragraph 7 it is clear that this is a reference to NUM.

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[833] Day 23, Mathunjwa, p.2420
[834] Day 22, Mathunjwa, p.2301; Day 23, Mathunjwa, p.2469
[835] Day 23, Mathunjwa, p.2470
[836] Day 23, Mathunjwa, p.2482

29. Counsel for NUM also tried without success to find out to whom he was referring when he used the phrase *'rent a black'*[837] It was also put to him that there was a toxic relationship between AMCU and NUM in August 2012 hence a song sung by the National Organiser of AMCU, Mr Dumisani Nkalitshani, as to how could 'kill NUM, they hate NUM'. This he also denied.[838]

30. When it was put to him by counsel that he went to the koppie to incite the workers in a volatile situation, he did not give a satisfactory explanation as to why he accused NUM of oppressing the black nation.

31. On the question of his wanting Lonmin to guarantee that he would get a place to negotiate on behalf of the employees if he were to get the strikers off the mountain, which emanated from the cross examination especially that of counsel for Lonmin, he was not candid with the Commission on this aspect in his evidence in chief. In his statement, exhibit NN Mr Mathunjwa described his meeting with Mr Kwadi when he arrived at the Lonmin premises at 8h20 on 16 August 2012, without mentioning the very material fact that he had asked for an undertaking from the Lonmin management, before he went to the koppie to try to persuade the strikers to go back to work, that if the strikers went back to work and there was going to be a discussion on wages, AMCU would be part of the discussion. When cross-examined by counsel for Lonmin it was put to him that he wanted this undertaking from Lonmin management before he would go to the koppie. He replied: 'That's your opinion.' When counsel then said to him, 'no, I'm putting

[837] Day 23, Mathunjwa, pp.2479-2481
[838] Day 23, Mathunjwa, p.2420

it to you as a fact', he replied, 'That is not correct'. Counsel then said to him, 'And you said to management on the morning of the 16th, don't be technical with me, meaning don't refer me to bargaining structures. If these people get off the koppie, I want a seat at the table.' Mr Mathunjwa replied, '*Where is that, Sir? Can you give it to me?*'[839] When he was then shown the transcript of the recording of his discussion with Mr Kwadi, he conceded that he had indeed sought this undertaking from Lonmin. The transcript of the relevant portion of the conversation with Mr Kwadi reads as follows: "***Mr Kwadi****: okay, Joseph I think it is clear to me what you are saying. You basically saying you will go to the mountain on condition that you get some kind of a guarantee that the company will negotiate with AMCU on the demands of the people that are on the mountain. That is what you are saying; it is*

Mr Mathunjwa*: or whether AMCU will be part of the demand. I mean according to those people whom they want to negotiate on their behalf, yes.*"[840]

32. Furthermore Mr Kwadi stated thus: *"Better word, okay. There has to be a central forum to deal with the issues of RDOs across Marikana operations and you are saying the only way you will go to the mountain is if you are guaranteed a place there.* ***Mr Mathunjwa****: exactly."*[841]

33. SAPS genuinely believed him when he led them to believe that the strike would probably be over on 16 August 2012 hence the agitation of the Provincial Commissioner when he failed to go to the koppie in the morning.

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[839] Day 24, Mathunjwa, pp 2551-2552
[840] Exhibit 0013 p.695 Day 24, Mathunjwa, p.2530
[841] Exhibit 0013 p.696

34. It is clear that he used the strike as a platform to recruit more members of AMCU. He and the other officials of AMCU attacked NUM, using inflammatory language, thus inciting strikers to believe that NUM had been oppressing the black nation for 30 years and that it had to be '*killed*';

35. Mr Mathunjwa acquiesced in the inflammatory utterances of Mr Nkalitshana who spoke first at the koppie.

36. Although AMCU claimed that it knew nothing about the strike at tha Koppie the speakers said they were behind it. The following was said:

"Comrades, we will support you my brothers. We will be with you because we are a trusted organisation at all times that will remain trustworthy to you that will never lie to you..."

"Comrades you should not regret being here, because we do not get anything from the money of this country."

"As AMCU we have come to support you, as the national organiser has said, that we will be with you in everything."[842]

37. Though there were these points of criticism about his evidence it is to his credit that at the end of his speech, at the risk of damaging his credibility with the strikers, he pleaded with them to leave the koppie, telling them they would be killed by the police. If the strikers had clearly indicated at that point that they would accept his advice and left it is probable that the tragedy would not have occurred.

[842] Exhibit 009

CHAPTER 23

CAPITA SELECTA

TOXIC COLLUSION

1) Counsel for the Injured and Arrested Persons submitted that the co-operation between the SAPS and Lonmin in dealing with the situation at Marikana during the period under consideration by the Commission went beyond acceptable legal limits and was 'causal of the massacre and unlawful'. Counsel described it as amounting to 'toxic collusion' and said that this was an extremely important topic. The allegedly collusive relationship to which he referred was, he said, manifested in many ways, including:

(a) 'SAPS using surveillance equipment set up by Lonmin and their telephone lines and other equipment and resources';

(b) Lonmin, 'transferring [its] own "concerns" for example about the breakaway groups on 13 August, to the police and effectively egging them on to intercept the group when it was both unnecessary and inopportune to do so';

(c) Lonmin 'participating directly in devising the plan and [playing] a decisive and essential role therein. It was conceded that Sinclair played a vital role in the production of the ultimate police plan';

(d) 'The use of the Lonmin chopper by the SAPS';

(e) 'Sinclair and Botes pairing up with SAPS members to hunt down the breakaway group on 13 August';

(f) 'Botes being posted permanently at the JOC with an alternate when he went home';

(g) 'The sharing of radios and information as indicated by Amanda van der Merwe';

(h) 'The best evidence of the collusion between SAPS and Lonmin and the full extent of its toxicity is best demonstrated by a reading and careful analysis of JJJ 192, dealing with the synchronisation of the planning of the two entities, as well as the Ramophosa e-mails, Exhibit BBB4'; and

(i) 'The collapsing of the Lonmin JOC into the SAPS JOC'.

2) Counsel conceded that 'the collusion may have been acceptable or neutral on face value' but he submitted 'the toxicity thereof stems from the fact that it was intended to and did result in the massacre/ tragedy'.

3) The Commission does not agree that there was a toxic collusion between SAPS and Lonmin.

4) The situation confronting SAPS and Lonmin was, as the Commission has found, that from the evening of 10 August the strikers, or at least some of them, were enforcing their unprotected strike by violence and intimidation. They were contravening section 2(4) of the Dangerous Weapons Act read with Government Notice 1633 of 1 October 1996, by being in possession at gatherings or in public places, of dangerous weapons, such as spears, assegais knobkieries and pangas. Some of the strikers had used these weapons to kill Messrs Mabelane, Fundi, Mabebe and Langa and Warrant Officers Monene and Lepaaku and to inflict serious injuries on Lieutenant Baloyi and Mr Janse Van Vuuren and 2 others at K4 Shaft . In addition, they burnt seven vehicles at the K4 Shaft.

5) Lonmin requested SAPS to come to its premises to restore law and order to arrest those responsible for the crimes they had committed and to prevent a recurrence.

6) In order to do those things, which are all clearly functions to be performed by the SAPS in terms of the South African Police Services Act 68 of 1998, the

SAPS required to be on Lonmin premises for the period required to finish the job and they needed full co-operation from Lonmin and the use of some of its facilities to do so.

7) It would have been absurd for Lonmin to have declined the use of those of its facilities which SAPS required. It would have been unreasonable for Lonmin to have said to SAPS: '(1) you cannot use our JOC, where there are closed circuit television facilities which will enable you to see what is going on at various parts of our extensive premises; (2) our telephone lines, radios and other equipment and resources, and (3) the helicopter we hire from Protea Coin because that would mean we will be accused of colluding with you to assist you to perform your functions as a police service'.

8) It would also have been unreasonable for Lonmin to have refused to have Mr Botes, one of its Security Risk Managers, and an alternate on standby in the JOC to provide the SAPS with information about the property and the facilities available in order to deal with any problem that might arise and to make available to the SAPS any information it had received which could be of use to SAPS in carrying out its functions.

9) It is not correct to say that Lonmin transferred its own 'concerns' about the 'breakaway group' on 13 August to the police and egged them on to intercept the group 'when it was both unnecessary and inappropriate to do so'. Seen against the background of what had been happening since the evening of 10 August it was reasonable for the SAPS to infer that this group,

many of whom were armed with dangerous weapons and busy contravening the Dangerous Weapons Act, had embarked on a mission to intimidate and possibly assault workers they might find at the K3 Shaft who were not participating in the strike. It cannot be said that it was unnecessary and inopportune to intercept the group in an endeavour to prevent a recurrence of what had happened the previous night at the K4 Shaft, nor can it be said that there was anything untoward in the fact that Sinclair and Botes went with the police on this operation.

10) It is not correct to say that Sincalir played 'a vital role' in the production of the ultimate police plan, which on the evidence was produced by Lt Col Scott virtually on his own.

11) The Ramaphosa e-mails have been discussed under Chapter 18 and the Commission has found that his conduct in endeavouring to get the police to do their job to stabilise the situation and arrest those strikers who had committed serious offences was not improper.

12) The discussion between the Provincial Commissioner and the Lonmin management on 14 August has been considered in Chapter 9 and the conduct of the Provincial Commissioner and the National Commissioner has been subjected to strong criticism. But as far as concerns, the relationship between the SAPS and Lonmin, the desire of the Provincial Commissioner to see to it that any action the police might take would not be inconsistent with what Lonmin was doing can scarcely be described as collusion.

13) The Commission is also unable to agree with Counsel's contention that the so called 'collusion' between the SAPS and Lonmin was 'toxic' because it was 'intended and did result in the massacre/tragedy'.

14) Although the Commission is strongly critical (for reasons which appear elsewhere in this report) of the decision by the Provincial Commissioner to launch the 'tactical option' on 16 August if the strikers did not voluntarily lay down their arms, sight must not be lost of the fact that her main desire was not for there to be a massacre or tragedy and for the strikers to be killed but for the weapons to be laid down and for the strikers to leave the koppie. This clearly appears from the evidence of Mr Mathunjwa that she berated him for not going to the koppie and persuading the strikers to do what he had confidently predicted the previous evening they would do.

15) There is accordingly no substance in the contention that the SAPS and Lonmin were guilty of toxic collusion.

B EVENTS WHICH WERE ALLEGED TO BE GAME CHANGERS

1) Counsel for the Injured and Arrested Persons contended that 3 events during the period from 11 August 2012 onwards were what he called 'game changers', which had a decisive influence on what followed. They were:

(a) The shooting of strikers by the NUM members at the NUM offices on 11 August;

(b) The confrontation between strikers and the SAPS members near the railway line on 13 August and what he called 'the resultant revenge motive on the part of members of SAPS'; and

(c) 'the impact of political pressure'.[843]

2) He submitted that if the first 'game changer' had not occurred the strikers would not have decided 'to gather at the koppie and to arm themselves with dangerous weapons'. He submitted further that 'these two decisions literally set the stage for the massacre in that without them having been taken, the massacre, as we know it, would definitely not have occurred.'

3) The Commission does not agree with the analysis of what happened at Marikana over the relvant period. As appears from Chapter 6 above, it does not accept that the strikers decided to arm themselves because of the shooting of two strikers at the NUM offices on the morning if 11 August 2012. The evidence indicates that contrary to their counsel's submission, they were not unarmed with some carrying traditional sticks. According to the evidence of Mr Gegeleza, which the Commision accepts, he saw knobkieries, pangas and spears in the possession of the approaching strikers.[844] He also testified that far from marching to the NUM offices in order to enquire why NUM had prevented the employer from talking directly to the strikers (as the strikers allege) the strikers who numbered between 2 000 and 3 000, were singing

[843] Section E of the Injured and Arrested Persons Heads
[844] Day 39, Gegeleza, pp 4233 - 4237

songs and moving fast, running and their mood was aggressive. The fact that they were armed (and not unarmed as they alleged) gives the lie to their allegation that they only decided to arm themselves after this incident in order to protect themselves against NUM members.

4) The Commission is of the view that the first 'game changer' was another decision by the strikers, to enforce the unprotected strike by violence and intimidation. That decision had been made on 10 August 2012 and they had started to implement it in the late afternoon or early evening of 10 August 2012. In Chapter 6 above, the Commission has given its reasons for finding that the large group of between 2 000 and 3 000 strikers, some of whom were armed with dangerous weapons, went on the morning of 11 August to the NUM offices with violent intent. The strikers remained in possession of their dangerous weapons and in fact bought more after their confrontation in which two of their members were injured. That they remained in possession of their weapons so that they could continue implementing their decision to enforce the unprotected strike by violence and intimidation is confirmed by the subsequent actions of some of them in murdering the two security guards, Mr Mabelane and Mr Fundi, and Mr Mabebe and Mr Langa, who were not participating in the strike.

5) As far as the second 'game changer' is concerned, the important factor there was their refusal to comply with Major General Mpembe's request that they lay down their weapons, weapons which were clearly required for the enforcement of the unprotected strike.

6) It was their determination to hold on to their weapons and to continue congregating on the koppie which set in motion the series of events which culminated in the tragedy of 16 August. The Commission has dealt elsewhere in this report with the actions and omissions of some of the other participants which also contributed to the tragedy but there can be no escape from the conclusion that if the strikers had not decided to resort to violence, no-one would have been injured and no property would have been damaged.

C The consequences of the SAPS attempt to mislead the Commission

1) As appears from what is said earlier in this report SAPS's initial case as set out in the opening speech by its counsel and Exhibit L, the presentation of its case in writing accompanied by photographs and videos, was in so far as it related to the killings on 16 August, that there was no prior intention to implement phase 3 of its plan, the so called 'tactical option', on 16 August but that it became unavoidable because of an escalation in violence in the course of the morning.[845] It was also part of its initial case that the plan which was implemented had been meticulously developed on the afternoon of 14 August with input from commanders with extensive POP experience and the approval of the full strength JOCCOM. It became apparent during the course of the Commission's proceedings that that version of events was

[845] [Exhibit L, slides 133 and 174, third bullet;
Day 82, Annandale, pages 8657 to 8663]

incorrect. What really happened was that the decision to launch phase 3 of the plan was taken by Provincial Commissioner Mbombo before or during a meeting of the NMF. In terms of the decision, the launching of phase 3 was to take place on 16 August if the strikers failed to lay down their arms and disperse from the koppie on or after 09h00 (as it was anticipated that they might). The implementation of the plan was not dependent on any 'escalation' but only on the strikers' failure to lay down their arms and disperse. The Provincial Commissioner announced this at a media conference at 09h30.

2) This decision meant that, once it became apparent that the strikers might not lay down their arms and disperse, the plan which had been developed on 13 – 14 August and approved by the JOCCOM could not be implemented and a new plan had to be prepared. Unlike the earlier plan, which was relatively risk free, the new plan, which had to be prepared in haste, did not benefit from inputs from experienced POP commanders and contained serious defects. It had moreover to deal with a very different situation from the one for which the earlier plan had devised and there was a distinct risk of significant bloodshed, which was in fact foreseen by some of the senior SAPS commanders.

3) At 13h30, when there was no sign of the strikers being willing to lay down their arms and disperse, the Provincial Commissioner ordered Major General Annandale to implement the 'tactical option'. At that stage the new plan had not been discussed by the JOCCOM. The planner, Lieutenant Colonel

Scott, put the details before the JOCCOM, from which its POP members were absent. There was no challenge process and Lieutenant Colonel Scott and Brigadier Pretorius went to FHA 1 to brief the commanders. There was no time to prepare the hard copies for the commanders and they were shown an image based on the earlier plan on Lieutenant Scott's laptop computer and orally given the details of the plan. The implementation of the plan had catastrophic consequences which resounded all over the world.

4) The leadership of the police, on the highest level, appears to have taken the decision not to give the true version of how it came about that the 'tactical option' was implemented on the afternoon of 16 August and to conceal the fact that the plan to be implemented was hastily put together without POP inputs or evaluation. In order to give effect to this, the decision at the NMF was not disclosed to the Commission. An inaccurate set of minutes for the 06h30 meeting was prepared and a number of SAPS witnesses testified before the Commission in support of the incorrect version. There is at least a prima facie case that the National Commissioner and the Provincial Commissioner for the North West Province, who knew the true facts, approved Exhibit L, SAPS presentation which contained the incorrect facts.

5) In the circumstances, the Commission recommends that steps be taken in terms of section 9 of the SAPS Act to inquire into their fitness to remain in their posts and whether they are guilty of misconduct in attempting to mislead the Commission.

D. Recommendation regarding the shooters at Scene 1

1) Earlier in this report it was said that none of the persons or bodies participating in the proceedings of the Commission bears an onus to prove or disprove any fact and there is thus no 'risk of non-persuasion' but that where a person or body has sole access to relevant information and does not disclose it, an adverse inference could be drawn against such person or body. This is particularly so in the case of the SAPS because the National Commissioner gave an undertaking when the Commission was appointed that the SAPS would give its full co-operation to the Commission.

2) It was not practically possible for the 53 persons who fired R5 rifles at scene 1 to testify and the chairperson made a ruling that no adverse inference would be drawn against any scene 1 shooter by reason of the fact that he did not give oral evidence. This did not, of course mean that such shooters were not expected to explain fully in affidavits the circumstances in which they discharged their firearms. They could make such statements without fear of incriminating themselves because of the provisions of Regulation 9(1) of the Commission's Regulations. Statements were produced which were made by 51 of the SAPS members who discharged their weapons at scene 1. Many were warning statements made to IPID investigators which insofar as they incriminated the makers could also not be used against them in criminal proceedings by virtue of the provisions of section 25(4) of the IPID Act. Unfortunately it does not appear that the provisions of the subsection

were drawn to the attention of the persons making the statements because the standard forms used for IPID statements do not refer to the subsection and appear to be based on those used by SAPS when interviewing ordinary suspects in criminal investigations.

3) The Commission has considered all the statements made by the scene 1 shooters and agrees with Mr De Rover's comments thereon, which are as follows:

> *'They all sing much of a tune and they don't offer you much of a clue. And where they do offer a clue I'd actually want detail, the same detail that you want. So they're a frustrating bunch of statements in that sense and that is a given.'*

4) Some of the statements, as Mr De Rover indicates, are better than others but not one of them gives the details required to enable one to say that each shot by the shooters was justified.

5) The Commission has found that those members who fired at scene 1 had reason to believe that they were facing an imminent attack. There are indications that some may well have exceeded the bounds of self or private defence, in which event there is at least a *prima facie* case that they are guilty of attempted murder (for the reasons given earlier in this report no rifle can be linked with any specific death so there can be no question of there being a *prima facie* case against any of the shooters on a charge of murder.)

6) The Commission does not believe that it would be appropriate to draw an adverse inference against all those fired their weapons at scene 1. It accepts that some in all probability did not exceed the bounds of self and private defence. It is for this reason that it has decided to refer the whole question as to whether any of the shooters at scene 1 exceeded the bounds of self or private defence to the DPP of the North Western Province with the recommendation that he cause investigations to be made by IPID under the direction of a senior member of his staff as to whether there is a prima facie case against any of the shooters and then for him to consider whether to institute any criminal proceedings.

Proposed recommendations with regard to Compensation

1) The evidence leaders and several other parties proposed that compensation be paid by the State on the basis of 'loss without liability' not only to the dependants of the deceased who were killed by members of the SAPS and to those strikers who were injured by shots fired by members of the SAPS but also to the dependants of those people killed by the strikers and to those injured by them.

2) This proposal has much to commend it from the point of view of bringing closure to a shocking chapter in our history since the advent of the

democratic era in 1994 and achieving the goals of truth, restoration and justice for which the Commission was established.

3) This proposal does, however raise complex and difficult issues. The Commission understands that actions have been instituted by many, if not all, of the dependants of those killed by police gunfire during the period covered by the Commission's investigations and by many, if not all, of those injured by such gunfire. The Commission also understands that many, if not all, of those arrested have instituted actions against the State.

4) Some, if not all, of the dependants of those persons killed by some of the strikers have endeavoured during the proceedings of the Commission to establish that Lonmin is liable to them for failing to take sufficient steps to protect their deceased bread-winners from being attacked by some of the strikers. And for all the Commission knows, those persons who were injured or suffered damages as a result of the actions of some of the strikers may also be contemplating instituting claims against Lonmin.

5) The representatives of Warrant Officer Lepeeku and Warrant officer Monene who were killed by strikers on 13 August 2012 and of Lieutenant Baloyi, who was also injured on 13 August have also endeavoured before the Commission to establish that the SAPS are liable to compensate them.

6) In the case of these workers and their dependants, there is the possibility that they may have claims against the Commissioner under the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

7) It is clearly desirable that the legal issues raised by the events at Marikana should be resolved without further lengthy and expensive legal proceedings but the finding of a satisfactory and just solution will not be easy.

8) The Commission is not satisfied that its terms of reference are wide enough to cover the question as to whether a compensation scheme of the kind proposed should be implemented by the State.

The applicability of the McCann Principle

1) The decision to make Thursday, 16 August, 'D Day' meant as has been seen, that the relatively risk-free encirclement plan, which was drawn up with POP input and approved by the full strength JOCCOM with experienced POP commanders present, had to be discarded and replaced by another plan, which had to be prepared in haste without the benefit of POP input, which was not approved by the full strength JOCCOM and was not subjected, as it should have been, to a challenge process. The defective nature of this plan has been explained in Chapter 13 above. It carried with it a substantially heightened risk of bloodshed, which was a result of the circumstances in which it had to be implemented.

2) Even before it was drafted Major Generals Mpembe and Annandale warned the Provincial Commissioner that proceeding to the tactical option that day

would involve bloodshed. She reconciled herself to the fact that this was so, merely asking for an assurance that it would be kept to the minimum. In the Commission's view this was not good enough.

3) Section 13(3) (a) of the Police Services Act, 68 of 1998 recognises the basic principle on which the use of force by members of the Police Services rests, namely, that where force has to be used only ' the minimum force which is reasonable in the circumstances' must be used.

4) The decision to make Thursday 'D-Day' and the consequent replacement of the encirclement plan which involved the use of minimum force to deal with the situation, by the 'Disperse-Disarm-Arrest' plan, which from the nature of things was likely to require the use of more force, was therefore in conflict with the basic principle to which the use of force by members of the SAPS is subject. Put simply: a decision to implement a plan to use more force on Thursday than would probably be required on Friday will, in the absence of compelling circumstances requiring action on Thursday, be an illegal decision.

5) The *McCann* principle, which requires the planners of policing operations where force may possibly be used to plan and command the operations in such a way as to minimise the risk that lethal force will be used has accordingly been breached.

CHAPTER 24

PHASE 2: LONMIN'S HOUSING OBLIGATIONS IN TERMS OF THE SOCIAL AND LABOUR PLAN

1) It will be recalled that subparagraph 1.1.3 of the Terms of Reference enjoins the Commission to 'inquire into, make findings, report on and make recommendations concerning the following:

> '*1.1 the conduct of Lonmin PLC, in particular:*
>
> *…*
>
> *1.1.3 whether it by act or omission, created an environment which was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct.'*

2) It will also be recalled that the original Terms of Reference contained a further subparagraph, 1.5, which enjoined the Commission to investigate 'the role played by the Department of Mineral Resources or any other government department or agency in relation to the incidents and whether this was appropriate in the circumstances, and consistent with their duties and obligations according to law'.

3) This subparagraph was subsequently deleted from the Commission's Terms of Reference by Proclamation 30 of 2014, which was published in Government Gazette 37611 of 5 May 2014.

4) On 8 November 2012 the Commission gave a ruling in terms of which it decided to investigate the matters referred to it in two phases, the first being an examination of the events of 9 to 16 August 2012 at Marikana and the second, being the remaining topics set out in subparagraphs 1.1.3 and 1.5 of the Terms of Reference.

5) The deletion of subparagraph 1.5 means that the Commission is still obliged to give its attention to the topics raised in subparagraph 1.1.3, which were not examined as part of phase 1.

6) While the Commission was busy with Phase 1 its researcher Dr K Forrest commenced doing detailed research in respect of the matters to be examined in Phase 2. For this purpose Lonmin was asked to provide access to its documents on a number of topics which were considered relevant to Phase 2.

7) On 25 August 2014, despite opposition by Lonmin, the Commission withdraw its ruling of 8 November 2012. A copy of this ruling is set out in Annexure K to this report.

8) Lonmin's opposition to the withdrawal of the earlier ruling was based on three main propositions: (a) that the issue the Commission proposed to examine in Phase 2, *viz* the housing obligations of Lonmin, was not covered by the Terms of Reference, which required a causal link between any conduct or omissions by Lonmin in respect of its housing obligations and the events of 9 to 16 August 2012; (b) that Lonmin's performance of its housing obligations could not be examined without an examination of the responsibility and performance of local authorities in the area to provide housing; and (c) that an examination of the issue proposed to be canvassed by the evidence leaders would in the time available be unfair to Lonmin.

9) In the ruling given on 25 August 2014 the Commission dealt with and rejected the first two propositions relied on by Lonmin for the reasons set out in the ruling. As far as the third proposition is concerned the Commission held that the question of fairness could only be answered at the end of the inquiry.

10) Now that that stage has been reached, the Commission is in a position to decide the question of unfairness.

11) What happened during the hearing on Lonmin's performance of its housing obligations in terms of the Social and Labour Plan submitted by it to the Department of Mineral Resources and approved by it under the relevant provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 ('the MPRDA'), was that the evidence leaders put a large amount of

documentary material which had been received from Lonmin before the Commission and a report prepared by Dr Forrest based on that material, whereupon Lonmin led the evidence of one of its directors, Mr Mohamed Seedat, who was then cross-examined.

12) The case the evidence leaders seek to make against Lonmin on this branch of the inquiry is based on what the Commission saw at its inspection *in loco* at Marikana in October 2012 and on Lonmin's own documents and information provided and made available by Mr Seedat.

13) The Commission is satisfied that an examination of the topic presently under discussion on this basis cannot be regarded as unfair to Lonmin and that it is obliged in order to carry out its mandate under the Terms of Reference to conduct the enquiry on this topic.

14) Lonmin contended that a consideration by the Commission of its performance of its housing obligations would lead to unfairness, *inter alia,* because it did not have the opportunity to cross-examine Dr Forrest on her report. But this was not necessary because, as has been pointed out, the case presented by the evidence leaders in respect of the inquiry rests, not on her report as such, but Lonmin's own documents and the evidence of its own witness.

15) It was also contended that the housing issue was not properly considered because the responsibility of local government was not looked at and that

the impact of the 2008 financial collapse (on Lonmin and all other companies) was not properly investigated. For the reasons set out in the ruling of 25 August 2014 the responsibility and performance of the local government in the area of housing is irrelevant because Lonmin's obligations were self-standing. The impact of the 2008 financial collapse is also strictly speaking irrelevant, as will be shown later.

16) It is common cause that in order for it to have its old order rights in respect of the Marikana mine converted into a mining right under the MPRDA its Social and Labour Plan ('SLP') had to be approved by the Department of Mineral Resources under sections 23(1)(e) and 25(2)(f) and (h) of the MPRDA.

17) Because the Marikana mine was operating as a single mine Western Platinum Ltd ('WLP') and Eastern Platinum Ltd ('ELP') submitted a joint SLP with their conversion applications. In terms of this SLP they committed themselves to phasing out all existing single sex hostel accommodation, converting most existing hostels into bachelor or family units and building an additional 5500 houses for their migrant employees. It was made clear that the house construction obligations would cater for the workers who had previously been housed in hostels but would be rendered homeless by the hostel conversion programme. [846] This was because of the existing 129 blocks, 15 were to be phased out and the conversion of the remaining 114 hostel blocks would generally turn hostel block accommodation for eight or 16 workers into single family or bachelor units, with a resultant loss of

[846] Exh SSSS2, WLP SLP, pp 79 – 81; D 293, Seedat, p 38282

accommodation for approximately 87.5% of the workers previously accommodated. [847]

18) The Department of Mineral Resources approved the proposed SLP and WLP and ELP became legally obliged to comply with its terms, which could only be amended with the written consent of the Department, which was never given or even sought. In the SLP WPL and EPL committed to completing both the hostel conversion and the house construction processes by September 2011.

19) It is common cause that WLP and ELP built three of the 5500 houses which should have been built.

20) It is also common cause that large numbers of Lonmin workers live in squalid informal settlements surrounding the Lonmin mine shafts. The living conditions in these settlements are very poor and the people living there lack basic social services. Mr Seedat conceded in his evidence that the living conditions in Nkaneng and other informal settlements were truly appalling. [848]

21) Mr Seedat also conceded in cross-examination that there was a critical shortage of decent housing for the employees of Lonmin and that the board and executive of Lonmin understood that the tragic events at Marikana were

[847] *Ibid*
[848] D 292, Seedat, p 38274

linked to that shortage. [849] That link was clearly reflected in the public statements of Lonmin in the immediate aftermath of the tragedy. Thus in his address on 31 January 2013 at the first Lonmin AGM after the tragedy, Lonmin's chairman Mr Phillimore characterised the events that led up to the tragedy as being linked to a breakdown of trust between itself and its workforce.[850] While in the Lonmin PLC annual report for 2012, which was delivered with the address, it was recognised that Lonmin would not easily build a relationship of trust with its employees as long as they were forced to live in squalid conditions on its doorstep. [851] Mr Phillimore also said in his address that Lonmin PLC committed itself to addressing the living conditions of its workforce as part of its attempt to create 'a safe and sustainable business'. [852] Mr Seedat conceded that Lonmin had known about the critical housing shortage at Marikana and the squalid conditions in Nkaneng for years. [853]

22) Mr Seedat contended that the obligation assumed by WPL and EPL under the SLP was not an obligation to build houses but merely an obligation to broker an interaction between their employees and private financial institutions in terms of which employees would be able to obtain mortgage bonds to build their own houses. [854] The evidence leaders submitted that this version of Lonmin's obligations in respect of the provision of housing for its employees must be rejected. They contended that it was not only implausible but inconsistent with:

[849] D 292, Seedat, pp 38354 – 38355
[850] Exh SSSS5, p 375; D 292, Seedat, p 38350
[851] Exh SSSS2 at p 1455; D 292, Seedat, p 38353
[852] Exh SSSS5 at p 375; D 292, Seedat, pp 383 – 38354
[853] D 292, Seedat, p 37717
[854] ELs' Heads, para 14

a) the terms of the SLP itself;

b) the annual SLP reports which Lonmin furnished to the Department of Mineral Resources under section 25(2)(h) of the MPRDA;

c) the SLP close-out reports that Lonmin furnished to the Department after the five year term of the SLP; and

d) Lonmin's sustainable development reports.

23) As regards the contention that the version was implausible, the evidence leader referred to what they called the 'obvious problem' which the Chairperson had put to Mr Seedat, *viz:*[855]

> *'You go to the department and you say, "look here, we'd like you to convert our old order mining rights to new order mining rights and what we will do in order to make sure that we get the new order mining rights is, we will agree to an SLP." One of the things you agree to do is to convert the hostels and see to it that there's housing. Now could it ever have been envisaged by anybody that you could say, "well all we have to do as far as the housing is concerned is try to see …there are houses, get banks involved, get developers involved, facilitate it, and if they don't provide the houses or the banks walk away from it, well tough. It's very*

[855] D 293, Seedat, pp 38293 – 38294

unfortunate. We did our best: we went through the motions of facilitating; It didn't work out; There aren't the houses. The people are having to live in shacks in appalling conditions in an informal settlement, but that's very sad, but nevertheless, this was all we had to do in order to get the new order mining rights." Does that sound like a proposition that makes sense?'

24) The evidence leaders correctly comment, 'Mr Seedat spent several pages responding to this question but could not come up with any credible answer.'[856]

25) The inconsistency with the terms of the SLP themselves in demonstrated by the evidence leaders in their argument in the following passage:

'16. The Lonmin version is clearly inconsistent with the terms of the WPL and EPL SLP. In this regard, the SLP expressly stated that "Employees will have the choice of a number of tenure options (i.e. rental, instalment sale, rent-to-buy or full mortgage bonds) and will therefore be able to select the option most suited to their financial circumstance."'

17. The tenure options other than outright purchase on full mortgage bond would inevitably have required the

[856] ELs' Heads, para 15; D 293, Seedat, pp 38294 – 38298

involvement of WPL, EPL or some related party within the Lonmin Group on a basis that went beyond the bland facilitation role described by Mr Seedat. When this difficulty was put to him, he suggested that the SLP may have contemplated the creation of a special purpose vehicle for the housing obligations, but maintained that Lonmin would not have underwritten the obligations of that special purpose vehicle and may not even have held a majority shareholding in it. Mr Seedat referred in this regard to the Marikana Housing Development Corporation ("MHDC") as a special purpose vehicle of the sort he had in mind. When it was put to him in this context that the example of the MHDC did not support his version because it was a wholly owned Lonmin subsidiary, he denied this. That denial was wrong. The MHDC was a wholly owned subsidiary of WPL as is reflected in its financial statements and the financial statements of WPL.

18. Furthermore, the [SLP refers] to the financing of the hostel conversion process and the house construction process in identical terms. Mr Seedat conceded that Lonmin had put its own money into the hostel conversion process. He could not satisfactorily explain why this would not have been intended in relation to the house construction process when the SLP used identical wording to refer to the financing of both processes.'

26) The evidence leaders' contention as regards the inconsistency with the SLP reports Lonmin furnished annually to the department is set out in the following paragraph of their heads, with which the Commission is in agreement:

> *'19. It is clear from the terms of Lonmin's annual SLP reports that it contemplated an obligation to build houses, as opposed to an obligation to facilitate a series of market-driven transactions between employee buyers and private financial institutions and/or developers. Thus Lonmin referred to these commitments in terms that did not hint at the version now advanced, and that did not distinguish between the nature of the commitment in relation to housing and the nature of the commitment in relation to hostel conversion.'*

27) There is a similar inconsistency in the close out reports WLP and ELP furnished to the department after the five year term of the SLP, about which the evidence leaders say the following:

> *'20. In the WLP and ELP close out reports on their SLP they accounted for their failure to meet their housing obligation in terms which are incompatible with the version advanced through the mouth of Mr Seedat. In particular, the close out reports refer to an unachieved financial commitment of*

spending R665 million on house construction. When the relevant extracts of the close out reports were put to Mr Seedat, he could not explain them and had to seek refuge in the fact that he had played no part in their production or approval.'

28) In their sustainable development reports Lonmin clearly indicated not only that it understood that WPL and EPL's housing obligations went further than Mr Seedat contended in his evidence but also that a failure to deliver on these commitments could lead to the possible withdrawal of the mining licenses. The following passages in Lonmin's 2010 Sustainable Development Report [857]makes these two points abundantly clear:

'Our commitment to affordable housing for our employees is underpinned by a sound business imperative created by the inclusion of housing provision in our SLP requirements. In order to meet this commitment, we have to:

- *Convert a total of 114 hostel blocks into 2, 718 family and bachelor accommodation units; and*
- *Construct 5,500 houses within the GLC.*

[857] Exh SSSS2, p 1404

'Our principal risk is possible withdrawal of our Mining Licences resulting from failure to deliver commitments made in our Social and Labour Plan (SLP) regarding housing and converting our hostel units.'

29) The evidence leaders deal with Lonmin's breach and repudiation of its housing obligations in paras 23 to 27 of their heads, with which the Commission is in complete agreement. These paras read as follows:

'23. WPL and EPL defaulted consistently in the performance of their SLP obligations in relation to hostel conversion and house construction. By the end of the 2009 financial year they had built only 3 of the 3200 houses it had undertaken to build in the first three years of the SLP, and were 41 hostels behind their target for the conversion of 70 hostels over this three year period.

24. In its 2009 SLP report Lonmin abandoned any reference to the figures in its actual SLP and stated that:

> *"The financial situation of the company impacted by the global economy on the price of platinum resulted in a review of the housing and hostel upgrade programme."*

25. In accordance with this "review", the new target for the 2009 financial year was reduced to the construction of 3 show houses. WPL awarded itself 100% in respect of the achievement of this target. In terms of the "review", what had previously been an unconditional obligation to construct 5500 houses over five years with a capital budget of R665 million was converted into a contingent obligation to build houses only for workers who could obtain mortgages, and then only when at least 50 applicants with approved home loans approached WPL or EPL with a request to build them each a home on the basis of their approved home loan.

26. The revised obligation was not accepted by the DMR, which noted in its audit and inspection report of 9 September 2009 that

> *"The company committed to building 5500 houses to be sold to its employees. To date the company should have built 3200 houses, but only three show houses have been built at Marikana Extension 2….*
>
> *Hostel conversion in Marikana, to date the company should have converted 70 hostels, only 29 blocks of hostels have been converted."*

27. The 2009 "review" amounted to a unilateral repudiation of the obligations assumed in the original WPL and EPL SLP. In his evidence in chief Mr Seedat took issue with the characterisation of the 2009 "review" as a unilateral repudiation of the WPL and EPL obligations. However, in cross examination he was obliged to concede that the step that was taken in 2009 was one which was incompatible with any belief that it may still be possible to ensure the construction of 5500 houses by the end of the term of 2011.'

30) Lonmin attempted to justify its repudiation of its housing obligations on two grounds:

(a) it claimed that there were delays in proclamation which prevented it from starting its house construction programme; and

(b) it stated that in the wake of the financial crisis it could not afford to construct houses for its employees.

31) The evidence leaders demolished the first ground of attempted justification as follows:

'29. The proclamation delay argument is a red herring. Proclamation of Marikana Ext 2 took place on

> *10 February 2009 and it is common cause that following proclamation of Marikana Ext 2 there was available proclaimed land for the house construction programme. In fact, proclamation was never a barrier for the start of the house construction programme because there were 780 serviced stands available at the start of the SLP period as well as vacant land that did not have to go through the proclamation process because it was within the existing hostel complexes.'*

32) The second ground of attempted justification, as the evidence leaders submit,[858] starts from a mistaken premise. The obligations of WPL and EPL were legally binding under the MPRDA. It is common cause that WPL and EPL did not apply to the department to vary their SLP obligations in relation to house construction (and they realised that by not complying with their obligations in that regard they ran the risk of losing their mining licence). If the department had applied to court for an order directing that they comply with their obligations they could not have relied on their alleged inability to afford to comply. It follows that this attempted ground of attempted justification is irrelevant.

[858] ELs' Heads, para 30

33) The evidence leaders also submit, correctly in the Commission's opinion that the affordability argument is, on its own terms, incorrect. They motivate this submission by pointing out:

> *'31.1. Over the 2007-2011 period in which Lonmin claims that WPL and EPL could not afford to meet their housing obligations which were budgeted at R665m, the two companies*
>
> *31.1.1. paid dividends of US$607 million to Lonmin Plc and Incwala Resources (Pty) Ltd, and*
>
> *31.1.2. paid more than R1.3 billion in 'marketing commission' payments to Lonmin Plc (in the form of its SA branch company Lonmin Management Services (Pty) Ltd) and/or its Bermudan registered subsidiary, Western Metal Sales Ltd.*
>
> *31.2. Over the period 2008-2011 alone, Lonmin Management Services made an aggregate profit of R 643,547,159 on these "marketing commissions" paid by WPL and EPL.'*

34) Counsel for Lonmin endeavour to deal with the fact that dividends of US$607 million were paid over the 2007 – 2011 period by referring to 'the fact that Lonmin shareholders, through Lonmin PLC in the form of two significant rights issues had put more funds into the two operating companies since 2007 than had been paid out to shareholders by WPL and EPL in the form of dividends'. [859] The provision of those funds by the shareholders does not alter the force of the point made by the evidence leaders because the shareholders who put in the funds received consideration in exchange, *viz* the rights which were the subject of the rights issue.

35) Counsel for Lonmin also argued that Lonmin's admitted failure to comply with the housing obligations under the SLP would not have made a difference because the failure to build 5500 houses would have had no effect on the tragedy. Advancing what he called a 'counterfactual' he said: [860]'Remember we employ 28 000 employees … of the 28 000 we've employed we've now built houses for five and a half thousand. What about the other 20 and a half thousand [sic, the correct figure is 22 500]? Is that going to take away their complaints? Is that going to create trust between the employer and the employees? I wouldn't have thought so'.

[859] Lonmin's Heads of Argument, dated 27 October 2014, para 295
[860] D 296, Submissions by Burger SC, p 38993

36) In reply Mr Chaskalson SC said that this was:[861]

> *'… quite a breathtaking argument for Lonmin to make. It amounts to an argument that Lonmin has been so neglectful of the housing needs of its workforce that the 5500 houses in their SLP would have been no more than a drop in the ocean of squalor in which they expect their workers to live. That's what the argument is.*
>
> *Well, Lonmin may have been bad, but it wasn't that bad. The figures that Mr Burger quoted to you are actually incorrect for two reasons; first is they conflate the total workforce with the number of migrant workers in categories 4 to 9, which is the real inquiry, migrant workers, and second they ignore the houses that were already available for Lonmin's category 4 to 9 migrant workers either through hostel conversion process or through housing developments undertaken by Lonmin prior to 2000.*

[861] D 300, Submissions by Chaskalson SC, pp 39678 – 39680

Now we've prepared a table which … shows the correct figures on the basis of Lonmin's own documents with the sources, and there we see that the total number of category 4 to 9 employees was 23044, not 28000 quoted by Mr Burger, that the total number of these workers who were in decent housing by 2012 was 5883, which is 25%, 1 in 4. The total number not in decent housing by 2012 was 17161, 74.4%,three quarters.

We then look at what would have happened if Lonmin had delivered. It would have created another 1130 on outstanding hostel conversions and another 5497 houses, that's the 5500 minus the three that they managed to build. That would have changed the situation, so instead of 25% of the workers in decent housing and 74% not in decent housing, you would have had 54% in decent housing and 45% not in decent housing.

Now in our submission it would have been a very material difference. It's not just that more than half the migrant workers would have been in decent housing, it's also that the remaining 45% would have

> *seen that their employer was in the process of addressing their living conditions. Instead three-quarters of the migrant workforce was living in squalor and Lonmin had done nothing about it for more than a decade. In fact they'd compounded the problem by pushing 7 out of every 8 hostel residents into the informal settlements. So it very much would have made a difference is our submission'*

37) The Commission is satisfied that Lonmin's failure to comply with its housing obligations 'created an environment conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct'.

CHAPTER 25

RECOMMENDATIONS

A The Commission recommends that the following matters are referred to the Director of Public Prosecutions, North West for further investigation and to determine whether there are bases for prosecution:

1) **10th August 2012**

The attempted murder of Mr Mutengwane and Mr Dlomo.
(Marikana CAS 69/08/2012) refers.

2) **11th August 2012**

The shooting by NUM officials of Mr Mabuyakhulu and Mr Ngema and the subsequent attack on Mr Mabuyakhulu whilst he lay injured on the ground. (CAS 67/08/2012) refers.

3) **12th August 2012**

Where Lonmin, well knowing of the reports of intimidation and violence and being fully aware of their inability to protect their employees, urged employees

to go to work and after the killings of security personnel by the strikers, failed to inform employees of the dangers of coming to work and failed to withdraw their call to work during the strike:

(a) The assaults upon Mr Louw and Mr Vorster and the deaths of Mr Fundi and Mr Mabelane in confrontations with the strikers.

(b) The death of Mr Mabebe at K4 Shaft. (CAS 109/8/2012) refers

(c) The assaults upon Mr Janse Van Vuuren, Mr Andries and Mr Keyser at K4 shaft. (CAS 111/08/2012) refers.

4) **13th August 2012**

(a) The killing of Mr Langa by the strikers in the early hours of the morning of 13 August 2012

(b) The killing of Mr Sokhanyile in circumstances where there are conflicting versions of the allegations of the shooters acting in private defence.

(c) The killing of Mr Mati, where there is difference in opinion about whether the fatal wound is a gunshot wound or a stab wound.

(d) The killing of Warrant Officer Lepaaku and Warrant Officer Monene and the assault on Lieutenant Baloyi.

5) **14th August 2012**

The killing of Mr Twala (CAS 121/8/2012)

6) **16th August 2012**

With regard to scene 1 and with regard to those members of the South African Police Services, who in firing shots at the strikers may have exceeded the bounds of self and private defence and the delay in conveying medical assistance to scene 1, and with regard to scene 2, with regard to issues of command and control, the failure to stop the operation after scene 1 and the possible liability of senior officers in the South African Police Services, the shooting of strikers by various members of the South African Police Services:

(a) In terms of paragraph 5 of the Commission's terms of reference, the Commission refers the circumstances surrounding the injuries and deaths of all persons at Scene 1 and 2 to the Director of Public Prosecutions of the North West Province, to exercise his powers in terms of section 24(1)(c) of the National Prosecuting Authority Act 32

of 1998[862], to supervise, direct and co-ordinate a specific investigation into the events at scenes 1 and 2.

(b) It is recommended that for the purposes of the investigation, a team is appointed, headed by a Senior State Advocate, together with independent experts in the reconstruction of crime scenes, expert ballistic and forensic pathologist practitioners and Senior Investigators from IPID, and any such further experts as may be necessary. The Commission recommends a full investigation, under the direction of the Director of Public Prosecutions, with a view to ascertaining criminal liability on the part of all members of the South African Police Services who were involved in the events at scene 1 and 2.

7) **The period between 10th August 2012 and 16th August 2012**

(a) The offences in terms of the Regulation of Gatherings Act and the Possession of Dangerous Weapons Act. The strikers can be seen very clearly on videos and photographs in possession of dangerous weapons at public gatherings or in public places, as were NUM members after the attack on the NUM office on 11 August 2012.

[862] NPA Act: Section 24(1)(c) Subject to the provisions of section 179 and any other relevant section of the Constitution , this Act or any other law, a Director referred to in section 13 (1) (a) has, in respect of the area for which he or she has been appointed, the power to supervise, direct and co-ordinate specific investigations

(b) The propensity in South Africa presently for the carrying of sharp instruments and firearms and the associated violence even in service delivery protests, require strict enforcement of the laws prohibiting such conduct.

B The Commission recommends with regard to Public Order Policing that a panel as described in paragraph 8 below be established to perform the tasks set out in paragraphs 8, 9 and 10.

1) The experts were unanimous in their view that automatic rifles like the R5 have no place in Public Order Policing. Mr De Rover testified that he suggested an immediate withdrawal of R5 from POP operations. He said that military assault weapons have no place in law enforcement and that he was fully aware of the particular problems of violence in South Africa.[863] Mr White also recommended an immediate withdrawal of R5 rifles and added that any replacement weapon system should not be capable of "automatic fire" mode'.[864]

2) The evidence before the Commission clearly indicates that the measures at the disposal of Public Order Policing are completely inadequate for the purposes of dealing with crowds, armed as they were, with sharp weapons and firearms, at Marikana.

[863] Page 36984
[864] Exhibit ZZZ31.3 para 45

3) Mr De Rover said POP capabilities are mainly reactive, they are mainly static, set piece, aimed at containment and crucially, prefer a distance between them and the crowd and the current configurations offer very limited options to deal with such situations.[865]

4) He said that the strikers on the 13th and more so on the 16th, appeared confrontational, organised, mobile, armed, violent and volatile.[866]

5) He said that the 13th, where POP members ran away from the scene during the attack by the strikers upon their colleagues, was an abject failure of Public Order Policing. He said POPS cannot deal with such situations. He went so far as to say that none of the units in the SAPS has the ability to stop a crowd with those characteristics if they decided to walk into the Union Buildings.[867]

6) Major General Mpembe said in a discussion with Mr Zokwana that no amount of training enables him with a rifle to disarm someone with an axe, without bloodshed. Mr De Rover said that the approach at Marikana has never been field tested. It was such a dangerous situation and the members of the South African Police Services were not trained for it.[868]

7) The Commission is mindful of the dangers inherent in the situation when Public Order Policing members are faced with a crowd armed with sharp

[865] Page 37057
[866] Page 37056
[867] Page 37062
[868] Page 37065

weapons and where non-lethal force is ineffective. However the use of R5 or any automatic rifle is clearly untenable, not only because of the Constitutional imperatives, but also because the effects seen at Marikana are just too disturbing and devastating for South Africa even to contemplate any recurrence.

8) Bearing in mind Mr De Rover's comment that no unit in SAPS is currently in a position to deal with such a crowd, it is recommended that a panel of experts be appointed, comprising senior officers of the Legal Department of the SAPS together with senior oficers with extensive experience in Public Order Policing and specifically including independent experts in Public Order Policing, both local and international, who have experience in dealing with crowds armed with sharp weapons and firearms as presently prevalent in the South African context, to:

(a) Revise and amend Standing Order 262 and all other prescripts relevant to Public Order Policing;

(b) Investigate where POP methods are inadequate, the world best practices and measures available without resorting to the use of weapons capable of automatic fire;

(c) Having done so, to implement a training programme where all Public Order Policing members are extensively and adequately trained in such measures and methods; and

(d) Consider and advise on the recommendations made by Mr Robert David Bruce and Amnesty International.

9) In addition to the above, the experts have made detailed and far reaching recommendations.[869] We recommend that the abovementioned panel investigate and determine the suitability of each of the recommendations to the South African situation, and, where found to be apposite, to authorize and implement such recommendations, and to ensure that adequate and appropriate prescripts, protocols and training are put into place to give urgent effect to those decisions.

10) The Commission has heard evidence of uncertainty as to the exact roles to be played when tactical units are deployed together with Public Order Policing Units in instances of crowd control. It is specifically recommended that the above mentioned panel pay particular attention to the lacunae in the standing orders and prescripts and identify, revise and amend the relevant protocols with clearly defined roles for each tactical unit.

11) It is recommended that the abovementioned panel be constituted as soon as possible to enable urgent attention to be directed to these recommendations.

[869] Exhibit ZZZ31.1 to 31.3

C Recommendations by National Planning Commission

The National Planning Commission, in its report, which has been accepted as Government policy, has made a number of important recommendations regarding the need to demilitarise the SAPS and to professionalise the police. These recommendations must be implemented as a matter of priority.

D Control over operational decisions

1) While it is recognised and accepted that in large and special operations there is a role for consultation with the Executive, in particular the Minister of Police, the Commission recommends that the Executive should only give policy guidance and not make any operational decisions and that such guidance should be appropriately and securely recorded.

2) The Commission recommends further that in Public Order Policing situations operational decisions must be made by an officer in overall command with recent and relevant training, skills and experience in Public Order Policing.

E Police Equipment

1) All radio communications should be recorded and the recordings should be preserved. Plans for Public Order Policing operations should identify the

means of communication which SAPS members will use to communicate with each other.

2) A protocol should be developed and implemented for communication in large operations including alternative mechanisms where the available radio system is such that it will not provide adequate means of communication.

3) The SAPS should review the adequacy of the training of the members who use specialised equipment (eg water cannons and video equipment), and ensure that all members who may use such equipment are adequately trained to do so.

4) All SAPS helicopters should be equipped with functional video cameras.

5) The SAPS should review the procurement, servicing and training processes which have had the result that expensive equipment purchased by the SAPS cannot be used, either adequately or at all.

F First Aid

1) In operations where there is a high likelihood of the use of force, the plan should include the provision of adequate and speedy first aid to those who are injured.

2) There should be a clear protocol which states that SAPS members with first aid training who are on the scene of an incident where first aid is required, should administer first aid.

3) All police officers should be trained in basic first aid.

4) Specialist firearm officers should receive additional training in the basic first aid skills needed to deal with gunshot wounds.

G Accountability

1) Where a police operation and its consequences have been contraversial requiring further investigation, the Minister and the National Commissioner should take care when making public statements or addressing members of the SAPS not to say anything which might have the effect of ‘closing the ranks’ or discouraging members who are aware of inappropriate actions from disclosing what they know.

2) The standing orders should more clearly require a full audit trail and adequate recording of police operations.

3) The SAPS and its members should accept that they have a duty of public accountability and truth-telling, because they exercise force on behalf of all South Africans.

4) The staffing and resourcing of IPID should be reviewed to ensure that it is able to carry out its functions effectively.

5) The forms used by IPID for recording statements from members of the SAPS should be amended so as to draw the attention of the members concerned to the provisions of section 24 (5) of the IPID Act and thereby encourage them to give full information about the events forming the subject of an IPID investigation without fear that they might incriminate themselves.

H Lonmin's Housing obligations under the SLP's

1) The Commission recommends that Lonmin's failure to comply with the housing obligations under the SLP's should be drawn to the attention of the Department of Mineral Resources, which should take steps to enforce performance of these obligations by Lonmin.

2) In his letter to the chairperson dated 24 April 2014, when paragraph 1.5 of the proclamation was deleted to enable the Commission to accelerate the finalisation of the primary invesitigation, the President said: 'the investigation relating to the role of the Department of Mineral Resources and other

departments or agencies pertaining to the tragic incidents as contemplated in paragraph 1.5 of the terms of reference may be considered at a later stage guided by the outcome of the Commission's findings and recommendations with regard to the incidents of 9 - 12 August 2012'. In view of the fact that the Commission has found that Lonim did not comply with housing obligations in the SLP's of its two Marikana subsidiaries, it is recommended that the topics dealt with in the deleted paragraph, in particular the apparent failure by the Department of Mineral Resources adequately to monitor Lonmin's implementation of its housing obligations, should be investigated.

CHAPTER 26

RESPONSES TO QUESTIONS POSED IN TERMS OF REFERENCE

1) The Commission has endeavoured to provide a narrative of important events that took place at Marikana during the period covered by its Terms of Reference.

2) In what follows, it will give its responses to the questions posed in the Terms of Reference.

3) Lonmin PLc did not use its best endeavours to resolve the disputes that arose between itself and the members of its work force who participated in the unprotected strike and between the strikers and those workers who did not participate in the strike. It also did not respond appropriately to the threat and outbreak of violence.

4) The Commission says this because it is of the view that Lonmin should in the special situation created by Impala's action in unilaterally raising the wages of its RDOs have negotiated with its RDOs and not initially sheltered behind the two year agreement and thereafter insisted it would only negotiate with NUM in which it knew the RDOs had no confidence.

5) Lonmin also failed to employ sufficient safeguards and measures to ensure the safety of its employees. In this regard it failed to provide its security staff with the armoured vehicles they needed for their protection despite being requested to do so. It also insisted that its employees who were not striking come to work despite the fact that it knew that it was not in a position to protect them from attacks by strikers.

6) Finally, it created an environment conducive to the creation of tension and labour unrest by failing to comply with the housing obligations undertaken by its two subsidiaries in the SLPs on the strength of which it obtained new order mining rights.

7) Apart from Standing Order (General) 262, which requires amendment and clarification, the standing orders, policy considerations, legislation and other instruments which deal with the situation prevailing at Marikana during the period covered by the Commission's investigation are in accordance with the Constitution and world best practice.

8) The facts and circumstances which gave rise to the use of all and any force are set out in the report.

9) As far as the events of 13 August 2012 are concerned, the initial firing of a teargas canister and a subsequent stun grenade were unreasonable and unjustifiable in the circumstances and was the 'spark' which caused the confrontation between the SAPS and the strikers.

10) As far as the events of 16 August 2012 are concerned, the decision to implement the 'tactical option' on that day at a time when a large number of armed strikers were present at the koppie was unreasonable and unjustifiable. The plan put together on that day was defective. It appears prima facie that some of the SAPS members who fired at the strikers at scene 1 exceeded the bounds of self and private defence. The principle that only the minimum amount of force reasonable in the circumstances should be used was not complied with.

11) The operation should have been stopped at the end of scene 1. There was no proper command and control at scene 2. Numerous shots were fired which were not justified by the principles of self and private defence. Members of the TRT and one member of the POP fired all the shots at scene 1. The shots fired at scene 2 were fired by members of the POP, K9 Unit, the NIU and the TRT.

12) Officials of AMCU did not exercise effective control over its members and those persons allied to it in ensuring that their conduct was lawful and did not endanger the lives of other persons. They sang provocative songs and made inflammatory remarks which tendered to aggravate an already volatile situation. The president of AMCU did his best before the shootings to persuade the strikers to lay down their arms and leave the koppie.

13) NUM did not exercise its best endeavours to resolve the dispute between itself and the strikers. It wrongly advised the RDOs that no negotiations with Lonmin were possible until the end of the 2 year agreement. It did not take

the initiative in endeavouring to persuade and enable Lonmin to speak to the RDOs. It failed to exercise effective control over its membership in ensuring that their conduct was lawful and did not endanger the lives of others. It encouraged and assisted non-striking workers to go to the shafts in circumstances where there was a real danger that they would be killed or injured by armed strikers.

14) Individual strikers and loose groupings of strikers promoted a situation of conflict and confrontation which gave rise, directly or indirectly, to the deaths of Lonmin's security guards and non-striking workers and to the injuries sustained by Lonmin's security guards and non-striking workers and endangered the lives of the non-striking workers who were not injured.

CHAPTER 27

CONCLUDING REMARKS

A The Fear Factor

During the course of the hearings it was apparent to the Commission that what may be described as a fear factor was operating. For example, Lonmin refused to disclose the name of the person who interpreted from Fanagalore into English during the negotiations between Lieutenant Colonel McIntosh and the leaders of the strikers. Some witnesses appeared reluctant to tell the Commission the full story for fear of reprisals. This apparent fear was understandable in view of the fact that several killings took place before and during the sittings of the Commission which gave rise to a justifiable suspicion that the motive therefor was to prevent the persons killed from giving evidence.

B Violence on the part of the strikers

1) This report would not be complete without a condemnation in the strongest terms of the violent manner in which the strike was sought to be enforced, and the brutality of the attacks upon those persons who suffered injuries and who died prior to 16 August 2012. Whilst the strikers aver that they first took up arms to protect themselves against the attack by NUM, a version which the Commission has found to be untrue, as set out above, they have not placed any evidence before the commission to explain why they found it necessary to resort to violence to achieve any of their aims.

2) The gratuitous violence of the attacks upon the deceased security officers and Lonmin employees, Mr Fundi, Mr Mabebe, Mr Mabelane, and Mr Langa and the number and types of injuries to their bodies as seen in the images and as detailed in the post mortem reports, must be as distressing to their families as to the families of the deceased who were killed on the 13th and the 16th in encounters with the Police.

3) So too with the attacks upon employees who sustained injuries in circumstances where they did nothing to provoke the situation but simply reported for work as urged to do by their employer.

4) In particular the burning of the vehicles on the 12th and the 14th must, in the Commission's view, have been premeditated, because of the unlikelihood

that on both days the strikers came upon the incendiary material at the scene to start the fires.

5) The fact that the strikers armed themselves with sharp weapons on the 12th both on their way to the NUM offices and on their way to K4 shaft, and did not hesitate to use the weapons in unprovoked attacks upon Lonmin Security officers and civilian employees, must point to an intention on their part to use violence at every instance to promote their cause.

6) While not detracting at all from the criticisms of the actions of the SAPS, the taking up of arms and the use of violence by the strikers was an important contributory fact to the situation at Marikana developing as it did. It alerted the police to the type of criminal acts they were required to deal with and precipitated a police presence in addition to Public Order Policing. It was also an indication of the lengths the strikers to which were prepared to go, to enforce their demands.

7) It appears from the evidence that the taking up of arms and the violence perpetrated by the strikers was partly responsible for the reluctance on the part of the employer to engage in any manner whatsoever, whilst they remained armed .

8) Whilst there exist adequate mediation and negotiation channels to enable issues to be resolved in matters of protests, strikes and stand offs, it might be a salutary lesson, for the citizens of this country to take away from

Marikana, that the taking up of arms and the resorting to violence is neither constructive nor appropriate in protecting and enforcing one's rights.

C Public perception of the SAPS

9) In his concluding remarks at the end of the oral hearings of the Commission Mr Budlender SC quoted the following passage from the Stonechild Report at page 207 which reads as follow:

> *'Certainly the Saskatoon Police Service must treat its members with respect and dignity and observe the procedural and substantive protections of the law. If, however, the Saskatoon Police Service becomes an advocate for its members it assumes a role that is antithetical to its responsibility to the public. In assuming such a partisan rule the Saskatoon Police Service contributes to a public perception that police cannot police themselves and that complaints against the police are futile.'*[870]

10) Mr Budlender submitted that this is a very telling observation which is very much applicable to the response the SAPS adopted to the allegations against it which is encountered in this Commission. The Commisson agrees.

[870] Reports of the Commission of Inquiry into matters relating to the death of Neil Stonechild, 2004, p 207

11) The recommendations of the Commission will, it is hoped, help the SAPS to provide a policing service within the constraints of the Constitution and the law.

D Hopes for the future

10) The Commission endorses the following comments in the Heads of Argument submitted on behalf of SAPS:

> '*South Africa should not have another Marikana. The loss of lives of the strikers, the members of the police, security personnel of Lonmin and employees of Lonmin is to be deeply regretted. The injuries sustained by some of the strikers are also regrettable. Damage to property should not follow expression of any civil disaffection. Bearing arms against a lawful authority should provoke widespread outrage. A career in the police service should not be a death warrant. Those who are found to have been culpable in relation to the criminal acts in the period 9 to 16 August 2012 in Marikana must bear the consequences of their conduct.*'

ANNEXURE A

RULING ON MR X'S EVIDENCE

IN THE MARIKANA COMMISSION OF INQUIRY

(*HELD AT CENTURION*)

In re:

The application by SAPS to present certain oral evidence in camera and by video link

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RULINGS

The Chairman:-

Introduction

[1] The South African Police Service (to which I shall refer in what follows as '*the SAPS*') has brought an application to present '*in camera and by video link*' oral evidence to be given by a witness described as '*Mr X*'. Unsigned and unattested copies of statements purporting to have been made by him have been handed in as exhibits.

[2] The evidence leaders supported the application in the main but suggested that the rulings sought should be amplified in certain respects. As these modifications have been accepted by the SAPS, I shall in referring to the rulings sought deal with them as modified in accordance with the evidence leaders' suggestions.

[3] The rulings which the SAPS requests me to make are as follows:-

1. That the evidence of Mr X be presented *in camera* and by video link.

2. That at all times during the testimony of Mr X, one of the evidence leaders shall be present in the room from which Mr X testifies.

3. That only the commissioners, legal representatives and accredited media representatives shall be present in the auditorium during the testimony of Mr X.

4. That at least two weeks prior to the commencement of the testimony of Mr X, the SAPS legal representatives shall -

(a) disclose the name of Mr X to the evidence leaders and the legal representatives of all the parties;

(b) provide the evidence leaders and the legal representatives of the parties with a photograph of Mr. X; and

(c) indicate to the evidence leaders and the legal representatives of the parties all points at which they have been able to identify Mr X on video footage of the events during the period 13 to 16 August 2012.

5. That the details in paragraphs 4(a) to (c) above shall be disclosed only to the commissioners, the evidence leaders and to the legal representatives who require
the information in order to obtain instructions from their clients.

6. That neither the name nor any information that may reveal the identity of Mr X shall be disclosed further by any party other than the SAPS save for the purpose of obtaining instructions.

7. That members of the public may listen to the audio transmission of the testimony of Mr X in the overflow room.

8. That members of the media may not publish the name of Mr X or any other information which may reveal his identity.

9. That all video recordings of the evidence of Mr X must be blurred or blacked out so as to not disclose his identity.

The case sought to be made out by the SAPS

[4] As is apparent from the supporting and replying affidavits filed by Mr. Frikkie Pretorius, the attorney of record acting on behalf of the applicant, and further confirmatory affidavits by Brigadier Van Zyl, the Co-ordinator of the Task Team appointed to investigate cases reported since 8 August 2012 relating to the unrest at Marikana, and Mr X himself the orders claimed are primarily aimed at protecting the lives of Mr X and members of his family by withholding his visual image and identity from the public.

[5] According to Mr. Pretorius Mr. X will testify about the events at Marikana on matters relating to -

(a) the organizing and planning of the strike;

(b) the intimidation and killing of employees who were unwilling to participate in the strike;

(c) the march to the offices of NUM on 11 August 2012;

(d) the killing of the two LONMIN security employees on 12 August 2012;

(e) the events of 13 August 2012 during which two members of the SAPS were killed and one was seriously injured;

(f) the killing of Mr Isaiah Twala on 14 August 2012;

(g) participation in rituals in preparation for a confrontation with the Police; and

(h) a plan to attack the Police on 16 August 2012.

[6] Mr Pretorius also states that Mr. X will refer to persons who are facing criminal charges arising from the events in Marikana and who are presently on bail and will also refer to persons who are still being sought by the Police relating to criminal conduct of some individuals in such events. Mr Pretorius says that he has been advised that some of the persons who will be referred to in Mr. X's evidence attend the proceedings of the Commission.

[7] Mr. X is presently in a witness protection programme in terms of the Witness Protection Act 112 of 1998 and is assisting the NPA in relation to the events surrounding the killings and damage to property by the strikers during the strike at the Lonmin Mine in August 2012.

[8] The evidence shows that various potential witnesses have before and since the appointment of the Commission on 26 August 2012 been murdered in circumstances giving rise to a strong suspicion that it was done to prevent any or all of them giving evidence before the Commission and in any possible criminal proceedings.

[9] These persons include –

(a) Mr. Isaiah Twala, a shop steward of NUM, who was hacked to death on 14 August 2012 near the koppie at Marikana where the strikers were assembled; and

(b) Mr Daluvuyo Bhongo, a NUM member and a potential witness before the Commission, who pointed out relevant places during an inspection *in loco* conducted by the Commission and who was killed in his room at the Wonderkop Hostel on 5 October 2012

[10] It is against this background that the SAPS and Mr. X fear that should Mr. X be required to tender his evidence in open forum at the Commission, his life and possibly also those of his family may be at risk. The SAPS avers further that the criminal investigation and prosecutions arising from the events at Marikana will in that event be undermined.

[11] In addition to the killings to which Mr. Pretorius refers it is in my view relevant to mention that it is common cause that two persons who appear to have reported for work at the Karee shaft on the evening of 12 August 2012 and thus have indicated an unwillingness to join in the unprotected strike in which strikers were participating were murdered. It is thus clear that a reasonable possibility exists that some of the strikers were prepared to go to the lengths of murdering their colleagues in order to enforce the unprotected strike.

Opposition to the orders sought

[12] The application is opposed on behalf of the Injured and Arrested Persons, the amilies of the three mineworkers who were killed on 13 August 2012, the families of the 34 mineworkers who were killed on 16 August 2012 and AMCU.

[13] Their opposition is mainly based on the following grounds, namely -

(a) that permitting the testimony of Mr. X *in camera* will be inconsistent with existing common law principles relating to procedural fairness and the testing of evidence through full and effective cross examination;

(b) that it will breach the principles of openness and transparency;

(c) that it will infringe the rights of victims and members of the community to participate in the proceedings;

(d) that it will infringe the right of access to courts in section 34 of the Constitution, which guarantees a '*public*' hearing and the principle of '*open justice*';

(e) that it is inconsistent with international law; and

(f) that it is in any event impractical and adverse to the mandate of the Commission.

[14] Most, if not all, of the principles on which these grounds of opposition are based are well known and accepted both in our law and in international law. They are subject, however, to exceptions where there are special circumstances or where it is strictly necessary to have proceedings closed (see, eg., ***section 153 of the Criminal Procedure Act 51 of 1977*** and ***section 16 of the Supreme Court Act 59 of 1959***).

[15] This is well illustrated in, eg., ***Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re Masetlha v President of the RSA 2008 (5) SA 31 (CC) at 50A, para [45]*** where Moseneke DCJ said:

> '*The right of the media or public to attend, receive and impart workings of a courtroom may be attenuated by a court where it exercises its inherent power to regulate its own process under s 173 of the Constitution. If in so doing "it impinges upon rights entrenched in ch 2 of the Constitution, [it must ensure that] the extent of the impairment of rights is proportional to the purpose the Court seeks to achieve". It may be added that the right to an open court hearing and the right to report on it do not automatically mean that court proceedings must necessarily be open in all circumstances. There may be instances where the interests of justice in a court hearing dictate that oral evidence of a minor or of certain classes of rape survivors or confidential material related to police crime investigation methods or to national security be heard in camera. In each case, the court will have to weigh the competing rights or interests carefully with the view to*

ensuring that the limitation it places on open justice is properly tailored and proportionate to the end it seeks to attain. In the end, the contours of our constitutional rights are shaped by the justifiable limitation that the context presents and the law permits.'

In my view this exposition is also capable of application to commissions of inquiry.

Relevant legal provisions regarding the power of a chairman of a commission to grant any or all the orders sought

[16] Section 4 of the Commissions Act 8 of 1947 states that all the evidence and addresses must be heard in public subject to this proviso:

'*Provided that the chairman of the commission may, in his discretion, exclude from the place where such evidence is to be given or such address is to be delivered any class of persons or all persons whose presence at the hearing of such evidence or address is, in his opinion not necessary or desirable.*'

[17] Regulation 10 of the Regulations relating to the Commission reads as follows:

'*Where, at the time of any person presenting information to or giving evidence before the Commission, members of the general public [obviously in terms of section 4 of the Commissions Act, 1947] are or have been excluded from attendance at the proceedings of the*

Commission, the Chairperson may, on the request of such a person, direct that no person shall disclose in any manner whatsoever the name or address of such person or any information likely to reveal his or her identity.'

[18] Also relevant in this regard, in view of the fact that Mr X is under witness protection, are the provisions of sections 18 and 19 of Witness Protection Act of 1998, which read as follows:

'***Publication of information concerning protected person***

18. *Notwithstanding any other law, the presiding officer -*

(a) at any proceedings [which in terms of the definition of "proceedings" in section 1 includes proceedings before a commission] or at civil proceedings in which the protected person is a party or a witness;

(b) .....

must make an order prohibiting the publication of any information, including any drawing, picture, illustration, painting, photograph, whether produced through or by means of computer software on a screen or a computer print-out as contemplated in the Films and Publications Act, 1996 (Act 65 of 1996), or not, pamphlet, poster or other printed matter, which may disclose –

(i) the place of safety or location where he or she is or has been under protection or where he or she has been relocated in terms of this Act;

(ii) the circumstances relating to his or her protection;

(iii) the identity of any other protected person and the place of safety or location where such person is being protected; or

(iv) the relocation or change of identity of a protected person,

unless the Director [for Witness Protection] satisfies the presiding officer concerned that exceptional circumstances, which are in the interest of justice, exist why such an order should not be made.'

*'**Protected person not obliged to disclose certain information***

***19.** Notwithstanding any other law, no protected person -*

(a) when giving evidence or producing any book, record, document or object in his or her possession or under his or her control in any proceedings or in any civil proceedings before a court;

(b) ..... ,

shall be obliged to disclose any information referred to in section 18.'

[19] Relying on regulation 19 which provides for the Commission to determine its own procedure, counsel for the SAPS submitted that the Commission is empowered to direct, as a matter of procedure, that the evidence of Mr X be presented from a remote location and through video link.

[20] It was argued on behalf of the family of one of the mineworkers killed on 16 August 2012, relying on ***Phillips v NDPP 2006 (1) SA 505 (CC)*** and ***S v Pennington 1997 (4) SA 1076 (CC)***, that the powers conferred in regulation 19 cannot be exercised to provide for the video link, as such a ruling would, it was contended, circumvent section 4 of the Commissions Act. This submission is in my view not supported by the decisions on which reliance was placed. In those decisions it was held that the High Court's inherent powers envisaged in section 173 of Constitution, were intended to meet extraordinary procedural situations, usually where there was a legislative *lacuna* in the process and as a special and extraordinary power and not where a specific law directly provides for a given situation. This is not the situation here. Section 4 of the Commissions Act is not a law which provides fully and effectively for the power assigned. On the contrary section 1(1)(b) of the Commissions Act provides for the promulgation of regulations in respect of commissions to which the Act is made subject and section 19 of the Regulations applicable to this Commission provides, as has been seen, for the Commission to determine its own procedure

[21] It was contended by counsel for the Injured and Arrested Persons, the families of the three mineworkers killed on 13 August 2012, the families of 33

of the mineworkers killed on 16 August 2012 and AMCU that a direction or order that a witness may so give evidence can not be regarded as a procedural matter. I do not agree. It is apposite to refer to what Vieyra J held in ***Ex parte Millsite Investment Co (Pty) Ltd 1965 (2) SA 582 (T)*** in relation to the High Court's inherent powers to regulate its own procedure. At **585H** he said:

'*The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation ..... The outer reaches of the power do not have to be explored now. All that matters at present is this. The power is wide enough, it seems, to encompass directions concerning the search for and collection of evidence that is needed in litigation.*'

[22] I agree with the submission made by on behalf of the SAPS that it is competent for the Commission to exercise its powers to determine its own procedure by providing for the reception by it of evidence by video link in appropriate cases. Such a determination would fall under the rubric of procedure because, as counsel for the SAPS argued, it would deal with **how** the evidence would be received by the Commission.

[23] My fellow commissioners and I have decided to make the procedure set out in section 158(2) and (3) of the Criminal Procedure Act 51 of 1977 applicable

mutatis mutandis in the proceedings of the Commission. These subsections read as follows:

‘ *(2) (a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.*

(b) A court may make a similar order on the application of an accused or a witness.

(3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would -

(a) prevent unreasonable delay;

(b) save costs;

(c) be convenient;

(d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or

(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.'

[24] It can, we think, scarcely be contended that an evidentiary provision that applies in a criminal trial cannot appropriately be applied in a commission such as this.

[25] We were also influenced in coming to this decision by the consideration that similar provisions exist in other countries whose laws of evidence closely resemble ours (see in this regard what is said by the South African Law Commission in its report: ***The use of Electronic Equipment in Court Proceedings (Postponement of Criminal Cases via Audiovisual Link), 2003, at pp. 17 et seq***, as well as ***Audio Links and Audio Visual Links in Proceedings***, a paper published by the New Zealand Ministry of Justice in November 2008 at pp. 18 - 21 and ***section 105 of the New Zealand Evidence Act 2006*** and ***section 13(1) of the Criminal Evidence Act, 1992, of the Republic of Ireland***). See also the as yet unreported judgment of Satchwell J in ***Uramin Incorporated in British Columbia trading as Areva Resources Southern Africa v Carolyn Perie [2013] ZAGPJHC*** delivered on 11 December 2013 and available on the website of the Southern African Legal Information Institute. In that case the learned judge granted an application for the evidence of two witnesses, one in Paris and the other in Dubai to be heard through video conferencing. She quoted with approval (at paragraph 30 of her judgment) comments made by Lord Carswell in paragraph 10 of his speech in ***Polanski v Conde Nast Publications [2005] UKHL 10***, a decision, as the citation indicates, of the House of Lords to the

effect that video conferencing '*is an efficient and an effective way of providing oral evidence both in chief and in cross examination*' as that this is '*simply another tool for securing effective access to justice'*.

[26] The determination by the Commission to permit reception of evidence by audio visual link renders it unnecessary for me to decide whether a power to receive evidence in that way can be implied, as the evidence leaders contended, from the empowering provisions set out in paragraphs [16], [17] and [18] above.

[27] I am accordingly satisfied that I have the power to grant all the rulings sought.

Merits

[28] I now turn to consider whether the SAPS has succeeded in showing that the relief they seek should be granted.

Evidence by way of a video link?

[29] In my opinion a cogent case has been made out by the SAPS for the evidence of Mr. X to be given by means of a video link.

[30] If he has to travel to where the Commission is sitting from the place where he is staying under witness protection and to return thereto when he has finished testifying there is a real risk that his whereabouts may be discovered and that

he and/or members of his family may be harmed or even killed. I base this finding on the history of assassinations set out in paragraphs [8] and [9] above.

[31] If he is permitted to testify by means of a video link it will be possible for his demeanour to be observed. His evidence will be as effectively received as if he were present in the auditorium. It is possible, however, that if he is permitted to testify in this way he will be more inclined to provide false evidence. According to the South African Law Commission Report to which I have referred (in paragraph [25]) there are conflicting views as to whether a witness who is permitted to give evidence from a remote location may be more inclined to provide false evidence or whether the process of justice will be facilitated rather than hampered where such a procedure is employed. In the New Zealand Report it is stated (at p. 21) '*the New Zealand Law Commission has indicated that there is no "empirical evidence" to support the view that witnesses are likely to lie if confronted face to face by the accused nor to suggest that alternative modes of giving evidence detract from the rational determination of the facts or from procedural fairness. However, research has only begun to be undertaken in this area and it remains empirically uncertain as to whether remote witnesses are more or less likely to tell the truth than witnesses who are physically present at court*'.

[32] I think the uncertainty which exists on this point is not a reason to refuse as a matter of principle to allow the use of audio visual links in judicial proceedings or before a commission.

[33] It is a reason, however, for a court or a commission to take this factor into consideration when assessing the value to be attached to evidence given by means of an audio visual link.

[34] Another factor to be borne in mind when assessing evidence given in this way is the absence of advantages which are present when evidence is given in public. These were said by ***Wigmore*** *(**On Evidence** (**Chadbourn Revision 1976), vol 6, para 1834***) quoted by Ackermann J in ***S v Leepile (1) 1986(2) SA 333 (W) at 338A***) to include the production '*in the witness's mind* a disinclination to falsify; *..... by stimulating the instinctive responsibility to public opinion, symbolised in the audience, and ready to scorn a demonstrated liar*'. The same point was made by ***Blackstone (3 Commentaries at 373 (1768)***) in a passage also quoted by Ackermann J in ***Leepile (at 338G*)** where he said that 'a *witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal.*'

[35] These disadvantages must be taken into account when the weighing up of the conflicting rights and interests to which Moseneke DCJ referred in the ***Independent Newspapers case, supra***, takes place. In the present case they are substantially outweghed by the positive advantage accruing from the protection of the rights of Mr X and his family to life and physical security.

***In camera* hearing?**

[36] The principles to be applied by a chairman of a commission to which the Commissions Act applies in deciding whether to exercise the power conferred by section 4 of Act are not spelt out, but in my view it is appropriate to refer by way of analogy to the principles applied by courts when dealing with applications for *in camera* hearings in criminal trials in terms of section 153(2) of the Criminal Procedure Act and section 16 of the Supreme Court Act.

[37] The leading case on *in camera* hearings in England is **Scott v Scott 1913 AC 417 (HL)**. This case has often been cited with approval in South Africa (see, eg., ***S v Leepile, supra*****,** and ***S v Manqina 1994(2) SACR 692 (C)*** and the cases referred to therein).

[38] In his speech in ***Scott's case, supra*****,** the Lord Chancellor, Viscount Haldane, referred (at p. 437) to what he called '*the broad principle .... that the Courts of this country must, as between parties, administer justice in public*' (as section 4 of the Commissions Act enjoins commissions to which the Act applies to do). He went on to say , however, that this principle '*must yield to a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done*'.

[39] It follows then if a potential witness fears that he will suffer harm if he testifies and there are good grounds for holding that his fears are realistic then he '*ought to be protected against unlawful reprisal*. *Elementary considerations of fairness, justice and humanity dictate this*' (see: **Leepile, supra, at 340H**). If such protection is not forthcoming justice will not be able to be done.

[40] The test for what I have referred to as good grounds for holding that the witness's fears are realistic was held to be a reasonable possibility of harm. This was based on an interpretation of the wording of section 153(2) of the Criminal Procedure Act. These words are not used in section 4 of the Commissions Act, but in my view they provide a satisfactory test for applications in cases such as this..

[41] Ackermann J also held (at **340D**) that the fact that the order granted may be ineffective actually to protect the witness from harm is not in itself a reason to refuse to make such an order. '*The ultimate object of the order'* he said (at **340E***), 'is after all to ensure, as far as it is possible, that a witness will testify free from the fear of reprisals, free from the inhibition that such fears may bring and to ensure that his testimony is not distorted by such fear*. *The degree to which the order (however ineffective it might be in the result to actually protect the witness from harm) will alleviate the fear of the witness, will vary from case to case. The fact that it alleviates such fear, although in the result it may prove ineffective, is something which favours its granting*.'

[42] In the present case I am satisfied that, if one has regard to the murders committed since the unprotected strike began there is a reasonable possibility that Mr. X and/or members of his family will be killed or at least suffer serious harm if a ruling is not made excluding the public from the chamber where he is testifying and preventing his identity and whereabouts while he is subject to the witness protection programme from being revealed.

[43] The extent to which the open court principle will be attenuated if the rulings sought are granted is relatively minor because members of the public will still be able to hear what Mr. X says and the media will be able to report it. Only his identity and present whereabouts will not be revealed. Again in the weighing up process referred to, the rights of Mr. X and his family upheld by the exclusion of the public and restrictions on reporting far outweigh any rights of the parties objecting which would be attenuated by the rulings.

Exclusion of the parties

[44] Paragraph 3 of the rulings sought provides for a ruling that only the commissioners, the legal representatives and accredited media representatives (and not the parties) may be in the auditorium during Mr. X's testimony. Paragraph 7 provides for members of the public (which in this case would include the parties) to be able to listen to the audio transmission of his testimony in the overflow room. The parties are thus equated with the public. Normally when an *in camera* order is made in a court the public are excluded but not the parties. No evidential basis has been placed before the Commission to justify the exclusion of the parties. When counsel for the SAPS was asked how his client justified the exclusion of the families of the deceased mineworkers his answer was that as this is a commission and not a court they are not parties. While it may be technically correct that they are not parties in the full sense of the word, that is not the way the matter has been approached since the Commission began its work. In fact the ruling

suggested by the evidence leaders which the SAPS now seeks speaks of '*the parties*'. The families and the injured and arrested persons have been permitted, along with the SAPS, Lonmin and the trade unions and Lt. Baloyi, a policeman injured on 13 August 2012 and other entities interested in the matters covered by the Commission's terms of reference, to participate fully in the proceedings by calling witnesses and cross-examining witnesses called by others. The Commission has because of the way the terms of reference are framed, adopted a quasi-adversarial procedure. To regard them now as not being parties is to uphold the sort of technicality that gives lawyers a bad name.

[45] There is no sensible or realistic basis for excluding the injured and arrested persons from the auditorium. If Mr. X is telling the truth it is overwhelmingly probable that most of them already know who he is. This is because according to his statements he played a significant role in some at least of the events in which the strikers were involved. In addition the order sought permits the legal representatives of the parties to disclose Mr. X's name and other information that may reveal his identity to their clients for the purpose of obtaining instructions, As I see the matter, counsel for the injured and arrested persons will be acting in accordance with his duty as their counsel if, as he says he will, he reveals Mr X's and photograph to all his clients requests such information as they may have to enable him to cross-examine Mr X thoroughly. If this happens it will enable the Commission properly to assess his credibility and the truthfulness of his evidence, In the circumstances no purpose will be served by excluding them from the auditorium.

[46] As far as the families are concerned, the SAPS has not established facts to show that no purpose will be served by not allowing them to see his face when he testifies. As appears from what has been said above, it is for the party seeking the exclusion to establish that it should be ordered and that good reasons exist therefor. Counsel's contention that they are not '*parties*' must, as I have said, be rejected.

[47] The possibility cannot be excluded that some at least of the family members who attend the sittings of the Commission know Mr. X (who, for all we know, may come from the same area as they do) and may be able to provide their counsel with information that may reflect on his credibility. The SAPS have not endeavoured in their affidavits to exclude this possibility, which accordingly cannot be dismissed without more.

[48] There is another factor which which must also not be lost sight of. Since this Commission began its work it has been accepted that the families of the deceased sgtrikers have an interest in learning the circumstances in which their breadwinners died. The State has paid for their transport from the remote areas where they live to enable them to attend the sittings of the Commission and they have been accommodated at State expense, first at Rustenburg and later at Centurion, while the Commission has been doing its work. To treat them now simply as members of the public and not as parties with a special interest in finding out what happened would be contrary to the spirit in which they have been treated from the beginning.

Memorandum submitted by a large group of persons referring to themselves as '*Concerned Members of the Community*'

[49] Shortly after having heard final submissions on behalf of the applicant and the parties on 1 April 2014, a fairly large group of persons gathered in the foyer in front of the Commission's venue, singing and waving placards supporting the opposition of this application.

[50] Having been informed that they insisted on handing me a memorandum I adjourned the proceedings, and approached the group of persons where a memorandum purporting to be a memorandum of some "*Concerned Members of the Community*" was handed to me, and I undertook to consider it carefully before making my decision.

[51] In accordance with the undertaking I gave I have considered the seven points made in the memorandum. I now proceed to deal with them in the paragraphs that follow. I wish to point out, however, that this is a most unusual procedure and therefore that I am dealing with the memorandum, as I undertook to do, must not be regarded as having seen as a precedent.

[52] The first related to '*the issue of the witness called Mr X being given special treatment [by] the Commission*' and called upon the Commission to reject such special treatment.

[53] The second was to the effect that the concerned members of the community felt that Mr X must give his evidence in the same way as other witnesses who were also afraid were not given such special treatment.

[54] The third was that if he is telling the truth he has a right to testify.

[55] The fourth was to the effect that some persons were subpoenaed by the Commission '*and displayed in public against their will*' and that one of whom committed suicide afterwards.

[56] The fifth amounted to a complaint that it is not fair for the SAPS to be the one '*who are looking after Mr X so that he can tell lies on their behalf*'.

[57] The sixth indicated that there is no reason for Mr X to be scared of the people who regularly attend the Commission as parties.

[58] The seventh was that the people whose relatives were killed by Mr X want to see him and to hear him explaining how their relatives were killed. As will be seen from what I have said above I do not think that the families should be prevented from seeing Mr. X's face on the the television screen.

[59] As regards the first point the question whether he should be given "*special treatment*", is a question (as is apparent from the extensive submissions made for and against the application) that? has to be determined on the basis of the legal principles with which I have set out and applied to the facts of the present case.

[60] As regards the second point it is true that no other witnesses have to date been granted such treatment but this is because no request was received from either the evidence leaders or the representatives representing any of the parties that they be treated in this manner.

[61] As regards the third point the question whether or not Mr X will be telling the truth is a question which the Commission will have to decide after his evidence has been weighed up against other evidence that may contradict his.

[62] As regards the fourth point the Commission was not told that witnesses who were subpoenaed and requested publicly to return on a later date were called before against their will.

[63] As regards the fifth point there is no basis for the Commission to hold that the SAPS intends to use Mr X to tell '*lies on their behalf*'.

[64] I have dealt fully with the sixth point in what I have said above.

[65] I make the following rulings:-

1. **THAT** the evidence of Mr. X be presented *in camera* and by video link.

2. **THAT** at all times during the testimony of Mr X, one of the evidence leaders shall be present in the room from which he testifies.

3. **THAT** only the commissioners, the parties, the legal representatives, the evidence leaders and accredited media representatives shall be present in the auditorium during the testimony of Mr X.

4. **THAT** at least two weeks prior to the commencement of the testimony of Mr X, the SAPS legal representatives shall -

(a) disclose the name of Mr X to the evidence leaders and the legal representatives of all the parties;

(b) provide the evidence leaders and the legal representatives of the parties with a photograph of Mr. X; and

(c) indicate to the evidence leaders and the legal representatives of the parties all points at which they have been able to identify Mr X on video footage of the events during the period 13 to 16 August 2012.

5. **THAT** the details in paragraphs 4(a) to (c) above shall be disclosed only to the commissioners, the evidence leaders and to the legal representatives who require the information in order to obtain instructions from their clients.

6. **THAT** neither the name nor any information that may reveal the identity of Mr X shall be disclosed further by any party other than the SAPS save for the purpose of obtaining instructions.

7. **THAT**, subject to the rulings made in paragraphs 4, 5 and 6 above, in terms of sections 18 and 19 of the Witness Protection Act 112 of 1998, the following shall be prohibited -

(a) the publication of any information, including any drawing, picture, illustration, painting, photograph, pamphlet, poster or other printed matter in whatever form, which may disclose the place of safety or location where Mr X is or has been under protection or where he has been relocated in terms of this Act;

(b) the circumstances relating to his protection;

(c) the identity of any other protected person and the place of safety or location where such person is being protected or the relocation or change of identity of a protected person; or

(d) any questioning of Mr X which can lead to a disclosure of any the matters referred to in paragraphs (a), (b) and (c).

8. **THAT** members of the public may listen to the audio transmission of the testimony of Mr X in the overflow room.

9. **THAT** members of the media may not publish the name of Mr X or any other information which may reveal his identity.

10. **THAT** all video recordings of the evidence of Mr X must be blurred out so as not to disclose his identity.

11. **THAT** leave be granted to any interested person to seek an amendment of these rulings should circumstances show that any such ruling may be impracticable or incapable of proper implementation or circumstances may emerge which call for a reconsideration of these rulings.

.....

I G FARLAM

CHAIRMAN : MARIKANA COMMISSION OF INQUIRY

ANNEXURE B

Legislation relevant to the Commission of Inquiry

1 In so far as the Commission is enjoined to investigate the conduct of the SAPS with a view to, *inter alia*, '*the nature, extent and application of any standing orders, policy considerations, legislation or other instructions in dealing with the situation which gave rise to this incident*', the following orders, policies, legislation and instructions have been identified as being relevant to the Commission's inquiry:-

2 **Standing Order (General) 262**[1]

(1) In terms of paragraph 1 of the Order its purpose is to regulate crowd management during gatherings and demonstrations in accordance with the democratic principle of the Constitution and acceptable international standards. It determines that its provisions must be read in conjunction with the Regulations of Gatherings Act 205 of 1993. It emphasises the obligation on SAPS to act proactively in attempting to identify and diffuse possible conflict before it escalates to violence.

[1] Exhibit SS2

(2) In paragraph 3 it deals, *inter alia*, with pro-active conflict resolution, threat assessment based on information received, pre-planning of operations, briefing of members and execution.

(3) Other relevant sections include –

(a) threat assessment (para 7);

(b) the appointment of a CJOC who takes overall responsibility for an operation (para 8);

(c) pre-planning (para 9);

(d) briefing (para 10);

(e) execution of a plan (para 11);

(f) the use of force and provides that the use of force must be avoided at all costs and members deployed must display the highest degree of tolerance and the need for ongoing negotiations between SAPS and the leadership element of demonstrators (para 11);

(g) the use of force if it is unavoidable to meet the purpose of the offensive actions to de-escalate the conflict with the minimum force to accomplish the goal, measured by the results of the

operation in terms of cost, damage to property, injury and loss of life, to give warnings before the use of force and force to be discontinued once the objective has been met (para 11(3));

(h) the prohibition or restriction in crowd management operations of the use of 37mm stoppers, the use of firearms and sharp ammunition, the use of rubber bullets (para 11(4);

(i) the use of force only on the command or instruction of the CJOC or operational commander subject to common law principles of self or private defence (para 11 (5) and (7);

(j) reporting and record keeping (para 12);

(k) debriefing (para 13).

(4) As will be pointed out later in this report, there is a difference of opinion amongst some of the officers as to the applicability of this Order to the Marikana operation.

3 **Standing order 251 (Use of firearms)**[2]

(a) This standing order deals with the circumstances under which a member may use his or her firearm and the fact that members

[2] Exhibit ZZZ8

should be adequately armed to deal with the prevailing circumstances.

(b) Paragraph 251.2 provides that a member must not, when necessary, hesitate to use his or her firearms.

(c) Paragraph 251.8 provides that an officer (or senior member) on a scene should give all his attention to supervising the members under his command. He should not (except under extreme necessity) fire himself, but should command a specific member to fire a specific number of shots at a specific target.

(d) Paragraph 251.9 provides that a commander shall cause members to fire at the leaders of a mob. They must, however, take care that an innocent person who is not identifying himself with the mob is hit.

(e) Paragraph 251.15.1 provides that as soon as a weapon is discharged or, if an officer instructed that a weapon be discharged, the member concerned shall immediately report that fact to his immediate commander.

(f) Paragraph 251.15.5 deals with the requirement to file comprehensive shooting incident reports.

2. **Ministry of Police: Policy Guidelines: Policing of Public Protests, Gatherings and major events**[3]

(a) This policy guideline was signed on 29 August 2011.

(b) It aims to provide a framework with guidelines for police members in reviewing and aligning operational strategies and instructions applicable on policing of public protests and related major events.

3. **National Instruction of 2012 Crowd Regulations and Management during Public Gatherings and Demonstrations**

(a) This is a draft national instruction.

(b) Key provisions are the following:-

(i) Paragraph 12 which deals with briefing of members and emphasises the role of the overall commander or designated officer on, *inter alia*, briefing, instructing all commanders to furnish detailed written plans on their specific tasks, and designating video camera operators.

[3] Exhibit R

(ii) Paragraph 14 which deals with execution and the use of force in the dispersal of crowds which must only be conducted by those members of POP trained in crowd management an equipped with relevant crowd management equipment and dir\ects that, if dispersion is unavoidable, members must try to disperse participants in the direction of a positive attraction point - an area where participants would most likely be willing to move to.

4. **POP Policy Document on Crowd Management**[4]

(a) According to the preamble to this document, the findings and report of the Goldstone Commission as well as the provisions of the Regulations of Gatherings Act were used to compile this document.

(b) Paragraph 2 describes the goals of public order policing.

(c) Paragraph 3 describes the principles of crowd management.

(d) The following paragraphs appear to be relevant:-

[4] Exhibit FFF1

(i) Paragraph 3.2 which deals with the legal aspects of crowd management.

(ii) Paragraph 3.3 which deals with appropriateness.

(iii) Paragraph 3.4 which sets out the principle of optimisation (optimal use of personnel and resources) and the necessity of sufficient intelligence.

(iv) Paragraph 3.5 which deals with proportionality, and the need for proper planning and the use of less lethal means.

(v) Paragraph 4 which deals with preparedness for crowd management operations, levels of responsibility within SAPS and pre-planning and, furthermore, emphasises the importance of information and intelligence gathering and also incorporates the need for threat assessment.

(vi) Paragraph 4.3.2 which provides for the planning and operational command of public order operations which must always be entrusted to commanders of public order units, as they are trained and usually experienced in such matters.

(vii) Paragraph 5 which deals with operation, highlights the need for proper equipment and a detailed briefing, requires that SAPS' approach be a gradual build up from negotiation to the implementation of defensive action to the adoption of offensive action, emphasises the need for continuous contact with organisers of the demonstration, deals with the requirement of warnings, requires that the SAPS at all times make provision to identify perpetrators during the course of action (by means of video coverage, photographs or witness building), sets out the need for record keeping and requires the operational commander to appoint a record keeper and a video operator.

(viii) Paragraph 5.3 which deals with spontaneous gatherings.

(ix) Paragraph 5.4 which deals with the use of force and highlights that the use of force needs to be gradual, proportionate, reasonable and minimal in order to meet objectives.

5. Other SAPS prescripts include the following:-

(a) the Procedural manual: Public Order Police Information Management and Annexure A (Edition 1/2000);

(b) the Administrative Directive: Public Order (POP) Division: Operational Response Services;

(c) the Divisional Directive XX/2012; POP Operational Standards;

(d) the Use of force directive: Public Order Police (POP) Division: Operational Response Services (ORS);

(e) the Directive Guideline for armoured vehicles;

(f) The operational Use and Maintenance of the BAT 4500 and 6000 water canon which regulates the use of water cannons during operational deployment;

(g) the Public Order Police (POP): Use of force during crowd management - 3/1/5/1/174 dated 20 July 2012 which provides that the use of force must be gradual, that it must be appropriate to the situation and proportional to the threat, that it must also be reasonable in the circumstances and minimal in order to accomplish the intended objective.

It provides, furthermore, that the continuum of force is to consist of three phases, namely –

Phase 1 – Physical presence

Phase 2 – Soft skills/negotiation phase

Phase 3 – Minimum force which includes tactical actions and the use of tonfa, teargas; stun grenades, water cannons and shotgun rubber rounds (blue and white).

ANNEXURE C

SUMMARY OF EVIDENCE OF MR X

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1) Mr X a rock drill operator and member of NUM said that he was present at the meeting on the 9th of August 2012 at Wonderkop. The purpose of the meeting was to decide the issue of the R12 500, 00. At the time, he was earning an amount of R6 500, 00 which he said was inadequate for the kind of work RDOs did and the circumstances under which they worked. A decision was taken at the meeting on the 9th, that on the following day, all the rock drill operators would come together at Wonderkop and they would not go to work on the 10th but would march to the time office to demand the R12 500,00.

2) On the 10th he took part in the march to the time office. The demands, he said, were written on a cardboard box. Five men were elected to represent them, Bhele, Andries, a Tswana speaking and a Sotho speaking person. He said the fifth person was himself. On their way to Roland Shaft, they came across mine security. At that stage they were very peaceful and they were

not armed except that some people had some branches with them. A white person from the employer spoke to Bhele and then went back to the office.

3) They waited for about fifteen minutes and started proceeding towards the offices. The police escorted them until they were right in front of the office which was marked off with danger tape. At that stage, the white man emerged from the office and spoke to Bhele and to them and said that the demand would be addressed by the union in 2013 because of the agreement with the union and that they should all go back to work as their strike was illegal. They did not accept this explanation and Bhele then said that this white man was turning them into "Popeyes" which he understood to mean stupid. The person from the employer said that action would be taken against people who were not going to go to work. Bhele then said that they are making a decision that the night shift would not take place. He said that they would implement the strike it by fighting and threatening and that they were going to hit those going to work.

4) On the 11th August 2012 and on their way to Wonderkop, they saw mine security and NUM escorting people on their way to work at the Roland Shaft. He was not armed at the time.

5) At the Wonderkop stadium the decision was made that anyone that was not armed should go and get a weapon and could buy them at Nkaneng.

6) There was a discussion that NUM officials transporting people to work was rendering the strike ineffective and weak. The decision was to go and get weapons to arm themselves to go and kill NUM in their offices.

7) He said once they had got weapons, they met again and made a song "How are we going to kill this NUM? We hate Zokwana". He said as they were marching to the NUM office, they were all armed with pangas and assegais. Some of their weapons they had brought with them and some were bought from Ntshebe at Nkaneng. He said he bought a panga, bush knife and a spear at Nkaneng.[871]

8) He disagreed with the version of Mr Mabuyakhulu that the reason for going to the NUM office was to ask the NUM members why they did not want the employer to talk to them.[872] He also disagreed with three reasons advanced by Counsel for the injured and arrested persons that were put to Mr Zokwana for comment viz. that they wanted to enquire why the union was standing in their way; that strikers had been assaulted or forced to go to work; and that if NUM was the only union through which could pass their demands to the employer, then the NUM should do so even if the RDOs were not NUM members.

9) He said as they were proceeding to the NUM office, persons wearing security clothes appeared from the side of the office. They heard two shots being fired in their direction and they ran away to the mining area towards

[871] Page 30962
[872] Page 30963

the Teba offices and they went back to the place that they had originally gathered. He saw that the people who were firing were wearing the uniform worn by the security employed by Lonmin.[873] Along the way he saw two people who were lying there bleeding.

10) When they gathered at Wonderkop, it was suggested that they should go to near the koppie and this proposal was agreed to. One of the persons went into a shack and got some water and put some intelezi into it and sprayed the people who had walked past the place where the injured people were.[874] The purpose of the water and intelezi was to cleanse them and get rid of bad luck since they had walked on the path of those people lying there injured. The people had to undress their top garments, remain in their pants and stand in a line and he sprinkled the water with intelezi on them. He said he did not go to the line but went further up to where they were going to meet.

11) At the koppie, Bhele said they should take off their dresses and that it was time to get an Inyanga. The strikers agreed with the proposal. Kaizer came up with the name of Nzabe, an Inyanga from Flagstaff. His understanding that the Inyanga would make them brave like warriors that they were not subject to being shot at. The Inyanga would make the firearms not to work[875] and the firearms would be locked or jammed if they were being shot at.

12) Money was collected towards the Inyanga. Xolani and Kaizer were going to get the transport to get the Inyanga. They went off and returned with two

[873] Page 30967
[874] Page 30972
[875] Pages 30974 to 30975

boys of the Inyanga. They were told that each of the strikers was to have his own razor blade and the men who were chosen to take off their dresses and wear pants and be real men were the ones on whom the Inyanga was going to work. The Inyanga wanted R 1 000,00 as a whole amount but each person had to pay R 500,00. He said he contributed his R 500,00. It was decided that they would look for a secluded place that was not accessible to a car and a place was chosen on the top of the hill among the rocks and the bushy area. The other reasons for choosing that spot was that it was not easy to be seen and that they could see a car or the police approaching.

13) A committee of fifteen were chosen that were going to be in charge of this secluded place. Five were chosen from each hostel, that is eastern, western and Karee. From the eastern hostel, there was Mbala??, Nama, Otto and two Tswana speaking people. From the western hostel, there was Rasta or Makhubane, Kaizer and Thusi. He could not remember the others. From the Karee hostel there was Mambushe, Xolani, Anele and Bob. He said that everything that was done on the koppie had to be done through this committee of fifteen. The Inyanga would talk to the Committee and the Committee would then convey this to the workers.

14) They went to the secluded place and the Inyanga took out a trunk and some rags that were in the trunk together with some bottles and the one rag had the drawing of the lion on it. The Inyanga took out some red and yellow ropes and tied it to the tree. There were also some spoons which were tired

onto these ropes.[876] He referred to a photograph of a sheet that depicted the heads of lions on it.[877] He said they even composed a song about it saying that this is the lion from Bizana that eats people.[878]

15) He said that the lion was important because on the 12th, there were two security personnel who were killed at the bus stop, one of whom was burnt in the car. He said that one security was pulled out of the car and tortured and some piece of his flesh was taken from him to make the muti strong. He said to go forward they had to be strong so the muti had to be laced with human flesh. The Inyanga had said to them that if they went to the people, they should try and get a part of the person's flesh.[879]

16) He referred to photographs taken at an inspection in loco and described the area as the place where the rags were tied and where two fires were made and where the people were made to be strong and consumed the muti. He points out the yellow and red ropes tied to the trees as well as some bottles attached to the ropes. [880] He said the bottles were Ntoni, which contained muti that was being used by the Inyanga.[881] He agrees that that there are no bottles visible on the photograph but at the time there were bottles present there.[882]

[876] Pages 30978 to 30979
[877] Exhibit AAAA11
[878] Page 30980
[879] Pages 30981 to 30982
[880] Pages 31853-31854
[881] Exhibit AAA12
[882] Page 31857

17) He said two sheep were obtained from the settlement. They were tied in sheets and put on the fires by the Inyanga. At the time they were wrapped in the sheets and put in the fire, they were still alive and he said from this process some black water emerged and the water was going to be used on the persons who had to undergo the rituals that were conducted there. He left with about two hundred of them and one of the sons of the Inyanga to the river to be washed and cleansed.[883]

18) At the river, the Inyanga stood in front of them and poured the water from the stream onto them to wash and he put muti into their mouths. They returned to the place where the rituals were conducted and found that the mixture of the burnt sheep and the water that emerged from the sheep and the blood and the fat had been prepared. The Inyanga saw to it that each of them had their own razor blades and he cut them on various parts of their bodies. The mixture that had been made from the water, blood and muti was mixed together and applied to the cuttings made on their bodies.[884] At that stage in the proceedings, he asked for a stand down to see his own sangomas because he thought that the people were using muti against him.

19) They were told the secrets on the mountain end there and that they were not to be taken out of the mountains. They were told that rituals will be conducted there and the people will be cut on their bodies. He said the rules of the mountains were that they would have to abstain from being intimate with a woman for seven days, they were not to point at a person but could

[883] Pages 30997 to 30999
[884] Pages 31008 to 31011

use a clenched fist, they were not have to keep a stick raised, they were not to eat pork, sheep or fish, not to wear a watch or a golden tooth on any necklace and not to carry any money that was silver.[885] The persons that were required to participate in the muti were the strong people who would keep the secrets in the mountain. The people who took part in the rituals were called makarapas and their role was to kill people.[886]

20) He said that they were warned not to fire or shoot before the police did so because if that happened they would then be capable of being shot. The Inyanga said that if they followed his instructions the police guns would not be able to shoot them.[887]

21) He was shown the video of the 13th when General Mpembe was talking to the strikers when they were repeatedly clicking their weapons while squatting. He said that that was the instruction given to them by the Inyanga to hasten the effects of the muti so that the police would be in a hurry to shoot them. He said the Inyanga told them that they were not to listen to the police.[888]

22) He said that between the 11th August 2012 and the 16th August 2012, they were told by the Inyanga not to change their clothes because they were supposed to wear the same clothes and wear a blanket so that they must

[885] Pages 30999 to 31000
[886] Page 31105
[887] Page 31002
[888] Pages 31002 to 31003

always be smelling of muti. They were instructed to sleep in the mountain until they got the R 12 500,00 that they wanted.

23) He said that the role of the Committee of fifteen was that everything that was done at the mountain had to be passed through them first. After the rituals had been conducted on them, they were told to select a person who was strong and who was going to be the leader. Mambushe was chosen because he was brave and strong. Xolani was also a leader. Mambushe was strengthened more than the others .The remains of the two sheep were put into a hole that was dug up and Mambushe took a bath there because he was going to be strengthened further to lead them.

24) They were told not to kill any animal and when they were talking and wanted to point at something, they should use their fist. They should not carry their sticks pointing up but have them horizontal pointing to the ground and they must not have a hat on their head and they could not be intimate with women and should not wash for seven days and if they had wash it had to be with green Sunlight soap.[889]

25) He pointed out on photographs of the inspection in loco, the place where the hole was dug and the ritual on Mambushe had been conducted.[890] He said when he got there with the police to point it out, he found that the hole had been opened. He said that the dog that had been with the police went straight to that place and sat down but nothing was found relating to any

[889] Page 31108 to 31109
[890] Exhibit AAAA 16 photograph 13

sheep there. Strands of wool that were hanging from the trees were recovered.[891]

26) On the evening of the 11th, the strikers were convinced of the effectiveness of the muti because the Inyanga had spread the muti on the box and the box was shot at and the bullet could not penetrate the box. It just stuck to the box. He said that some workers did not believe this but they did believe after the security were killed because the security had tried to shoot at them and they could not. He said that is when they also came in their numbers and performed the rituals.[892]

27) On Sunday, the 12th, they came down from the mountain. There was a discussion that because NUM was the one that was fighting with them the previous day, they were going to kill NUM. The strikers were armed with pangas and spears. Mambushe, Obai and Anele were armed with firearms and Mpele was carrying petrol. He described the firearms as pistols. The one that he saw was red on top and was in possession of Bhele.[893]

28) When they came to the hostel to the first gate, the security tried to talk to them but they ignored them. The security tried to shoot at them, but their guns did not work. Two security officers ran towards the car that was next to the bus stop. Bhayi and Anele fired some shots at them. Bhele poured petrol on the car and burnt the car with the security persons. Bhayi removed

[891] Pages 31110 to 31114
[892] Pages 31114 to 31115

[893] Page 31116 to 31117

one of the security officers from the vehicle and put him down. Rasta stabbed him with a spear and Mr X said he also participated in the attack when the security officer was on the ground.

29) Bhele cut the chin and the tongue from the security personnel and put it in a plastic. Anele scoped the blood with a bush knife and poured into the plastic. Anele took the firearm and the cell phone. Mambushe took a radio and the cell phone. Bhayi took the firearm. He said they went past the NUM offices but there were no one there and they went back to the mountain. By that time, Bhele had poured the petrol, burnt the car and thrown the container away. The pieces of meat were given to the Inyanga who burnt it until it was ashes and it was mixed with some muti to be licked to strengthen the men so that when they were going forward, they would not become afraid and turn back. [894]

30) He identified in a photograph [895] a firearm that looked like the one he saw in the in the possession of Bhele.[896] In Slide L 163 he identifies Tholakela Bhele as the person who was in possession of the firearm in the red.[897]

31) With regard to the incident with the security personnel, he said that they were firing with rubber bullets and aiming up in the air trying to scare them but they did not retreat. They approached the security officers crouching as instructed by the Inyanga. The security officers fired rubber bullets and then

[894] Pages 31118 to 31119
[895] Exhibit AAAA 20
[896] Page 31120
[897] Pages 31799 to 31801

ran away. He said that when Bhayi and Anele fired, they were aiming at Fundi and another man in a private car and he thinks that Fundi was struck on the left side of the forehead. He said he hit Mr Fundi with a panga on his face while he was lying on the ground because he was not a spectator in a fight and he could not say exactly where it was that he hit him.[898]

32) He said that the bullets fired by the security persons did not do them any harm because the Inyanga had told them that the guns would not work against them because of the rituals they had undergone.[899]

33) He said that the fire arms that were in the possession of the two security officers were two pump action guns and these guns were taken to the mountain.[900] When they returned to the mountain, Mambushe and Xolani reported that when they went to the NUM offices, there was no one there. The security personnel had tried to fire at them and they had taken firearms from them and they presented the firearms and that the muti was working. The firearms were kept next to the Inyanga on the mountain.

34) The killing of the two security personnel had the effect that those who did not believe in the muti came in their numbers to undergo the rituals realising that the guns of the security and the police were not working.

[898] Pages 31126 to 31129
[899] Page 31129
[900] Page 31133

35) These further rituals took place from the 12th until the 14th.[901] He said that Slide L 34 shows the strikers standing in a queue after taking off their clothes to undergo the rituals where the muti was being consumed. He said that he as present while the rituals were being conducted on the 12th and the 14th. Those strikers who had undergone the rituals on the 11th were sprinkled with intelezi to revive the muti on them.

36) On the evening of the 12th they marched to K4 Shaft where they set seven vehicles alight. Before they did that, a meeting took place and the discussion was that the people who consumed the muti and underwent the rituals should go out and those who still had to undergo the rituals remained in the koppie. It was said that they should go out and kill the people who were going to work so that others should come and join the strike. The meeting was held at about 4 o' clock because they had to go to K4 Shaft when it was a little bit dark.[902]

37) He said about five hundred strikers went to K4 Shaft and they were armed with firearms, pangas and spears. He had a panga and a spear. When they arrived at K4 Shaft the people who saw them coming ran away. Bhayi cut the wire fence with a pair of pliers. They gained access to the property through that opening. Others used the gate and Mambushe instructed the security to give way which they did. He took the radio and the phones away from the security personnel. Mr X said he and Bob were carrying 5 litre

[901] Pages 31133 to 31134
[902] Pages 31135 to 31136

containers with petrol. They set alight the seven cars as well as bikes at K4. They killed one person who was wearing a white t-shirt who was in the parking lot. He said he did strike the person who was found there because he was not a spectator there watching the fight. He found this person lying on the ground and he struck him on the right side of his stomach and stabbed at him. He noticed workers standing in the parking area where the cars were and they chased them but could not apprehend them. It was Bhele who set the cars alight at J4 Shaft.[903]

38) On the 12th, they had armed themselves and proceeded to the offices of NUM because their issue was with NUM. He was asked why the group engaged on this attack on the security guards whom they had outnumbered and whose bullets had no effect on them. He said that the security guards were stopping them from going to the NUM offices. He was asked whether the attack on the security guards took place on the spur of the moment or if that was something that was discussed in the meeting that was held prior to embarking on the march to the NUM offices. He said that there was discussion about the security guards on the mountain and they had said that they would kill anything in front of them until their demands were met.[904]

39) After they left K4 Shaft, they went back to the mountain where Mambushe and Xolani gave feedback. They were sprinkled with muti. Mambushe and Xolani said that cars had been burnt, people had run away and that a cell

[903] Page 31151
[904] Page 31145

phone and radio were confiscated. The cell phone and radio were given to Xolani.[905]

40) They slept on the mountain on the night of the 12th. He said that there was some six hundred of them that were sleeping on the koppie and that it was mainly the group of makarapas, the people who had undergone the rituals. The inyanga stayed with them on the koppie until the 16th.[906]

41) At the mountain the makarapas and the committee members held a meeting on the mountain where they decided that they should go and kill people at Bob Mine to send a message to the people that there is a strike until their demands are met. There was a discussion about what would happen in case they encountered security personnel and it was decided to simply kill anything on their way. He said they were all armed with spears, pangas and firearms. He said the persons who had firearms were Mambushe, Bhele, Baai and Anele and he remembers Mambushe, Makhubane, Anele, Bob, Nido, Kaizer, Baai, Masinga, Xolani and Matetjisa all being part of the crowd of strikers.

42) When they came across Mr Langa, he was asked where he was going to and he said he was going to work. They asked him how he could go to work when he knew there was a strike going on. They then killed him. They stabbed him and he took part in this attack with a panga.

[905] Pages 31149 to 31150
[906] Pages 31152 to 31154

43) He was shown the post mortem report of Mr Langa[907], where the injuries to him are described as eighteen incised wounds to the front and back of his body. He said they were consistent with the attack upon him. He was asked why he participated in this brutal killing of Mr Langa with the others and he said that they wanted to send a message to the people who were not aware of the strike, that there is a strike. They killed him so that others would come and join them and support the strike. The killing of Mr Langa took place at about 04h00 in the morning. They went back to the mountain. Xolani and Mambushe gave feedback. They arrived there at about 11h00 or 12h00 that day. When they arrived, they were told there is a group of people who had marched to K3 and that they had to support those people. They then left for K3.[908]

44) Before embarking to the march on K3 shaft, there was a discussion about what was going to happen upon arrival and about what would happen along the way if they met the Lonmin security personnel. They said if they met the security personnel, they would not listen, they would just kill them. When they arrived, the people who had gone to check on the shaft came back and gave a report that they could not find anyone at the shaft. They had gone there with the security to check on the shaft. He could not remember who the five persons where who had gone with the security towards the shaft.[909]

45) They met the security personnel where there were some water pipes where they were told that they would not be able to pass the police carrying the

[907] Exhibit AAAA 22
[908] Pages 31165 to 31167
[909] Page 31168

weapons that they had. He said that they simply ignored the security personnel because they knew that they were “sissies”. They had a meeting where Mambushe said to them they were going to meet the police and they should not all talk with the police and only three persons should speak to the police because if they all did, they would be afraid. [910] The three people chosen were Mambushe, Xolani and Mosotho. He said they selected them because they believed and trusted in them.[911]

46) With regard to Video HHH61 which shows the strikers at the water pipes, he said that he was part of the group that is seen crouching clicking their weapons. He was asked why the strikers did that and he said that they were encouraging their muti to work fast, that they knew things were bad and that people were going to be killed and they were hurrying things and they knew that the guns would not work and they were not capable of being shot at. He said they knew that their muti was such that the guns would not do any harm to them. They were asked why the strikers were ululating. He said that their blood had become hot at this stage and their blood was burning them and there were encouraging the muti to act fast. He explained that that the intelezi in their blood was working in such a way that they did not listen to anything. They just wanted the employer to come to them and give them what they wanted. [912]

[910] Page 31169
[911] Pages 31178 to 31179
[912] Pages 31176 to 31177

47) On the video, he points out himself as a person with a pinkish blanket around him. He said at that stage they were going towards the spot where Major General Mpembe was.

48) At some stage on the video, he observes that the pace of the clicking on the video picks up and he says that was because they were hastening the operation of the muti and they wanted it to work fast and to annoy the police for them to shoot at them.[913]

49) He also said that they were singing a song and translated it said "tighten your balls young man, otherwise you won't come right". He said this was because they were not capable of being shot at and the police could do nothing to them.[914]

50) At 11.13 on the video, he identifies Mambushe standing in front hold his right hand with his fist clenched and he said this was in accordance with the instructions given to them by the inyanga on the 11th when the rituals were being conducted.[915] He said that the inyanga had said to them that if they did not follow his instructions, the result would be that the guns of the police would be effective and would work.[916]

51) With regard to Mr Noki being heard on the video saying "that is all we ask. We are not fighting with you", he said they said that simply to fool General

[913] Page 31182
[914] Page 31183
[915] Page 31184
[916] Page 31185

Mpembe so that he would get angry and start shooting. He is asked why they were fighting with the police because they had no quarrel with them and he said that the police were stopping them from getting what they wanted because they wanted the employer to come to them and give them what they wanted. He was asked why it was seen as the police that were stopping the employer from coming to them and he said it was the police who had not allowed them to proceed with the things that they had because it was illegal.[917]

52) He said that they all understood what Major General Mpembe was conveying to them because he was speaking in Fanagalore and this is the language that was mostly used at the mine.[918]

53) On the video, Mr Noki is heard to say that the weapons would be handed over at the koppie. He said that that would not have happened.[919]

54) He was asked what would have happened if the police tried to disarm them and he said that they were going to kill the police using their bush knives, pangas and all the weapons that they had. He said that he was aware that the police had firearms with them.[920]

55) At 18:18, Noki was heard on the video saying that the employer should be brought to the workers so that he could give them the response they wanted.

[917] Page 31187
[918] Pages 31188 to 31189
[919] Page 31190
[920] Pages 31194-95

He was asked what would have happened if the police succeeded in bringing a representative of Lonmin to address the strikers and there was a negative response about the demand of the strikers. He said that they would have killed that white man.[921]

56) He said that they did not obey the policemen because they wanted them to shoot first but they seemed not to have been shooting. As they were moving, a single policeman appears to be pointing a firearm at them and he was asked why that police officer was not attacked and the answer was that he was not shooting and they were waiting for him to shoot first. They can be heard ululating and he said that was to hasten their muti. They were crouching and beating their spears, trying to hasten the medicine and for the police to start action.[922]

57) He said they were on their way to the settlement to look for the people who were busy drinking beer there while they were striking and that they were going to kill them.[923]

58) He said at the time the tear gas and stun grenades were fired, they were going towards the settlements towards the mountain to kill the people that they had found there. He said in the confrontation, they attacked three policemen and described in detail how they attacked each of the persons and took from them the short guns, the long guns and the cell phones and radios. He said that the confrontation occurred because the police first fired

[921] Pages 31195-96
[922] Pages 31201 to 30202
[923] Pages 31203 to 31204

the rubber bullets and after that firing, they attacked and killed one policeman and left one policeman still moving who had not died. He said that the firing that was done by the police was not effective and they did not care about it because the Inyanga had worked on them. He said the confrontation came because the police started shooting. He was asked whether the confrontation came when the tear gas and the stun grenades were deployed and he said first they shot the tear gas and thereafter the fighting ensued. He said subsequently that fighting started after the rubber bullets were shot and they knew that the guns had been blocked from working. Then he gives a third reason for why there was the attack on the police and that is because they were using real guns.[924] He has given three different reasons for why the attack on the police started.

59) After describing the attack on each of the police officials, he said that they returned to the koppie. They went through the settlement and returned to the mountain. Some of the people were injured and they arranged for transport for them to be taken away and these people who had been injured were people who had joined them along the way and who had not undergone the rituals.[925] At the koppie, it was decided that anyone wearing a red shirt must take it off and tear and burn it because they did not want NUM on the mountain. It was said that NUM is vehicle that is not moving and is being left behind and they wanted to get into a vehicle that was moving which he said he thought was AMCU. He said they had taken a decision that NUM should be killed and they were killing it with bush knives

[924] Pages 31205 to 31307
[925] Pages 31215 to 31216

and pangas and that is why they mentioned they were going to kill Mr Zokwana because they were stopping them from getting their demands of R12 500,00. He thought that AMCU was together with them because it was interested in their demand of R 12 500,00.

60) He said he had been a member of NUM but at the mountain he joined AMCU. There was a gentleman there who was one of the makarapas who was handing out the forms to be filled to join AMCU and he joined AMCU for two months before he went back to NUM.[926]

61) He said that on the 14th a message was received from Mr Joseph Mathunjwa that AMCU was the organisation that helped them to receive their demands and that they would be coming to the mountain on the 15th together with Mr Zokwana to address the strikers and they were told not to allow Mr Zokwana to address the meeting. He said it was the 14th, Tuesday, that they were told about this quite late in the evening. He said this was a message that Xolani got on his cell phone

62) On the 14th, at the koppie, there was a meeting and three people were called before the meeting. They were Mr Twala, Mr Mawewe and another person from Bizana who was working at Saffey Shaft and he did not know his name. Questions were put to them. Mawewe being the first and then he was left to leave. Then the second person was the person from Saffey Shaft. He was also questioned and then he left.

[926] Pages 31215 to 31220

63) When Mr Twala was questioned, Xolani said that he knew Twala and that Twala was a spy at work and he had caused people to be dismissed. He searched him and in his pocket he found his cell phone and he asked him what he was doing with his cell phone because nobody was allowed to carry a cell phone on the mountain. He was accused of handing out information to NUM people using this phone. Mr Twala, he said, was a shop steward at Karee with NUM. Five of them took Twala around the mountain to the other side. Twala's gun was taken by Mambushe. Of the five people, he remembers Mambushe, Xolani and Anele. After they had gone to the other side, he heard a gunshot. When he looked in that direction subsequently, he saw that Anele took the skull of the beast and placed it on the chest of Mr Twala.

64) When they came back, Anele said they were through and finished with him. The strikers started singing out very loud "How are we going to kill this NUM? We hate NUM". He said before this incident, there was a discussion as to what should happen with Mr Twala among the committee and he was part of the decision that was taken that Twala should be taken to the other side and killed. He was in that committee of five persons. The persons who left with Mr Twala had bush knives, pangas and spears. This incident took place between 12h00 and 13h00 during the day.[927]

65) He said that when the police arrived between 10h00 and 11h00 with a team of negotiators, five young men proceeded towards the Nyala with Mambushe and Xolani amongst them. Mambushe went right up to the hippo and they

[927] Pages 31735 to 31741

spoke through a loud speaker. He said he could hear the discussion that took place between those inside the Nyala and those outside and they realised that there was trouble there. He said they could hear that there was a request that the police should bring their employer to the mountain and the police were begging and pleading with them to come off the mountain. The strikers said that they were not going to move away from the mountain until the police brought their employer to the mountain to come and tell them about the R 12 500,00 that they were demanding.[928]

66) He is shown Slides L93 and L86 and confirms that they were being sprayed with muti by a person called Buccaneer who was one of the young traditional leaders conducting the rituals on the scene. It was necessary for the muti to be applied to be ready in case a fight broke out between the strikers and the police and they needed to be ready to fight there because the police were bringing the hippo closer to them.[929]

67) He said that they had killed police on the 13th and the people then realised that the guns were ineffective against them so they joined in bigger numbers on the 14th. He said that even those who were previously scared, who did not trust the muti were then convinced that the guns were not effective. These rituals were not conducted in the same spot as previously and were conducted in open veld.[930]

[928] Pages 31742 to 31743
[929] Pages 31743 to 31745
[930] Pages 31745 to 31746

68) He said this took place at about between 13h00 and 14h00 on the 14th. He was shown Slide L 90. He said it was still part of the rituals. There was a big dish there with ntelezi. The people were being washed and this was being done by two persons, Bucaneer and another person. He refers to a belt being tired around the upper arm of one of the makarapas and said that there was muti inside this belt.[931]

69) He was asked how it was that the belief still prevailed after some strikers had been shot on the 13th and why it was thought that the guns were still not effective in relation to the strikers. He said that it was believed that the two people that were injured and taken to hospital were people who had joined them along the way and who had not undergone the rituals.[932]

70) He said that Xolani received a message from the cell phone that Mr Mathunjwa wanted to come to the koppie on the 14th. Mr Mathunjwa was not allowed to come to the koppie because he had not undergone the ritual so the committee decided that they would meet him halfway. He said when Mr Mathunjwa arrived, he said he was interested in membership and that he would lead his organisation and that they had to kill the NUM. He said that they were going to come the following day with Mr Zokwana and that they should not allow Mr Zokwana to address them. He said the members of the committee agreed with them. Then Mr Mathunjwa left the koppie.[933] He said that he was present when he saw Mr Mathunjwa arrive in a silver motor

[931] Page 31761
[932] Page 31748
[933] Pages 31764 to 31768

vehicle with another young person and he was standing about fifteen metres away and had a good look at him.[934]

71) With regard to a photograph that appeared in the Daily Maverick[935] he confirms that that picture shows them caucusing and identifies Kaizer speaking to them not to allow Zokwana to address them the following day. He said that it was agreed that Zokwana would not be allowed to speak, he was going to be challenged or he was going to leave as a dead person. He said that he was part of the group and points himself out as a person wearing what looks like a slightly frayed blanket with his back to the camera.[936]

72) On the 15th the negotiating team of SAPS met with the five committee members and they were asked to put their weapons down. The five were Mambushe, Xolani and three others. The committee members told the police to go and fetch their employer and that they were not going to lay down their arms. The employer must come and agree to their demands. He said that he was not aware if the negotiating team gave a report back to the committee members.

73) With regard to the arrival of Mr Zokwana, he said that Xolani was going to call out to him but Mr Zokwana never alighted from the vehicle and they did not allow him to talk. Xolani had called out to Mr Zokwana and said "Zokwana come here". Had he gotten out of the hippo they had palnned to kill him. They knew that the police were present but their firearms would not

[934] Page 31769
[935] (Exhibit AAAA 25),
[936] Pages 31774 to 31776

work against them.[937] Mr Mathunjwa arrived and he addressed them from inside the koppie and he was told to come back the following day because he was the one who listened and was supposed to go and demand their R 12 500,00 and get the money. They did not make a promise to Mr Mathunjwa that they were going to lay down their weapons. [938]

74) On the 16th, Mr Mathunjwa came back in the morning and he said that he was going to get feedback from the employer. Thereafter the Bishop came and had a discussion with five people but he does not know what the discussion was about. Then the Bishop left. Even during the presence of the Bishop, they were armed with pangas and spears.[939] Mr Mathunjwa returned to the koppie and he said that they should lay down their arms because there would be bloodshed there. The strikers said that they were not laying down the arms until the employer comes back to them about the matter of the R 12 500,00. Mambushe said that there could not be two bulls in one kraal. He understood this to mean that there would be a fight and that the police who had the firearms which could not work would run away and they would be the coward bulls and that the strikers would be the strong bulls because they had the rituals performed on them.[940]

75) Kaizer is heard to be saying on a video that they going to finish the police there on the scene[941]. He understood that to mean that they were going to fight with the police and going to kill them and that was a decision had been

[937] Pages 31786 to 31788
[938] Page 31789
[939] Pages 31789 to 31791
[940] Pages 31792 to 31794
[941] Video Exhibit CC 18

taken a long time ago by the makarapas.[942] He was asked why a decision was taken to fight the police and he said that the police were saying that they should lay down their arms and come off the mountain before they got the money that they were asking for.[943]

76) He said that Mr Mathunjwa said that there will be bloodshed and he was pleading with them to go down from the mountain. They did not listen to him and said that they were not going down from the mountain until he brought the employer there. They said that they were prepared for whatever could happen and they were even prepared to die but they were not moving away from that place. Mr Mathunjwa then left.

77) He then noticed the line formation of the Nyalas and the wire being deployed. He said Mambushe went forward to the first Nyala and then came back to them and said that they must go towards the Nyalas. A shot rang out from his side because some of them had firearms like Bhele and Gwaai. He said they did not follow the Inyanga's instructions because the Inyanga had said that they should not fire first. He said there was also water spraying at them and they ran away. Others fell down.

78) He said it was the group of makarapas who went towards the group of police that were unrolling the barbed wire and they were armed at this stage and they were going to kill the police. They were going to fight with the police because two bulls could not be in the same kraal and they going to kill and

[942] Pages 31805 to 31807
[943] Pages 31792 to 31797

finish the police.[944] He said that as the makarapas approached the police he was there in the middle of the group.He was carrying a panga and a spear, others had firearms and he was armed because he knew that he was ready for whatever would come and was ready to fight to the death.

79) He described on slide L 198 the strikers carrying their weapons, knocking them against the Nyala provoking the police to start shooting so that they would end up having a fight.[945] He said that they did not feel the things like tear gas and rubber bullets and went there to fight with the police.[946]

80) With regard to Slide L198, he said that as the Nyala proceed to the kraal, the strikers were going towards the police. The police were shooting with rubber bullets and that was not effective in dispersing the strikers because they were interested in going to the police to attack them.[947] With regard to Slide L207 he said that they were attacking the police who were on foot as they were proceeding towards them. The police were shooting rubber bullets and tear gas which they did not feel and they kept on proceeding towards them and went past them. He said as they were attacking them during the commotion the group that was in the front fell to the ground and some of them turned around and ran away. He said that the crouching formation seen on the photograph was in accordance with the Inyanga's instructions. He is not visible in that photograph.

[944] Pages 31809 to 31811
[945] Page 31813 to 31814
[946] Page 31818
[947] Pages 31821 to 31822

81) He said that the muti had stopped functioning because the people in the front had fallen when the police had started shooting with real bullets and it meant that the muti had lost it's power. He was some distance away from the people that fell and realised that something was wrong and ran away. They discovered later that the muti was not effective because one of them had actually killed a hare and that was contrary to the instructions of the Inyanga about the killing of animals. He said he still believed in the effectiveness of the muti provided they followed the directions.[948]

82) On 10th Jnauary 2013, he opened a case at Bethanie under CAS number 48/01/2013. He said he reported a case against Mbala and Nzama because he thought they were going to come kill him because he said he was going to make a statement to the police. They wanted to know why he was wearing an ANC beret and other kind of clothes when he had cancelled his membership with NUM.[949]. He was taken to the police by the security personnel from the mines.[950] At some stage he withdrew the case because they came to him at the shaft and they said to him if he had to go to the police things that were secretly done on the mountain would come out into the open. He also had a discussion at some stage with the persons against whom he had laid the case and it was decided that he should withdraw the charge.[951] He withdrew the charge on the 23rd of January 2013,

[948] Pages 31822 to 31826
[949] Pages 31834 to 31845
[950] Page 31839
[951] Page 31839 to 31840

83) The docket comprises five pages with Mr X as the complainant.[952] His said that his statement was made to Lieutenant Colonel Shonela who was talking to him in English and Shangaan which he did not understand very well.[953] Another policeman, whose name was Ngqoko was called who spoke in Fanagalo.

84) He said that there were inaccuracies in his various statements because of language difficulties, and that the reference to two goats was a misunderstanding as was where it refers to ashes being taken from the body of the two security officers. He also said it was incorrect that it was said that every time a person was killed their flesh and blood was mixed with muti and they all licked it. He said he only referred to the one security officer from whom these items were taken. He also said it was incorrect that he was afraid for his life and was forced to join the strike and that he underwent the rituals and licked the muti that was mixed with human tissue and blood because he was afraid for his life. He said that he also needed the money and that he was not forced to joint the strike.[954]

85) Under cross examination by Mr Budlender, it was put to him that Mr Mathunjwa's phone records show that on the afternoon of the 14th up to the morning of the 15th, he was in Johannesburg and Pretoria and Mpumulanga but his cell phone was never shown to be anywhere near Marikana. Mr X

[952] AAAA 26
[953] AAAA 8,
[954] Pages 31849 to 31851

could not explain except to say that he could have used someone else's phone to call Mr Nzuza.[955]

86) It was put to him that the phone records of Mr Nzuza's phones indicate that he received thirteen phone calls on his phone but none from Mr Mathujwa's phone number and that all the calls that were made to him were made from Marikana.[956] The witness had no cogent explanation for this. He also agreed that he did not mention the phone calls or the visit by Mr Mathunjwa on the 14th in his first statement in February 2013 and did add it in his second statement that was taken in 2014. He said that the person who took the first statement asked him half the questions but the person who took the second statement asked him and so he explained it.[957]

87) The transcript of the Forum at 8, Exhibit LL, was put to Mr X where it was quite clear that the suggestion that the leaders of the unions go to the koppie together was raised by Mr Gwala.[958] There is no indication whatsoever that there was any indication that the arrangement was made the day before. An extract of the evidence of Mr Mathunjwa was put to him where Mr Mathunjwa said that it was during the interview when Mr Gwala asked whether they would be willing to go to Marikana and he said he was willing to go there.[959]

88) With regard to the events on the 13th, It was put to him that if Mr Noki wanted to make Major General Mpembe angry, he should have said to him we have

[955] Pages 31897 - 31899
[956] Page 31901 and 31905
[957] Page 31911
[958] Pages 31917-31918
[959] Page 31919

come here to fight you and we are going to kill you and that would have made him start shooting.

89) With regard to his evidence that the police was stopping them from getting what they wanted, Mr Budlender asked him if the police had ever stopped him from talking to the employer. He agreed that the police did not stop them on the 10th, but accompanied them on their march; on the 11th when they were marching to the NUM office; when they slept on the koppie on the night of the 11th; on Sunday the 12th when they killed two security officers, stole property and burnt vehicles. Thereafter the police did not disturb them or stop them from sleeping on the koppie.[960] He agreed that they enforced the strike through violence and intimidation and the police did not stop them from doing that. He agreed with Mr Budlender that the police did not stop them when they went to the K4 shaft, when they killed Mr Mabebe and burnt vehicles and when they killed Mr Langa on the morning of the 13th. It is put to him by Mr Budlender that the police never told the employer not to talk to them.[961] He was unable to answer the question.[962]Eventually he agreed that the police never told the employer not to pay the R 12 500,00 per month that they wanted.[963]

90) With regard to the confrontation on the 13th of August when two members of the police and three strikers were killed, it was put by Mr Budlender that if it was true that the strikers intended to attack the police on the 13th of August,

[960] Page 31930-31933
[961] Page 31936
[962] Pages 31927-31929
[963] Pages 31936-31938

that that was very important information and that he did not include this in his first statement to the police in February 2013 but only brought it to their attention in 2014. His response was that the person who took the first statement did not ask him these issues thoroughly.[964]

91) With regard to his evidence that on the 13th when they were being escorted by the police towards the settlement, they were going to kill the people there that were busy drinking beer while they were on strike, it was put to him that the strike started on the 9th and they did not attack any settlement between then and he 16th. He agreed with that. The improbability in his evidence that the only time in that entire period when they tried to attack that settlement was when they had armed policeman watching them could not be explained by him.[965]

92) It was also put to him that his statement in February in 2013 paragraph 19, deals with what happened on the afternoon of the 13th at the railway line but does not mention anywhere that they were going in the direction of the settlement to attack the people in the settlement when the shooting started with the police.[966]

93) It was put to him that he said on the 16th of August that the committee decided that the police were a stumbling block to the attainment of his demand. It was, however, not in his statement of February 2013 and again he said that the policeman who was taking his statement did not ask him

[964] Pages 31939
[965] Pages 31940 - 31943
[966] Pages 31944- 31945

questions extensively. It was put to him that the police were not a stumbling block to the attainment for their demand for three reasons viz because the police said they would speak to management and ask them to speak to the strikers, the police said they would try to get the employer to speak to them and the police never said to management that they should not pay the strikers R 12 500,00 per month. He agreed with all the propositions. He also agreed that the police interfered with their activities only on one occasion, on the 13th of August, but on that occasion they actually did what they were requested to do which was to accompany them towards the koppie with their dangerous weapons.

94) An examination of stills from the video of the 13th where he had pointed himself out wearing a pinkish blanket, was shown in cross examination to be incorrect as the facial features of Mr X did not correspond with those of the person in the photograph.[967]

95) Mr Budlender also put it to him that he is incorrect when he says in his statement[968], that shots were fired whilst Major General Mpembe was counting.[969] It was put to him that what the video actually shows is that Major General Mpembe did not count to ten, he counted to three and the strikers stood up and walked away. His answer was again that the person who took the statement did not understand what he was saying. [970]

[967] Day 254, Mr X, pp 31978-31979
[968] Exhibit AAAA 1.2,
[969] Day 254, Mr X, pp. 31982-31984
[970] Day 254, Mr X, pp. 31983-31985

96) The discrepancies in his statement and evidence with regard to whether he was one of the five members that were nominated to represent the strikers when talking to the employer about the demands on the 10th of August when there was a march to the Time Office, were put to him.[971] He was unable to provide any satisfactory answer.

97) With regard to the photograph of the committee caucusing in front of the koppie on the 15th of August[972], he said that he was one of the persons that was therein position number 4. He was unable to explain when it was shown to him in cross examination that the person he pointed out was not him.

98) Mr X said that Mr Mathunjwas was responsible for the deaths at Marikana. He persisted in this even when it was put to him that Mr Mathunjwa only came to the Koppie on the 15th. E could not explain why he attributed the killings prior to that date to him.[973]

99) The improbabilities and unexplained contradictions in his evidence abound. He was evasive whenever he was challenged about the differences in his various statements.

100) Some of his evidence, like Mr Mathunjwa's calls to Xolani and arriving at the Koppie on the 14th is plainly false. So too is his version that firing commenced whilst Major General Mpembe was counting on the13th.

[971] Up to 32010
[972] Exhibit AAAA 25
[973] Day 257, Mr X, pp. 32480 to 32488

101) He placed himself as one of the members of the committee of fifteen to indicate that he was part of the decision making and therefore able to testify to the details of the decisions of the strikers, especially apropos the police. However his evidence about deciding to fight the police from the outset, is so fraught with contradictions, as set out above, that no reliance can safely be placed thereon.

102) What perhaps is more probable is his version that they decided to kill anyone who came in their way. This would explain why they attacked and killed the two security officers who posed no threat to them whatsoever on the 12th.

103) An analysis of the evidence of Mr X indicates that there is corroboration for his versions in respect of the following issues:

(a) that parts of the tongue and chin of Mr Fundi were removed from his body at the time he was killed. This mutilation does not appear ex facie the post mortem report. It is confirmed by Mr Fundi's brother who saw the body prior to burial;

(b) at the inspection in loco, the ropes that he said were used to tie up the sheets and the sheep were present at the spot he pointed out, as was the spoon that was used to lick the muti.

(c) the firearm with the red on the top was recovered from Mr Tholakhele subsequent to information provided by Mr X to the Police.

104) It would appear that the only area in which any reliance can placed on Mr X's evidence is where it relates to muti. The use of intelezi is not disputed, and is shown on various slides in Exhibit L. If his evidence about the removal of the body parts of Mr Fundi is accepted, then it must be accepted that it was for the purposes of making strong muti.

105) His evidence provides possible explanations for the crouching posture adopted by the strikers and the clenching of their fists.

106) His evidence also provides a possible explanation for why all the strikers ran away when shots were fired on the 11th, but were focussed, organized and brave on the 12th after the rituals had been conducted on the afternoon of the 11th. The 12th is also the first time that the crouching posture is noticed.

107) There is possible corroboration of Mr X's version about muti in an article published in the 21 August 2012 edition of the City Press quoting an interview with a miner Bulelani Malwana about the Inyanga and the effects of the muti.

Relying on the evidence of Mr X

108) The stringent test for relying on one portion of the evidence of a witness where he is clearly untruthful on other important issues is enunciated by Sir

William Solomon in *Rex v Kumalo 1916 AD 480 at 484* and quoted in *R v W and Another 1960(3)247 at 249 (ECD):*

> *'Now it is no doubt competent for a court while rejecting the one portion of the sworn testimony of a witness, to accept another portion; but, where a witness is clearly perjuring herself in matters of great importance, there should be very good reasons to justify a court in finding that in other respects she is speaking the truth.'*

109) In Mnyanda v R 1941 (2) P.H. H.130 the principle was applied by Tindall J. A.

> *'it has been pointed out by this Court that, though it is competent for a Court, while rejecting one portion of the sworn testimony of a witness, to accept another portion, where a witness has already perjured himself on a matter of great importance, the Court must have very good reasons before it holds that in other respects such witness is speaking the truth. A fortiori where a witness who has given certain evidence is recalled and then tells the Court that his previous evidence was false and he adheres to his retraction, the Court is only justified in discarding the retraction and acting on the witness' original evidence of the other evidence (sic) or the relevant circumstances suplly convincing reasons for holding that he original statement was the truth. If the evidence of such a*

witness were not treated with this extreme caution a grave miscarriage of justice might result. Examination and consideration of the record has satisfied the Court that such support is absent.'

109) We have already set out (in the first draft on Mr X)that while he was contradictory and unreliable in many aspects, there is corroboration for his evidence with regard to the removal of part of the tongue and chin of Mr Fundi, as well as the finding of the strands of wool with spoons attached to the trees at the pointing out by him.

110) It is not disputed that intelezi was used. The removal of the body parts at the request of the Inyanga points to the use of stronger muti.

111) Mr X testified that one of the reasons for the use of the muti was to make them brave and strong warriors and that they would not be susceptible to being shot as the guns would jam and the bullets would have no effect upon them.

112) There are descriptions from various witnesses of the crowd of strikers crouching, clicking weapons and behaving in a focussed manner under the leadership of Mr Noki and others. This and the use of the clenched fists are all explained by Mr X as being the instructions of the Inyanga.

113) In particular, the uttering of threats to the Police and the display of aggression towards the Police in full view of the media, and in the presence of hundreds of heavily armed policemen, was foolhardy

behaviour which might have, in their minds, been understood to be bravery.

114) The strikers also carried out attacks and killings in broad daylight on Lonmin property where they must have known of the presence of cameras.

115) There are also various reports in the media before us corroborating the use of muti by the strikers, and their belief that they would not be shot by any firearms.

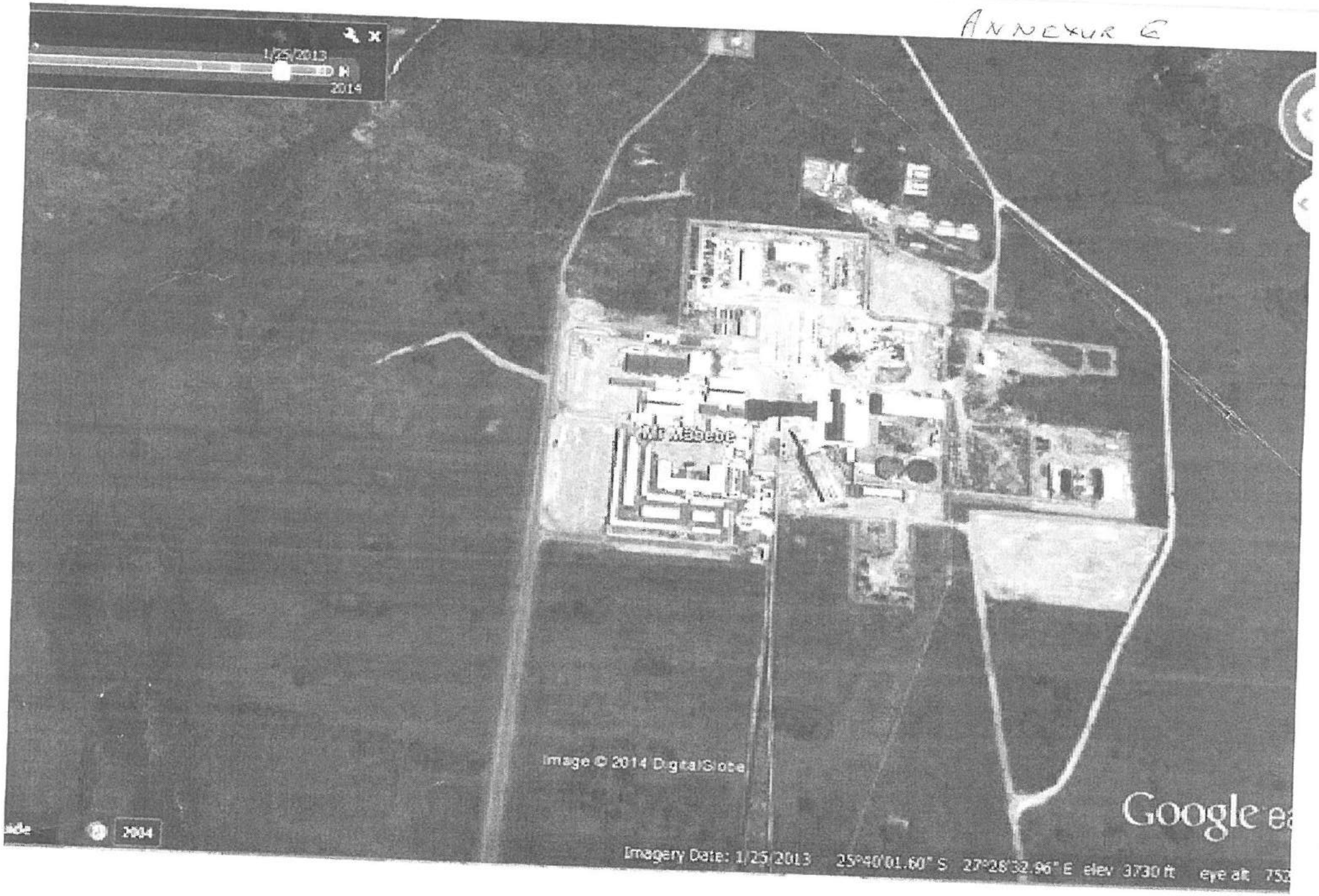
116) We are satisfied that there is sufficient corroboration of Mr X's version to satisfy the very stringent test set out above and which enables us to accept his evidence only in this abovementioned regard.

Annexure F

ANNEXURE D

1/25/2013
2014
Mr Mabelane
Mr Fund
Image © 2014 DigitalGlobe
Google
Imagery Date: 1/25/2013 25°40'31.93" S 27°31'52.02" E elev 3691 ft eye alt 566

ANNEXUR E


1/25/2013
2014
Old Mabele
Image © 2014 DigitalGlobe
2004
Google ea
Imagery Date: 1/25/2013 25°40'01.60" S 27°28'32.96" E elev 3730 ft eye alt 752

ANNEXURE E F

1/25/2013
2014
Mr Mabebe
Deaths of the 16th
Mr Mabelane and Mr Fungi
Mr Twala
Deaths of the 13th
Mr Langa
Image © 2014 DigitalGlobe
Google e
Guide
Imagery Date: 1/25/2013 25°43'14.02" S 27°30'09.82" E elev 3863 ft eye alt 504

ANNEXURE 9

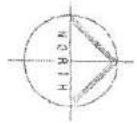
1/25/2013
2014
Mr Sokhanyile
WO Lepaaku
WO Monene
Mr Jokanisi
Mr Matj
Image © 2014 DigitalGlobe
Google e
2004
Imagery Date: 1/25/2013 25°41'13.21" S 27°28'35.50" E elev 3777 ft eye alt 66

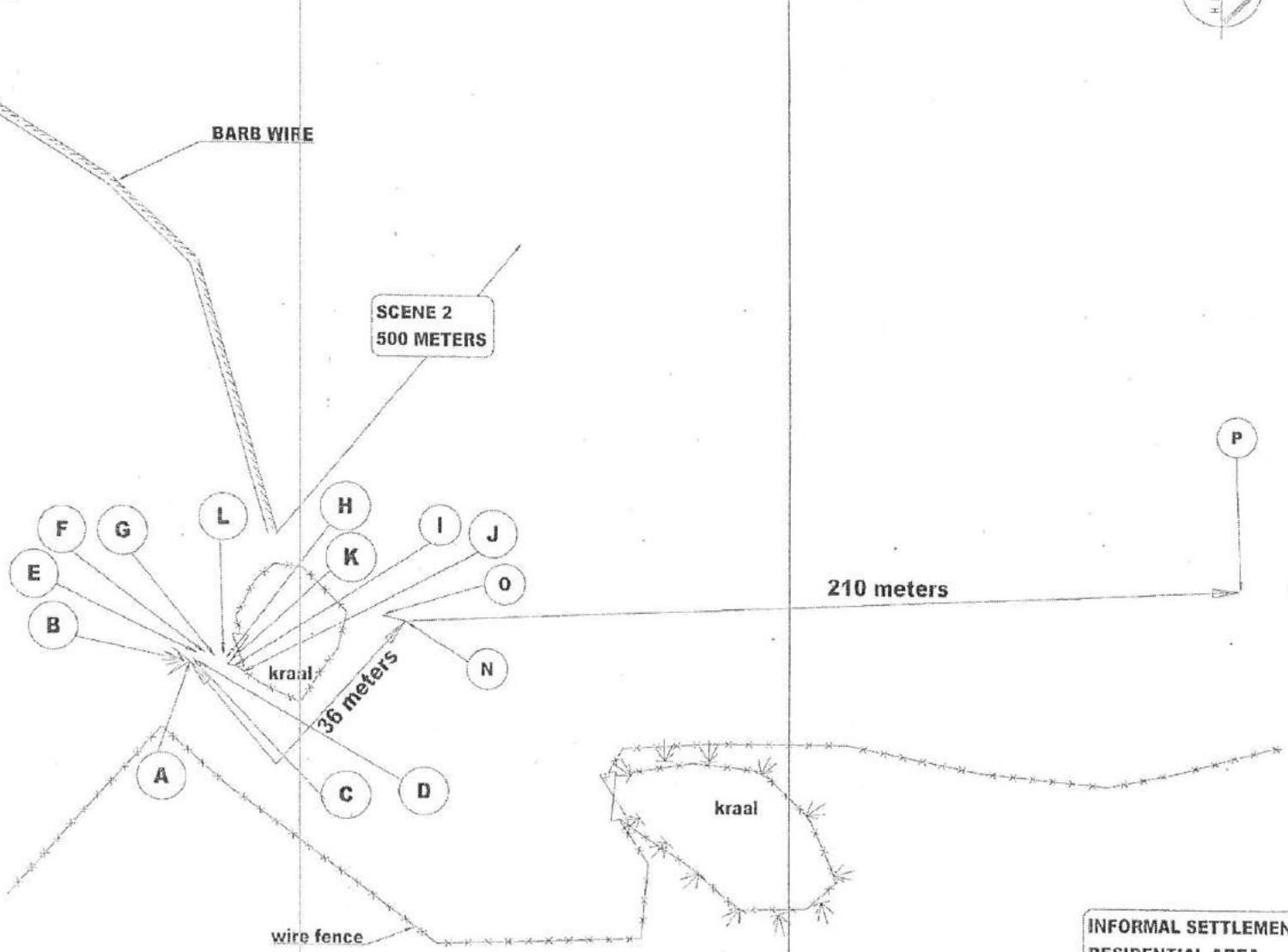
ANNEXURE H

ANNEXURE T

MARIKANA CAS 137/08/2012
RUSTENBERG LCRC 308/08/2012
DRAWN BY W/O P T THAMAE
ON 2012-08-16

SKETCH PLAN





KEY TO PHOTOGRAPHS AND SKETCH PLAN

MARIKANA CAS	:	137/08/2012
KLERKSDORP LCRC	:	308/08/2012

POINTS ON PHOTOGRAPHS AND SKETCH PLAN

Photo 3 and 65 are aerial Photographs and were at Wonderkop, Marikana on Friday the 17th of August 2012.

Point A	:	indicates the place and position of body number 25 as found at the scene.
Point B	:	indicates the place and position of body number 24 As found at the scene.
Point C	:	indicates the place and position of body number 22 as found at the scene.
Point D	:	indicates the place and position of body number 21 as found at the scene.
Point E	:	indicates the place and position of body number 19 as found at the scene.
Point F	:	indicates the place and position of body number 20 as found at the scene.
Point G	:	indicates the place and position of body number 18 as found at the scene.
Point H	:	indicates the place and position of body number 14 as found at the scene.
Point I	:	indicates the place and position of body number 16 as found at the scene.
Point J	:	indicates the place and position of body number 17 as found at the scene.
Point K	:	indicates the place and position of body number 15 as found at the scene.
Point L	:	indicates the place and position of body number 23 as found at the scene.
Point M	:	indicates the place and position of body number 26 as found at the scene.
Point N	:	indicates the place and position of body number 28 as found at the scene.
Point O	:	indicates the place and position of body number 27 as found at the scene.
Point P	:	indicates the place and position of body number 29 as found at the scene.

1. The area in blue indicates the concentration of rifle's cartridge cases.

2. The area in yellow indicates the concentration of pistol's cartridge cases in between rifle cartridge cases and shot gun cartridge cases.

3. The area in red indicates the concentration of shotgun cartridge cases as well as rubber balls used stun grenades and 40 mm cartridge cases.

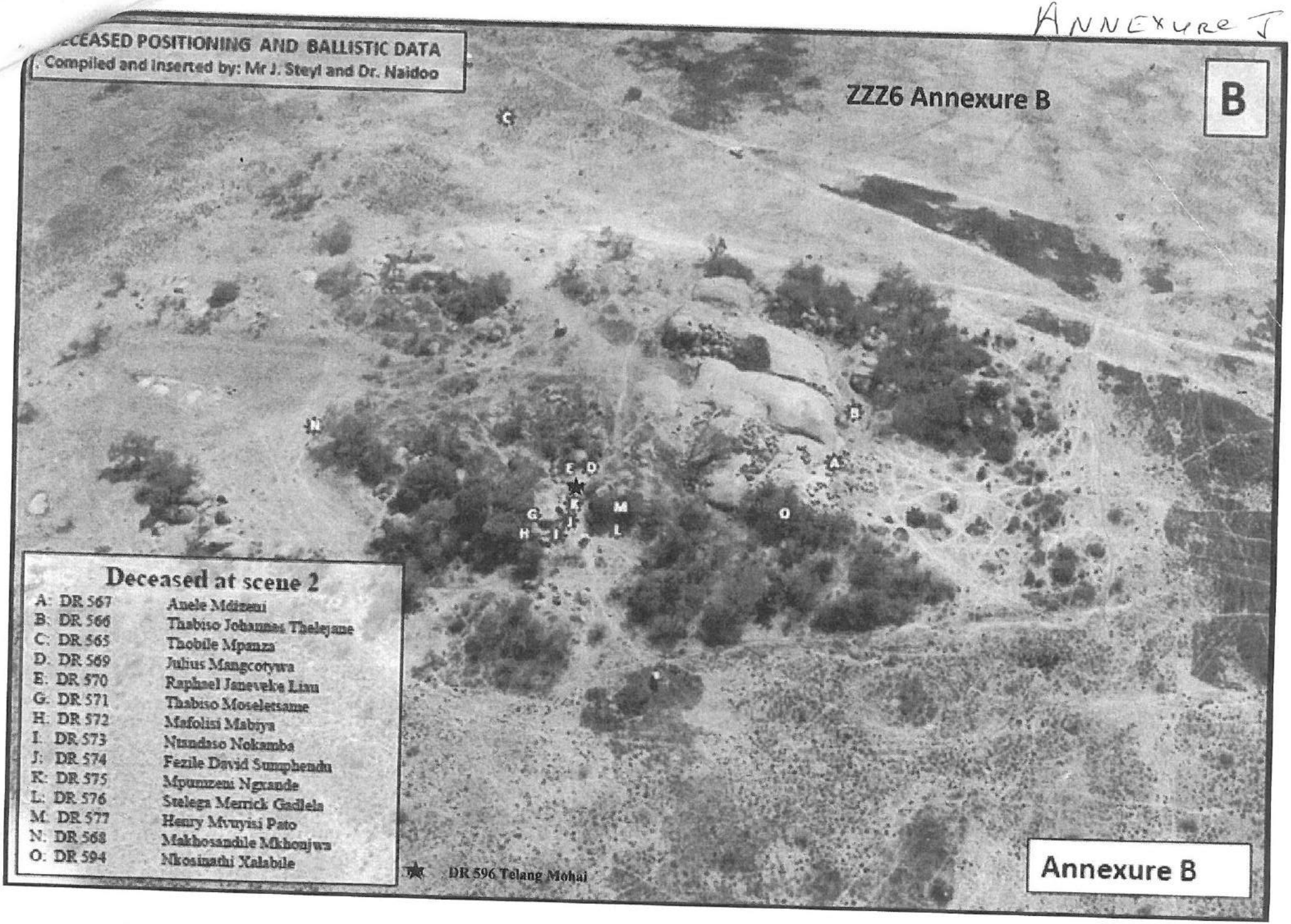
DISTANCES BETWEEN CARTRDGE CASES CLOSER TO BODY B:

1. 2.3 METERS
2. 4.6 METERS
3. 5.3 METERS
4. 4.8 METERS
5. 6.1 METERS
6. 5.4 METERS

0479203-3
WARRANT OFFICER

P T THAMAE
KLERKSDORP
2012-10-01

ANNEXURE J



DECEASED POSITIONING AND BALLISTIC DATA
Compiled and Inserted by: Mr J. Steyl and Dr. Naidoo
ZZZ6 Annexure B
B
C
N
B
A
E D
K
M
G
J
H I
L
O
Deceased at scene 2
A: DR 567 Anele Mdizeni
B: DR 566 Thabiso Johannes Thelejane
C: DR 565 Thobile Mpanza
D: DR 569 Julius Mangcotywa
E: DR 570 Raphael Janeveke Liau
G: DR 571 Thabiso Moseletsame
H: DR 572 Mafolisi Mabiya
I: DR 573 Ntandaso Nokamba
J: DR 574 Fezile David Sumphendu
K: DR 575 Mpumzeni Ngxande
L: DR 576 Stelega Merrick Gadlela
M: DR 577 Henry Mvuyisi Pato
N: DR 568 Makhosandile Mkhonjwa
O: DR 594 Nkosinathi Xalabile
DR 596 Telang Mohai
Annexure B

ANNEXURE K

IN THE MARIKANA COMMISSION OF INQUIRY

(HELD AT CENTURION)

RULING ON APPLICATION FOR THE WITHDRAWAL OF THE RULING GIVEN ON 8 NOVEMBER 2012

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[1] The evidence leaders have requested the Commission to withdraw the ruling it made on 8 November 2012 to divide the hearing into two phases, the first being confined to an examination of the events of 9 to 16 August 2012 at Marikana regarding such aspects as the facts directly relating to and relevant to the events and the direct causes thereof, as well as the legal responsibility of any party for the deaths of and the injuries to any persons and damage to property at Marikana during the period. During the second phase it was envisaged that the Commission would turn its attention to the other topics covered by its Terms of Reference: these included those set out in subparas 1.1.3,1.1.6 and 1.5 of the Proclamation which set up the Commission.

[2] The portions of the Proclamation which are relevant in regard to the issues raised in this application read as follows:

'1. *The Commission shall inquire into, make findings, report on and make recommendations concerning the following, taking into consideration the Constitution and other relevant legislation, policies and guidelines:*

1.1. The conduct of Lonmin Plc (Lonmin), in particular:

....

1.1.3. whether it by act or omission created an environment which was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct;

...

1.1.6. whether by act or omission it directly or indirectly caused loss of life or damage to persons or property.

...

1.5. The role played by the Department of Mineral Resources or any other government department or agency in relation to the incident and whether this was appropriate in the circumstances and consistent with their duties and obligations according to law.'

[3] The Terms of Reference of the Commission were amended by Proclamation 30 of 2014 published on 5 May 2014, which deleted paragraph 1.5. As a result of this amendment the ambit of phase 2 was substantially reduced.

[4] Since May 2014 the Commission's Senior Researcher, Dr Forrest, has produced a Preliminary Report. In chapter 5 she states that at the time Lonmin's old order mineral rights were converted into new order rights it adopted a Social and Labour Plan in terms of which it assumed a legally binding obligation to convert its existing hostels into bachelor or family units and to build a further 5500 houses: these processes were to be complete by September 2012.

[5] According to the report 60 hostels out of 114 were converted over the 2007 to 2011 period. These converted units could only accommodate 12.5% of the persons who were accommodated in the hostels prior to the conversion. In addition only 3 houses of the 5500 Lonmin was obliged to build had in fact been built. Dr Forrest stated further that this state of affairs had been brought about by what she called a unilateral and unambiguous repudiation by Lonmin of its legal obligations under the Social and Labour Plan. The primary justification proffered for this by Lonmin was the constraints of the economic climate after the financial crisis of 2008. She pointed out, however, that throughout the period when it was defaulting on its housing obligations it continued to pay dividends to its shareholders.

[6] The evidence leaders ask for the withdrawal of the November 2012 ruling because they wish to cross-examine Messrs Mokwena and Jamieson, who are to testify on behalf of Lonmin, about these matters so as to investigate the topic raised in subparagraph 1.1.3 of the Commission's Terms of Reference. This, they say, can easily be done in the time available and the witnesses should be able without difficulty to deal with the matters to be raised.

[7] Lonmin opposes the application and advances three grounds in support of its opposition, viz:

(1) that to confine the Phase 2 enquiry to Lonmin's non-compliance with its housing obligations under the Social and Labour Plan would be outside the Commission's mandate because, as it is put in Lonmin's letter of objection, 'the specific matters which the Commission was appointed to

enquire into and report upon [are] prefaced by an introductory paragraph which requires a causal link between those specific matters and the "events at (Marikana) Mine from [9 to 16] August 2012"...[and] the Commission has not considered that causal link in the context of, for example Phase 2';

(2) that Lonmin's role in providing housing to its employees cannot be considered in isolation without regard to the performance of the national and provincial governments and the local authority in the provision of housing and infrastructure development; and

(3) that it would not be fair to do so because there is not enough time.

[8] In our view there is no substance in any of these grounds of objection.

[9] The contentions raised in support of the first ground are not in accordance with the wording of the Terms of Reference. The introductory paragraph does not in terms require a causal link between the matters set out and the events at Marikana during the period 9 to 16 August 2012 nor is it necessary to imply such a requirement: indeed the express requirement in paragraph 1.1.6 of a direct or indirect causal link between Lonmin's acts or omissions and loss of life or damage to persons or property renders such an implication unnecessary. When the President wanted a causal link to be investigated he said so. The contentions also overlook the express wording of paragraph 1.1.3, which refers to the creation of an environment which was '*conducive to*' the creation of tension, labour unrest, etc. According to the

Oxford British and World English Dictionary 'conducive' means 'making a certain situation or outcome likely or possible', language which clearly does not require a causal link.

[10] The second contention, namely that Lonmin's non-compliance with its legally binding housing obligations cannot be looked at in isolation is also patently without substance because Lonmin's obligations in this regard are self-standing and the performance or non-performance by other bodies in the area of housing provision is not relevant.

[11] As regards the contention that an examination of the question as to whether Lonmin's failure to comply with its housing obligations was 'conducive to the creation of tension, labour unrest [etc]' would be unfair in the time available, it is in our view not possible to say whether there will be unfairness. That is a question which can only be answered at the end of the enquiry. If the matter has, in the opinion of the Commission, been adequately canvassed it will be able to make a finding. If not, it may, as Mr Ntsebeza contended, consider referring the matter, in terms of paragraph 5 of the Terms of Reference, to some other body for further investigation.

[12] In the circumstances we are satisfied that it would be appropriate to grant the evidence leaders' application. The following ruling is made: *'The ruling made on 8 November 2012 is withdrawn.'*

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I G FARLAM
CHAIRMAN : MARIKANA COMMISSION OF INQUIRY