

In the Marikana Commission of Inquiry

BEFORE TRIBUNAL

THE HONOURABLE MR JUSTICE FARLAM (RETIRED) - CHAIRPERSON

MR TOKOTA SC

MS HEMRAJ SC

HEADS OF ARGUMENT OF EVIDENCE LEADERS

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INTRODUCTION

1. This Commission was established to address the causes of the events of 9 to 16 August 2012 at Marikana, which culminated in the killing of 34 civilians by members of the SAPS on 16 August 2012, and to make recommendations in this regard. That was a catastrophic event which is likely to have consequences for South Africa for a long time. The purpose of these submissions is to set out the facts of what happened, to identify important causes, and to propose steps that should be taken.
2. The proposals are limited by the fact that as a result of an amendment to the Commission's terms of reference, it is no longer the function of the Commission to address matters such as the migrant labour system, the labour relations system on the mines, and the performance by the Department of mineral resources of its functions. Those are pressing issues, which require to be addressed urgently outside the processes of the Commission.

PHASE 2 ISSUES

Living Conditions in the Informal Settlements of Marikana

3. Large numbers of Lonmin workers live in the squalid informal settlements surrounding the Lonmin mine shafts. These settlements are characterised by poor living conditions and lack of access to basic social services¹. During his testimony, Mr Seedat conceded that the living conditions in Nkaneng and other informal settlements around Marikana are truly appalling.² This concession was unavoidable as is illustrated by the photographs in Fig 1 below.



Fig 1(a) Road in Wonderkop with a woman queuing for water (Image: A Benya)

¹ Exhibits YY3 SSSS8.2

² Day 292 p38273/16-20.



Fig 1(b) Shack occupied by mine worker and his family (Image: A Benya)



Fig 1(c) Pit latrine in Nkaneng (Image: A Benya)

4. Dr Forrest's Phase 2 Interim Report provides a detailed description of the conditions in which most Lonmin Category 3 to 9 workers live.³ In these heads of argument we provide the following brief summary:

- 4.1. Homes in the informal settlements comprise structures made of zinc sheets in undemarcated yards. Most stands accommodate between five and twelve shacks with different families co-existing and sharing resources and facilities. In some cases a stand held twenty shacks.
- 4.2. Shacks are ten feet by eight feet and are used as a kitchen, bathroom and bedroom. Shacks are not easily waterproofed. They are also vulnerable to being uprooted by strong wind.
- 4.3. There are no tarred roads in the informal settlements. When it rains dirt tracks become impassable and vehicles cannot enter the informal settlements.
- 4.4. Although the Madibeng municipality provides some stand pipes and water tankers where people can fill their buckets, residents are often forced into buying water. Many taps had been dry since January 2013 and less than ten functional taps existed in the informal settlement. Most mine workers shower at work because there is no water in their yards.

³ Exhibit NNNN2 Chapter 3.

- 4.5. Madibeng municipality has provided some ventilated pit latrines in an attempt to prevent contamination of underground water but the clay soil makes them difficult to build and there is a critical shortage of ablution facilities. As many as twenty people may share a pit toilet.
- 4.6. No reliable source of energy exists. Residents gather wood for energy and most use candles, paraffin lamps and primus stoves. Very few shacks have access to electricity, and most that do, obtain their electricity through illegal connections.
- 4.7. Lonmin supports the only three schools in Wonderkop: a lower primary school, a middle school and a high school. No Xhosa medium schools exist in the community, so the children of migrants have to learn in a second language.

The Housing Obligations in the Social and Labour Plans of Eastern and Western Platinum Ltd

The issue falls within the terms of reference

5. The terms of reference of the Commission oblige it to investigate the conduct of Lonmin relevant to the events of 9-16 August 2012 and, in particular,

‘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.’⁴

6. As has been described in the preceding section, the bulk of Lonmin’s migrant workers live either in unacceptable single sex hostel accommodation on Lonmin property or in shacks in informal settlements like Nkaneng which do not have access to proper municipal services. The need to address mineworker living conditions in order to achieve labour peace has been recognised in the platinum wage agreement of June 2014, which includes the establishment of a ‘joint task team to... assess a number of other fundamental issues including employee share ownership schemes, migrant labour and employee housing and living conditions.’⁵
7. It was also recognised independently by Lonmin. As Mr Seedat acknowledged in cross examination, the Board and Executive of Lonmin understood the tragic events at Marikana to be linked to the critical shortage of decent housing for its employees.⁶ That link clearly reflected in the public statements of Lonmin in the immediate aftermath of the tragedy where it

⁴ Clause 1.1.3 of the Terms of Reference

⁵ Agreement in respect of the review of wages salaries and other terms and conditions of employment – 2013 - 2016 between Lonmin Platinum comprising Western Platinum Ltd and Eastern Platinum Ltd in respect of the Marikana Operations only and the Associated Mineworkers and Construction Union - AMCU (24 June 2014), quoted in Exh NNNN2 at p 52.

⁶ Seedat Day 292 p 38355/4-23.

- 7.1. characterised the events that led up to the tragedy as being linked to a breakdown of trust between itself and its workforce,⁷
- 7.2. recognised that it 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,⁸ and
- 7.3. committed itself to addressing the living conditions of its workforce as part of its attempt to create 'a safe and sustainable business'.⁹
8. If, therefore, the squalid housing conditions of the Lonmin workforce in 2012 were due to an omission on the part of Lonmin, that omission is a matter for investigation under the terms of reference of the Commission

The obligation in the SLPs

9. The mining licences at the Marikana mine are held by the Lonmin subsidiaries Western Platinum Limited ('WPL') and Eastern Platinum Limited ('EPL').
- Lonmin PLC has mining and exploration assets outside of Marikana, but at the time of the tragedy, WPL and EPL were the only mining subsidiaries that were generating income for the Lonmin Group.

⁷ See the Speech of Mr Phillimore, the Lonmin Chairman, on 31 January 2013 at the first AGM after the tragedy Exh SSSS5 at p 375 and Seedat Day 292 p 38350/3-21

⁸ Lonmin PLC Annual Report 2012 Exh SSSS2 at p 1455; Seedat Day 292 p 38353/5-20

⁹ Speech of Mr Phillimore, the Lonmin Chairman, on 31 January 2013 at the first AGM after the tragedy Exh SSSS5 at p 375; Lonmin PLC Annual 2012 Exh SSSS2 at p 1455 and Exh SSSS4 at p 696; Seedat Day 292 p 38352/5 – 38354/25

10. The Marikana mine was an operating mine when the Mineral and Petroleum Resources Development Act 28 of 2002 ('the MPRDA') came into operation on 1 May 2004. In terms of the transitional provisions in Schedule II to the MPRDA, WPL and EPL had to apply for the conversion of their old order rights in respect of the Marikana mine into a mining right under the MPRDA. Mining rights applications under the MPRDA are conditional on the adoption of an approved social and labour plan ('SLP') the provisions of which become legally enforceable under the MPRDA.¹⁰ So the transitional provisions required the adoption of an approved SLP as a condition for conversion of old order rights.¹¹
11. At the time that WPL and ELP applied to convert their old order rights, they had already committed to phasing out all hostels and to converting them into decent single and family units. They had, in fact, already converted 28 of the 157 Lonmin hostel blocks. This left 129 hostel blocks, 114 of which were to be converted into family or bachelor units, and 15 of which were simply to be phased out.¹²
12. The hostel conversion program could not sensibly be pursued independently from the house-building programme, because 15 hostels were going to be phased out without conversion and for the remaining hostels the conversion

¹⁰ Sections 23(1)(e) and 25(2)(f) and (h) of the MPRDA.

¹¹ Item 7(2)(f) of Schedule 2 to the MPRDA.

¹² Because the Middelkraal hostel complex was situated far away from existing settlements, it would not have been socially viable to convert it into family and bachelor units and Lonmin made clear that the 15 blocks in this hostel complex would be phased out without being converted. See WPL SLP Exh SSSS2 p 78 para 3.7.3.

programme would generally¹³ turn hostel block accommodation for 8 or 16 workers into single family or bachelor units. So the converted units would not be able to accommodate more than 12.5% of the workers who had been accommodated in the hostels prior to conversion. This was always appreciated by Lonmin.¹⁴ Moreover, Lonmin also had to cater for workers who had taken up the living out allowance offered by Lonmin and left the hostels for informal settlements prior to the conversion programme.

13. Because the Marikana mine was operating as a single mine, WPL and EPL submitted a joint SLP with their conversion applications. In terms of this SLP WPL and EPL 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. The SLPs were framed in terms that 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 program.¹⁵ In the SLPs WPL and EPL committed to completing both the hostel conversion and house construction processes by September 2011.¹⁶

¹³ In the Karee hostel, the plan was to convert each hostel block into 2 single units. WPL SLP p 7.3 para 3.7.3(a).

¹⁴ See WPL SLP Exh SSSS2 pp 79-81 and Seedat Day 293 p 38282/17 – p 38285/1.

¹⁵ See WPL SLP Exh SSSS2 pp 79-81 and Seedat Day 293 p 38282/17 – p 38285/1.

¹⁶ See WPL SLP Exh SSSS2 p 77 Table 42 and p 79 Table 43.

Lonmin's version of the obligation in the SLPs must be rejected

14. Through the evidence of Mr Seedat, Lonmin claimed that the housing obligation assumed by WPL and EPL in the SLPs 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 houses.¹⁷ This attempt by Lonmin to wash its hands of an obligation that it repudiated must be rejected:

14.1. it is, on its own terms, an implausible version,

14.2. it is inconsistent with the terms of the SLPs themselves,

14.3. it is inconsistent with annual SLP reports that Lonmin furnished to the DMR under section 25(2)(h) of the MPRDA,

14.4. it is inconsistent with the SLP close-out reports that Lonmin furnished to the DMR after the 5 year term of the SLPs,

14.5. it is inconsistent with Lonmin's sustainable development reports, and

14.6. it is a version that was put forward by a witness with no personal knowledge of what was intended by WPL and EPL when they produced their SLPs.

¹⁷ Seedat Day 292 p 37717/8-16

15. The version advanced by Mr Seedat is not credible. During his testimony, the Chairperson confronted him with this obvious problem:

*'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 if 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 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?'*¹⁸

Mr Seedat spent several pages responding to this question but could not come up with any credible answer.¹⁹

¹⁸ Seedat Day 293 p 38293/17 – p 38294/10

¹⁹ Seedat Day 293 p 38294/11 - 38298/4

16. The Lonmin version is clearly inconsistent with the terms of the WPL and EPL SLPs. In this regard, the SLPs 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.’²⁰

17. The tenure options other than outright purchase on full mortgage bond would inevitably have required the 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.²¹ 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.²² 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.²³ That

²⁰ WPL SLP Exh SSSS2 at p 77

²¹ Seedat Day 293 p 38443/13 – 38449/11.

²² Seedat Day 293 p 38445/15-24.

²³ Seedat Day 293 p 38446/22 – 38447/5.

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.²⁴

18. Furthermore, the SLPs refer to the financing of the hostel conversion process and the house construction process in identical terms.²⁵ Mr Seedat conceded that Lonmin had put its own money into the hostel conversion process.²⁶ 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.²⁷
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 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.²⁸
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

²⁴ Exh ZZZZ28.1 to 28.3 Financial Statements of the Marikana Housing Corporation 2005 to 2007. Financial Statements of WPL 2007-2009, Exh SSSS5 at pp 28, 69-70 and 104.

²⁵ Exh SSSS5 pp 77 and 79 (text before and after Tables 42 and 43)

²⁶ Seedat Day 293 p 38289/12 – p 38289/22

²⁷ Seedat Day 293 p 38287/1 – p 38289/11

²⁸ See for example WLP SLP Report 2008 Exh SSS2 p 516 Table 4 and pp 549-551 para 15; WLP SLP Report 2009 Exh SSSS2 p 646 Table 4 and pp 682-4 para 15; WLP SLP Report 2010 Exh SSS2 pp 809-10 para 13

out reports refer to an unachieved financial commitment of spending R665 million on house construction.²⁹ 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.³⁰

21. In its sustainable development reports Lonmin showed an understanding that its SLP housing obligations went further than Mr Seedat contended in evidence. For example, in its 2010 Sustainable Development Report, Lonmin stated ³¹

‘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.’*

‘Our principal risk is possible withdrawal of our Mining Licences resulting from failure to deliver commitments made in our Social and Labour Plans (SLP) regarding housing and converting our hostel units.’

²⁹ WPL SLP Close Out Report Exh SSSS2 pp 1057-8 Table 25 and p 1059 para 3.2, p 1006 Exec Summary Table 2, p 1044 Table 18.

³⁰ Seedat Day 293 p 38298/23 – 38299/2, p 38301/4-6 and p 38304/8-11.

³¹ Lonmin Sustainable Development Report 2010 Exh SSSS2 at p 1404.

22. Finally, we point out that Mr Seedat was the only witness put up by Lonmin to justify its version of the nature of the SLP obligation in relation to house construction. As we have indicated above, Mr Seedat had no personal involvement in the drafting or signing off of either the original SLPs or the close out reports on the SLPs.³² He does not even claim hearsay knowledge in this regard. In the circumstances,

22.1. his evidence is of no value in relation to the ambit of the SLP housing obligation, and

22.2. to the extent that Lonmin failed to present evidence from witnesses directly involved in the drafting or implementation of the SLPs or even on the reporting in relation to the SLPs, the Commission should draw the adverse inference that witnesses with some personal involvement would not have supported the version offered without personal knowledge by Mr Seedat.

Lonmin's breach and repudiation of the housing obligations

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 SLPs, and were 41 hostels

³² Seedat Day 293 p 38298/23 – 38299/2, p 38301/4-6 and p 38304/8-11.

behind their target for the conversion of 70 hostels over this three year period.³³

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.”³⁴

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.³⁵ 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.³⁶

26. The revised obligation was not accepted by the DMR, which noted in its audit and inspection report of 9 September 2009 that

³³ WPL SLP 2009 Exh SSSS2 p 646 Table 4 and p 684 para 15.5

³⁴ WPL SLP 2009 Exh SSSS2 p 682 para 15

³⁵ WPL SLP 2009 Exh SSSS2 p 682 Table 49

³⁶ WPL SLP 2009 Exh SSSS2 p 684 para 15.5

'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.'*³⁷

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.³⁸ 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 2011.³⁹

Lonmin’s attempts to justify the breach and repudiation of its obligations

28. Lonmin offered two broad grounds of justification for its repudiation of its housing construction obligations:

³⁷ DMR Audit and Inspection Report 9 September 2009 Exh SSSS2 pp 1616-7 para 2.4.

³⁸ Seedat Day 289 p 37777/12-23.

³⁹ Seedat Day 292 p 38318/21-25.

- 28.1. It claimed that there were delays in proclamation which prevented the house construction programme from beginning, and
- 28.2. It contended that in the wake of the financial crisis, it could not afford to construct houses for its employees.
29. The proclamation delay argument is a red herring. Proclamation of Marikana Ext 2 took place on 10 February 2009⁴⁰ and it is common cause that following proclamation of Marikana Ext 2 there was available proclaimed land for the house construction programme.⁴¹ 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.⁴²
30. The affordability argument starts from a mistaken premise. The house construction obligations were legal binding obligations under the MPRDA. It is common cause that WPL and EPL made no application to the DMR to vary their SLP obligations in relation to house construction.⁴³ So issues of affordability are ultimately irrelevant.

⁴⁰ Local Authority Notice 28 of 2009 (NorthWest)

⁴¹ Seedat Day 293 p 38452/21 – 38453/3

⁴² Seedat Day 293 p 38451/1-23 and WPL SLP Exh SSSS2 at p 76

⁴³ Seedat Day 292 p 38320/5 – p 38321/25

31. Although issues of affordability are ultimately irrelevant to the failure by WPL and EPL to meet housing obligations that were binding on them throughout the period 2007-2011, we submit that the affordability argument is, on its own terms, incorrect. In this regard we point out that

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.⁴⁴

⁴⁴ Exh SSSS12.

BACKGROUND TO THE WEEK OF 9-16 AUGUST

Labour Relations arrangements at Lonmin

32. In August 2012, Lonmin employed approximately 28000 employees and utilised approximately 10000 contractors⁴⁵. Before the unprotected strike at Karee in May 2011, NUM had historically enjoyed majority representation of employees there. At that time AMCU had no presence at Karee⁴⁶. In 2013 NUM lost its recognition status at Karee, and by February 2014 Lonmin had negotiated a recognition agreement with AMCU.⁴⁷

The wage agreement

33. The wage agreement between Lonmin and NUM which was operative during August 2012 is dated 2 December 2011.⁴⁸ Clause 2 of the wage agreement provides that it binds all permanent Lonmin employees in the bargaining unit who are members of NUM. It also binds all permanent employees who are not members of NUM but who are employed within the bargaining unit at Lonmin.

34. Clause 3 of the agreement sets out increases which would take effect from 1 October 2011 and 1 October 2012 respectively. Clause 4 deals with housing

⁴⁵ Lonmin PLC 2012 Annual Report Exh SSSS4 Vol 1 Part 8 p684

⁴⁶ Exh XXX2, para 4

⁴⁷ Mr Da Costa Day p 30105/15

⁴⁸ Exh XX2 p13

allowances. Clause 12 is a 'full and final settlement' clause and specifies the following:

34.1. The agreement amends the existing terms and conditions of employment and is in full and final settlement of the demands and proposals put forward by the union and the company.

34.2. Clause 12.3 provides that all proposals and demands on which agreement was not reached or which were withdrawn are regarded as having been settled and may not be subject to strike action until the agreement lapses on 30 September 2013.

34.3. Clause 12.4 is a non-variation clause which provides that any variation of the agreement shall not be valid unless agreed to, reduced to writing and signed by Lonmin and NUM. Mr Gcilitshana accepted that in the past this amendment clause was used to amend the wage. This clause was also used to amend the wage agreement in order to effect the agreement reached as a result of the September 2012 mediation process.⁴⁹

Dissolution of Karee Branch Committee

35. On 12 May 2011, the Rustenburg regional office of NUM informed Lonmin management that the union had decided to dissolve the Karee branch of NUM.

⁴⁹ Day 36 p 3953/14-24

They had also decided to suspend Steve Khululekile and Daniel Mongwaketsi from all union activities.⁵⁰

36. On 18 May 2011 workers from Karee embarked on an unprotected strike demanding the reinstatement of Messrs Khululekile and Mongwaketsi.⁵¹ 11000 Lonmin employees were dismissed as a result of that strike.⁵² Subsequently, approximately 9000 employees were re-employed (as opposed to being reinstated) including the suspended Karee branch leadership.⁵³ One of the implications of re-employment was that union membership was not reinstated and unions had to embark on fresh recruitment campaigns.⁵⁴
37. By December 2011 AMCU had recruited sufficient members in order to win limited organisational rights at Lonmin.⁵⁵ In February 2012 NUM launched its new branch at Karee.⁵⁶
38. Mr Gcilitshana testified that once AMCU had established itself at Karee, a mass meeting was held where it was decided that workers would not work overtime in protest against the refusal to re-employ the 2000 workers.⁵⁷

⁵⁰ Notice from NUM Rustenburg regional office; Exh XX2 p7

⁵¹ Gcilitshana Day 35 p 3793/16-25

⁵² Gcilitshana Day 35 p 3794/9-15

⁵³ Gcilitshana Day 35 p 3794/17-22

⁵⁴ Gcilitshana Day 35 p 3794/17-22

⁵⁵ Gcilitshana Day 35 p 3795/19-24

⁵⁶ Gcilitshana statement; Exh XX1, p5, para 17

⁵⁷ Gcilitshana Day 35 p 3883/4-9

The Skoonteer issue

39. According to Mr Da Costa (then Vice President of Mining at Karee Mine) underground employees at Lonmin traditionally work a 'skoonteer' shift once every fortnight. This shift involves the cleaning and maintenance of underground operations and is treated as overtime work.
40. Since a skoonteer shift did not form part of the normal shift roster, underground employees volunteered to work on such a shift. Prior to January 2012, Karee had not experienced problems with securing sufficient underground employees to volunteer to work a skoonteer shift. There had in fact always been a surplus of volunteers, because the skoonteer shift not only attracts overtimes rates but is normally of shorter duration than a normal shift.
41. During January 2012, Karee experienced a significant drop in the number of underground employees who were volunteering to work skoonteer shifts. Mr Da Costa testified that he investigated the reasons for this, and was told by Tumele Nkisi that there was a rumour that AMCU had instructed its members not to work skoonteer shifts because AMCU had not been consulted about these shifts. During his evidence Mr Da Costa referred to an AMCU pamphlet which had been found in one of the hostels, which stated 'no overtime, no skoonteer'.⁵⁸

⁵⁸ Annexure 'B' to Exh XXX2

42. Mr Da Costa also testified about the death of a Lonmin employee that was related to the skoonter issue. On or about 21 April 2012, Mr Da Costa received a report that a NUM member, Mr Samio Taula Dolane who was rostered to work a skoonter shift, had been assaulted upon arriving at Karee to work this shift. This employee later died in hospital. Thereafter, there was a further drop in the number of volunteers who were prepared to work skoonter shifts.
43. In May 2012, the keys to the NUM offices at Four Belt shaft at Karee Mine was forcibly confiscated from one of NUM's branch leaders by a large group of workers.⁵⁹

The relationship between NUM and AMCU

44. Mr Da Costa in his evidence described the 'strained environment'⁶⁰ and acrimonious relationship between NUM and AMCU. He testified⁶¹ that in 2012, the relationship between NUM and AMCU was strained and adversarial. AMCU was aggressively recruiting at Karee and NUM was trying to regain members. Even after Lonmin had granted AMCU limited organisational rights and AMCU was allowed representation on Karee consultative forums, it was difficult to implement. As pointed out by Mr Jomo Kwadi in a memorandum dated 26 June 2012 to Lonmin's Exco, in or around June 2012 NUM had taken a decision at its national conference that they would not share platforms with AMCU.⁶² As a

⁵⁹ Gcilitshana statement; Exh XX1, p5, para 17

⁶⁰ Day 239 p 30039/3

⁶¹ Day 239 p 30038/5

⁶² Exh BBBB1 p169 para 2

result NUM was informed by Lonmin's Employee Relations Department that in so doing they would be forfeiting their right to attend meetings.

Union scenario planning at Lonmin

45. In April 2012, Barnard Mokwena and Abey Kgotle prepared a 'scenario planning' document which was placed before Lonmin's Exco meeting which was held on 12 April 2012. The document is headed 'The Changing Trade Union Dynamics at Lonmin and their implications'.⁶³

46. In the scenario planning presentation, the some of the key issues highlighted were the following⁶⁴:

46.1. That the relevance of trade unions had become questionable;

46.2. It was a global trend that trade union membership was declining; and

46.3. Recognised trade unions were not necessarily legitimate.

47. The scenario planning presentation also contained a table reflecting trade union statistics.⁶⁵ This table depicted a steady growth in AMCU membership from the period December 2011 to March 2012. It also reflected a sharp decline in NUM membership from June 2011 to July 2011 (from 17 594 members to 12086 members). While there is a marginal growth in NUM membership from July 2011 onwards, in March 2012 NUM is only recorded as having 14048 members.

⁶³ Exh VVVV1 p124

⁶⁴ Exh VVVV1 p129

⁶⁵ Exh VVVV1 p130

The table also reflects a gradual increase in non-unionised members from June 2011 to October 2011. The number of non-unionised members then seemed to dwindle slightly (from 11755 in October 2011 to 9313 in February 2012).

48. The scenario planning presentation drew the following conclusions⁶⁶:

48.1. That NUM had lost 16% of its membership from March 2011 to March 2012;

48.2. That during the same period Solidarity had increased its membership by 16%, UASA had lost 5% of its membership and the percentage non-unionised members had grown by 71%.

48.3. That 31% of Lonmin employee population was not unionised; and

48.4. That there was a direct correlation between the growth of AMCU and the reduction in NUM representation.

49. The scenario planning presentation then identified the following problems in respect of NUM's membership⁶⁷:

49.1. That while NUM had historically enjoyed complete majority, they seemed to have lost touch with their members to have lost their confidence; and

⁶⁶ Exh VVVV1 p133

⁶⁷ Exh VVVV1 p134

- 49.2. That there was an emergence of an alternative trade union.
50. In respect of AMCU, the presentation indicated that AMCU was a breakaway union from NUM. It said that they position themselves as an alternative to NUM, 'a saviour of NUM members'. They are aggressive and disruptive and are known for their covert operations and intimidation tactics.⁶⁸
51. With regard to Lonmin management, the presentation highlighted that management was anxious and feared the unknown. Management knew NUM and preferred to deal mainly with them.⁶⁹
52. The presentation then poses the all-important question 'what does it all mean?'
⁷⁰ In response, the following are some of the issues identified:
- 52.1. The current thresholds and other legal relationships are no longer relevant;
- 52.2. Organisational systems may be outdated and hence a total overhaul of organisation systems, policies and procedures should be considered.
53. As we demonstrate below, during April, May, June and July 2012, the scenario planning process formed an important part of the internal debate within Lonmin management around labour relations. Updates were presented at each of the

⁶⁸ Exh VVVV1 p139

⁶⁹ Exh VVVV1 p140

⁷⁰ Exh VVVV1 p142

Exco meetings and new developments (like the RDO demand) were discussed within the context of scenario planning.

Anglo Platinum 2012

54. As part of their 2011 wage agreement, Anglo American Platinum had agreed to review the remuneration of RDOs with a view to enhancing it in light of the physical demands of the position. The outcome of the review was an agreement to pay RDOs a fixed monthly allowance of R1000 per month.⁷¹

Impala 2012

55. On 30 October 2006 NUM and UASA concluded a recognition agreement with Impala Platinum Holdings Ltd ('Impala') in respect of its Rustenburg Operations.⁷² At that stage NUM represented a majority of Impala Rustenburg employees. NUM and Impala also had in place a collective agreement establishing representative thresholds.⁷³
56. On 7 October 2011 NUM and Impala entered into a two year wage agreement which was due to expire on 30 June 2013. Notwithstanding this, on 18 December 2011 Impala granted additional wage increases (of about 18%) to one category of its employees, namely Miners.⁷⁴ On 30 January 2012, RDOs

⁷¹ Exh XXX2 p4

⁷² Statement of Mr Gcilitshana; Exh XX1 p2 para5

⁷³ Supra para 5

⁷⁴ Supra para 6

employed at Impala, who were disgruntled at not being included in the wage increase, embarked on an unprotected strike demanding a R9000 basic wage.

57. The strike was characterised by violence and intimidation. NUM branch office had to be closed and the branch leadership had to be removed for fear of their safety.⁷⁵ Four people lost their lives as a result of this violence and over 60 people sustained injuries.
58. As a result of the widespread intimidation by strikers, most of Impala's workforce could not go to work. Impala issued an ultimatum that workers who did not report for today would be dismissed.⁷⁶ As a result of this ultimatum, and the workers' refusal and inability to go to work, by 2 February 2012 Impala dismissed around 17200 employees.⁷⁷ However the majority of these were later reinstated.
59. On 20 April 2012 Impala announced a unilateral salary adjustment in favour of various categories of workers. Of significance were the substantial increases in the basic salary of RDOs in its Rustenburg operations.⁷⁸

⁷⁵ Supra p3 para 9; Gcilitshana Day 35 p 3780/3

⁷⁶ Gcilitshana Day 35 p 3783/7-15

⁷⁷ Exh XX2 p4

⁷⁸ Impala Platinum Management Brief 11.12; Exh XX2 p5. Gcilitshana Day 39 p 3787 L19-24

60. On 19 April 2012 Impala gave NUM notice that its representivity had dropped below the 50 plus 1 threshold required by the threshold agreement. NUM was given three months to remedy its representivity or face de-recognition.⁷⁹
61. In August 2012, Lonmin employed approximately 28000 employees and utilised approximately 10000 contractors⁸⁰. Before the unprotected strike at Karee in May 2011, NUM had historically enjoyed majority representation of employees there. At that time AMCU had no presence at Karee⁸¹. In 2013 NUM lost its recognition status at Karee, and by February 2014 Lonmin had negotiated a recognition agreement with AMCU.⁸²

The RDO demand

62. According to the evidence of Mr Da Costa⁸³ in the period prior to June 2012, the RDOs at the Karee operation had started having meetings amongst each other. Initially these meetings were not well attended. However in around June 2012 Mr Da Costa became aware of a handwritten A4 poster which called on the RDOs at Karee mine to attend a meeting to be held on 21 June 2012 at Karee hostel. According to Mr Da Costa the poster did not give any indication of the issues to be addressed at the meeting. Importantly, the poster did not

⁷⁹ Letter from Impala Platinum dated 19 April 2012. Exh XX2, p1, para 7

⁸⁰ Lonmin PLC 2012 Annual Report Exh SSSS4 Vol 1 Part 8 p684

⁸¹ Exh XXX2, para 4

⁸² Mr Da Costa Day p 30105/15

⁸³ Day 239, p 30022/7

show any indication in any trade union involvement in the calling of the meeting.⁸⁴

63. Mr Da Costa confirms in his statement⁸⁵ that he was informed by a Lonmin security official that the meeting had taken a decision to march to the Karee administration offices and that there would be a request to see him.

64. After the meeting on 21 June 2012, about 300 RDOs went to the Karee administration building and asked to see Mr Da Costa.⁸⁶ He sent a message to them stating that he would not go out to speak to them but that he would talk to a delegation which represented them.⁸⁷ Two workers, Mr Magqabine and Mr Mofokeng, were designated to speak to Mr Da Costa, who asked Mr July Tiro (then Lonmin's Human Capital Manager for Karee) to sit in the meeting with him.

65. At that meeting the following transpired:

65.1. Mr Da Costa informed the workers that they had not raised their grievance in the correct way. He informed them that there were procedures in place and that they should have escalated the

⁸⁴ Da Costa OO17, p3, para 3.4

⁸⁵ OO17, para 3.7

⁸⁶ Day 239, p 30022/14

⁸⁷ Day 239, p 30025/2

grievance through line management, take it up through their union structures, or wrote a note to him setting out the grievance;⁸⁸

65.2. The workers pointed out that they were illiterate and therefore could not write a note. They also felt that their grievance was quite serious which is why they came directly to him.⁸⁹

65.3. Mr Da Costa then said to the workers: 'Okay well, you are here now, so you know, you want to share with me what your grievance is, what your issue is?';⁹⁰

65.4. The workers explained that their work was difficult, they worked long hours, it was physically demanding and they tended to get wet in the areas they were working.⁹¹

65.5. Mr Da Costa said that he was familiar with the work that they do and therefore understood how demanding their work was.⁹²

65.6. The workers said that they felt that they were not adequately remunerated for the type of work that they do.⁹³

⁸⁸ Day 239 p 30024/15

⁸⁹ Day 239 p 30025/4

⁹⁰ Day 239 p 30025/4

⁹¹ Day 239 p 30025/4

⁹² Day 239 p 30025/11

⁹³ Day 239 p 30025/13

- 65.7. He asked them 'what is it that you'd like me to do for you?' ⁹⁴
- 65.8. The workers then indicated that they wanted their wages to be increased to R12500 a month. ⁹⁵
- 65.9. Mr Da Costa indicated to them that it was a big increase that they were seeking. He also pointed out that wages and conditions of employment were dealt with through bargaining with union representatives at fixed periods, either on an annual basis or bi-annual basis. ⁹⁶
- 65.10. The workers informed him that they did not want unions involved 'since they did not feel that they could take this up with their unions.' ⁹⁷ They indicated that they were approaching him specifically as RDOs from Karee (and not the wider Lonmin operations). They indicated that they did not want unions involved in the discussions and wanted him to address this concern of theirs. ⁹⁸
- 65.11. Mr Da Costa responded that he was not authorised to deal with the demand himself, and that he was going to escalate it to the executive since it was not his position to deal with it and '*it's an issue of wages*'

⁹⁴ Day 239 p 30025/17

⁹⁵ Day 239 p 30025/18

⁹⁶ Day 239 p 30026/15

⁹⁷ Day 239 p 30026/13

⁹⁸ Day 239 p 30026/11-20

⁹⁹ so he could not deal with it in a forum like that. He promised to escalate the demand to the executive and to revert with the response from the executive within two weeks.¹⁰⁰ He testified that he did however indicate to them that the demand was extremely high and unaffordable and that he had little doubt that Exco would not approve such an increase.¹⁰¹

66. Mr Da Costa was specifically asked by the chairperson if he asked the delegation of two workers who met with him on 21 June 2012 how the amount of R12500 was arrived at.¹⁰² He answered that the workers had indicated that this was a 'good number' and that it was the number that would reward them for the work that they were doing.¹⁰³ When asked if the number was based on any calculations the workers indicated that they do not do calculations and that it was just a 'good number'. This testimony was not challenged under cross-examination.¹⁰⁴

⁹⁹ Day 239 p 30026/24-25

¹⁰⁰ Day 239 p 30027/11-13 and Day 239 p 30028/24-25

¹⁰¹ Day 239 p 30027/11-18

¹⁰² Day 239 p 30027/21

¹⁰³ Day 239 p 30028/4-6

¹⁰⁴ Day 239 p 30028/8-10

The deliberations

67. On 27 June 2012, Mr Da Costa addressed a memorandum¹⁰⁵ to Lonmin's Exco in which he sought a response from Exco to the RDO demand. In that memorandum he highlighted the following:

67.1. The demand for an increase was made by workers some of whom are AMCU members and some of whom are NUM members; and

67.2. Lonmin's remuneration package has fallen behind that of Impala after the significant increases granted by Impala. Furthermore, even Anglo Platinum had introduced fixed monthly allowances in recognition of the physical demands of the RDOs work.

68. Mr Da Costa indicates that feedback will be given to the workers to the effect that Lonmin has well-established processes for negotiation and is not in favour of negotiating outside of these processes. Mr Da Costa however pointed out that this response is unlikely to resolve the problem. He accordingly proposed that:

68.1. Lonmin engage NUM and AMCU at national level to inform them of the RDO demand and to solicit their opinion;

68.2. Lonmin pay an RDO allowance rather than an increase in wages. He proposed an allowance of R1000 per month for single handed drillers;

¹⁰⁵ Exh XXX2 p3

R800 per month for drillers who are assisted and R500 per month for assistants;

68.3. Lonmin engage with NUM and AMCU at Marikana to reach agreement on the matter.

The Exco meeting of 28 June 2012

69. A meeting of Lonmin's executive committee was held on 28 June 2012 at a game farm.¹⁰⁶ At that meeting an update on Trade Union Scenarios was tabled by Mr Jomo Kwadi.¹⁰⁷

70. The key updates highlighted in that memorandum included the following:

70.1. AMCU had experienced phenomenal growth in membership. At Karee mine AMCU enjoyed 47.6% membership as opposed to NUM's 21.3%. Furthermore AMCU's membership at Easterns and Westerns had increased by 2% and 2.9% respectively.¹⁰⁸

70.2. NUM had lost members and was likely to go into a period of organisational decline and decay.¹⁰⁹

70.3. NUM had indicated that they will not share platforms with AMCU.¹¹⁰

¹⁰⁶ The minute appears at Exh VVVV1 p75

¹⁰⁷ Mr Kwadi's memorandum appears at Exh BBBB1 p169

¹⁰⁸ Exh VVVV1 p169 para 1

¹⁰⁹ Exh VVVV1 p169 para 1

¹¹⁰ Exh VVVV1 p169 para 2

- 70.4. Following the increases to RDOs remuneration by Impala, Lonmin's RDOs were on average lagging behind by an average of R898.23 per month.¹¹¹
- 70.5. Impala's handling of inter union rivalry and the RDO issue had the potential of posing serious risk for Lonmin. Mr Kwadi recommended that they monitor the Impala situation, avoid a knee jerk reaction to the RDO demand and implemented existing agreements.
71. Under the heading 'Human Capital' the redacted minute shows that the following issues were noted by Exco:
- 71.1. *'AMCU continues to grow its support base and currently represents 48% of Union members at Karee';*
- 71.2. *'BM cautioned that no adjustments should be made to the salaries of unionised employees as Lonmin has agreements in place that must be adhered to.'*
72. The minute also shows that a decision reached by the Exco was the following:
- 'To consider the implications of (i) NUM claiming representation at this point in time (ii) dealing with two unions that will not speak to each other, (iii) and possible requests for the re-opening of wage negotiations in*

¹¹¹ Exh BBBB1 p1170 para 2

October. Probabilities of the risk occurring and mitigation strategies are to be put in place for each scenario. [June Exco] BM'

73. The minute does not reflect what discussion took place around Mr Da Costa's proposal. Mr Mokwena however testified that Lonmin did not engage with NUM or AMCU at national level as advised by Mr Da Costa. Furthermore, while Mr Mokwena testified that the local branches of NUM and AMCU were informed about the RDO allowance, there is no evidence that Lonmin implemented Mr Da Costa's proposal that the introduction of these allowances be negotiated with either NUM or AMCU. Mr Da Costa testified that while he did not speak to either NUM or AMCU about the RDO demand, his HR manager, Tumelo Ntsiki did speak to representatives of the unions to keep them informed of the process.¹¹² He testified further that after EXCO had approved the allowance, he informed Mr Moloi from NUM and Mr Khululekile from AMCU that the executives had approved the allowances and that these were to be implemented.¹¹³

The Exco meeting held on 19 July 2012

74. On 13 July 2012, Mr Jomo Kwadi submitted a further update on the Trade Union Scenarios.¹¹⁴ In that document the following were some of the issues highlighted:

¹¹² Day 239 p 30039/11-19

¹¹³ Day 239 p 30039/11-19

¹¹⁴ Exh BBBB1 p171

- 74.1. Lonmin's RDO remuneration lagged both behind Impala and Amplats. Even after the October increases, Lonmin would still lag by around R300 per month. The remuneration gap has the potential of inducing RDOs to seek employment with competitors;
- 74.2. The sunset clause in the recognition agreements with the various unions would have expired in October 2012.
75. Mr Kwadi recommended that an RDO 'market allowance' be implemented in October 2012 or during the first half of October 2013.¹¹⁵
76. The redacted minute of the Exco meeting held on 19 July 2012 appears at exhibit BBBB1 p81. Paragraph 3 of that minute deals with Human Capital and reflects as an issue for noting that:
- '(iii) There is currently a risk to the retention of RDO's at Lonmin given that RDO's are paid more at both Impala and AngloPlats. This risk needs to be measured against the potential risk of re-opening wage negotiations during the current financial year if the demands of RDO's are addressed separately to the rest of the workforce'.*
77. The minute also reflects that Mr Mokwena was requested to *'prepare an Opinion covering the operational, political and legal implications in the event of various identified inter-union rivalry scenarios emerging. This is to include the*

¹¹⁵ Exh BBBB1 p179

*implications of addressing the demands of RDO's at this point in time and the implications in terms of potentially re-opening wage negotiations. [To provide an update at the August Exco].'*¹¹⁶

78. It is immediately evident from the minute of the Exco meeting of 19 July 2012 that at that stage Lonmin's Exco had not yet taken a categorical decision that it would not reopen wage negotiations. Instead Exco appeared to be open to considering the possibility of reopening wage negotiations, but needed to understand the implications of doing so. This much was confirmed by Mr Albert Jamieson under cross-examination.¹¹⁷ Mr Mokwena, in his testimony, maintained that Exco had never considered reopening wage negotiations.¹¹⁸ He testified that he was not aware of any decision to consider opening up wage negotiations. We submit that this reasoning is flawed. As confirmed by Mr Jamieson, the minute clearly reflects that Exco wanted an opinion on the implications of reopening wage negotiations. This must mean that Exco was considering that possibility. Mr Mokwena's assertion to the contrary is contradicted by his evidence that he in fact did participate in an Exco discussion on the implications of re-opening wage negotiations.¹¹⁹

¹¹⁶ Exh VVVV1 p84

¹¹⁷ Day 287 p 37234 / 13-19

¹¹⁸ Day 291 p 37934/16 – p 37935/13

¹¹⁹ Day 291 p 37937/4 – 24

The Exco meeting of 30 July 2012

79. On 30 July 2012, Lonmin's Exco discussed Mr Kgotle's benchmarking proposal and recommendation as to RDO allowances.¹²⁰ Exco took a decision to implement an RDO allowance of R750.¹²¹ The decision reached in respect of the RDO wage allowance is contained in a document prepared by Lonmin (titled 'Communication Script: RDO Allowance') aimed at educating and briefing frontline supervisors on the RDO allowances.¹²² That document records that the company had decided to pay the following allowances in order to attract and retain RDOs:

79.1. Implementation of a monthly drilling allowance of R750 for single handed Drillers;

79.2. Implementation of a monthly drilling allowance of R500 for assisted Drillers; and

79.3. Implementation of a monthly drilling allowance of R250 for Rock Drill Assistants.

80. The allowance was to be paid effective from 1 July 2012.

¹²⁰ Statement of Mr Jamieson, Exh VVV2, p2, para 2.4

¹²¹ Mr Jamieson Day 287 p 37263/7-10

¹²² Da Costa Day 239 p 30035/11-18

The meeting of 30 July 2012

81. On 30 July 2012 the RDOs, represented by Mr Macheke and Mr Mofokeng, had a meeting with Mr Da Costa and Mr Nkisi. According to a record of the meeting produced by Lonmin¹²³ (and confirmed by Mr Da Costa during his evidence)¹²⁴ the following was explained to the workers during the meeting:

81.1. That the executive had approved the payment of a Rock Drill Operator's Allowance backdated from 1 July 2012;

81.2. The allowance will be a monthly amount of R750;

81.3. This is a management decision due to RDO market movement. The intention is to retain RDOs and make Lonmin competitive;

81.4. The representatives must communicate this allowance to the RDOs in general and make sure that any illegal activity is averted.

82. The worker representatives responded that the RDOs wanted R12500 but that they would take the news of the allowance to the employees who would decide. There was no further demand made before the strike commenced on 9 August 2012.

¹²³ Exh XXX3 p24

¹²⁴ Day 239 p 30055/7

BACKGROUND TO THE WEEK OF 9 - 16 AUGUST - SAPS

The Events at Impala Platinum

83. In paragraph 43 of its opening address SAPS stated the following:¹²⁵

'We propose to give a presentation regarding the training of the various units of the Police Service, the policy considerations which apply in crowd control and management, the constitutional mandate of the Police Service and the provisions of the various statutes dealing with police conduct. The evidence, however, will be that some of these instruments were not adequate to deal with a treacherous situation of more than 3000 belligerent protesters who were armed and resisting any effort to disarm them.'

84. In cross examination Gen Phiyega was asked whether she agreed with the above quoted statement. Her reply was that she did but with one qualification, namely:¹²⁶

'That the incident was unprecedented.'

After her attention was directed to the existing standing orders, national instructions and standard operating procedures Gen Phiyega was asked, if all

¹²⁵ See Exh FFF9, paragraph 43.

¹²⁶ Day 68 pp 7232/15 to 7233/14.

of them were in place, what shortcomings there were that prevented SAPS from avoiding the killings. She replied: ¹²⁷

'I think the important thing in responding to your question is that I would like to say the situation was different. I have said the situation was unprecedented.'

85. In further cross examination about whether the events at Marikana were unprecedented, Gen Phiyega testified: ¹²⁸

'In my statement I do mention that post 1994 where I am talking about the statistics of the new South African Police Service, we have never encountered anything like that, and this is why I even gave statistics to say in the past three years we've handled 33000 unrests. Some were peaceful, some were not peaceful. In the 18 years of existence of this country we've handled close to 150000, and we have never experienced anything like this.'

86. In paragraph 57 of its opening address SAPS stated the following:¹²⁹

'The Marikana Tragedy was a first for the country. There was no history of protesters with such large number bearing arms posing immediate threat to life and property, armed with dangerous weapons, sabre rattling

¹²⁷ Day 68 pp 7247/21 to 7248/7.

¹²⁸ Day 68 p 7316/11 to /19.

¹²⁹ See Exh FFF9, paragraph 57.

with an intent to engage the police in a mortal duel. The policies of crowd control and management have proved inadequate to contain this type of situation. The Police Service will then have to reconsider its practices, policies, training, equipment and additional resources to better help it address future events of this kind. A recommendation along these would therefore be apposite.' (own underlining)

87. The notion that SAPS had never faced a situation such that which they were faced with at Marikana is incorrect. The situation which SAPS confronted at Marikana was, in most respects, similar to that which they had recently confronted in the same area during the Impala Platinum strike from January to May 2012. The narrative to the SAPS presentation¹³⁰ provides a short chronology of the unrest at Impala. It shows many features that reappeared at Marikana:

87.1. An unprotected strike of migrant workers in the platinum mining industry,

87.2. Large numbers of strikers assembling regularly in the same public place¹³¹ with traditional weapons,

87.3. Crowds of armed strikers attacking, and in some cases murdering, workers who were not on strike,

¹³⁰ Exh HHH28 pp 9 – 13 para 2.1.1

¹³¹ See Zokwana Day 42 p 4538/9-11 where Mr Zokwana points out that the Impala strikers regularly gathered next to the railway station.

- 87.4. Crowds of armed strikers acting violently towards the SAPS when SAPS members intervened in an attempt to restore law and order,
- 87.5. Crowds of armed strikers threatening the NUM offices¹³² and attempting to burn down buildings occupied by the employer and parties they identified as their opponents (including the actual burning down of the Freedom Park Police Station), and
- 87.6. Crowds of armed strikers burning private vehicles.
88. The clear parallels between what was taking place at Marikana and what had taken place at Impala were identified at the time by Mr Zokwana,¹³³ the Provincial Commissioner¹³⁴ and Lt Col Scott who had been informed about the events at Impala by security guards who had been present there.¹³⁵ In fact, on the basis of what had happened at Impala, Lt Col Scott concluded at Marikana that *'a phase 3 was always on the cards.'*¹³⁶

The Incident at Tlhabane on 22 May 2012

89. In the course of examining the contents of an electronic hard drive that was provided to the evidence leaders a document was discovered, the existence of which had not been disclosed to the Commission by SAPS. The document was

¹³² See Zokwana Day 41 p 4443/16-24

¹³³ See Zokwana Day 41 p 4443/16-24 and Day 43 p 4651/1-21

¹³⁴ Exh JJJ192bis p10

¹³⁵ Exh HHH20 Consolidated Statement of Col Scott p 107 para 34.6 and Scott Day 137 p 14550/22 – 14551/4.

¹³⁶ Scott Day 135 p 14377/22 – 14378/2

a letter dated 28 May 2012 that was written by Lt Col Salmon Vermaak, Commander of the North West Air Wing of SAPS, and addressed to Lt Gen Mbombo and Brig Calitz.¹³⁷ In this letter Lt Col Vermaak reported to Lt Gen Mbombo and Brig Calitz on the SAPS conduct whilst policing a march that had occurred on 22 May 2012 to the Magistrates' Court in Thlabane by approximately 15000 people. Lt Col Vermaak explained that after the attending SAPS members had used teargas, stun grenades and their full supply of rubber rounds, 'the TRT members start shooting with live ammunition (R5 rounds) to protect the police and the community.' Lt Col Vermaak also stated the following:

'Lt Col Merafe handles the situation very good with minimum manpower, but this incident could end tragedy if the helicopter was hit or a marcher was killed by a R5 round.'

and

'This report is not to put any person in a negative light, but rather prevent an incident where members may be criminal charged.'

90. On the same electronic hard drive the evidence leaders discovered another document that had not been disclosed to the Commission by SAPS, being an unsigned statement by Lt Col Joseph Omphile Merafe dated 30 November 2012.¹³⁸ As indicated by Lt Col Vermaak, the SAPS commander on the scene of the incident on 22 May 2012 was Lt Col Merafe, who was the Unit

¹³⁷ See Exh JJJ137.

¹³⁸ See Exh QQQ2.

Commander of the Rustenburg POP. Lt Col Merafe confirmed that he drafted exhibit QQQ2 and that the content thereof was true and correct.¹³⁹ In this document Lt Col Merafe recorded the following:

'On 22-May-2012 after the arrests of suspects that were involved in the shooting of NUM Shop stewards at no.08 Hostel gate there was an illegal march by the miners to Tlhabane Court with an intention to go and release suspects. There was ±15000 people at that march and I took a decision to stop the crowd before they reach Tlhabane Industrial area because of fear of damage to property. Marchers were armed with sticks and pangas at that time. With the limited number of personnel I had on that time I had to make calls for enforcement from neighbouring stations as well as the use of other specializing unit in the Rustenburg Cluster. On the day I relied on the support of the air wing because it was not easy to see what was happening at the back of the marchers. I tried to negotiate with them but they did not give me co-operation and instead myself and members were thrown with stones. I then instructed members to use teargas to disperse the crowd but it was not effective enough for them to disperse. I communicated with the Air Wing Commander Lieutenant Colonel Vermaak over the radio to through CS Canisters to the crowd from the air. The situation was becoming more tense and I ordered members to use rubber bullets and we ran in short of rubber bullets. One of our armoured vehicle fell into a hole and

¹³⁹ See Exh QQQ3, paragraph 1.

participants ran to it trying to burn it with police officials inside then I instructed TRT members to make use of their R(5) to scare the people attacking our members and safe lives. VISPOL members that were requested from different stations arrived and there were more visible policing at the scene.

We ultimately managed to restore public order without any loss of lives and damage to properties. Participants were prevented from going to Court and they dispersed. I instructed members to patrol the area to make sure that everybody was dispersed and no road was barricaded.'

91. On 22 May 2012 SAPS discharged eleven R5 rounds and two 9 mm rounds.¹⁴⁰
92. Hence, contrary to what SAPS stated in paragraph 57 of its opening address, prior to Marikana SAPS did have a *'history of protesters with such large number bearing arms posing immediate threat to life and property, armed with dangerous weapons, sabre rattling with an intent to engage the police in a mortal duel'*. SAPS had experienced a similar event as recently as 22 May 2012.
93. It is significant that both on 22 May 2012 and on 16 May 2012, SAPS first used traditional non-lethal public order policing methods in its actions against the crowd, and then resorted to the use of sharp point ammunition, the shooters in both instances coming from the Tactical Response Team (TRT). It was the use

¹⁴⁰ See Exh QQQ12.

of live ammunition on 22 May 2012 in such circumstances that was addressed by Lt Col Vermaak in the letter that he wrote to Lt Gen Mbombo and Brig Calitz on 28 May 2012.¹⁴¹

94. Maj Gen Mpembe admitted to having read exhibit JJJ137 and having discussed it with Brig Calitz.¹⁴² Brig Calitz admitted to having full knowledge of exhibit JJJ137, stating that he had requested the letter.¹⁴³ Brig Calitz said that the incident that had occurred at Tlhabane on 22 May 2012 had been reported to him on that day, that he had reported same to Maj Gen Mpembe, that Maj Gen Mpembe had requested that he obtain a report, and that he then asked Lt Col Vermaak to write the report.¹⁴⁴ Brig Calitz agreed that exhibit JJJ137 amounted to a warning by Lt Col Vermaak and testified that this warning was conveyed to the highest echelons of the SAPS.¹⁴⁵
95. Finally, regard must be had to the second bullet in slide 283 of exhibit L, where the following appears:

'Even when Stage 3 of the Operational Plan was implemented, the use of live ammunition was never an option, and the use of minimum force, if negotiation was not successful, was the next alternative, where encirclement and dispersion would be executed by using, if necessary,

¹⁴¹ See Exh JJJ137.

¹⁴² Day 149 pp 48/21 to 49/6.

¹⁴³ Day 155 pp 17526/25 to 17527/25.

¹⁴⁴ Day 155 p 17528/1 to /20.

¹⁴⁵ Day 155 pp 17538/1 to 17539/12.

water cannons, stun grenades, tear grenades and rubber bullets. The unfortunate reality was that the aggression of the crowd left the SAPS with no other choice than to act in private defence, defending their own lives and the lives of others.'

96. Considering what happened on 22 May 2012, if the protesters failed to be pacified by POPS with water cannon, stun grenades, CS gas and rubber bullets on 16 August 2012, it was likely (almost probable) that live ammunition would be used, more especially by the TRT who were backing up the POPS.

THE APPLICABLE LEGAL FRAMEWORK

The Constitution

97. Section 17 of the bill of rights entrenches the right to peaceful and unarmed assembly, demonstration picket and petition.
98. Chapter 11 of the Constitution deals with Security Services. Section 198(d) provides that national security must be pursued in compliance with the law. Section 199(6) provides that no member of any security service may obey a manifestly illegal order.
99. Section 199(7) provides that neither the security services, nor any of their members, may, in the performance of their functions prejudice a political party interest that is legitimate in terms of the Constitution; or further, in a partisan manner, any interest of a political party.
100. Sections 205 to 208 deal specifically with the police service. In terms of section 206(1) a member of cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account policing needs and priorities.
101. In terms of section 207(1), the President appoints a person as National Commissioner to control and manage the police service. Section 207(2) provides that the National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Minister of Police.

102. The National Commissioner appoints Provincial Commissioners under section 207(3). In terms of section 207(4) Provincial Commissioners are responsible for policing in their respective provinces (subject to the power of the National Commissioner to exercise control over and manage the police service in terms of section 207(2)).

The South African Police Service Act 68 of 1995 (SAPS Act)

103. According to its preamble the purpose of the SAPS Act is to provide for the establishment, organisation, regulation and control of the South African Police Service.
104. The powers duties and functions of the national commissioner and the provincial commissioner are set out in sections 11 and 12 respectively.
105. Section 13 sets out the powers duties and functions of members of SAPS. Section 13(3)(a) provides that a member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances. Section 13(3)(b) encapsulates the doctrine of minimum force. It provides that where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances.
106. In terms of section 25, the national commissioner may issue national orders and instructions in relation to any issue falling within her jurisdiction.

The Regulation of Gatherings Act 205 of 1993

- 107. The purpose of this Act is to regulate the holding of public gatherings and demonstrations at certain places.
- 108. The following are the applicable regulatory provisions regarding gatherings, demonstrations and offences
 - 108.1. Section 3 - Notice of Gatherings
 - 108.2. Section 4 – Consultations and negotiations
 - 108.3. Section 8 – Prescribes conduct at a gathering. Prohibiting certain conduct, including the carrying of dangerous weapons
 - 108.4. Section 9 – Powers of police attending gatherings
 - 108.5. Section 12 – Offences and penalties

The Dangerous Weapons Act 71 of 1968

- 109. The applicable sections of the Dangerous Weapons Act are:
 - 109.1. Section 1 which sets out the definition of a dangerous weapon;
 - 109.2. Section 2 which places a prohibition on the possession of dangerous weapons.

The Criminal Procedure Act 51 of 1977 ('the CPA')

- 110. Sections 39 to 42 of the CPA deal with arrests with and without warrants.

111. The other relevant section is section 49, and in particular section 49(2) which deals with the use of force in affecting an arrest. In August 2012, this section (which was subsequently amended) provided that:

'If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds-

- (a) that the force is immediately necessary for the purpose of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;*
- (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or*
- (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.'*

SAPS national orders and instructions

Standing order 262¹⁴⁶

112. According to section 1 thereof, the purpose of SO 262 is to regulate crowd management during gatherings and demonstrations in accordance with the democratic principle of the Constitution and accepted international standards.
113. SO262 states 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. It deals, *inter alia*, with pro-active conflict resolution, threat assessment based on information received, pre-planning of operations, briefing of members and execution.
114. Section 1(3) of SO 262 places a duty on SAPS to promote public safety and play a pro-active role to diffuse conflict before it escalates to violence.
115. Other relevant sections include:
 - 115.1. Section 7 dealing with threat assessment;
 - 115.2. Section 8(1) and 8(2) provide for the appointment of the CJOC who takes overall responsibility for the operation;

¹⁴⁶ Exh SS2

- 115.3. Section 9 deals with pre-planning;
- 115.4. Section 10 dealing with briefing;
- 115.5. Section 11 dealing with execution of the plan:
 - 115.5.1. Section 11(1) deals specifically with 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.
 - 115.5.2. Section 11(1) also emphasises the need for ongoing negotiations between SAPS and the leadership element of the demonstrators.
 - 115.5.3. Section 11(3) provides that if the use of force is unavoidable it must meet the following requirements: the purpose of the offensive actions must be to deescalate the 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, injury and loss of life. It stresses the importance of clear communication and the giving of warnings before the use of force. It also requires that the use of force be discontinued once the objective has been met.

115.5.4. In terms of section 11(4), the following are prohibited or restricted in crowd management operations:

- Use of 37mm stoppers (prohibited);
- Use of firearms and sharp ammunition (prohibited);
- Use of rubber bullets. These may only be used to disperse a crowd when less restrictive means have proved unsuccessful (restricted).

115.5.5. In terms of section 11(5) force may only be used on the command or instruction of the CJOC or operational commander.

115.5.6. In terms of section 11(7), common law principles of self or private defence are not affected SO262.

115.6. Section 12 deals with reporting and record keeping;

115.7. Section 13 deals with debriefing;

115.8. Section 14 places obligations on the first member at a spontaneous gathering.

Standing order 251¹⁴⁷ (Use of firearms)

116. This standing order deals with the circumstances under which a member may use his/her firearm and the fact that members should be adequately armed to deal with the prevailing circumstances. Section 251.2 provides that a member must not, when necessary, hesitate to use his or her firearms.
117. Section 251.8 provides that the officer (or senior member) on the 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.
118. Section 251.9 provides that the commander shall cause members to fire at the leaders of the mob. They must however take care that an innocent person who is not identifying himself with the mob is hit.
119. Section 251.13 provides that as soon as the necessity for firing has stopped, a further shot shall not be fired.
120. Section 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.

¹⁴⁷ Exh ZZZ8

121. Section 251.15.5 deals with the requirement to file comprehensive shooting incident reports

*Ministry of Police: Policy Guidelines: Policing of Public Protests, Gatherings and major events*¹⁴⁸

122. This policy guideline was signed on 29 August 2011. It aims to provide a framework with guidelines for police in reviewing and aligning operational strategies and instructions applicable on policing of public protests and related major events.

National Instruction # of 2012 Crowd Regulations and Management during Public Gatherings and Demonstrations

123. This is a draft national instruction. Key provisions are the following:

123.1. Paragraph 12 deals with briefing of members (and in particular paragraph 12(2)). It emphasises the role of the overall commander or designated officer, inter alia, briefing, instructing all commanders to furnish detailed written plans on their specific tasks, and designating video camera operators.

123.2. Paragraph 14 deals with execution (and particularly 14(1)) the use of force in the dispersal of crowds must only be conducted by those members of POP trained in crowd management and equipped with

¹⁴⁸ Exh R

relevant crowd management equipment (and 14(3)(g)). 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.

*POP Policy Document on Crowd Management*¹⁴⁹

124. 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.

125. Section 2 describes the goals of public order policing. Section 3 describes principles of crowd management.

126. The following sections are particularly relevant:

126.1. Section 3.2 deals with the legal aspects of crowd management

126.2. Section 3.3 deals with the principle of situational appropriateness;

126.3. Section 3.4 sets out the principle of optimisation (optimal use of personnel and resources) and the necessity of sufficient intelligence;

126.4. Section 3.5 deals with the principle of proportionality, and the need for proper planning and the use of less lethal means;

¹⁴⁹ Exh FFF1

- 126.5. Section 4 deals with preparedness for crowd management operations. Section 4.1 deals with levels of responsibility within SAPS. Section 4.2 deals with pre-planning. It emphasises the importance of information and intelligence gathering. It also incorporates the need for threat assessment.
- 126.6. Section 4.3.2 provides the planning and operational command of public order operations must always be entrusted to commanders of public order units, as they are trained and usually experienced in such matters;
- 126.7. Section 5 deals with the execution of the operation. Section 5.1.1 highlights the need for proper equipment and a detailed briefing. Section 5.2 requires that SAPS's approach be a gradual build up from negotiation to the implementation of defensive action to the adoption of offensive action. Section 5.2.1 emphasises the need for continuous contact with organisers of the demonstration. Section 5.2.4 to 5.2.6 deals with the requirement of warnings. Section 5.2.7 requires that SAPS at all times make provision to identify perpetrators during the course of action. This can be done by means of video coverage, photographs or witness building. Section 5.2.10 sets out the need for record keeping. It requires the operational commander to appoint a record keeper and a video operator.
- 126.8. Section 5.3 deals with spontaneous gatherings. It requires that certain steps be taken once the existence of a spontaneous gathering is

known. It also provides that the POP policy applies to spontaneous gatherings.

126.9. Section 5.4 deals with the use of force. It highlights that the use of force needs to be gradual, proportionate, reasonable and minimal in order to meet objectives.

126.10. Section 5.6 permits the use of the SANDF but states that their role should be limited to supporting role to assist with preventative tasks. The section states that the SANDF should never be used in the physical front line of marches or gatherings.

126.11. Section 6 deals with debriefing.

Other

127. Other SAPS prescripts include the following:

127.1. Procedural manual: Public Order Police Information Management and Annexure A (Edition 1/2000).

127.2. Administrative Directive: Public Order (POP) Division: Operational Response Services.

127.3. Divisional Directive XX/2012; POP Operational Standards;

127.4. Use of force directive: Public Order Police (POP) Division: Operational Response Services (ORS);

This document contains much of the same information as others dealt with. It does however have a paragraph on 'Deadly force'. It notes that deadly force can be used to only in cases of necessity, self-defence or private defence.

- 127.5. Directive Guideline for armoured vehicles.
- 127.6. The operational Use and Maintenance of the BAT 4500 and 6000 water canon (This document regulates the use of water cannons during operational deployment).
- 127.7. Public Order Police (POP): Use of force during crowd management – 3/1/5/1/174 dated 2012-07-20
 - 127.7.1. This document withdrew circular 3/1/5/1/174 dated 2011-12-20
 - 127.7.2. It provides that the use of force must be gradual; it must be appropriate to the situation and proportional to the threat. It must also be reasonable in the circumstances and minimal in order to accomplish the intended objective.
 - 127.7.3. The continuum of force is to consist of three phases:
 - 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).

ASSESSING THE ORAL EVIDENCE

The extent of the untruthful evidence and its consequences

128. It is regrettably necessary to record that the oral evidence of a significant number of witnesses was not truthful.
129. As we show below, the SAPS closed ranks at a very early stage, under the leadership of the Minister of Police and the National Commissioner. There was an unwillingness to admit error – or even, in some instances, to admit that a police operation in which 34 civilians had been killed was a catastrophic failure. A police narrative was constructed at a conference in Potchefstroom (the Roots Conference) which was held over 9 days during August-September 2012. Certain evidence was constructed, and other evidence was concealed, in order to support that version.
130. This could not and would not have happened unless it had the sanction of top leadership of the SAPS.
131. The evidence introduced on behalf of the injured and arrested persons was similarly highly unsatisfactory. Several witnesses denied that they had been present when the critical events had taken place, disputed the indisputable, gave an improbable account of their own role, and were evasive.

132. This has had two consequences. First, it unnecessarily prolonged the proceedings of the Commission. As evidence emerged, and it became clearer that witnesses were not telling the truth, it became necessary to dig further and to seek further evidence in an attempt to uncover the truth. Second, because of the widespread unwillingness to tell the truth as to what happened at Marikana in August 2012, it is difficult to construct a fully reliable narrative of the events. We attempt to do so in the submissions which follow.
133. A centre-point of the SAPS was the evidence of Mr X, who asserted that he had been one of the leaders of the strike. He was in the witness protection programme, and he gave evidence through a remote video link. The Chair of the Commission prohibited the publication of information which would disclose his identity. Because his evidence was so central to the SAPS case, we commence our submissions with an analysis of the reliability of the evidence of Mr X.

The evidence of Mr X

134. According to his evidence, Mr X was intimately involved in all of the major events from 10 to 16 August. He stated that he was a member of the delegation whom the strikers elected to meet management on Friday 10 August; and that he was a member of a 15-member committee which was elected to represent the strikers on the koppie.
135. He gave evidence intermittently on eleven days during the period from 30 June 2014 (day 252) to 7 August 2014 (day 269). His evidence runs to 1 092 pages. His evidence in chief alone amounted to 134 pages.

136. The evidence of Mr X is subject to fundamental criticism. The criticism goes to the heart of his evidence. The most fundamental points of criticisms are the following:
- 136.1. He claimed to have participated in the events of 13 August 2012, including the killing of police members, when it is probable that he was not there.
- 136.2. As evidence of his membership of what he said was the 15-member committee, he pointed to a photograph of himself in a group which he said was that committee in discussion. It was in fact not a photograph of him. He was not able to point out any other person on that photograph who was him.
- 136.3. He gave evidence of events which plainly did not happen. He invented those events, apparently because of an animus which he holds towards AMCU.
137. We deal further with these and other matters below.
138. It may well be that some of the evidence which Mr X gave is the truth. The problem is that when a witness has shown a willingness to invent evidence on such material issues, it becomes impossible to say with any confidence which parts of his evidence are invented, and which parts are the truth.
139. It may be contended that his evidence should be accepted where there is independent corroboration of its correctness. Of course, if the corroborating

evidence is sufficiently persuasive, there is no need to rely on the dubious evidence of Mr X in order to make findings in that regard.

140. There is a fundamental difficulty with relying on the evidence of Mr X on the basis that there is independent corroborating evidence. The difficulty is that there is reason to believe that parts of his evidence, and particularly parts of his supplementary statement, were inserted in order to address perceived defects in the SAPS case. It is reasonable to suppose that whoever induced him to give this evidence would have been aware of the “corroborating” evidence with regard to that matter, and would have ensured that his evidence was consistent with it. Under those circumstances, one could not conclude that the evidence of Mr X was reliable because it was confirmed by the “corroborating” evidence: it would have been contrived in order to support the “corroborating” evidence.

141. The second statement made by Mr X, on 10 March 2014,¹⁵⁰ is repeatedly embellished with statements intending to show that

141.1. the strikers were not prepared to negotiate: this would supposedly justify the failure by the SAPS (contrary to the claim in its opening statement) to attempt to persuade Lonmin to talk to the strikers.

141.2. the intention of the strikers was at all material times a violent one, to carry out killings.

¹⁵⁰ Exh LLL 26.

141.3. the strikers intended to attack residents of the informal settlement on 13 August: this would justify the contrived SAPS version that they intervened on that day to protect the residents of the informal settlement.

142. Examples of this embellishment in his second (March 2014) statement (Exhibit LLL26) include the following:

142.1. At the very outset, on 5 or 6 August, the strikers agreed that the demand of R12 500 per month was not negotiable (para 3).

142.2. On 10 August, it was reiterated that the amount of R12 500 per month was not negotiable (para 7).

142.3. On 11 August, it was agreed that violence should be used to close down the NUM offices and attack any person who was found inside the office. It was decided that the strikers would go to their various places in order to arm themselves with an assortment of dangerous weapons which were to be used in attacking the NUM office and the NUM officials¹⁵¹ (para 10).

142.4. On the way to the NUM offices they sang the song “How are we going to kill NUM and Mr Zokwana?” as a demonstration of their

¹⁵¹ The statement refers to the evidence of Mr Phatsha (day 51, p 549), apparently as a source of confirmation of this. In fact, Mr Phatsha’s evidence is to the contrary: it is that it was after the march to the NUM office, at which NUM officials shot at the strikers, that they armed themselves in response to the shootings and the belief that two of their number had been killed.

intention to close down the NUM offices and injure or kill any NUM officials or members (para 11).

142.5. The strikers were instructed by the nyanga to wait for the police to fire at them before launching an attack on the police, and to conduct themselves in a manner that would provoke the police, resulting in the police firing first at them (para 16.5).

142.6. On 12 August, the displaying and brandishing and brushing (clicking?) of weapons was intended to provoke the Lonmin security officials to start firing at them, so that the strikers could then attack them ¹⁵² (para 22).

142.7. On 12 August, it was decided that if the police approached the koppie, they would be met with resistance and violence, as the strikers were “heavily” armed with dangerous weapons and firearms. The strikers would not have allowed themselves to be arrested by the police without mounting a resistance (para 25).

¹⁵² This is inconsistent with the version at para 12 of the 2013 statement, which says that the security officials fired shots, and that it was because of these shots that Bayi retaliated “by shooting back at the security”, and that “was when the situation went out of control” (para 12). This is inconsistent with the 2014 version of an attack which had been planned in advance, and a deliberate provocation of the security officers in order to make it possible for the planned attack to be implemented.

- 142.8. The message the strikers gave to the police on Monday 13 August, that the strikers were not fighting them, “was not said in good faith”¹⁵³ (para 27).
- 142.9. On 13 August, the instruction from Mr Noki was that the strikers should defy any instructions given by the police, and do whatever they could to provoke the police to shoot at them (para 27).
- 142.10. On 13 August, the singing and clicking of weapons were meant to give the strikers courage and at the same time to provoke the police into first firing at them (para 29).
- 142.11. On 13 August, while proceeding in the field, the strikers decided to move towards the informal settlement “with the intention of attacking or killing any male person found” (para 30).
- 142.12. On 15 August, it was agreed that if Mr Zokwana stepped out of the police vehicle, he should be “viciously attacked in the presence of the police”. If he had stepped out of the nyala, he would have been violently attacked by the strikers in the presence of the police (para 35 and 36).
- 142.13. On 16 August, it was discussed that if Lonmin did not agree to the wage demand, the police should be attacked and removed, because

¹⁵³ Of course, if the intention had been to provoke the police, then the statement that they were not fighting with the police was contrary to their instruction to provoke the police.

they were a stumbling block to the attainment of the wage demand (para 37).

142.14. On 16 August, if either Bishop Seoka or Mr Mathunjwa had returned with Lonmin management and had given feedback to the effect that the demands of the strikers had not been met, “Lonmin representatives would have been violently attacked in the presence of the police” (para 38).

142.15. On 16 August, the threats that were made against the police were made following a decision already taken that they should be violently attacked, as they were seen as a stumbling block to the attainment of the objectives of the strikers (para 39).

143. The statement of March 2014 was contrived in an attempt to demonstrate that the strikers at all material times intended to kill Lonmin security officials, all of the men living in the neighbouring settlement (including those who did not work at Lonmin), the officials at the NUM office, Mr Zokwana, Lonmin management, and the police. We submit below that it is clear that the strike was enforced with brutality and through murders. If, however, the intention of the strikers had always been to kill all of the parties to whom we have referred, that is surely something which Mr X would have told the SAPS when he was first interviewed, and which would have been included in his initial statement. We submit that it is a contrived attempt, late in the day, to justify the conduct of the SAPS.

144. We submit that the evidence of Mr X is so plainly contrived, and so plainly false in a number of the most material respects, that it is unsafe to place any reliance on it. The material and deliberately false evidence includes the following.

144.1. First, his evidence that on 14 August Mr Mathunjwa telephoned Mr Nzuza and asked whether he could come to the koppie, and that Mr Nzuza (after consulting others) telephoned him to say that this was in order, is plainly false for the following reasons:

144.2. Mr Mathunjwa's telephone records show that during that period he never telephoned Mr Nzuza.

144.3. Mr Mathunjwa's telephone records show that during that period he was not and could not have been at Marikana.

144.4. Mr Nzuza's telephone records show that during that period, every call which he received had been made from Marikana.

144.5. Mr Nzuza's telephone records show that every call which made during that period, he made to the Marikana area.

144.6. Mr Nzuza's telephone records show that he did not receive a call from Mr Mathunjwa's phone during that period.

144.7. Mr Nzuza's telephone records show that he never telephoned Mr Mathunjwa during that period.

145. This entire episode is plainly fabricated. This means that Mr X also fabricated the evidence that Mr Mathunjwa had told the strikers to kill Mr Zokwana.
146. Second, on the morning of 15 August Mr Xolani Gwala had a radio interview with Mr Mathunjwa and Mr Zokwana, in which he persuaded them to go to the koppie that day and speak to the workers. This is clear evidence of the falsity of the evidence of Mr X that on the 14th, an arrangement had been made for Mr Mathunjwa and Mr Zokwana to come to the mountain, at which event Mr Zokwana would be killed by the strikers.¹⁵⁴
147. Third, the claim by Mr X that it was decided that the strikers would kill the SAPS because they were an obstacle, and that at all times their intention was to provoke the SAPS into attacking first so that the strikers would then be protected by the muti, is inexplicable in the light of the fact that the SAPS did not obstruct the strike and were not an obstacle to the strikers:
- 147.1. On 10 August, the strikers marched from Wonderkop to the Time Office. The SAPS stopped them when they were halfway there. Bhele and Bayi told the SAPS what their demands were. The SAPS then accompanied the strikers on the march to the Time Office. They did not stop the strikers.
- 147.2. On 11 August, the strikers marched to the NUM offices. The SAPS did not stop them from marching.

¹⁵⁴ The transcript of the radio interview is Exh LL: see pp 48, 49, 52 and 53.

- 147.3. On 11 August, the strikers slept at the koppie and carried out rituals there. The SAPS did not interfere with this in any way.
- 147.4. On 12 August, the strikers again went to the NUM offices. On the way they killed Mr Fundi and Mr Mabelane, stole some of their property and burnt their vehicle. They then went back to the koppie and slept there. The SAPS did not intervene and did not raid the strikers.
- 147.5. On 12 August, the strikers went to K4 to stop people who were going to work. They killed Mr Mabebe, they burnt seven vehicles, and then went back to the koppie and slept there. The police did not interfere in any way, and did not raid them.
- 147.6. On 13 August, the strikers went to Eastern Platinum to stop people working there. On the way there, they killed Mr Langa, because he was on the way to work. They then went back to the koppie. The SAPS did not intervene in any way, or raid the koppie.
- 147.7. The SAPS did not at any time or in any way prevent the strikers enforcing the strike through violence and intimidation.
148. This flies in the face of the central evidence of Mr X that the plan of the strikers was to provoke and then kill the police, who were a stumbling block.
149. Fourth, the claim that on 13 August, when the strikers were being escorted by the SAPS, they decided to go towards the settlement to kill the people there,

is again a contrived and false piece of evidence. The strike had started on 9 August. The strikers did not attack any of the settlements on 9 August, 10 August, 11 August, 12 August, the morning of 13 August, 14 August, 15 August and 16 August. According to Mr X, the only time the strikers tried to kill people in the neighbouring settlements was when they had armed police watching them. That is incomprehensible. It is also inconsistent with the video evidence, which does not show the strikers changing direction towards the settlement; it is inconsistent with the evidence of Lt Col Vermaak, who was watching from the helicopter and said that he did not see this; and it is inconsistent with the evidence of Capt Loest, who also said that he did not see this.

150. This evidence was contrived in order to attempt to justify the conduct of the SAPS on 13 August. The question which arises, as it arises throughout the evidence of Mr X, is who informed him what evidence the SAPS needed in order to justify their position. Mr X could not have invented this without some assistance, because he would not have known what needed to be invented.

151. Sixth, Mr X gave evidence that the strikers had decided that they would kill the Lonmin management if they did not give the strikers what they wanted.¹⁵⁵ This would obviously be very material, if it were true. It is not mentioned either in the statement of February 2013, or in the statement of March 2014.

¹⁵⁵ Day 248, p 31196/2-16.

The only possible reason it could have been excluded from both statements is that it was a late invention.

152. Seventh, as we have noted above, Mr X claimed that he had been present at the events of 13 August. He identified himself on a video and photograph, as proof that he was there.¹⁵⁶ The person he identified was not him. Mr X has a long, thin face, and a gap in his front teeth. The person in the video had a round face, and no gap in his front teeth.

153. The probability that Mr X was in fact not present at the events of 13 August is demonstrated by the fact that when he made his February 2013 statement, he clearly did not know what had happened on 13 August. He said¹⁵⁷ that while Maj Gen Mpembe was counting down, and before he could finish counting, gunshots were fired from the side of the police. It is common cause that in fact, while Maj Gen Mpembe was counting, the strikers moved away; they went past a policeman; they started moving across the field; and that it was only after some time that the police started firing teargas and stun grenades, which triggered the violent confrontation.

154. No-one who was present at the events of 13 August can have been in any doubt that this is what happened. The most reasonable inference to be drawn is that Mr X was not there.

¹⁵⁶ The video is Exh EEE5; the photograph is Exh AAAA25.

¹⁵⁷ Exh AAAA1.2, p 12, para 19, lines 6-12.

155. Eighth, Mr X attempted to place himself at the centre of events on the basis that he was a member of a 15-member committee elected by the strikers. He sought to prove this by identifying himself as the person who is marked as number 4 in the photograph on Exhibit AAAA25, taken at 17h27. An examination of the photograph, and of the photographic sequence, demonstrates that in fact this was not him.¹⁵⁸
156. The reason for this false statement is clear. The evidence of Mr X was that all important matters had been discussed and decided by the Committee of 15. If he was not a member of the Committee, then he could not have been present when these matters were discussed and decided. He had to make himself a member of the Committee, in order to be able to give evidence of the discussions and the decisions. His evidence in this regard is simply an invention.
157. To summarise: Mr X may have been present at some of the events of which he gives evidence. Some of his evidence may be true. But he has given very material evidence which he must have known was false, and which he invented, apparently in an attempt to bolster the SAPS case. It is impossible to know which parts of what he says reflect what he actually saw and heard, which parts reflect what he was told by others, and which parts are simply invented.

¹⁵⁸ Day 292 p 31970/8 to p 31982/18.

158. For all of these reasons, it is not possible to place any reliance on the evidence of Mr X. At some points of these submissions we make reference to what Mr X said. This is done in order to provide a full account of the evidence which was before the Commission. It should not be understood as implying that because something was said by Mr X, it should be accepted as the truth.

THURSDAY 9 AUGUST 2012 AND FRIDAY 10 AUGUST 2012

The RDO meetings of 9 August

159. On 9 August a group of Lonmin workers gathered at the Wonderkop Stadium. The gathering was in support of their demand for 'R12 500'¹⁵⁹ which they had previously raised with Mr Da Costa. The workers resolved that they would not involve any unions in their demands that they would not report for work on 10 August 2012, but that they would meet again on 10 August 2012 at the Wonderkop Stadium.¹⁶⁰

160. Mr Vusimuzi Mabuyakhulu testified that the workers decided not to engage the unions for three reasons:¹⁶¹

160.1. The RDOs came from different units, namely Karee, Rowland and Eastern Platinum and hence belonged to different unions;

¹⁵⁹ See Exhibit AAAA1.2, paragraphs 2, 3 and 4.

¹⁶⁰ See Exhibit AAAA1.2, paragraphs 2, 3 and 4; and Exhibit BBB8, paragraph 2.

¹⁶¹ D48 P5261/11 – P5261/4

- 160.2. At that stage NUM had already made it clear that they were unable to take forward the demand of the RDOs; and
- 160.3. In 2006/2007 a similar request had been made to NUM and they did not receive any feedback from NUM.
161. According to Mr Mabuyakhulu, by this time the workers had not decided to go on strike, but only agreed to approach Lonmin with their demand for a wage increase to R12 500.¹⁶²
162. This gathering was observed by, amongst others, Mr Pieter Willem (PW) Botha, a security superintendent in the employ of Lonmin.¹⁶³ Mr Botha also made video recordings of the gathering.¹⁶⁴ He described the gathering as peaceful and said that he did not observe any weapons in the hands of the participants.¹⁶⁵ Mr Henry Blou, Manager of Mine Security at Western Platinum, also monitored the gathering and confirmed these observations by Mr Botha.¹⁶⁶
163. News of this gathering reached Mr Barnard Mokwena, Lonmin's Executive Vice President for Human Capital and External Affairs, together with 'strong rumours' that the workers were possibly intending to embark on a wild cat strike from 10 August.¹⁶⁷ In response, on 9 August 2012 Lonmin issued an internal

¹⁶² D48 P5263/1 – 6

¹⁶³ See Botha statement 2 July 2014 (reflected in the index exhibit ZZZZ16) paragraphs 6, 7 and 8.

¹⁶⁴ See Exhibits V1 and V2.

¹⁶⁵ Exhibits V1 and V2

¹⁶⁶ See Exhibit RRRR1, paragraph 9.

¹⁶⁷ See Exh RR1 para 15.

communiqué¹⁶⁸ (drafted by Mr Mokwena) reminding employees that Lonmin had existing collective bargaining structures and that no demands outside of these structures would be tolerated.

164. The communiqué also warned that the planned work stoppage on 10 August amounted to unprotected industrial action and that any gathering of workers would be in breach of the Regulation of Gatherings Act. The communiqué warned that SAPS would be called in to assist and that management would not hesitate in dismissing workers who participated in the industrial action.

The march on 10 August and the immediate genesis of the strike

The facts

165. At approximately 06h00 on 10 August Lonmin workers began gathering at the Wonderkop Stadium. This was observed by, amongst others, Mr Botha.¹⁶⁹ 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.
166. At 07h00 Graeme Sinclair, the Group Mining Emergency and Security Manager of Lonmin, held a debriefing with other Lonmin managers¹⁷⁰ 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

¹⁶⁸ See Exhibit WWWW1, p 8.

¹⁶⁹ See Botha statement 2 July 2014; exhibit ZZZZ16, paragraph 9.

¹⁷⁰ See Exhibit EEEE19.2.

Lonmin shafts as per usual.¹⁷¹ Significantly, the note of the records that AMCU is not aligned with the demand of the workers and NUM has distanced itself from it.

167. At approximately 08h00 the workers started marching from the Wonderkop Stadium to the LPD offices.¹⁷² 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 Regulations of the Gatherings Act.¹⁷³ After reporting telephonically to Mr Sinclair, Mr Blou telephoned Lt Gen Mbombo, the North West Provincial Commissioner of Police, and requested that assistance be provided by the Public Order Police (POP) unit at Rustenburg. Lt Gen Mbombo advised him that the necessary support would be sent to Lonmin.¹⁷⁴

168. At the LPD office Messrs Sinclair and Blou had a telephone 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.¹⁷⁵ Mr Kgotle deals with this conversation in his witness statement. He states that 10 August he reported for work at approximately 8H00, and at 9H00 he received an urgent telephone call

¹⁷¹ Exhibit EEEE19.2

¹⁷² See Exhibit EEEE19.2.

¹⁷³ See Exhibit RRRR1.1, paragraphs 12 and 13.

¹⁷⁴ Exhibit RRRR1.1, paragraphs 12 and 13

¹⁷⁵ See Exhibit FFFF1, paragraph 25; Exhibit RRRR1.1 paragraph 19.

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.¹⁷⁶ Mr Kgotle states 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.¹⁷⁷

169. By 10h00 the crowd had moved past the four-way stop at Rowland Shaft.¹⁷⁸ Mr Botha observed that the crowd was armed only with sticks and knobkerries and that no other weapons could be seen.¹⁷⁹ SAPS had arrived on the scene by this time with four Nyala armoured vehicles and several soft skin vehicles.¹⁸⁰ SAPS took over the task of escorting the workers from Lonmin security.¹⁸¹ 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.¹⁸² Mr Sinclair replied that management had instructed him that management was not willing to negotiate with the crowd as

¹⁷⁶ Exhibit OO16 para 12

¹⁷⁷ Exhibit OO16 para 16

¹⁷⁸ Exhibit OO16par 14.

¹⁷⁹ See Botha statement 2 July 2014, exhibit ZZZZ16 paragraph 10.

¹⁸⁰ Botha statement 2 July 2014, exhibit ZZZZ16 paragraph 10.

¹⁸¹ Botha statement 2 July 2014, exhibit ZZZZ16 paragraph 11.

¹⁸² See exhibit BBB8, paragraph 4.

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.¹⁸³ The crowd then dispersed peacefully.

170. After the march Mr Kgotle issued a communique¹⁸⁴ informing workers that their conduct amounted to serious misconduct and instructing them to report for duty. The communique points out that failure to comply with the instruction will lead to the termination of their employment.

171. By around 13h00, the crowd had arrived at the LPD office.¹⁸⁵ 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.¹⁸⁶ Mr Sinclair conveyed to the crowd what Mr Kgotle had instructed him. The workers' representatives then addressed the crowd. This was recorded by Mr Callie Miles, a security manager in the employ of Lonmin.¹⁸⁷ Thereafter the crowd began to disperse from the LPD office and proceeded back to the Wonderkop Stadium. Whilst dispersing, members of the crowd showed their displeasure, displayed aggressive behaviour, and intimated that management

¹⁸³ See Exhibit FFFF1, paragraphs 22, 23 and 24.

¹⁸⁴ See Exhibit CCC4.

¹⁸⁵ See Exhibit FFFF1, paragraphs 26 and 27; Exhibit RRRR1.1 paragraph 20.

¹⁸⁶ See Exhibit BBB8, paragraph 4.

¹⁸⁷ See Exhibit AAAA27.

would have to take the consequences and would be responsible for what was to happen.¹⁸⁸ 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.¹⁸⁹

172. Mr Mabuyakhulu testified that on 10 August 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.¹⁹⁰ 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 LPD offices.

173. The workers then marched to the Time Management Office (also known as Lonmin Platinum Division or LPD).¹⁹¹ Mr Mabuyakhulu testified that at 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. 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.

¹⁸⁸ See Exhibit FFFF1, paragraph 28; Exhibit RRRR1.1, paragraph 20.

¹⁸⁹ Day 262, p 33043/1 - 22

¹⁹⁰ D48 P5264/13 – 25

¹⁹¹ See Exhibit LLL26, paragraph 7; Exhibit BBB8, paragraph 4.

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.¹⁹²

174. At approximately 13h58 a Lonmin management debriefing was conducted by Mr Sinclair.¹⁹³ The note of the debriefing recorded that two SAPS members were in attendance.¹⁹⁴

175. 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.

The absence of weapons and the mood of the crowd

176. Major (then Capt) Veerasamy Velayudam Govender was the commander of Visible Policing, stationed at Marikana.¹⁹⁵ He 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.¹⁹⁶ He testified that he was in close proximity to the workers during the march but that the mood of the crowd was peaceful.¹⁹⁷ Some of the workers had sticks in their hands, but nothing

¹⁹² See Exhibit AAAA1.2, paragraph 5.

¹⁹³ See Exhibit EEEE19.2.

¹⁹⁴ Exhibit EEEE19.2

¹⁹⁵ Some of the police officers who were involved in the events of 2012 have since been promoted. In these heads of arguments we refer to them by the ranks which they held at the time of the events.

¹⁹⁶ Day 274 pp 35022/5 to 35024/16. And see Exhibit LLLL5.

¹⁹⁷ Day 274 p 35023/7-18

dangerous that he took note of. He testified that he did not see any threat being posed by the workers towards the police.¹⁹⁸ This however is in sharp contrast to the account given by Mr Sinclair. He stated that the crowd showed displeasure and aggression when they dispersed after the march.¹⁹⁹ We submit that the objective evidence supports Capt Govender's account of the mood of the strikers. The march was recorded in videos taken by Mr Botha,²⁰⁰ Mr Miles,²⁰¹ and by W/O Masinya,²⁰² a video operator attached to the Rustenburg POP unit. All of these recordings confirm the observations that were made by Capt Govender that the crowd dispersed peacefully after the march.

The difficult position in which Lonmin security found itself

177. The communiques that were issued by Lonmin on 9 and 10 August demonstrated that Lonmin management were not prepared to talk to the protesters, more especially outside of the normal bargaining structures. On 10 August it was left to Lonmin security personnel under the leadership of Mr Sinclair to communicate Lonmin management's stance to the protesters. Lonmin security personnel cannot be faulted for trying to communicate with the protesters. This was undoubtedly a positive step, in spite of the negative message that they had to convey.

¹⁹⁸ Day 274 p 35023/7-18

¹⁹⁹ Exhibit FFFF1 para 28

²⁰⁰ See Exhibit W1.

²⁰¹ See Exhibits W2, W3 and W5.

²⁰² See Exhibit W4.

178. On the other hand, the intransigent stance adopted by Lonmin management is difficult to understand given that management had in fact been engaging with the workers prior to this.
179. The difficult position in which Lonmin security personnel found themselves is reflected in the record of the debriefing that occurred at approximately 13h58 on 10 August. The Lonmin Karee OB mentions the lack of good communication between management and the workers and notes that management cannot make decisions whilst sitting in the office.²⁰³

The Interdict Application

180. During the course of the afternoon of 10 August 2012 Lonmin brought an urgent application in the Labour Court (Johannesburg).²⁰⁴ The National Union of Mineworkers (NUM) and the Association of Mineworkers and Construction Union (AMCU) were cited as the first and second respondents respectively. Significantly, the third and further respondents, who were the protesting workers at whom the application was mainly directed, were the persons whose names appeared in a list that was annexed to the notice of motion and marked 'A1'.²⁰⁵ This list contained the names of workers who are alleged not to have reported for work on the morning of 10 August and who took part in the march that day.²⁰⁶

²⁰³ See Exhibit EEEE19.2.

²⁰⁴ Exh RR1, pp 44 to 172.

²⁰⁵ Exh RR1 pp 48 to 133.

²⁰⁶ Exh RR1 p 138 paragraph 16.

181. The substantive relief that Lonmin sought was an order declaring the strike to be inconsistent with the LRA. Lonmin also sought orders interdicting workers from going on strike and preventing them from intimidating workers who reported for duty.²⁰⁷ The Labour Court granted Lonmin the order sought.²⁰⁸
182. Significantly the founding papers in the urgent interdict application, while placing great emphasis on the integrity of Lonmin's established bargaining structures, did not mention the handling of the RDO demand outside the established bargaining structures, and how Lonmin had ultimately agreed to pay the RDOs an allowance.

Allegations of violence and intimidation against strikers and Lonmin Security shooting at strikers²⁰⁹

183. At approximately 16h30 on 10 August 2012 the first recorded report of intimidation by workers was received by Lonmin, when it was reported that intimidation had occurred at the Wonderkop NUM offices.²¹⁰ 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. At 17h25 Mr Botha reported that Lonmin security were in the process of monitoring a meeting at Wonderkop near the SAPS satellite

²⁰⁷ Exh RR1 p 45.

²⁰⁸ Exh RR1 pp 176 to 178.

²⁰⁹ Contemporaneous documents sometimes refer to 'strikers' and sometimes to 'protestors'. We use the two terms interchangeably.

²¹⁰ See Exhibit EEEE19.2.

police station.²¹¹ At 17h45 Mr Blou reported the receipt of information that a few people at the mine were intimidated.²¹² 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.²¹³ At 18h10 it was reported that approximately 200 workers were gathered at the Karee Hostel.²¹⁴ At 18h25 the manager of the K3 Shaft reported the intimidation of employees who were going to work.²¹⁵ 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.²¹⁶ At 18h59 Mr Kellerman reported that commuters were intimidating workers not to go to work, and were using pangas and knobkerries to do so.²¹⁷ He reported further that Mr Botha had fired 15 rounds of rubber bullets at them.²¹⁸ At 19h31 Camera 637 observed commuters who were offloading workers from the bus at EPL Hostel.²¹⁹ At 20h00 it was reported that two workers who were on their way to work had been assaulted near the NUM offices at Wonderkop.²²⁰ And at 21h19 a report was received that commuters were intimidating workers at K3 Shaft.²²¹

²¹¹ Exhibit EEEE19.2.

²¹² Exhibit EEEE19.2

²¹³ Exhibit EEEE19.2

²¹⁴ Exhibit EEEE19.2

²¹⁵ Exhibit EEEE19.2

²¹⁶ Exhibit EEEE19.2

²¹⁷ Exhibit EEEE19.2

²¹⁸ Exhibit EEEE19.2

²¹⁹ Exhibit EEEE19.2

²²⁰ Exhibit EEEE19.2

²²¹ Exhibit EEEE19.2

184. Mr Malesela William Setelele,²²² who held the post of 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 responded to this by using the NUM vehicle, a Toyota Quantum, to transport workers to work throughout the mine.²²³
185. 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.²²⁴
186. According to Mr Botha, at approximately 18h00 on 10 August 2012 and at the Rowland crossing he observed a group of about 20 to 30 workers carrying knobkerries, spears and pangas.²²⁵ 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.²²⁶ He was accompanied by Mr Kellerman.²²⁷

²²² Malesela William Setelele was shot dead at Marikana on 17 October 2013.

²²³ See Exhibit YY1, paragraph 14.

²²⁴ Day 265 pp 33433/24 to 33434/18.

²²⁵ See Botha statement 2 July 2014, (Exhibit number forthcoming) paragraph 14.

²²⁶ See Botha statement 2 July 2014, (Exhibit number forthcoming) paragraph 14.

²²⁷ See Botha statement 2 July 2014, (Exhibit number forthcoming) paragraph 14.

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.²²⁸

187. Mr Botha filed a shooting report in respect of the shootings that he was involved in on the evening of 10 August 2012.²²⁹ 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 20h10.²³⁰ In the shooting report he described the incident in the following terms:²³¹

' - RDO's started with an illegal march from Wonderkop to the hostel.

- Members tried to disperse the RDO's from the area.

- The persons had knop kieres, pangas and spears with them and intimidated the workers in the area.

- The crowd refused to withdraw from the area.'

188. The reason given by Mr Botha for the incident which led to the shots being fired was that RDOs were involved in an illegal march and intimidated employees.²³²

²²⁸ See Botha statement 2 July 2014, (Exhibit number forthcoming) paragraph 14.

²²⁹ See Exhibit EEEE32C.

²³⁰ Exhibit EEEE32C.

²³¹ Exhibit EEEE32C.

²³² Exhibit EEEE32C.

189. In the shooting report Mr Botha recorded that he had fired seventeen rubber bullets, all of them warning shots.²³³
190. 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.²³⁴ The second report related to his firing of sixteen rubber bullets, two of them being warning shots.²³⁵ 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.
191. 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.²³⁶ Mr Botes was informed that two people from amongst a group of marchers had been shot near the NUM office.²³⁷ 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;

²³³ Exhibit EEEE32C.

²³⁴ See Exhibit EEEE32A.

²³⁵ See Exhibit EEEE32B.

²³⁶ See Exhibit EEEE2 paragraphs 12 to 16, read with Exhibit EEEE9, paragraphs 8.1 and 8.2.

²³⁷ See Exhibit EEEE2 paragraphs 12.

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.²³⁸

192. Significantly, Mr Kellerman's shooting incident report mentions that the shooting of the rubber bullets occurred in the presence of SAPS. The SAPS commander in question was Capt Govender. According to him, 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.²³⁹ He immediately proceeded to the Rowland Shaft at Wonderkop, accompanied by other SAPS members.²⁴⁰ He stated²⁴¹ that upon his arrival at Wonderkop he noticed a group of approximately 15 African males standing on the side of the road opposite Rowland Shaft. While some of them were in possession of knobkieries, he saw no sharp instruments. He states that as 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. He told Mr Botes that those people were just standing there and not presenting a problem to anybody.²⁴² Capt Govender testified that as far as he could see the strikers were not in possession of sharp instruments but merely had knobkerries.²⁴³ He testified that

²³⁸ Exhibit EEEE2. paragraphs 13 and 14.

²³⁹ See Exhibit FFFF7 paragraph 2.

²⁴⁰ Exhibit FFFF7 paragraph 2

²⁴¹ See Exhibit FFFF7 paragraph 3.

²⁴² Day 274 p 35027/7 to 35028/3.

²⁴³ Day 274 p 35027/14-17

he did not see them as threatening.²⁴⁴ He also testified that he did not witness any shooting by Lonmin security with rubber bullets.²⁴⁵

193. In his statement a Lonmin employee, Mr Thando Elias Mutengwane, stated that he was walking towards Nkaneng past the Wonderkop Stadium on 10 August 2012 at approximately 18h15 'when one of Lonmin Security Twin cab opened fire at us'.²⁴⁶ He saw white men in or on the bakkie, and realised that he had been shot in the left thigh.²⁴⁷ He reported that another man who was walking with him was also shot.²⁴⁸ Another Lonmin employee, Mr Bulelani Kluvert Dlomo, stated that on the night 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.²⁴⁹ He fell to the ground having been shot in the head and next found himself in hospital.²⁵⁰ 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.²⁵¹

Was the shooting by Lonmin justified?

²⁴⁴ D274 P35033/8-12

²⁴⁵ D274 P35035/9-14

²⁴⁶ See Exhibit XXX2.18.

²⁴⁷ Exhibit XXX2.18

²⁴⁸ Exhibit XXX2.18

²⁴⁹ See Exhibit XXX2.19.

²⁵⁰ Exhibit XXX2.19

²⁵¹ See Exhibit XX5.

194. According to the log book²⁵² there were three incidents of Lonmin security shooting at people on the evening of 10 August: at 18H35, 18H59 and 20H10. The question that arises is whether this was justified.
195. Mr Botes testified that he was present on 10 August when Lonmin security shot at people with rubber bullets.²⁵³ He arrived after the incident of 18H35 and therefore only witnessed the events of 18H59 and 20H10.²⁵⁴
196. Mr Botes testified that the shooting occurred when people were intimidating workers who walked from the hostel complex to Rowland crossing.²⁵⁵ Mr Botes said that he was also present when Mr Kellerman shot at 20H10 at a group in front of them.²⁵⁶
197. Mr Botes was unable to explain why he only dealt with one shooting incident in his statement²⁵⁷. He testified that he 'forgot' about the latter incident.²⁵⁸
198. We submit that the bland references to strikers intimidating workers are insufficient grounds to justify shooting at people. Lonmin was unable to provide sufficient clarity or detail on exactly what intimidation was taking place and,

²⁵² Exhibit EEEE19

²⁵³ D265 P33560/15-23

²⁵⁴ D265 P33434/10-15

²⁵⁵ D265 P33435/4-10

²⁵⁶ D265 P33437/16-23

²⁵⁷ Exhibit GGG19 p27 para15

²⁵⁸ D265 P33440/13-23

more importantly, why it was necessary to resort to shooting at people gathered there.

199. To make matters worse, the shooting incident reports as well as the log book²⁵⁹ state that the shooting occurred in the presence of SAPS witnesses. If there was intimidation taking place, it is inexplicable that Lonmin would act by shooting rubber rounds while SAPS do nothing. Moreover, Capt Govender testified that he was present on the day and he did not observe anything that warranted SAPS taking action against the protestors. According to Capt Govender he merely saw men standing around. On his description of the events, there was no basis for Lonmin security to shoot at the protestors.

200. Finally, once cannot evaluate Lonmin's conduct on the day without looking at the fact that the reports of these shooting incidents were deleted from the log books so that the version which was disclosed by Lonmin before the Commission²⁶⁰ did not reflect reports of these shootings. The question is why it was thought necessary to delete these insertions if the shootings were fully justified.

201. We submit that the explanation of the shooting by Lonmin employees on 10 August raises more questions than answers. We submit that a finding must be made that shootings were not justified.

²⁵⁹ Exhibit EEEE19

²⁶⁰ Exhibit XXX2.10

202. Apart from the shooting by Lonmin, no further serious incidents occurred during the remainder of the evening of 10 August 2012. A total of 29 SAPS members were deployed in the Marikana area on 10 August 2012. This excluded the normal policing deployment in the area by Marikana police station. Of these 9 came from Marikana SAPS and 20 from Rustenburg POP.²⁶¹

SAPS attributing the shootings of 10 August to union rivalry

203. In exhibit L SAPS alleged that Mr Mutengwane and Mr Dlomo were shot by protesters on the evening of 10 August 2012, attributing this shooting to union rivalry. The presentation records this allegation in the following terms:²⁶²

'Protesters wounded two persons during a clash of rival unions'.

204. There was no basis for SAPS to allege that the person or persons who shot Mr Mutengwane and Mr Dlomo were protesters or that the reason for the shootings could be ascribed to union rivalry. These allegations are without foundation, and inexplicable given that SAPS had in its possession the docket that was opened at Marikana under CAS 69/08/2012 in respect of these two shootings.²⁶³ The docket contains statements which allege that the shooting was by Lonmin security. The attempt to portray the shooting as an incident of union rivalry appears to have been deliberately misleading.

²⁶¹ See Exhibit L, slide 12, read with Exhibit JJJ40

²⁶² See Exhibit L slide 6.

²⁶³ See Exhibit XX5

The SAPS Contingency Plan of 10 August 2012

205. 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 of 10 August).²⁶⁴ The contingency plan was signed by Lt Col Joseph Omphile Merafe, the Unit Commander of Rustenburg POP, and by Brigadier Mokhele Samuel Seboloki, the then Acting Cluster Commander for Rustenburg.²⁶⁵
206. Maj Gen Naidoo testified that the contingency plan of 10 August 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.²⁶⁶ He testified further that the deployment of POP units from other provinces and the National Intervention Unit (NIU) was to enhance the contingency plan of 10 August.²⁶⁷ Maj Gen Naidoo testified that the contingency plan of 10 August was activated from 10 August and was continuously built on and upgraded thereafter.²⁶⁸
207. Lt Col Merafe testified that the contingency plan of 10 August was prepared on his behalf by W/O Motlame on 10 August 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).²⁶⁹

²⁶⁴ See Exhibit U.

²⁶⁵ Exhibit U.

²⁶⁶ Day 188 pp 22872/16 to 22873/1.

²⁶⁷ Day 188 p 22873/1-6.

²⁶⁸ Day 196 p 24021/2-4.

²⁶⁹ Day 216 pp 26619/24 to 26622/7.

208. Capt 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 of 10 August 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 of 10 August²⁷⁰ fell within his usual area of operations.²⁷¹ It would therefore have been expected that he would have intimate knowledge of the contents of the plan. However, Capt 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.²⁷²

209. While the contingency plan of 10 August directed that a JOC (Joint Operational Centre) would be activated at 07h00 on 10 August and would remain open for the duration of the strike,²⁷³ Capt Govender testified that he had no knowledge of any such JOC being established.²⁷⁴ 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,²⁷⁵ the patrolling and monitoring that was conducted by his unit in the area

²⁷⁰ See Exhibit U, paragraph 1.2, where the area where the operation is to take place is recorded as being 'Western Platinum Mine (Karee Mine) and Eastern Platinum Mine which falls within the policing precinct Marikana SAPS'.

²⁷¹ Day 274 p 35021/5 to /8.

²⁷² Day 274 pp 35039/12 to 35043/24.

²⁷³ See Exhibit U, paragraph 3.2.2.

²⁷⁴ Day 274 pp 35046/13 to 35048/10.

²⁷⁵ See Exhibit U, paragraph 5.2.3.

on 10 and 11 August was conducted as part of their normal policing duties and not in accordance with the contingency plan of 10 August.²⁷⁶

210. A JOC was established by SAPS on 12 August at 18h00.²⁷⁷ By that time ten people had been injured and four people had been killed.²⁷⁸

211. In cross examination Maj Gen Naidoo was invited to comment on the assertion that if SAPS had executed the contingency plan of 10 August, 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 SAPS, and the injuries and deaths might possibly have been prevented.²⁷⁹ Maj Gen Naidoo responded that he had no comment.

212. The SAPS intelligence report for 11 August recorded the following in respect of the events that had occurred on 10 August:²⁸⁰

'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 Hostel Sportsground 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

²⁷⁶ Day 274 pp 35050/13 to 35051/19.

²⁷⁷ See Exhibit FFF25.

²⁷⁸ See Exhibit L, slide 40.

²⁷⁹ Day 196 pp 24053/21 to 24054/18.

²⁸⁰ See Exhibit TT5, p 1, par 5.

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.'

213. 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.

214. We submit that there were three clear flaws in the SAPS approach to planning on 10 August:

214.1. The plan that was in place (the contingency plan) was vague and lacked sufficient detail to address the situation;

214.2. In any event the contingency plan was not implemented. Capt Govender did not even know of its existence;

214.3. The contingency plan was not adapted in the light of intelligence reports of pending attacks by strikers. Crucially, there was not increased visible policing introduced notwithstanding intelligence reports that the strikers were intent on a pattern of intimidatory and coercive conduct.

Lonmin's failure to apply its own procedures for dealing with industrial action

215. One of the documents discovered by Lonmin in these proceedings is its Counter Industrial Action Response Procedure ("the security procedures document").²⁸¹ According to the cover page this document was last revised in May 2012. It was approved by Lonmins Manager of Mining Security.
216. 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).
217. Mr Sinclair testified that the security procedures document was formally adopted by Lonmin.²⁸² He testified that their operational procedures are based on that document²⁸³which guided the response of Lonmin security to an emergency situation. While he testified that exhibit XXX8 is a guideline for Lonmin security of what should be done,²⁸⁴Mr Sinclair accepted under cross examination that exhibit XXX8 constitutes rules prescribed by Lonmin for how unprotected industrial action should be dealt with.²⁸⁵
218. Mr Mokwena on the other hand testified that this document was never a fully authorised company policy²⁸⁶ as it had not been authorised or signed by three operation executives including him and presented to EXCO.²⁸⁷ This evidence

²⁸¹ Exhibit XXX8

²⁸² D268 P34088/3-11

²⁸³ D268 P34088/18-20

²⁸⁴ D267 P33960/1-2

²⁸⁵ D267 P33962/11-14

²⁸⁶ Transcript Day 290 p37887/17-25 p 37888/9-13 p 37888/16-21

²⁸⁷ Transcript Day 290 p37884/1-25

is surprising in view of the evidence of Mr Sinclair, the head of security, 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.²⁸⁸ We submit that in these circumstances this Commission ought to make a finding that the document was binding on Lonmin security and that Mr Mokwena's protestations to the contrary should be disregarded.

219. Some of the crucial issues dealt with in exhibit XXX8 include the following:

219.1. 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, the Manager of Mining Security, testified that in practice this duty rested on him.²⁸⁹ 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.²⁹⁰

²⁸⁸ D281 P36126/10-25

²⁸⁹ D281 P36128/12 - P36129/7

²⁹⁰ D281 P36129/8-14

- 219.2. It is necessary to obtain sufficient forewarning through intelligence gathering and maintaining effect channels of communication; (clause 4.3)
- 219.3. 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.²⁹¹
- 219.4. 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.²⁹² 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.²⁹³

²⁹¹ D281 P36130 11/15

²⁹² D281 P36132/6-22

²⁹³ D281 P36133/4-25

- 219.5. 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.²⁹⁴ 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.²⁹⁵
- 219.6. Clause 5 regulates the establishment of the JOC;
- 219.7. Clause 6 deals with administration and record-keeping;
- 219.8. Clause 7 deals with operational requirements:
- 219.9. Clause 7.1.3 entrenches the doctrine of minimal force.
220. 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.

SATURDAY 11 AUGUST

²⁹⁴ D281 P36136/12-16

²⁹⁵ D281 P36137/24 – P36138/4

The March to the NUM Office and the Confrontation at the NUM Offices

The Facts of the March

221. Events on 11 August 2012 began early when 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 (Mr Beukes) to do the same thing inside the hostel.²⁹⁶ In consonance with this report is the statement by Mr Setelele that 'in the early hours of 11 August 2012, [I 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. I also arranged for other NUM members and shop stewards to do the same on foot in the hostel complex.'²⁹⁷

222. At 08h00 a Lonmin management debriefing was conducted by Mr Sinclair. The note of the meeting recorded the following concerning the situation at Lonmin that morning:²⁹⁸

'HB – reports that rumours of a person two killed still unfounded, Crime Intelligence to investigate the rumour

Cases reported for the past 24 hours ids: Theft of copper cable at K4 waste belt, Intimidation at Roland Shaft

²⁹⁶ See Exh EEEE19.2 [also Exh XXX4].

²⁹⁷ See Exh YY1, paragraph 16.

²⁹⁸ See Exh EEEE19.2.

Noko : Busses were running as normal, but information is that people boarded the bus, but did not align [read alight] at the shafts

Jomo Kwadi : fear of NUM trying to assist and protect its members will lead to NUM taking law into own hands and faction fight between rival unions

Patrick Peega : reports information of intimidation at Nkaneng, Marikana and Wonderkop . Intensive patrols needed.

PW : escorted the ambulance to the NUM offices were two people were assault

...

Ludick : NUM requested intervention by security to loud hail around Wonderkop to urge people to go to work while they loud hail at Wonderkop village.

This request could not be carried out.

...'

223. Mr X stated that on the morning of 11 August 2012 whilst he was on the way to the Wonderkop stadium 'I personally noticed persons wearing red t-shirts and caps embroidered with the name NUM inside two Quantum mini-busses belonging to LONMIN using loud hailer encouraging RDOs to report for duty. Those who reported for duty were assured that the necessary steps would be

taken to ensure their safety. I saw some people reporting for duty on the 11th.²⁹⁹ This accords with the tenor of Riaan Beukes's report and the note of the Lonmin management meeting that was held at 08h00 on 11 August 2012. Mr X continued his narration as follows:

'The aforesaid conduct on the part of NUM's members or officials in encouraging the RDO's to report for duty was discussed at the meeting and it was clear that there was anger as it was felt that the conduct of NUM's members or officials was undermining the RDO's cause. It was agreed that violence should be used to close down NUM's offices and attack any person who was found inside the office. It was decided that we should go to our various places in order to arm ourselves with an assortment of dangerous weapons which were to be used in attacking NUM's office and its officials. I went to Nkaneng Settlement where I bought a knobkerrie and a spear with which I armed myself and joined the strikers along the route to NUM's office. I am aware that some of the strikers bought dangerous weapons from a gentleman known to me as Ntshebe who resides in Nkaneng.

*On the way to NUM's office we sang the song '**how we are going to kill NUM and Mr Zokwana**' ('Zokwana') as a demonstration of an intention on our part to indeed close down NUM's offices, injure or kill any of NUM's officials or members.'*

²⁹⁹ See Exh LLL26, paragraph 10.

(emphasis in the original)

224. Vusumuzi Mandla Mabuyakhulu was amongst the group of protesters who were at the Wonderkop Stadium on the morning of 11 August 2012. He described the events that occurred as follows:³⁰⁰

'On the 11th at 09h00 we met at Wonderkop and we exchanged views. It was then decided that we should approach NUM and enquire from them why they had prevented the employer from engaging with us. The gathering then marched to the offices of NUM. We walked to the offices, which are situated near the satellite police station. I was in the group immediately behind the front group. We certainly did not have violent intentions and none were discussed.'

225. 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. The group numbered approximately 300 persons. These events were observed by Akanyang Julius Motlogelwa, a Tactical Response Unit Officer in the employ of Lonmin.

226. Mr Motlogelwa stated that a certain David informed him 'that protesters have decided to destroy and burn NUM offices at the Hostel. At about 11:00 they started singing and marched towards the Hostel. I drove to the Hostel in which

³⁰⁰ See Exh BBB8, paragraph 7.

I informed Mr. Brown the chairperson of NUM at Rowland shaft that, protesters are coming to destroy and burn their offices. I advised him to move out / vacate their offices to save their lives. ... Mr Brown and his Team stood outside their offices and said they are going nowhere.’ 301 ‘Brown’ was the nickname of Mr Setelele.³⁰²

227. According to Mr Setelele, he was at the NUM office that morning when two Lonmin security officers arrived there and told him that a group of protesters had started marching from the veld near the Wonderkop Stadium headed in the direction of the NUM office, and that they were carrying an assortment of weapons that included knobkerries and spears.³⁰³ These officers told him that according to their information the protesters intended to burn down the NUM office and the vehicle that NUM had been using to transport employees to work.³⁰⁴ Mr Setelele left the NUM office immediately to take the vehicle that NUM had been using to a place of safety.³⁰⁵

228. The two Lonmin security officers who went to the NUM office were Sello Elias Dibakoane³⁰⁶ and Julius Motlogelwa,³⁰⁷ who confirmed this event.

³⁰¹ See Exh XX2.20, paragraphs 6 and 7; [also ZZ4].

³⁰² Day 39 pp 4226/24 to 4227/3.

³⁰³ See Exh YY1, paragraph 17.

³⁰⁴ Exh YY1,

³⁰⁵ Exh YY1, paragraph 18.

³⁰⁶ See Exh ZZ3, paragraphs 2.10 to 2.23.

³⁰⁷ See Exh ZZ4, paragraphs 6 and 7 [also Exhibits XX2.20, AAAA38 and DDDD10].

229. Mr Seteleke 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.³⁰⁸ This is in accordance with what Saziso Albert Gegeleza, who was present at the scene, stated.³⁰⁹

230. Mr Gegeleza describes what happened in his own words as follows:³¹⁰

'15. We then all moved out of the office and onto the road. We did this because we feared that we might otherwise be trapped in the building or its yard, which was fenced. There was a good deal of anxious discussion about what we should do. Although many people spoke in favour of remaining and trying to protect the office, it was clear that most of us, if not all, were very afraid of the strikers given the information we had received. Several of those present did in fact leave. By the time that the

³⁰⁸ Exh ZZ4, paragraphs 6 and 7 paragraph 19.

³⁰⁹ See Exh ZZ2, paragraph 14. Daluvuyo Bongo was shot dead at Marikana on 5 October 2012.

³¹⁰ Exh ZZ2, paragraph 14, paragraphs 15 to 24.

strikers arrived, there were less than 20 people who had remained at the office. I was one of those who resolved to stay, despite my fear.

16. Whilst we were standing outside the office fence, two security personnel drove up in a white van and spoke to Mr Bongo. They did not leave their vehicle while talking to him. I was at the time standing quite close to Mr Bongo and I heard them advising him that we 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. The fact that Lonmin security was unable to assist us added to the level of the fear amongst those of us who were still at the office.

17. Very soon after that, we could hear that the strikers were approaching. I then led a small number of persons (four or five) to the rough sidewalk alongside the Brits taxi rank road, from where I saw that a very large group of strikers was coming around the corner of the road from the hostel and Stadium and moving in our direction. They were singing and chanting in an aggressive manner. They were armed with knobkerries and sticks and I could see that several of them had assegais.

18. Many of the strikers were turning down the road to their right which led to the entrance to the NUM office. The others continued to move

down the road towards us. When they were more or less in line with the satellite police station the strikers in front stopped. I got the impression that they had just then seen who we were.

19. There followed a very short period during which the strikers started shouting at us, including threatening words like 'here are these dogs'. It was clear that they were very hostile. There was at no stage any indication from them 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.

20. Some of them threw stones at us and they started moving forward again. These events were happening very fast. I had no doubt that they were going to attack us and I was extremely afraid. I and those with me were nevertheless determined that we would not run away but that we would defend ourselves and the NUM office.

21. At that very moment I heard some gunshots. There were at least three. There was a lot of noise and I could not tell exactly from where the shots had been fired. I was very startled by them and it seems that the strikers were also. Almost immediately the strikers in front of the group began turning back and retreating. Those behind did the same and very quickly the strikers in front of us were dispersing. I saw that the same was happening with those strikers who had gone down the road towards the NUM office entrance.

22. As far as I could tell, the majority of the strikers turned back up the road through the hostel complex and I noticed others pushing 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.

23. I was enormously relieved once the strikers began dispersing and have no doubt that the gunshots brought this about. I believe that they saved me (and others of us) from serious injury and, even, from being killed.

24. Once the strikers started dispersing, the NUM members chased after them. I do not recall that anyone called out that we should so, but it was very clear in my own mind that it was essential for us to ensure that the strikers kept on the move and continued to disperse. My great concern was that they should not have the opportunity to regroup and launch another attack on the NUM office and us. As this was happening I did not hear any further gunshots. I pursued some strikers who had gone through the break in the ‘stop-nonsense’ and then joined up with other NUM members in the road leading past the hostel complex.’

231. Mr Dibakoane and Mr Motlogelwa were positioned near the scene where this incident occurred. Mr Dibakoane described the events that occurred in the following terms:³¹¹

'2.24 The NUM crowd were standing outside the NUM office and facing in the direction of the oncoming marching strikers. We did not observe any weapons on the NUM members however, some NUM members were wearing blankets which could have concealed weapons.

2.25 Julius stopped the vehicle some 70 meters behind the gathered NUM members. Our vehicle was also facing in the same direction as the oncoming crowd of marching strikers.

2.26 As the crowd approached the MTN container located on the corner of the cross road in front of the NUM office, approximately 30 (thirty) NUM members started to run towards the crowd. I witnessed the two crowds clash in the general vicinity of the aforesaid MTN container. When the two crowds clashed, there was 'chaos' in that everybody scattered and started running in all directions. The train of the approaching striking workers seemed to have halted and the majority of persons appeared to have turned around and in an attempt to run away. I heard 2 (two) loud sounds which I took to be gunfire and

³¹¹ See Exh ZZ3, paragraphs 2.10 to 2.23.

watched as the crowd ran off in the opposite direction towards the Wonderkop Koppie ('Koppie').

2.27 As the crowd retreated back to the koppie, Julius slowly drove his security vehicle towards the direction of the Wonderkop stadium trailing behind the retreating striking employees.

2.28 Julius drove up to the gate of the Wonderkop hostel where we met up with Mr Graeme Sinclair ('Sinclair'). We briefed Sinclair on what had happened that morning.

2.29 Sinclair then noticed that Bongo was standing in the close vicinity and walked up to him. It is my understanding that Sinclair requested Bongo to 'calm down' and to return to the NUM office.'

(emphasis in the original)

232. Mr Mabuyakhulu, who was shot during this incident, gives the following description of it:³¹²

'Whilst we were marching on the same street as the taxi rank but before we could reach the junction behind the satellite police station, we observed a small group of NUM members approaching. The group was singing. I heard them saying something about 'AMCU' and 'Karee' and thereafter I heard gun shots. I did not see who was shooting but it was

³¹² See Exh BBB8, paragraphs 8 and 9.

from the side of the group of NUM members in NUM shirts. We then ran away into different directions. I saw one person fall apparently from a gunshot. I then decided to go through the gap in the concrete fence known as 'stop nonsense' and started to run and then I realised that I had been shot in the back. I continued running towards the bus rank. I then fell after losing power and feeling weaker and weaker.'

233. It was not disputed that in the melee described above, NUM members opened fire on the crowd of protesters.³¹³ Two members of the crowd of protesters, 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 67/08/2012³¹⁴ in respect of Ngema and a further attempted murder docket was opened at Marikana CAS 68/08/2012³¹⁵ in respect of Mr Mabuyakhulu.

234. Despite Mr Mabuyakhulu's assertion to the contrary, it is probable that the protesters who descended on the NUM office did so with a violent intent. This intent was most probably fostered by the fact that NUM had actively assisted worker to go to work during the night, which constituted actions aimed at breaking the strike that the protesters were trying to enforce.

235. The evidence of Mohammed Cassim, the owner of a hardware store at Marikana, serves to be mentioned. He stated that on 11 August 2012 at

³¹³ See Exh YY1, paragraph 21.

³¹⁴ See Exh XX5.

³¹⁵ See Exh XX6.

approximately 09h00 he was on duty at his store and when he opened his doors 'I had a rush of African males buying pangas from me.'³¹⁶ He stated further his usual stock of pangas of about thirty items was quickly sold out,³¹⁷ and that he 'was very suspicious about it because usually they want you to wrap it in newspaper, but on that day they just put it in their pants and left.'³¹⁸ Whether the panga buying spree occurred before or after the NUM shooting incident is not entirely clear.

The absence of CCTV footage

236. Camera 218 (Taxi Rank Dome camera) is a fixed security camera that is situated very near the eastern perimeter of the Wonderkop hostel and to the north of the eastern gate. According to Mr Botes this camera is situated approximately 75 meters from the taxi rank.³¹⁹ Camera 218 has an unobstructed view running from the eastern entrance to the Wonderkop hostel to the NUM office. Camera 218 would have an unobstructed view of the scene of the incident between the protesters and the NUM officials on 11 August 2012.

237. Mr Botes explained the workings of all Lonmin fixed security cameras and the closed circuit television system to which the same were connected.³²⁰ In particular, he explained that a dome camera such as Camera 218 did not have

³¹⁶ See Exh HHH7.2, paragraph 3.

³¹⁷ Exh HHH7.2, paragraph 4.

³¹⁸ Exh HHH7.2, paragraph 5.

³¹⁹ See Exh EEEE8, paragraph 14.

³²⁰ See Exh EEEE5, paragraphs 3 to 10.

a 360 degree view but could only view what was in front of the lens.³²¹ He explained further that '[w]hen an operator leaves the camera in an area where no activity is taking place, it will not record anything until an operator moves it to an area where activity is taking place.'³²²

238. SAPS served a subpoena in terms of section 205 of the Criminal Procedure Act 51 Of 1977 on Lonmin (per Botes) on 7 September 2012.³²³ Included in the materials forming the subject matter of the subpoena were all video materials recorded by Lonmin during the period 9 August 2012 to 17 August 2012.³²⁴ According to Dirk Botes, Lonmin complied with the subpoena and made all recordings of video materials available to all of the parties before the Commission.³²⁵

239. Absent from the video materials that were produced by Lonmin was any footage of the incident between the protesters and the NUM officials on 11 August 2012. The only footage that was recorded by this camera was recorded after the incident had occurred and showed (according to Botes)³²⁶ what purport to be NUM members returning to NUM office.³²⁷

³²¹ Exh EEEE5, paragraph 10.

³²² Exh EEEE5.

³²³ See Exh EEEE9 Supplementary Statement of Botes 22-10-2013, paragraph 7.

³²⁴ Exh EEEE9 Supplementary Statement of Botes 22-10-2013, paragraph 7.

³²⁵ See Exh EEEE5, paragraph 11.

³²⁶ Exh EEEE5, paragraph 12.

³²⁷ See Exh X1.

240. Despite Camera 218 having had an unobstructed view of the scene of the incident between the protesters and the NUM officials on 11 August 2012, and being in working order on the day, no footage of this incident was recorded by Lonmin.³²⁸ Mr Botes stated that he assumed that this was the case because ‘the operators on duty were not aware that the clash was taking place and therefore did not monitor the actions prior to and during the clash. Only when they became aware of the clash did they use the camera closest to this scene and record the NUM group returning to their office.’³²⁹

241. The explanation that was given by Lonmin for the failure to record any footage of the incident between the protesters and the NUM officials on 11 August 2012 by Camera 218 is of doubtful validity. As shown above, Lonmin security personnel were tracking the movements of the crowd of protesters before they marched on the NUM office, knew that the crowd was heading for the NUM office, and knew why the crowd was going there. In the circumstances it is likely that the Lonmin security personnel would have alerted the controller for Camera 218 to the fact that he or she should be on the look-out. That no footage was then recorded of the clash between the officials and the protesters itself is inexplicable.

242. After the event Lonmin security personnel on the ground made several recordings of what purport to be NUM members returning to NUM office, after

³²⁸ See Exh EEEE5, paragraph 12.

³²⁹ Exh EEEE5 paragraph 13.

having engaged with the crowd of protesters.³³⁰ This group can be seen carrying, amongst other items, knobkieries and sharp weapons.

Was this a turning point?

243. At approximately 09h43 Mr Sinclair held a short debriefing. The note of the debriefing read, *inter alia*, as follows:³³¹

'GS just got back from Wonderkop, met NUM.

PW instructed to put in place a no-go-area between NUM members stand and the mob at Wonderkop itself.

HB [Henry Blou] to contact SAPS – PC Mbombo or Gen Naidoo to report no support from SAPS and the two shootings already reported.'

244. At approximately 10h00, Mr Blou called Lt Gen Mbombo.³³² Whilst she was unclear as to the name of the person who called her, she stated that the caller 'informed me the he was employed at Lonmin in the security department. He told me that some mine employees had embarked on an unprotected strike which turned violent, and this resulted in some people being shot. According to him, it appeared that the protesters might continue with their violent conduct. I advised the person that I will attend to the matter. ... It is not unusual that

³³⁰ See Exhibits X3, X4, X5 and X6.

³³¹ See Exh EEEE19.2 [also Exh XXX4].

³³² See Exh LLL1, par 20. According to Exh RRRR3, Blou called Lt Gen Mbombo three times between 09h44 and 09h50.

members of the public phone a senior police officer as and when they require assistance with policing matters.³³³ Mr Blou did not have a clear recollection of this telephone call.³³⁴ He stated that during this time he called various senior SAPS members on a regular basis in order to secure a sufficiently substantial SAPS presence at Marikana, that Lonmin believed that such SAPS presence would deter the protesters from intimidating non-striking employees and from sabotaging or damaging property, and that SAPS would also be able to deal with action and conduct by the protesters which fell outside of the capabilities of Lonmin security.³³⁵ Mr Blou stated further that he explained the gravity of the situation to the senior SAPS members that he called when he requested SAPS to intervene in the matter, and that he did so because Lonmin security was neither equipped nor had sufficient capacity to deal with the number of protesters involved in the unprotected strike, nor the developing levels of intimidation, and the threatening situation.³³⁶

245. After speaking to Mr Blou, Lt Gen Mbombo called Maj Gen Naidoo and instructed him to assist the Rustenburg cluster with additional resources.³³⁷ In turn Maj Gen Naidoo called Brigadier Adriaan Marthinus Calitz, Provincial Head of Operational Response Services, and instructed him to supplement the public order police at Lonmin mine on a twenty four hour basis until the following

³³³ See Exh LLL1, par 20.

³³⁴ See Exh RRRR1.4, paragraphs 11 and 12.

³³⁵ Exh RRRR1.4 paragraph 11.

³³⁶ Exh RRRR1.4 paragraph 12.

³³⁷ See Exhibits DD, paragraph 2, and JJJ108, paragraph 16.

Monday.³³⁸ Brig Calitz in turn called Lt Col Merafe and instructed him to deploy SAPS members to the Lonmin mine, the deployment to be done to cover a twenty four hour policing operation.³³⁹ After receipt of the call from Brig Calitz, Lt Col Merafe arranged for two shifts to be deployed to Wonderkop, one during the night of 11 August 2012 until the morning of 12 August 2012, and the other from the morning of 12 August 2012 until the following night.³⁴⁰

246. At approximately 10h04 a crowd of protestors was observed gathering near Nkaneng.³⁴¹ Lonmin security personnel recorded video footage of this.³⁴² At approximately 10h43 the group at Wonderkop was observed dispersing.³⁴³ At approximately 10h59 Lonmin security observed a group running towards Karee from Wonderkop through the veld, numbering between 600 and 800 persons.³⁴⁴

247. According to SAPS, at approximately 12h00 a group of about 50 men were seen performing a ritual at the Wonderkop koppie.³⁴⁵

248. Mr X said that he was amongst the group of protesters who fled the scene of the shooting that occurred near the NUM office. He testified that they regrouped at the Wonderkop Stadium where a certain Ben said that they should go to near

³³⁸ See Exhibits JJJ108, paragraph 17, and JJJ107, paragraph 17.

³³⁹ See Exh JJJ107, paragraph 18.

³⁴⁰ See Exh QQQ1, paragraph 5.3.

³⁴¹ See Exh EEEE19.2.

³⁴² See Exh X2.

³⁴³ Exh X2.

³⁴⁴ Exh X2.

³⁴⁵ See Exh L, slide 20.

the koppie, which they did.³⁴⁶ According to Mr X, on the way to the koppie a cleansing ritual was held for those protesters who may have had contact with or walked next to the two protesters whom they believed had just been killed. A mixture of ntelezi and water was prepared for the cleansing ritual, and the protesters that took part in the cleansing ritual stood in a row and were sprinkled with the mixture.³⁴⁷ According to Mr X, at the koppie Xolani and Bhele told them that they would not meet at the Wonderkop stadium again as it was mine property, but would henceforth meet at the koppie.³⁴⁸

249. A member of Lonmin Security infiltrated the meeting of the protesters at the koppie and reported what had transpired there to his superiors.³⁴⁹ His statement is addressed hereunder.

250. According to Mr X, Bayi, Bhele Xolani and Bob addressed the protesters and urged them to unite.³⁵⁰ They also told the protesters that they should organise an Inyanga (Sangoma) to protect them from being shot and to make them strong.³⁵¹ The protesters then elected a committee of fifteen delegates, with five from Karee shaft, five from Western shaft, and five from Eastern Shaft.³⁵² The protesters then each donated R20 towards the hiring of a motor vehicle to fetch

³⁴⁶ Day 245 p 30971/8 to /23.

³⁴⁷ See Exh LLL26, paragraph 13, read with Day 245 pp 30972/1 to 30973/12.

³⁴⁸ See Exh AAAA1.2, paragraph 6.

³⁴⁹ See Exh ZZZZ15, file 1, tab 6.

³⁵⁰ See Exh AAAA1.2, paragraph 7.

³⁵¹ Exh AAAA1.2, paragraph 7.

³⁵² Exh AAAA1.2, paragraph 7. The persons who were elected were as follows: Karee shaft – Xolani, Bhele, Mbhele, Anele and Boo; Western shaft - Khaiza, Bob, Bayi, Mambush and Rasta (Magubane); and Eastern shaft – Bhele, Ntswana, Otto, Nico and (according to Mr X) Mr X himself.

the Inyanga from where he was staying at an informal settlement near Impala Platinum mine, and Xolani and Mbhele then went to fetch the Inyanga.³⁵³ Later on that evening two men who were purportedly the sons of the Inyanga arrived at the koppie and rituals were performed on a smaller group of volunteers who were henceforth called the Makarapas.³⁵⁴ The Makarapas were, he said, a separate group of protesters from the main body who functioned under the guidance of the protest leaders. Each protester who was to undergo the rituals was to pay R500.³⁵⁵ Prior to the rituals being performed two sheep (one black in colour and one white in colour) were burnt alive and the remains mixed in with the muti.³⁵⁶ After agreeing to observe the instructions of the two sons of the Inyanga they fastened three multi-coloured sheets to trees to make a screen, and also fastened bottles that contained muti to trees using multi-coloured ropes.³⁵⁷ The participants then received instructions that had to be followed in order for the muti to work.³⁵⁸ The rituals were only performed on the

³⁵³ Exh AAAA1.2, paragraph 7, paragraph 8.

³⁵⁴ Exh AAAA1.2, paragraph 7, paragraph 9.

³⁵⁵ Exh AAAA1.2, paragraph 7, paragraph 10.

³⁵⁶ Exh AAAA1.2, paragraph 7.

³⁵⁷ See Exh LLL26, paragraph 17.

³⁵⁸ The instructions that they received were that they were not to wash for seven days, nor have sex, nor eat fish or pork, they were not to greet anybody with a handshake but were to point to the person that they were greeting with a clenched fist, they were not to kill a snake or a rabbit: see Exh AAAA1.2, paragraph 10; and also that they not to look back once they decided to launch an attack, they were to remove bracelets and watches, they were not to carry cellular phones or coins, they were to wait for the police to first fire at them before launching an attack against the police, if possible they were to conduct themselves in a manner that would provoke the police, resulting in the police firing first them first, they were to appoint a person who was going to be their leader, they were to sit or stand separately from the people who did not take part in the rituals, they were not to step on a spot where there was an indication that someone might have urinated there, they were to sleep at the koppie until such a time that their demands were met, they were to approach the police in a crouching manner which would make any bullets fired by the police at them miss as they would be invisible to the police, they were to defy any orders or instructions given by the police, if the necessary they were to put down the weapons that they had in their possession a flat manner, and they were to make clicking sounds with their weapons to give them encouragement: see Exh LLL26, paragraph 16.

committee members and the makarapas.³⁵⁹ According to Mr X, one of the Inyanga's sons told them that the muti would prevent bullets from penetrating their bodies.³⁶⁰ Those who received the muti were Mr X stated that after undergoing the rituals they felt strong and aggressive, and that they had agreed from then on to always carry their weapons with them.³⁶¹ Mr X stated further that the two sons of the Inyanga stayed with them at the koppie until 15 August 2012.³⁶²

251. Sipete Phatsha, who joined the strike on 10 August 2012 and received a gunshot injury on the afternoon of 16 August 2012,³⁶³ testified that what was depicted in slide 87 of exhibit was men washing themselves, and that he did not see any muti being used.³⁶⁴

252. However, this was contradicted by Xolani Nzuza, who said that he was the second-in-charge of the strikers.³⁶⁵ He stated that on 11 August 2012 Mr Noki (the leader of the strikers) had asked him to assist with brining the inyanga when requests to that effect were made.³⁶⁶ He formed part of a four man delegation which was tasked with going to fetch the inyanga.³⁶⁷ He stated that

³⁵⁹ Exh LLL26, paragraph 16

³⁶⁰ Exh LLL26, paragraph 16

³⁶¹ Exh LLL26, paragraph 11.

³⁶² Exh LLL26, paragraph 11.

³⁶³ See Exh DDD1.

³⁶⁴ Day 51 pp 5570/15 to 5572/10.

³⁶⁵ See Exh PPPP1, paragraph 2.

³⁶⁶ Exh PPPP1 paragraph 3.

³⁶⁷ Exh PPPP1 paragraph 4.

the reason why he had not mentioned this fact in his first statement³⁶⁸ was because 'it is, in my view, completely irrelevant to the issues being investigated by the Commission. The various religious and/or cultural beliefs of such a heterogeneous group as the 3,000 or more strikers played no role whatsoever in relation to the massacre or its causes.'³⁶⁹ 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.'³⁷⁰

253. As stated above, a member of Lonmin Security infiltrated the meeting of the protesters at the koppie and reported what had transpired there to his superiors.³⁷¹ The body of the statement by the undercover security superintendent reads 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.

³⁶⁸ See Exh HHH21.

³⁶⁹ See Exh PPPP1, paragraph 4.

³⁷⁰ Exh PPPP1 paragraph 6.

³⁷¹ See Exh ZZZZ15, file 1, tab 6.

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 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 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 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.'

254. Mr Blou testified about inscriptions contained in an annexure to the Lonmin ICAM report regarding the undercover security superintendent, which read:³⁷²

'A security employee went undercover, attended the gathering of people in the open field next to the Wonderkop stadium to get intelligence on what was happening. The security didn't know what was happening. The security had a lack of intelligence in the field. The leaders of the mass of people requested that the sangoma that helped Impala employees assist the mass gathering. To let the people attending do a ritual to be fearless. They believed that the bullets fired at them will turn into water and firearms would not be able to shoot bullets. The mass wanted to retaliate. The mass believed that two of their members were killed during an attempt earlier in the day to torch the NUM offices. They were preparing for war. The mass of people

³⁷² See Exh RRRR2.4.

moved to the koppie. It was more private for what they had planned. There were no women and children around to witness what was happening. The undercover security officer decided to leave the mass of people gathered at the koppie, it was dark and his life was in danger. The undercover security officer reported to the JOC team and informed them of the ritual and the retaliation planned. He needed to inform them that the mass will not sleep that night. The mass wanted to plan what they will be doing in retaliation. They were planning for war.'

255. Mr Blou confirmed that this was reported to the Lonmin JOC, and also that he spoke to the person who had gone to the koppie.³⁷³

256. 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 follows³⁷⁴:

'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 between the groups, gun shot and 2 people were injured.

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

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

³⁷³ Day 283 pp 36492/22 to 36494/6.

³⁷⁴ See Exh EEEE19.2.

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.'*

257. At approximately 15h30 a further debriefing was held by Mr Blou and Mr Botes.

The note in respect of this debriefing reads as follows:³⁷⁵

'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.'*

³⁷⁵ See Exh EEEE19.2.

258. At approximately 18h31 Col Merafe confirmed that he would send SAPS members to Marikana after the parade which was to be held at 19h00.³⁷⁶

259. At approximately 21h03 Mr Blou reported that a POPS hardskin vehicle was on the scene.³⁷⁷

260. The SAPS intelligence report for 12 August 2012 recorded the following in respect of the events that had occurred on 11 August 2012:³⁷⁸

‘... 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.’

261. After the rituals had been performed the protesters stayed on the koppie through the night of 11 August 2012.³⁷⁹

262. It is apparent that on 11 August 2012 the protesters embarked on a process of arming themselves with sharp and dangerous weapons. In his testimony 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

³⁷⁶ See Exh EEEE19.2.

³⁷⁷ See Exh EEEE19.2.

³⁷⁸ See Exh TT5, pp 1 to 2, paragraph 6.

³⁷⁹ See Exh AAAA1.2, paragraph 11.

sharpened iron rod.³⁸⁰ 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' and that he wanted to use the weapons 'to protect or defend myself in case NUM came and attacked us, like before.'³⁸¹ We submit that in light of the totality of the evidence it is more probable that the protesters armed themselves with sharp and dangerous weapons in order to better enforce the strike, rather than for purposes of affording themselves protection against attacks by NUM. The only reported incident of violence by NUM officials occurred, as explained above, when they were confronted by the protesters near their office. There are no reports of NUM perpetrating attacks on protesters subsequent to this action.

263. A number of reasons can be given as to why the protesters engaged the services of an inyanga. We submit that given the sequence of events, the most probable reason is that which was given by the undercover security superintendent, namely for purposes of protection against the effects of bullets. This would accord with the chronology of events in that the muti was called for after the protesters had been shot at by NUM officials.

264. There are several indications that a core group of protesters was in existence during the week leading up to 16 August 2012, that this group was armed with dangerous weapons, and that its members were always prominently situated at the front of the protesters and near Mr Noki. It is likely that the purpose of

³⁸⁰ Day 50 pp 5457/2 to 5460/17.

³⁸¹ Day 51 p 5462/2 to /21.

this group was to provide a dedicated and committed core group of protesters who were considered brave, who were unafraid of a fight, and who were willing if necessary to effect violence so as to further the strike. If this group was also have been formed so as to provide a means of securing the whole of the protesting group, this seems to have been a secondary consideration.

SUNDAY 12 AUGUST

The Confrontation between Strikers and Lonmin Security

265. Lonmin security held a debriefing meeting at 7H40 on 12 August. In attendance were Mr Blou, Mr Kgotle and a man by the name of Tony from Murray and Roberts.³⁸² Mr Blou testified about the presence of Tony at this debriefing, stating that he could not recall Tony's surname but that Tony was from Murray and Roberts. Murray and Roberts were 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. Mr Blou 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.³⁸³

³⁸² See Exhibit EEEE19.2

³⁸³ Day 283 p 36479/12 to 36485/7.

266. 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.³⁸⁴
267. At approximately 09h29 Lonmin security personnel reported that the 'mob' at the Wonderkop koppie was moving in the direction of Nkaneng.³⁸⁵
268. Mr Dewald Louw, a Security superintendent in the employ of Lonmin, had reported for duty at 05h00 on 12 August 2012.³⁸⁶ Together with Mr Sydney Mogola, he proceeded to the Wonderkop Stadium area where they relieved 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.
269. 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 emphasis on Karee Mine. Mr Louw then received notification 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

³⁸⁴ See Exhibit EEEE19.2 [also Exhibit XXX4].

³⁸⁵ See Exhibit EEEE19.2 [also Exhibit XXX4].

³⁸⁶ See Exhibit AAAA36.

something that the crowd did not wish them to attend to. At this point in time 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.

270. On the way back 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. There they parked their vehicle on the traffic island which is situated outside of the western entrance to the Wonderkop Hostel. Mr Louw proceeded to describe what happened next.³⁸⁷

270.1. The crowd stopped about 20 Metres before the traffic island. They formed a crescent with the Lonmin security in the concave part.

270.2. Mr Louw and Mr Vorster got out of their vehicle and faced the crowd pointing our shotguns in their direction.

270.3. Mr Louw informed emergency OPS of the situation and asked for back-up.

270.4. There were two groups of strikers: a smaller group in front of about 50 people and another group consisting of more than 1000 behind them.

³⁸⁷ Exhibit AAAA36.

- 270.5. During this period the smaller group rhythmically slammed their traditional weapons together, humming/chanting just loud enough to be audible.
- 270.6. One of the strikers stood up and hurled a rock at the Lonmin security.
- 270.7. 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.
- 270.8. 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.
- 270.9. 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.
- 270.10. 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.

270.11. 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.

271. In his testimony Mr Louw referred to Exhibit DDD4, which shows aerial photographs depicting the scene taken from Google Earth, in describing these events. During this episode Mr Vorster discharged 14 rubber rounds,³⁸⁸ whilst Mr Louw discharged 6 rubber rounds.³⁸⁹ Exhibit DDDD3 is a series of six photographs which show the damage that was inflicted on the vehicle that Messrs Louw and Vorster were using during this incident.

272. Mr Joseph Masibi, a security officer in the employ of Lonmin, stated that he had received a radio communication from Mr Louw requesting that a back-up team be sent to assist him as he, Mr Louw, was being attacked in his vehicle by protestors outside the Wonderkop Hostel.³⁹⁰ 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

³⁸⁸ See Exhibit DDDD8.

³⁸⁹ See Exhibit DDDD12.

³⁹⁰ See Exhibit AAAA37.

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).

273. 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

273.1. By 09:51, Mr Mabelane and Mr Fundi in a Nissan Livina, Mr Motlogeloa and Mr Dibakoane in a Hilux had stopped approximately 100m east of the boom at the west entrance to the Wonderkop hostel complex, and they had been joined by a rescue vehicle driven by Mr van Roo1 who was responding to the distress call of Mr Louw.³⁹¹

273.2. 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;³⁹²

273.3. By 09:54 all three vehicles had retreated to the bus terminal where they had stopped near Mr Masibi's vehicle.³⁹³

274. 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

³⁹¹ Exhibit EEEE15.6

³⁹² Exhibit EEEE15.7

³⁹³ Exhibit EEEE15.8

were on their way to burn the NUM office. He instructed them to take out their shotguns and stop them.³⁹⁴

275. 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 under these circumstances should have been present before attempting to stop the strikers. According to Mr Masibi, Mr Mabelane insisted that they needed to stop the illegal gatherers.

276. 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.

277. The security officials realised 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.

278. Mr Masibi testified that he and his colleagues retreated and ran to his vehicle, the VW Polo. However when he reached the vehicle he realised that he would not have enough time to get into the vehicle and retreat along with it. He decided

³⁹⁴ See Exhibit AAAA37.

to leave the vehicle there and retreated on foot to where Mr Mabelane and Mr Fundi were already seated in their vehicles.

279. 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 09:59.³⁹⁵

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

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

The strikers' responsibility for the deaths of Mr Mabelane and Mr Fundi

282. It appears to be common cause that 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. We submit that the Commission should find that certain of the strikers murdered Mr Mabelane and Mr Fundi.

³⁹⁵ Exhibit EEEE15.9 and EEEE15.10

283. Notwithstanding the evidence of Mr X, we submit that there is insufficient reliable evidence before this Commission to link the murders of Mr Messrs Mabelane and Fundi to individual strikers.

Lonmin's responsibility

284. There was extensive debate before the Commission on the extent of Lonmin's responsibility for the situation in which Messrs Mabelane and Fundi found themselves.

285. After the events of 9 to 16 August Lonmin commissioned an ICAM investigation in order to identify the causes and contributing factors which led to the deaths during this period. The ICAM report³⁹⁶ identified seven factors which contributed to the deaths of Mr Mabelane and Mr Fundi. They were:³⁹⁷

285.1. Inadequate intelligence network;

285.2. Lack of consideration of risk associated with supplier and contractor equipment services;

285.3. Ineffective contingency plan for this type of situation;

285.4. 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;

³⁹⁶ Exhibit DDDD4

³⁹⁷ Exhibit DDDD4 p16

285.5. Lack of risk/change management processes applied across the department;

285.6. Inadequate document management system; and

285.7. Lack of systematic audit review systems and protocols.

286. We turn to look at some of these factors

Intelligence gathering

287. From 10 August, Mr Sinclair issued security updates in the form of briefs which summarised the state of security as well as the intelligence available. In brief 4 which was released at 7H30 on 12 August³⁹⁸ Mr Sinclair pointed out the following:

287.1. The strikers had undergone rituals in preparation for a counter-attack on NUM;

287.2. Security operation was stepped up to double red because of the potential for mass revenge;

287.3. ASM medical teams were advised of potential of mass casualties.

³⁹⁸ Exhibit FFFF6.4

288. Furthermore, the ICAM report reflects the report by the undercover Lonmin security guard who reported on 11 August that:³⁹⁹

288.1. The strikers used the services of an inyanga to held them with a planned retaliation against NUM;

288.2. The strikers believed that after the rituals the bullets would turn to water and firearms will not be able to shoot bullets; and

288.3. The strikers were preparing for war.

289. From the content of Mr Sinclair's briefing, read with the report from the undercover security guard, it is apparent that Lonmin security had intelligence available about the serious risk posed by the strikers. This was no doubt the reason for the increased security status to double red.

290. Hence, rather than not having intelligence at its disposal, the thrust of the criticism is that Lonmin did not use the intelligence available to:

290.1. properly formulate plans for dealing with the strikers;

290.2. ensure that there were adequate security resources at its disposal;
and

290.3. properly brief members.

³⁹⁹ Exhibit RRR2.4 p2

291. That there was a total lack of proper planning and briefing is evident from the evidence of Mr Motlogelwa, who testified that there was no planning before the incident of 12 August and there was no briefing as to what to expect.⁴⁰⁰

292. As a result, the response of Lonmin security to the planned march on 12 August was haphazard and disorganised. This left security officials vulnerable to attack when, in carrying out their duties, they confronted the strikers who planned to march to the NUM offices.

Lonmin's lack of armoured vehicles

293. The request for an armoured vehicle was first made in August 2011 by Mr Blou.⁴⁰¹ In that request he pointed out that security members remain vulnerable to attack as long as they are in soft-skin vehicles. Mr Sinclair testified that he supported the request and took it to the person to whom he reported. The response was that Lonmin preferred not to have any hard top vehicles of its own. It preferred to procure hard topped vehicles from its service providers.

294. Mr Sinclair was unable to explain what the rationale was for this decision.⁴⁰²

295. On 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. This letter is marked exhibit FFFF3. In that letter Mr

⁴⁰⁰ D264 P33288/6 – P33290/5

⁴⁰¹ In exhibit FFFF2

⁴⁰² D268 P34039/15-24

Kent highlighted how violent unrest situations had become. 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 states that while Lonmin have issued their personnel with riot helmets, bullet proof vests and riot shields, this is usually not adequate to protest members should protestors decide to launch a full scale attack on members. Mr Kent pointed out that they needed armoured vehicles in order to adequately protect members.

296. Mr Sinclair testified that he once again elevated this request to his direct report. The response was the same: Lonmin would not buy an armoured vehicle but would use the armoured vehicles of contractors. Once again Mr Sinclair was unable to explain the rationale for this decision.⁴⁰³

297. 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 disposing of its armoured vehicles limited Lonmin security's ability to control unrest.⁴⁰⁴ 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.⁴⁰⁵

⁴⁰³ D268 P34046/9-24

⁴⁰⁴ Exhibit RRRR1.4 para 35

⁴⁰⁵ D282 P36240/1-6

298. Lonmin's insistent reliance on contractors' armoured vehicles was in itself questionable given the state of these vehicles. The evidence is that prior to 12 August, one of Protea Coin's two armoured vehicles had caught alight en route to Mooi-nooi. The second vehicle was riddled with mechanical faults. Mr Botes testified that he got into the Protea armoured vehicle in order to go to Mr Mabelane and Mr Fundi immediately after the attack. However the driver could not get the armoured car into gear. When asked whether he was aware whether these mechanical problems played 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 that was the case.⁴⁰⁶

Interaction with SAPS

299. Lt Gen Mbombo stated that on 12 August 2012, whilst she was on sick leave, she received a telephone call from Mr Blou.⁴⁰⁷ According to Lt Gen Mbombo, Mr Blou was in a hysterical state. He informed her Mbombo that the protestors had killed two security guards employed by Lonmin and damaged mine property. She told him that she would attend to the matter. She then contacted Maj Gen Naidoo and told him to contact SAPS head office with a view to getting more manpower and resources to effectively deal with the unfolding situation.⁴⁰⁸ Maj Gen Naidoo stated that on 12 August 2012 'the Provincial Commissioner once again called me to inform me that the situation at Lonmin Mine had

⁴⁰⁶ Day 265 p 33425/1-4

⁴⁰⁷ See Exhibit LLL1, paragraph 22.

⁴⁰⁸ Exhibit LLL1, paragraph 22.

escalated and that since our last conversation two people had been injured and two mine security guards had been killed. I immediately contacted Brig Calitz who responded by proceeding to the Lonmin Mine to assess the situation and make a further report. On the basis of his preliminary telephonic report I contacted Maj-Gen Annandale, the head specialised operations at head office and requested reinforcements as the current deployment in the province would be insufficient for the situation. He agreed to provide support with personnel from the national intervention unit, public order police Gauteng and Mpumalanga'.⁴⁰⁹ Brig Calitz stated that after talking to Maj Gen Naidoo he immediately left for Marikana.⁴¹⁰ He said that upon arriving at the Lonmin mine in Marikana he was met by mine security and other members of the police. He said that after assessing the situation, he instructed Lt Colonel Masiza (Marikana station commander) to set up a Joint Operations Centre (JOC) at Lonmin mine's security offices to address the developing unrest situation at the mine.

300. Exhibit Y1 is a recording of the events at the Wonderkop Hostel at the time of the death of Mr Fundi and Mr Mabelane. This footage was recorded from Camera 218. Unfortunately the view of the area where the incident occurred is obstructed by a tree.

⁴⁰⁹ See Exhibit DD.

⁴¹⁰ See Exhibit JJJ107, paragraph 19.

301. Sometime after Mr Mabelane and Mr Fundi had been murdered, Brig Calitz called Lt Col Vermaak,⁴¹¹ and requested him to urgently deploy a helicopter to Marikana as a result of unrest there, where two security officers had been murdered. . Lt Col Vermaak instructed W/O Padayachi and Sgt Venter immediately to depart with the R44 Robinson helicopter to go and give air support. Sgt Venter (the ALEO) later telephoned Lt Col Vermaak and informed him that there was a group of people gathered on the mountain and that they were performing one or other rituals on the mountain. She also told Lt Col Vermaak that two security officers were murdered and their service weapons were taken away. Sgt Venter took photographs with her Blackberry and sent them to Lt Col Vermaak via BBM service.

302. According to Mr X,⁴¹² '[a]t the koppie, it was established that none of the Makarapas were killed or sustained any injuries during the incident referred to above [being the murder of Fundi and Mabelane]. This fortified our belief that the muti is effective and encouraged us to persist in our attitude of using violence, if need be, to achieve our objective. The Inyangas cut the body parts of Fundi into smaller pieces, mixed it with the blood, placed it on top of a lid which was placed on the fire until the body parts and the blood were burnt to ashes. We were instructed by the Inyangas to stand in a line and the ashes were put inside our mouth using a spoon which we licked and swallowed. After

⁴¹¹ See Exhibit LLL8.1.

⁴¹² See Exhibit LLL26, paragraph 24.

this the Inyangas told us that they had accomplished their mission in protecting us from the police bullets, made us fearless, strong and invisible to the police.'

303. The post mortem report of Mr Fundi recorded that his tongue had multiple lacerations and that his lower lip was lacerated.⁴¹³ There is no record in this report that any parts of Fundi's tongue were actually missing.

Establishment of the SAPS JOC

304. At 18h00, SAPS established a JOC at Marikana. The following inscription appears above the signature of Lt Col Masiza in the SAPS OB book:⁴¹⁴

'As a result of the unrest situation around Marikana policing area especially the mine and the murders in Wonderkop Hostel where two security persons were killed and two cars burned and the murder case opened once registers at Wonderkop police station.

JOC is hereby established and opened to record all incidents as they occurred.'

305. At approximately 19h12 a briefing was held by Mr Sinclair. The note of the meeting records, *inter alia*, that 'NUM assisting with SAPS and management'.⁴¹⁵

⁴¹³ See Exhibit A, pp 755 to 759.

⁴¹⁴ See Exhibit FFF25 and JJJ127.

⁴¹⁵ See Exhibit EEEE19.2.

306. At 19h32 Lonmin recorded a report that that the buses that went to collect night shift employees had returned empty, followed by a report that the helicopter had observed a group of people gathering at the corner of the Nkaneng settlement.⁴¹⁶

307. At 19h50 Lonmin recorded a report that people were throwing stones at vehicle at the Newman Shaft.⁴¹⁷ At 20h10 Lonmin recorded that people were intimidating workers at the EPL bus rank with weapons like knobkerries and guns.⁴¹⁸

308. At 20h35 Lonmin recorded the following:⁴¹⁹

*'Tsholofelo from Hossy shaft reported that the Shift Supervisor
cancelled the shift'*

The murder of Mr Mabebe and the assaults and damage to property at K4 Shaft

309. At 21h04 Lonmin made the first note that indicated that there was trouble at the K4 Shaft, when it was recorded that intimidation was happening there.⁴²⁰ Mr Hermanus Andries Janse van Vuuren was employed by Murray and Roberts as

⁴¹⁶ See Exhibit EEEE19.2.

⁴¹⁷ See Exhibit EEEE19.2.

⁴¹⁸ See Exhibit EEEE 19.2.

⁴¹⁹ See Exhibit EEEE 19.2.

⁴²⁰ See Exhibit EEEE 19.2.

an underground diesel mechanic, working at the K4 shaft.⁴²¹ He stated that on the night of 12 August 2012:

- 309.1. He was scheduled to go on night shift at the K4 shaft. At approximately 21h00 that evening he drove his red VW caddy bakkie to the K4 shaft to go on shift.
- 309.2. Prior to 12 August they had been briefed by Lonmin and by Murray & 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.
- 309.3. When he arrived at the security gate at the K4 shaft there was one security guard on duty there.
- 309.4. 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.
- 309.5. Mr Janse Van Vuuren 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.
- 309.6. Inside the parking area Mr Janse Van Vuuren started to repair his car. He was later joined by Mr Chris Keyter. While they were busy they

⁴²¹ See Exhibit GGGG3.

saw a group of people break through the fence that was next to the security office.

309.7. These 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. They threw stones at Mr Janse Van Vuuren who was still in his bakkie. The attackers hit at his bakkie with an iron pipe. The windows of the bakkie were shattered and a stone hit Mr Janse Van Vuuren on the side of his head, causing an injury.

309.8. The attackers then attacked other people in the area and set alight to cars.

309.9. After the attack, Mr Janse Van Vuuren approached a person he saw lying on the ground. He was bleeding heavily. He grabbed hold of this man's feet and dragged him away from the burning motor vehicle. The man was still able to speak and complained about being in a lot of pain. Mr Janse Van Vuuren stayed with him for a while. He then assisted with putting out the fires.

310. Exhibits GGGG4.1 to GGGG4.6 are photographs of the damage caused to Mr Janse van Vuuren's motor vehicle during the aforesaid incident. Exhibits GGGG4.7 and GGGG4.8 are photographs of the injuries sustained by Mr Janse van Vuuren to his left shoulder and to his right elbow respectively. Exhibit GGGG5 is a medical certificate relating to Mr Janse van Vuuren dated 22 August 2012 which records his injuries and also that he was emotionally

traumatised. Exhibits GGGG7.1 to GGGG7.40 are a bundle of photographs that were taken on the morning of 13 August 2012 of the scene at K4 shaft after the previous night's incident which depict the aftermath.

311. During the incident at the K4 shaft three people were assaulted and Thapelo Eric Mabebe was killed. 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. A docket for the murder of Mr Mabebe was opened at Marikana under CAS 109/08/2012.
312. At 21h45 a situation report appears in the SAPS OB book relating to the attack at K4 mine, recording that seven vehicles had been burnt and one pedestrian stabbed.⁴²²
313. At 23h25 it is reported in the SAPS OB book that Mr Mabebe had passed away at the Andrew Saffey Hospital.⁴²³
314. Exhibit Y2 is video footage that was recorded during the night of 12 August 2012 of the scene at K4 shaft showing the aftermath and burning vehicles. This is the only video footage that was made available to the Commission in relation to this incident. During his testimony Mr Botes was questioned about the lack of video material of this event. Mr Peter Johannes Maleka was employed by OESU CC as a fridge plant operator, and was contracted to work at the K4

⁴²² See Exhibits FFF25 and JJJ127

⁴²³ See Exhibit FFF25 and JJJ127

shaft.⁴²⁴ He was on duty at the K4 shaft when the incident occurred there on the evening of 12 August 2012. He stated that at about 20h00 he saw people in the street coming towards K4 shaft, at which time he went back into the control room where he contacted emergency personnel and requested them to contact SAPS.⁴²⁵ He proceeded to describe the events that followed in the following terms:⁴²⁶

'I then saw that the mine strikers were already inside the premises. I saw the mine strikers busy assaulting an unknown male who was standing at the turnstile. I have seen this on the CCTV footage. I was then busy trying to get help phoning for Mr Sefika to contact SAPS and dispatch them to K4 shaft.

I then saw on the CCTV footage that there was smoke all over the parking area. ...'

315. It is apparent from what Mr Maleka stated that Lonmin did have CCTV installed at the K4 shaft, and that he could see what was happening by means of this system. Mr Botes was questioned about this and asked to explain the absence of any recorded footage of the incident. He said that the security cameras that were installed at the K4 shaft were integrated into the Lonmin security system which was inoperable on the night of 12 August 2012, and suggested that what

⁴²⁴ See Exhibit EEEE22, paragraph 1.

⁴²⁵ EEEE22 paragraph 2.

⁴²⁶ EEEE22 paragraphs 3 and 4.

Mr Maleka may have been watching was an operational camera or a process camera that was installed at the shaft and linked to the shaft's control room.⁴²⁷

316. Mr Botes was cross-examined on entries in the Lonmin Occurrence Book⁴²⁸ that tended to indicate that an attack on K4 shaft was likely. Despite this, Lonmin had failed to introduce special measures to ensure the safety of employees and property thereat against attack by protesters. Mr Botes maintained that despite these indicia, Lonmin did not anticipate that the K4 shaft would be attacked.⁴²⁹ On having his attention directed to the fact that the security personnel at K4 shaft had no means such as firearms to protect themselves in the event of an attack, Mr Botes stated that he agreed that it was a concern that security guards were deployed without anything with which to protect themselves.⁴³⁰ He testified further that Lonmin did not have any of its own security personnel deployed at its shafts, but that Protea Coin had been contracted to provide security guards there.⁴³¹ Mr Sinclair confirmed that Lonmin had a contract with Protea Coin for the provision of guarding accesses.⁴³² Significantly, he testified that after the incident at the K4 shaft he assessed that Lonmin had vulnerable areas at the mine and took steps to secure the same.⁴³³

⁴²⁷ Day 265 pp 33452/16 to 33459/17.

⁴²⁸ See Exhibit EEEE19.2.

⁴²⁹ Day 265 pp 33459/24 to 33464/15.

⁴³⁰ Day 265 pp 33464/16 to 33465/5.

⁴³¹ Day 265 pp 33540/25 to 33541/21.

⁴³² Day 267 p 33819/17 to p 33820/19.

⁴³³ Day 267 p 33893/8 to p33894/16.

317. The testimony of Mr Botes that Lonmin did not anticipate that the K4 shaft would be attacked stands in sharp contrast to the testimony of Mr Blou that by 07h40 that morning, it was deemed probable that the protesters wanted to extend the strike to the K4 shaft, and that it must have been apparent that there might well be trouble at the K4 shaft and that something had to be done about it to prevent the trouble and to protect the people who were there. We submit that Lonmin falls to be criticised for not taking concrete steps to protect its employees who went to work at the K4 on the evening of 12 August 2012, and for not exercising more care for their safety, when it was apparent that they would be putting their health and well-being in jeopardy by reporting for work.

Lack of adequate security at K4

318. The security at Lonmin shafts are primarily outsourced to Protea Coin Security.⁴³⁴ Mr Sinclair testified that the risk assessment is done in-house, surveillance is done by an external company and guarding is also done by an external company.⁴³⁵

319. During cross-examination Mr Sinclair was questioned on whether, as a result of the double red risk assessment (referred to in security briefing note 4⁴³⁶), there was an instruction to Protea Coin Security to increase the security at K4 shaft. His response was that while he believed security was increased across Lonmin's operations, he could not categorically say whether there was a

⁴³⁴ D268 P34050/7-17

⁴³⁵ D268 P34052/6-24

⁴³⁶ Exhibit FFFF6.5

specific instruction to increase security at K4.⁴³⁷ He was afforded the opportunity by the Chairperson to try to locate such an instruction (if it existed) and then provide it to the Commission.⁴³⁸ No such instruction was produced. We submit that the inference to be drawn from this is that such an instruction does not exist. This we submit is consistent with the woefully inadequate security arrangements in place at K4 on the evening of 12 August.

320. We submit that Lonmin's failure to insist on and ensure heightened security arrangements at K4 is inexcusable in view of the intelligence information available which consisted of:

320.1. The statement of the undercover security official;

320.2. The security briefing notes prepared by Mr Sinclair; and

320.3. The occurrence book which showed repeated reports of clear and direct threats to workers at K4⁴³⁹ immediately prior to 12 August.

321. In these circumstances Lonmin had a duty to ensure that it had adequate security arrangements in place at K4 to protect workers. It failed in this duty, and therefore bears a measure of responsibility for the death of Mr Mabebe.

⁴³⁷ D268 P34059/8-16

⁴³⁸ D268 P34072/1-7

⁴³⁹ Exhibit EEEE19.2

A 45th Victim?

322. At 11h20 of 12 August 2014 Lonmin recorded the following report:⁴⁴⁰

‘Midbank Bus Driver Shabangu of Midbank reported to Mr Noko through Supervisor Lepphoto that he saw a dead body at Marikana, the person was allegedly killed while reporting from duty around 17:00, they reported that the body was recovered by SAPS’

323. A follow up report that was recorded 14h30 reads:⁴⁴¹

‘According to allegations, the deceased was reporting from duty K3 and refused to board the bus with fear of being attacked as they [alight]’

324. The Commission received no evidence of the dead body that according to the first report was recovered by SAPS. Mr Louw was questioned about these reports, but testified that he knew nothing about this.⁴⁴²

MONDAY 13 AUGUST

325. Two significant events occurred on Monday 13 August 2012. The first was the killing of Mr Julius Langa, a Lonmin employee, in the early hours of 13 August. The second was the violent confrontation between SAPS and a breakaway group of strikers when the strikers were making their way from a bridge near

⁴⁴⁰ See Exhibit EEEE19.2.

⁴⁴¹ See Exhibit EEEE19.2.

⁴⁴² Day 262 pp 33143/20 to 33145/13.

K3 shaft to the koppie at Wonderkop, which had the result that five people lost their lives.

The killing of Mr Langa

326. Mr Julius Langa was employed by Lonmin as a production team leader at Saffy Shaft.⁴⁴³ According to Mr Dirk Botes, at the time of his death Mr Langa was not affiliated to any union.⁴⁴⁴ He was brutally killed near EPL next to the railway line in the early hours of 13 August 2012.⁴⁴⁵ A google earth image depicting where Mr Langa's body was found is marked as exhibit EEEE16. A screen shot of the video footage depicting the position of Mr Langa's body and the ambulance in attendance on the morning of 13 August is marked as exhibit EEEE17.

327. According to a 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.⁴⁴⁶

328. 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 fourteen holes in his back.⁴⁴⁷ 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

⁴⁴³ Exhibit FFFF10 (Statement of Obed Meko) p7

⁴⁴⁴ Exhibit EEEE1

⁴⁴⁵ See Lonmin Case Report, Exhibit FFFF10, p 1

⁴⁴⁶ Exhibit AAAA22

⁴⁴⁷ Exhibit AAAA23

scene there were many bystanders, no one came forward with information on how Mr Langa died.

329. Apart from Mr X (whose credibility is in question as referred to elsewhere in these submissions) none of the witnesses who testified before the Commission admitted to having personal knowledge of how or why Mr Langa was killed. Mr X testified that on the evening of the 12th of August, the strikers at the koppie decided to go to Eastern Plats and 'block off the place'⁴⁴⁸. He said that during a meeting that evening on the koppie, the strikers who were armed with spears, pangas and firearms decided to go to 'Bob mine' and to kill workers there in order to enforce the strike.⁴⁴⁹ According to Mr X the strikers were armed with spears, pangas and firearms.⁴⁵⁰ On their way to Bob shaft the strikers came across a man at a railway line and killed him. This was around 4am.⁴⁵¹ According to Mr X, the strikers had asked Mr Langa where he was going to. He told them he was going to work. They then proceeded to stab him. Mr X also testified that he struck Mr Langa with his panga.

330. We submit that under cross-examination, Mr X was proven to be an inherently unreliable witness. We therefore do not place any reliance on his evidence on the killing of Mr Langa.

Responsibility for Mr Langa's death

⁴⁴⁸ Day 235 p 31152/3

⁴⁴⁹ Day 235 p 31155/4-7

⁴⁵⁰ Day 235 p 31155/24-25

⁴⁵¹ Day 235 p 31154/19-21

The strikers' conduct

331. However, even if one is to disregard the testimony of Mr X, the evidence before the Commission is overwhelming that Mr Langa was killed by strikers on his way to work:

331.1. 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;

331.2. The Lonmin occurrence book⁴⁵² 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's was killed which records specific threats by strikers directed at workers from Saffy shaft.⁴⁵³

331.2.1. On 12 August 2012 the following entry is made at 13:35:

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

331.2.2. On 12 August 2012 the following entry is made at 14:22:

'Received information from Michael Mokwena of Saffy that

⁴⁵² Exhibit EEEE19.1

⁴⁵³ Exhibit EEEE19.1

when the workers are going to work tonight they will be shot.'

331.3. The JOC occurrence book⁴⁵⁴ contains entries which reflects unrest in the early hours of the morning of 13 August 2012 as well as intimidation of workers:

331.3.1. Entry 14 at 3:30 records that there were people gathered at Segwaeleng/Wonderkop bridge throwing stones at cars and passers-by;

331.3.2. Entry 17 at 4:18 records that there were people intimidating workers going to work.

331.3.3. Entry 20 records that at 5:10 people were gathering near Wonderkop intimidating commuters. Const Serope shot 2 rounds with his shotgun to disperse people.

331.4. 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.⁴⁵⁵

⁴⁵⁴ Exhibit FFF25

⁴⁵⁵ See Sinclair Day 283 p 36569/25

332. Crucially, the case put forward by the injured and arrested does not dispute that Mr Langa was killed by strikers. To the contrary, during his cross-examination of Mr X, Mr Mpofu 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*'⁴⁵⁶. In addition to this concession, Mr Xolani Nzuza testified that the deaths of the 10 people before the 16th of August 2012 were caused by Lonmin's refusal to talk to the strikers.⁴⁵⁷ 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.

333. 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.

Lonmin's conduct

334. On 12 August, at 13H06, Mr Jamieson addressed an email to Mr Thibedi Ramontja, the Director-General in the Department of Mineral Resources.⁴⁵⁸ In that email Mr Jamieson informed the DG of the 'terrible and distressing' situation at Lonmin's Marikana operations and requested that he keep the Minister updated of events there. After relaying information pertaining to the killing of the two Lonmin security guards, Mr Jamieson stated that attacks and

⁴⁵⁶ Day 260 p 32774/20 – p 32775/4

⁴⁵⁷ Day 279, p 35841/21-25

⁴⁵⁸ Exhibit VVVV1.1

disruptions were continuing and that *'the situation can neither be described as stable nor under control'*.⁴⁵⁹ He stated further that Lonmin simply did not have capability to protect life and limb.⁴⁶⁰ In his evidence Mr Jamieson confirmed that Lonmin management was aware of the widespread violence and intimidation by the strikers. They were therefore aware of the serious danger facing Lonmin employees who decided to go to work and the ongoing threat to the lives of these employees.⁴⁶¹ Mr Jamieson confirmed that Lonmin management would have been aware of the need to exercise caution in deciding to issue a call to workers to return to work.⁴⁶²

335. Mr Sinclair testified that at this time Lonmin security had serious capacity constraints. He conceded that Lonmin security just did not have sufficient resources to protect the whole of their property. He conceded that Lonmin security were not able to protect all of the workers who came to work.⁴⁶³

336. In these circumstances, it is inexplicable why Lonmin did not issue an instruction to workers to stay away from work until they were able to get the situation under control and were better able to protect workers. On the contrary, it appears that at the time Lonmin was actively encouraging workers to go to work. This is evident from the Lonmin occurrence book which reflects that on 12 August there were messages broadcast on Radio Mafisa and North West

⁴⁵⁹ Exhibit VVVV1.2

⁴⁶⁰ Exhibit VVVV1.2

⁴⁶¹ Day 287 p 37295/24-37296/14

⁴⁶² Day 283 p 36580/15-20

⁴⁶³ Day 283 p 36580/4-12

FM urging Lonmin employees to return to work.⁴⁶⁴ While this broadcast preceded the killing of the two security guards by a few hours, we know that it was made after the attacks on employees at K4 shaft, the burning of the vehicles there and the killing of Mr Mabebe. Even at that stage, Lonmin ought to have been aware of the serious risk to its employees and, in the absence of sufficient resources to adequately protect workers, ought not to have encouraged workers to come to work. This is compounded after the attack on the security guards on 12 August when, as Mr Jamieson describes it, the situation was unstable and out of control. We submit that by this time, there was a duty on Lonmin to issue an instruction, broadcast for the benefit of workers like Mr Langa, that workers should not come to work until the situation was brought under control. This much was conceded by Mr Jamieson who accepted that, in the context described above, there was a 'heavy duty' on Lonmin to broadcast messages that workers should not come to work until further notice.⁴⁶⁵

337. In his testimony, Mr Mokwena confirmed that Lonmin management was aware of the serious risks faced by workers who were not on strike. He accepted that it was 'irresponsible' for Lonmin not to ask someone like Mr Langa not to come to work. He testified that it was not proper to expect workers to come to work if the situation was not safe.⁴⁶⁶ He however explained that Lonmin management extensively deliberated on whether or not to close the mine. They carefully

⁴⁶⁴ Exhibit EEEE19. Entry against 7:40 line14.

⁴⁶⁵ Day 287 p 37303/14-25

⁴⁶⁶ Day 292 p 38184/12-15

considered the 'complexities' including difficulties associated with identifying and paying non-striking workers, and ultimately decided against closing the mine.⁴⁶⁷ It appears therefore that it was possible for Lonmin to close the mind in order to protect its workers but that, for business reasons, it elected not to do so. We submit that this election was irresponsible and a dereliction of Lonmin's duty to protect its workers.

SAPS conduct

338. As we elaborate further below, on 11 and 12 August, Brig Engelbrecht received crime intelligence reports of planned attackers by strikers on NUM and on workers who defied the strike. Notwithstanding the availability of this intelligence, there was limited visible policing in place prior to the confrontation between SAPS and the strikers on 13 August. SAPS have put up no explanation at all for why there was inadequate police presence at Marikana on 12 and 13 August. As canvassed more fully below, both Brig Engelbrecht and Maj Gen Mpembe allude to dissatisfaction with the inadequate visible policing in place. In this context and based on the availability of crime intelligence of planned attacks on workers, we submit that SAPS bears a measure of responsibility for failing to implement adequate policing measures to protect the community from the violent strikers.

The incident between SAPS and the strikers

⁴⁶⁷ Day 292 p 38212/13 to p 38213/11

The prelude to the violent confrontation

339. One of the key factors in understanding the underlying causes of the violent confrontation between SAPS and the strikers on 13 August is the nature of the crime intelligence available beforehand, and the extent to which this was acted upon by SAPS or utilised to fashion an appropriate response to the march to K3 shaft. In this regard, the interaction between Maj Gen Mpembe and Brig Engelbrecht in the prelude to the incident of 13 August is highly significant. We therefore deal with it in a fair amount of detail.

340. In his statement, exhibit GGG12, Maj Gen Mpembe⁴⁶⁸ states that on 11 August he received an sms from Brig Engelbrecht, the acting provincial head of Crime Intelligence: North West, who informed him of employees at Karee mine who marched to the sports grounds and demanded salary increases.⁴⁶⁹ He sent the sms to Maj Gen Naidoo who was acting provincial commissioner at the time. Maj Gen Naidoo indicated that Brig Calitz was handling the situation and that he had deployed POP members to the area. Maj Gen Mpembe claims to have passed this information on to Brig Engelbrecht.⁴⁷⁰

341. Brig Engelbrecht however has a different account of the engagement with Maj Gen Mpembe. He states in an affidavit filed that:

⁴⁶⁸ In exhibit GGG12

⁴⁶⁹ p 1 para2

⁴⁷⁰ p 1 para2

341.1. On 11 August he received a report from a handler about a gathering that had taken place the day before at Marikana. The report (received via sms) indicated that there were going to be attacks that night on members of NUM;⁴⁷¹

341.2. Having received the report, he telephoned Maj Gen Mpembe and discussed the information with him.⁴⁷² He also forwarded the sms from the handler to Maj Gen Mpembe. ⁴⁷³ According to Brig Engelbrecht that there were two reasons for having informed Maj Gen Mpembe:

341.2.1. It was his duty to report the information; and

341.2.2. He wanted to see visible policing deployed in the area.⁴⁷⁴

342. Brig Engelbrecht then stated that he was informed by Maj Gen Mpembe that he would deploy operational people from SAPS in Marikana and that he would deal with the issue.⁴⁷⁵

343. Brig Engelbrecht attested to having received a further report (again by way of sms) from the same handler on 12 August. In that report it was pointed out that protestors wanted to stop employees from going to Karee mine on night shift

⁴⁷¹ Exhibit LLL6, p1, para 2

⁴⁷² Exhibit LLL6, p1, para 2

⁴⁷³ Exhibit LLL6, p2, para 3

⁴⁷⁴ Exhibit LLL6, p1, para 3

⁴⁷⁵ Exhibit LLL6, p2, para 3

as well as the next day. According to Brig Engelbrecht he again telephoned Maj Gen Mpembe and conveyed the content of the report to him. During this discussion he also raised his concerns about the killing of the two security guards earlier that day. Brig Engelbrecht stated that he specifically raised the concern that visible policing had not been deployed the way he had requested. Maj Gen Mpembe responded that he was attending to the issue and that visible policing had not been deployed the way he would have wanted them to be deployed.⁴⁷⁶

344. On the same day Brig Engelbrecht received a further sms from the handler stating that AMCU supporters would also target employees who supported NUM in the area of Nkaneng, Marikana West and Karee mine hostel. The report also stated that all employees who did not support the strike would be targeted. Brig Engelbrecht stated that he once again forwarded the sms to Maj Gen Mpembe.

345. Maj Gen Mpembe's evidence on his engagement with Brig Engelbrecht is less than satisfactory, to say the least. On being questioned by the chairperson, he confirmed the facts set out in his statement, namely that apart from dealing with the SMS that he received from Brig Engelbrecht (which he passed on to Maj Gen Naidoo) and giving feedback to Brig Engelbrecht, he was not involved at all in what was happening at Marikana until Monday 13 August.⁴⁷⁷ He maintained that he did not have discussions with Brig Engelbrecht as described

⁴⁷⁶ Exhibit LLL6, p2, para 4

⁴⁷⁷ Day 150 p 16848/14-22

by the Brigadier in his statement. He also testified that since he was on leave he did not have the authority to deploy members to Marikana and therefore could not have assured Brig Engelbrecht that there would be sufficient visible policing.⁴⁷⁸

346. However, on being cross-examined, Maj Gen Mpembe conceded that there may have been additional telephone calls from Brig Engelbrecht but that he could not remember those.⁴⁷⁹

347. When asked specifically about the information that two Lonmin security guards had been brutally killed, Maj Gen Mpembe gave the following curious answer:

*'Chairperson, there were quite some people that phoned me when those incidents happened. It's not only Brigadier Engelbrecht. I could say also Brigadier Calitz, I did communicate with him, it's not only that I was only communicating with Brigadier Engelbrecht. And I don't deny that he might have communicated with me but by that time he was aware that I'm on leave'.*⁴⁸⁰

348. This answer contradicts earlier testimony by Maj Gen Mpembe that paragraph 6 of the Crime Intelligence report⁴⁸¹ (which reflects that Brig Engelbrecht informed Maj Gen Mpembe about the attack on the security guards on 12

⁴⁷⁸ Day 150 p 16848/14-22

⁴⁷⁹ Day 150 p 16860/20-25

⁴⁸⁰ Day 150 p 16861/9-16

⁴⁸¹ Exhibit TT5

August) is incorrect.⁴⁸² From Maj Gen Mpembe's response quoted above, it is clear that Brig Engelbrecht had in fact had a telephonic discussion with him about the killing of the two Lonmin security guards. This is fortified by Maj Gen Mpembe's concession ultimately that Brig Engelbrecht's version is only wrong when he uses certain words which 'assumes that I personally took the matter'.⁴⁸³

349. In view hereof, and in light of the fact that neither SAPS nor Maj Gen Mpembe have proffered any explanation for why Brig Engelbrecht would include false allegations in his affidavits, we submit that Brig Engelbrecht's version is, on the probabilities, to be preferred.

350. It is furthermore evident from Maj Gen Mpembe's testimony quoted above that he had had telephonic discussions with other SAPS members (including Brig Calitz) on 12 August about the killing of the two Lonmin security guards. (As can be seen above he testified that he was phoned by people 'when those incidents happened'). While this is in stark contrast to Maj Gen Mpembe's earlier testimony that he only found out about the incident of 12 August on 13 August⁴⁸⁴, it means that Maj Gen Mpembe failed to disclose the full extent of his knowledge and understanding of the events at Marikana (as at 12 August) in his statements and in his previous evidence. It also means that Maj Gen Mpembe's statement and his emphatic testimony that the sum total of his

⁴⁸² Day 120 p 12320/2-8

⁴⁸³ Day 150 p 16866/13-17

⁴⁸⁴ Day 120 p 12319/7-9

discussions on Marikana prior to the 13th was the sms from Brig Engelbrecht, the ensuing discussion with Maj Gen Naidoo and the subsequent feedback to Brig Engelbrecht, was false.

351. The question that arises is why Maj Gen Mpembe would try to mislead the Commission by downplaying his knowledge of and role in what transpired at Marikana prior to 13 August. The answer, we submit, is twofold:

351.1. It absolves him from any responsibility for failing to ensure that adequate visible policing was in place in the period prior to 13 August notwithstanding reports from crime intelligence that violence and attacks were imminent;⁴⁸⁵ and

351.2. It supports his dubious explanation that the march was a 'spontaneous event' and hence it was justified for him to intercept the strikers at the railway line without having:

351.2.1. conducted a proper threat assessment;

351.2.2. prepared a proper operational plan; and

351.2.3. properly briefed SAPS members on what to expect and what to do.

⁴⁸⁵ Col Merafe testified that had he received the information which had been sent to Gen Mpembe by Brig Engelbrecht, he would have posted additional personnel under the command of Capt Sefiki on duty on the evening of 12 August 2012. (Day 221 p 27243/18 – p 27244/2). He also testified that the information reported by Brig Engelbrecht required the contingency plan to be developed into a proper plan in order to deal with the violence. (Day 221 p 27245/1-3)

The situation on the ground

352. From a planning perspective, SAPS claimed that the contingency plan of 10 August⁴⁸⁶ was kept in place on 13 August. No explanation is offered for why the contingency plan was not altered in view of the dramatic escalation in violence from 10 to 13 August. Importantly Capt Govender, who was the commander of visible policing at Marikana Police Station at the time, testified that he had not known of the existence of the contingency plan and that the document⁴⁸⁷ was not brought to his attention at the time.⁴⁸⁸

353. There were 121 SAPS members deployed (prior to the violent incident) on 13 August. They included STF, POP, NIU, TRT and airwing members.⁴⁸⁹ Also deployed were members were from VISPOL and Detective Services. This number excludes the Marikana police station's normal policing deployment.⁴⁹⁰ Exhibit L records that the briefing at the interim JOC on 13 August was that the situation among protestors was tense and police visibility needed to be maintained.⁴⁹¹

⁴⁸⁶ Exhibit U

⁴⁸⁷ Exhibit U

⁴⁸⁸ Day 274 p 35042/13-15

⁴⁸⁹ The numbers deployed from each unit are reflected in exhibit HHH28 p31 para 2.2.4.2

⁴⁹⁰ Exhibit HHH28 p31 para 2.2.4.2

⁴⁹¹ Slide 42

The Intervention of the Provincial Commissioner

354. As we have noted above, Lt Gen Mbombo stated that on Sunday 12 August she received a call from a person (initially referred to in her statement⁴⁹² as an 'unknown person' but subsequently identified as Mr Blou⁴⁹³) who was hysterical and informed her of the deaths of the two Lonmin security guards, Messrs Fundi and Mabelane. After instructing Maj Gen Naidoo to contact Head Office for more resources, she instructed Brig Calitz to establish a JOC at Lonmin.⁴⁹⁴ She decided to return early from sick leave in order to assist Maj Gen Naidoo in attending to the situation. She telephoned Maj Gen Mpembe (who was on leave at the time) and advised him that she wanted to meet with Lonmin management on 13 August. According to her statement this was with the view to being fully briefed about the situation and in order to see how the situation should be dealt with.⁴⁹⁵

355. On 13 August Lt Gen Mbombo travelled to Lonmin with Maj Gen Mpembe and Maj Gen Naidoo.⁴⁹⁶ According to Lt Gen Mbombo, when they arrived at Marikana they were met by Lt Col Merafe after which they proceeded to Lonmin mine in order to meet Lonmin management.⁴⁹⁷

⁴⁹² Exhibit GGG5

⁴⁹³ Day 177 p 21281/17-25

⁴⁹⁴ Statement of Lt Gen Mbombo, Exhibit GGG5, p2, para 7-8

⁴⁹⁵ Exhibit GGG5, p2, para8

⁴⁹⁶ Statement of Lt Gen Mbombo; Exhibit GGG5; p3; para 9.1

⁴⁹⁷ Statement of Lt Gen Mbombo; Exhibit GGG5; p3; para 9.1

The briefing by Brig Calitz

356. Brig Calitz testified that he arrived at the JOC at around 6H00 or 7H00 on 13 August. He then met with Lt Gen Mbombo, Maj Gen Naidoo and Maj Gen Mpembe. During this meeting he briefed the generals on the situation in Marikana. This briefing was based on the information at the disposal of SAPS as well as what was conveyed to them by Mr Sinclair.⁴⁹⁸ Brig Calitz testified that it was decided that the contingency plan was to be extended, that Maj Gen Mpembe would be appointed as overall commander, and that he would be appointed as operational commander – thereby replacing Brig Seboloki who was acting as overall commander and Lt Col Merafe who was operational commander.⁴⁹⁹

The meeting with Lonmin management

357. Maj Gen Mpembe testified that in that meeting Lonmin management described the problems they had encountered since 9 August. He said that they informed SAPS that they did not know who the perpetrators of the violence were. They described them as ‘faceless’.⁵⁰⁰

358. A contemporaneous note of the meeting with Lonmin management exists in the form of Lt Col Merafe’s diary. The relevant entry on 13 August is as follows:
‘Arrival of PC and other Generals from Province. Gen Naidoo and Gen

⁴⁹⁸ Day 152 p 17121/13-16

⁴⁹⁹ Day 152 p 17121/17-25

⁵⁰⁰ Day 103 p 11080/2-7

*Mpembe. Meeting with Mine Management. NUM officials were fired last year at Karee. AMCU did surface last year and they are now intimidating everyone. Not a labour disputes. Four people have been killed*⁵⁰¹.

359. In her statement, Lt Gen Mbombo says that the meeting commenced with Mr Sinclair reporting on the overall situation including the violence of the previous days.⁵⁰² When Lt Gen Mbombo requested a full briefing on the cause, extent and nature of the strike, they were informed that Lonmin management did not really know what the cause of the strike was.⁵⁰³ Lt Gen Mbombo however states that during the briefing it became clear to her that part of the problem was the negotiation by Lonmin with groups of employees outside bargaining structures.

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360. According to Lt Gen Mbombo, management indicated that they did not know who to talk to because there was no memorandum of grievances submitted by the strikers. They also claimed that the protest was being orchestrated by people outside Lonmin.⁵⁰⁵

361. Lonmin management also linked the strike to disharmony between NUM and AMCU. Lt Gen Mbombo testified⁵⁰⁶ that the rivalry between the unions stemmed from the fact that AMCU had started recruiting members at Lonmin

⁵⁰¹ Exhibit HHH26

⁵⁰² Statement of Lt Gen Mbombo; Exhibit GGG5; p3; para 9.1

⁵⁰³ Statement of Lt Gen Mbombo; Exhibit GGG5; p3; para 9.2

⁵⁰⁴ Statement of Lt Gen Mbombo; Exhibit GGG5; p3; para 9.3

⁵⁰⁵ Statement of Lt Gen Mbombo; Exhibit GGG5; p3; para 9.3

⁵⁰⁶ Day 77 p 21292/3-6

and that this was causing NUM to lose membership. According to Lt Gen Mbombo, management indicated that they had repeatedly attempted to resolve the issues between the two unions but without success.⁵⁰⁷

362. Brig Calitz testified that after the meeting with Lonmin management he returned to the JOC together with Mr Sinclair and the three generals.⁵⁰⁸ At the JOC they were informed by one of Mr Sinclair's subordinates that there were about 2000 to 3000 strikers on the koppie. They also informed him that a small group had broken away from the big group and were sitting next to a pipeline.⁵⁰⁹ Brig Calitz testified that they were also informed that the group at the koppie were armed with a variety of traditional weapons including spears, assegais and pangas. They were told that the small group which had broken away was similarly armed.⁵¹⁰

The OB entry

363. Maj Gen Mpembe said that after they returned to the interim JOC, Brig Calitz showed them the strikers on the koppie on the CCTV cameras. Lt Gen Mbombo then informed Maj Gen Mpembe that the situation warranted that the DPC of Operational Services remain behind and take charge of the operation.⁵¹¹

⁵⁰⁷ Statement of Lt Gen Mbombo; Exhibit GGG5; p4; para 9.3

⁵⁰⁸ Day 152 p 17125/5-14

⁵⁰⁹ Day 152 p 17125/20 to p 17126/3

⁵¹⁰ Day 152 p 17126/15-24

⁵¹¹ Day 103 p 11080 /11-14

364. The OB entry⁵¹² made by Lt Gen Mbombo appears at 12:45. It says:

'And as shown the different points of gathering, the planning has been adjusted to disperse the gatherings. All police officials on duty to conduct searches and confiscate all dangerous weapons. All those that can be identified on the footage should be picked up and deployments to key strategic areas should be enhanced. In terms of our policing on crowd management, all members to conduct themselves within the limits of this policy unless the situation dictates otherwise. Ensure that peace prevails.

Signed: Lt Gen Mbombo'

365. In her evidence in chief Lt Gen Mbombo expanded on this entry. She testified that she instructed Maj Gen Mpembe that the gathering which they were watching on the CCTV must be dispersed and that the people must be disarmed.⁵¹³ She testified further that it was part of her instruction that weapons should be confiscated⁵¹⁴ and those who could be arrested, should be arrested.⁵¹⁵ When asked how Maj Gen Mpembe responded to the instruction, she testified that he 'did what was supposed to be done'⁵¹⁶.

⁵¹² Exhibit FFF25

⁵¹³ Day 177 p 21296/19 to p 21297/5

⁵¹⁴ Day 177 p 21297/6-8

⁵¹⁵ Day 177 p 21297/9-11

⁵¹⁶ Day 177 p 21299/1-3

366. This evidence must however be understood against the testimony by Maj Gen Annandale that, in relation to operational matters, decisions get taken by the overall commander and not by the national or provincial commissioners.⁵¹⁷ Maj Gen Annandale testified that an overall commander does not act on the instructions of the provincial commissioner unless he agrees with it.⁵¹⁸ This must mean that notwithstanding the entry in the OB, Maj Gen Mpembe must take responsibility for steps taken to operationalise Lt Gen Mbombo's instruction.

The operationalisation of the PC's instruction

367. The evidence of precisely what transpired after that is not entirely clear. In exhibit GGG12 Gen Mpembe stated that on that day he decided to establish a permanent JOC (including the appointment of Maj Gen Annandale as the chairperson of JOCCOM). During cross-examination he however conceded that this only occurred after the violent confrontation had taken place.⁵¹⁹

368. In GGG12 Maj Gen Mpembe also stated that it was his duty to *'ensure that there was a proper plan to operationalise the Provincial Commissioner's instruction of dispersing the large group of protestors into smaller manageable groups, disarming the smaller groups and arrest those who refuse to disperse*

⁵¹⁷ D82 p 8667/25 - p 8668/7

⁵¹⁸ D82 p 8668/14-22

⁵¹⁹ Day p 16381/1-11

and disarm'.⁵²⁰ This he clearly did not do. In his supplementary statement⁵²¹ Maj Gen Mpembe accepts that there was no specific plan related to his interception of the group near the railway line.

369. Maj Gen Mpembe testified in chief that after had been appointed as overall commander, he 'decided to take it upon myself to go to the railway line'⁵²².

The movement of the strikers

370. What was observed on the CCTV cameras in the interim JOC was a group of strikers marching to Lonmin's K3 shaft (in the Karee hostel area).

371. According to the statement⁵²³ by Mr Kellerman, a Lonmin security officer, the group was part of the main group of strikers who had gathered on the koppie. The breakaway group was stopped along the railway line near the bridge leading from K3 shaft to K4 shaft. After discussion between the group and Lonmin security, the strikers turned and went back in the direction from which they had come.

372. This appears from the footage which is exhibit HHH61. It shows the strikers sitting along a pipeline near the railway line. One can hear them singing,

⁵²⁰ p 4 para 8j Gen

⁵²¹ Exhibit HHH3

⁵²² Day 103 p 11083/14-15

⁵²³ Exhibit HHH52

ululating and clashing their weapons. After being addressed by Mr Noki, the strikers made a U-turn and marched back in the direction from which they came.

373. Mr Nzuza said in his statement⁵²⁴ that, en route to K3, the strikers were stopped by Lonmin security officers who asked them where they were going. According to Nzuza, when the strikers told the security officers that they wanted to see whether people were working there, they were given an assurance by the security officers that no workers had gone underground. The strikers then said that they wanted to see for themselves but Lonmin security refused. The strikers then said that they wanted to convey their demand of R12500 to management. Security then said that they would pass the message on to management and that the strikers should go back to where they came from.⁵²⁵

374. The strikers' explanation of why they were marching to K3 shaft is somewhat ambiguous. In his statement, Xolani Nzuza claims that the workers resolved that a small group be sent there to request the mine management to close the mine and to allow those workers to join the strike.

375. During his testimony, however, he gave a slightly different reason for the march to K3 shaft. He testified that the purpose was to 'go and see if anybody was working.'⁵²⁶

⁵²⁴ Exhibit HHH21 p2 para 7

⁵²⁵ Exhibit HHH

⁵²⁶ Day 279 p 360781/11-17

376. This implies that the strikers intended to intimidate workers as they had done during the early hours of that morning when, according to the Lonmin occurrence book, there were reports of intimidation and violence (including the killing of Mr Langa). This inference is consistent with Mr Nzuza's description, in his statement, of the strikers' interaction with Lonmin security before they turned back and started moving in the direction of the koppie.

The interception of the strikers

377. SAPS came across the strikers while they were marching back to the koppie. Maj Gen Mpembe testified that he was appointed as overall commander at 12h45. By 14h00 he was at the railway line, where he met the protestors.⁵²⁷ Lt Col Merafe testified that Maj Gen Mpembe pleaded with them to lay down their weapons.⁵²⁸ He told them that if they laid down their weapons they would be allowed to proceed to the koppie.⁵²⁹ When Maj Gen Mpembe spoke to the strikers they crouched down and listened to him⁵³⁰. They said that they were not fighting, and wanted to speak to their employer about their wage demand. They refused to hand over their weapons. A transcript of what transpired is exhibit QQ2.

378. According to Lt Col Merafe, he then told Maj Gen Mpembe that as a senior POP commander he (Merafe) was taking control of the situation. He indicated further

⁵²⁷ Day 108 p 11551/10-15

⁵²⁸ Day 216 p 26635/24

⁵²⁹ Day 216 p 26636/1-2

⁵³⁰ Day 216 p 26636/6-8

that they should disperse and disarm the group.⁵³¹ However, Maj Gen Mpembe insisted that he was taking operational command.

379. Maj Gen Mpembe testified that he then started counting to ten. He only reached three: while he was counting the strikers stood up and started walking. Maj Gen Mpembe said that he had indicated to his commanders that they should not stop them, or to disperse them, but that they should escort them to the koppie.⁵³² He testified that he also informed the commanders that they should be aware of the sensitivity of key areas like the informal settlement and the mine shaft.⁵³³ Lt Col Merafe testified that Maj Gen Mpembe ordered Nyala drivers to drive to the road in front of the informal settlement and to ensure that the strikers did not enter the settlements.⁵³⁴ Lt Col Merafe conveyed the instruction from Maj Gen Mpembe to the five Nyala drivers present to line their nyalas up in front of the settlement. The purpose was to channel the strikers towards the koppie and not towards the settlement.⁵³⁵

380. As the marchers walked across the field, Maj Gen Mpembe, Capt Thupe and other SAPS members walked behind the strikers. By then the SAPS members who were in the nyalas which had driven to the informal settlements had alighted from the vehicles and stood alongside the nyalas.⁵³⁶ Exhibit HHH16.2

⁵³¹ Day 216 p 26636/18-24

⁵³² Day 120 p 12395/3-7

⁵³³ Day 120 p 12406/4-9

⁵³⁴ Day 216 p 26656/6 - 13

⁵³⁵ Day 216 p 26657/18 – p 26658/7

⁵³⁶ Day 216 p 26660/18 - p 26661/2

is a graphic depiction (agreed to by Maj Gen Mpembe) of the arrangement of SAPS members behind the strikers as they followed them to the koppie.

381. At this time. Lt Col Vermaak was in a helicopter flying directly above the group. He testified that he observed the strikers who had been crouched on the road next to the railway line get up and start walking. He noticed the SAPS members walking behind the group. At this stage the group 'het rustig aangeloop'⁵³⁷. He testified that the direction in which they walked is as depicted in exhibit OOO13.⁵³⁸ When teargas and stun grenades were fired, he expressed his surprise to Capt Loest, who was with him, because the group was walking peacefully.⁵³⁹ From his observation from the air, there was no reason to fire teargas and stun grenades.⁵⁴⁰ Capt Loest confirmed in his testimony that Lt Col Vermaak had expressed his surprise when the teargas and stun grenade was used, because from the air he could not see any reason for the teargas and stun grenades to be used.⁵⁴¹

The objective evidence

382. The video footage of the strikers when they were gathered along the railway line is exhibit Z1. It shows speakers from amongst the strikers address Maj Gen

⁵³⁷ Day 205 p 25229/12-25

⁵³⁸ Day 205 p 25231/8-15

⁵³⁹ Day 205 p 25232/1-3

⁵⁴⁰ Day 205 p 25232/16-20

⁵⁴¹ Day 229 p 28298/17 – p 28299/2

Mpembe. It also shows Maj Gen Mpembe address the strikers and start to count.

383. Exhibit Z2 shows the protestors marching across the field. At 2:02 into the footage one sees smoke from teargas.⁵⁴² At 2:14, one sees that even though teargas has been used the strikers, continue to march.⁵⁴³

384. At 2:26 into the exhibit Z2, two small clouds of smoke are visible. Maj Gen Mpembe testified that this was a stun grenade that was fired.⁵⁴⁴ At 2:27 one can see people start to run around.⁵⁴⁵ Maj Gen Mpembe confirmed that it is apparent from the video that people only start running around after the stun grenade has been fired.⁵⁴⁶

385. Exhibit Z3 shows the strikers after they have stood up and started to move off in the direction of the koppie. At 1:36 into exhibit Z3 one sees the nyala which was occupied by Lt Baloyi start to move from behind the strikers to the left of the strikers.⁵⁴⁷ Maj Gen Mpembe testified that this nyala could have been moving to protect a shaft which was located to the left of the strikers, but he did not know for sure why it moved in the way that it did.⁵⁴⁸ He also testified that at

⁵⁴² See Day 111 p 11847/6 – 9

⁵⁴³ See Day 111 p 11847/14 – p 11848/11

⁵⁴⁴ See Day 111 p 11849/10 – 17

⁵⁴⁵ See Day 111 p 11849/20 – 24

⁵⁴⁶ See Day 111 p 11861/2 – 8

⁵⁴⁷ See Day 111 p 11832/21 – p 11833/15

⁵⁴⁸ See Day 111 p 11834/ 9 –14

that stage the strikers did not give any indication of marching towards the shaft and that SAPS was acting proactively in trying to protect the shaft.⁵⁴⁹

386. At 2:58 of exhibit Z3, one can see the nyala which carried Lt Baloyi on the left (and slightly to the front) of the strikers.⁵⁵⁰ Maj Gen Mpembe confirmed that that nyala passed the strikers to the right. It then cut in front of the strikers, made a U-turn and stops on the left of the strikers slightly in front of them.⁵⁵¹ Maj Gen Mpembe testified that at this point the strikers were not walking towards the shaft.⁵⁵²

387. At 3:12 of exhibit Z3, one can see a SAPS member alighting from the nyala.⁵⁵³ At 3:16 smoke from the teargas is seen for the first time.⁵⁵⁴ At 3:17, two more people can be seen emerging from the nyala.

The reason advanced by SAPS for the use of teargas and stun grenades

388. According to SAPS, on their way to the koppie, the protestors changed direction towards the informal settlement. To prevent the group from entering the informal settlement, the police used teargas and stun grenades to disperse the group and to discourage them from their intended path.⁵⁵⁵

⁵⁴⁹ See Day 111 p 11838/22 – p 11839/3

⁵⁵⁰ See Day 111 p 11839/20 – p 11840/7

⁵⁵¹ See Day 111 p 11840/8 –18

⁵⁵² See Day 111 p 11840/19 – p 11841/4

⁵⁵³ See Day 111 p 11841/12 –19

⁵⁵⁴ See Day 111 p 11843/7 – 11

⁵⁵⁵ SAPS Report: Mine Unrest at Lonmin Marikana (SAPS Narrative); exhibit HHH28; p35 paras 2 and 3

389. However, the video footage showing the movement of the strikers across does not show any sudden change in the direction in which they walked. On the objective evidence alone, the version that the strikers abruptly changed direction is untrue. This conclusion is borne out by the evidence of Lt Col Vermaak, who witnessed the event from the helicopter flying immediately above the strikers. He testified that prior to the use of teargas and stun grenades there was no significant change in the direction in which the strikers walked.⁵⁵⁶

390. It is also significant in this regard that in his first statement made after the event Maj Gen Mpembe made no mention of the need to protect the informal settlement as the reason for SAPS's intervention.⁵⁵⁷ Nor did he mention this ostensible reason for SAPS's intervention when he described the events of the 13th to the media at the SAPS press conference on 17 August. Instead, he suggested that the strikers had attacked the SAPS without provocation.⁵⁵⁸

'At this moment they saw the chopper and they saw the Nyalas coming over this side. That's where the unfortunate situation happened where they suddenly turned against us and that's where we lost our two colleagues.'

⁵⁵⁶ Day 205 p 25232/21-25

⁵⁵⁷ Exh HHH13 Statement of Gen Mpembe, 13 August 2012.

⁵⁵⁸ Exhibit CCCC12 VTS_01_1 at 26:32 to 26:50

The violent confrontation

391. In his statement⁵⁵⁹ Simphiwe Booi, who was part of the group of strikers on the day, stated that when the negotiations with Maj Gen Mpembe failed and the General started counting, the strikers stood up, sang a song, and started walking towards the koppie. He states that there appeared to be a non-verbalised understanding that the police would escort the strikers to the koppie. Then, unexpectedly, he heard shots being fired by the police. The police fired teargas and stun grenades after which live ammunition was used.⁵⁶⁰
392. Maj Gen Mpembe testified that while members did use live ammunition on 13 August, they did so only in private defence. He testified that there was no command to use live ammunition.⁵⁶¹ When cross-examined on whether SAPS members used live ammunition before or after the attack on the police, Maj Gen Mpembe testified that they did so 'when the attack was imminent' ⁵⁶².
393. Xolani Nzuza testified⁵⁶³ that SAPS started accompanying the strikers to the koppie. However, all of a sudden SAPS members fired teargas and stun grenades, and there was the pandemonium as the strikers started running away

⁵⁵⁹ Exhibit BBB3

⁵⁶⁰ p 7/ 7

⁵⁶¹ Day 119 p 12276/14-18

⁵⁶² Day 119 p 12277/16-18

⁵⁶³ In his statement marked exhibit HHH21

mainly in the direction of the koppie. He states that some of the policemen were among the fleeing crowd and there were violent encounters.⁵⁶⁴

394. Maj Gen Mpembe testified that the attack on the police commenced only after the first stun grenade had been fired.⁵⁶⁵ He confirmed that when a stun grenade is fired one hears two reports. He agreed that a lay person who hears the sound of the stun grenade being fired may believe that live ammunition is being used.

⁵⁶⁶

395. Lt Col Merafe testified that the second stun grenade was fired by SAPS about two minutes after the first stun grenade was fired. Lt Col Merafe testified that he saw groups of strikers attack members who were retreating.⁵⁶⁷

396. Capt Thupe testified that when the stun grenade was fired, the strikers turned and charged at the police on the right hand side of the strikers, instead of running straight and increasing the distance between them and the police.⁵⁶⁸

397. This is confirmed by Lt Col Vermaak who testified that from the air he saw that after the stun grenade was fired, the strikers turned around and stormed towards the SAPS members.⁵⁶⁹ Lt Col Vermaak also testified that he was surprised to see SAPS members running away from the strikers. At this stage

⁵⁶⁴ p 3 para 10

⁵⁶⁵ Day 119 p 12282/19-21

⁵⁶⁶ Day 119 p 12283/5-10

⁵⁶⁷ Day 216 p 26666/8-11

⁵⁶⁸ Day 227 p 27980/12-15

⁵⁶⁹ Day 205 p 25233/1-5

he became aware that some SAPS members were being attacked. Capt Oosthuizen, the pilot of the helicopter, tried to fly as low as possible in order to scare the strikers away from the policemen.⁵⁷⁰ Lt Col Vermaak threw teargas and stun grenades in order to scare the strikers off.⁵⁷¹ A total of 20 teargas and 10 stun grenades were thrown from the helicopter by Lt Col Vermaak in a bid to stop the attack on the three SAPS members.⁵⁷²

The chase after the strikers

398. Lt Col Vermaak testified that after the teargas and stun grenades had been thrown from the helicopter, the strikers moved away from the police and across the gravel road in an easterly direction towards the river.⁵⁷³ He said that from the air they saw the strikers carrying an injured striker in a white overall.⁵⁷⁴ They also saw strikers take the SAPS members' R5 and shotgun.⁵⁷⁵

399. Lt Col Vermaak testified that they landed immediately and went first to where W/O Monene lay.⁵⁷⁶ Lt Col Vermaak then saw Maj Gen Mpembe, who appeared to be in a state of shock. Lt Col Vermaak testified that it was clear to him that Maj Gen Mpembe was not able to exercise command and control at the scene.⁵⁷⁷ He said that Maj Gen Mpembe ran between the members and shouted

⁵⁷⁰ Day 205 p 25233/14-16

⁵⁷¹ Day 205 p 25233/16-20

⁵⁷² Day 205 p 25241/1-9

⁵⁷³ Day 205 p 25241/1-9

⁵⁷⁴ Day 119 p 25242/10-14

⁵⁷⁵ Day 119 p 25244/14-16

⁵⁷⁶ Day 119 p 25243/1-2

⁵⁷⁷ Day 119 p 25243/5-11

repeatedly that his members were dead.⁵⁷⁸ He tried to calm Maj Gen Mpembe, and requested Capt Loest to give him some members who would accompany him to chase after the strikers in order to see what had happened to the person in the white overall and to retrieve the shotgun and R5.⁵⁷⁹

400. Lt Col Vermaak testified that he then went with some TRT members and members from POP Rustenburg after the strikers. They saw strikers pass through the stream.⁵⁸⁰ On the other side of the stream they saw strikers with the R5 and shotgun. These strikers started shooting at them.⁵⁸¹ Lt Col Vermaak testified that he ordered one of the TRT members who was with him to return fire.⁵⁸²

401. Lt Col Vermaak described the direction in which these bullets were fired, by reference to exhibit OOO6.⁵⁸³ This is a photograph of the area near the stream and shows, through the use of an arrow, the direction in which Lt Col Vermaak shot. In this exhibit Lt Col Vermaak also referenced the place where Mr Sokanyile's body was found.

402. Lt Col Vermaak testified that after they shot at the strikers with the shotgun and the R5, they moved through the stream.⁵⁸⁴ On the other side of the stream they

⁵⁷⁸ Day 119 p 25246/3-7

⁵⁷⁹ Day 119 p 25243/14-22

⁵⁸⁰ Day 119 p 25244/9-12

⁵⁸¹ Day 119 p 25248/4-10

⁵⁸² Day 119 p 25245/5-8

⁵⁸³ Day 119 p 25248/11-15

⁵⁸⁴ Day 119 p 25249/24 – p 25250/1

came across the body of Mr Sokanyile.⁵⁸⁵ He testified that while Mr Sokanyile (also) wore a white overall, he was fairly certain that he was not the injured striker who they saw from the air.⁵⁸⁶

403. He said that after they came across the body of Mr Sokanyile, he posted some members to guard the scene.⁵⁸⁷ He, together with four of the TRT members who had accompanied him, then returned to the scene where the SAPS members had been killed.⁵⁸⁸

404. Capt Thupe testified that after he saw a striker take an R5 rifle from one of the SAPS members who had been attacked and run towards the informal settlement, he and Sgt Sekgweleya chased after the strikers.⁵⁸⁹ A shooting incident occurred between him and the strikers in which he shot eight rounds.⁵⁹⁰ Capt Thupe said that this was necessary because the strikers were firing at them with the stolen R5 rifle.⁵⁹¹ The place and direction where he shot are depicted in exhibit RRR6. According to Capt Thupe this shooting incident occurred before the helicopter carrying Lt Col Vermaak landed. Capt Thupe said that on 14 August he prepared a note of all members under his command who fired live ammunition on 13 August. This list⁵⁹² shows that only three TRT

⁵⁸⁵ Day 119 p 25245/5-8

⁵⁸⁶ Day 119 p 25245/5-8

⁵⁸⁷ Day 119 p 25250/23 – p 25251/1

⁵⁸⁸ Day 119 p 25251/6-11

⁵⁸⁹ Day 227 p 27939/14-22

⁵⁹⁰ Day 227 p 27940/4-6

⁵⁹¹ Day 227 p 27940/7-10

⁵⁹² Exhibit RRR6

members fired live ammunition on the day: Capt Thupe, Sgt Sekgweleya and Sgt Mguye.

405. In his initial statement⁵⁹³ which is undated, Sgt Sekgweleya described how he witnessed the killing of the two SAPS members at the scene of 13 August 2012. He says that the strikers took an R5 rifle and pistols from the members. He also says that he fired 19 rounds with his R5 rifle into the ground to try to disperse them. After he shot the rounds into the ground, the strikers started to run away. He says that two police officers were injured and one died on the scene.

406. In his initial undated statement⁵⁹⁴ Const Mguye states that he witnessed the strikers attacking and 'chopping' the SAPS members. He says that that is when he started using his R5 rifle, discharging ten rounds into the ground. He states that at this stage the strikers fled, leaving the SAPS members badly injured. He states that they tried to locate the R5 rifle but could not do so as the strikers ran into the bush.

407. The SAPS withdrew its legal representation of Lt Col Vermaak before he gave evidence. Sgt Sekgweleya and Const Mguye deposed to supplementary statements⁵⁹⁵ after he had commenced his evidence. The contents of these supplementary statements stand in sharp contrast to what is contained in their initial statements:

⁵⁹³ Marked exhibit HHH29

⁵⁹⁴ Exhibit HHH30

⁵⁹⁵ Sgt Sekgweleya supp statement is QQQ7 and Capt Mguye's supp statement is QQQ8.

- 407.1. Both claim to have been instructed by Lt Col Vermaak to accompany him to pursue the strikers in order to retrieve the R5 rifle;⁵⁹⁶
- 407.2. Both claim that Lt Col Vermaak instructed them to shoot at the ground where the striker who was pointing the R5 rifle at them stood;⁵⁹⁷
- 407.3. Both claim that on the ridge they were joined by POP members and that Lt Col Vermaak instructed the POP members to shoot at the striker with the R5;⁵⁹⁸
- 407.4. Both claim to have seen Mr Sokanyile fall to the ground while the SAPS members were firing at the strikers;⁵⁹⁹
408. Apart from being contradictory to their initial statements, the supplementary statements of Sgt Sekgweleya and Capt Mguye are also inconsistent with the following evidence:
- 408.1. The testimony of Capt Thupe that Sgt Sekgweleya joined him in chasing after the strikers after the attacks on the policemen. Sgt Sekgweleya makes no mention of this in his supplementary statement;

⁵⁹⁶ Sgt Sekgweleya, QQQ7, p3, para9; Capt Mguye, QQQ8, para 6.

⁵⁹⁷ Sgt Sekgweleya, QQQ7, p3, para9; Capt Mguye, QQQ8, para 6.

⁵⁹⁸ Sgt Sekgweleya, QQQ7, p3, para9; Capt Mguye, QQQ8, para 6.

⁵⁹⁹ Sgt Sekgweleya, QQQ7, p3, para9; Capt Mguye, QQQ8, p4, para 11.

- 408.2. The testimony of Capt Mushwane that he only found one R5 cartridge on the ridge and 16 9mm cartridges. This is consistent with Lt Col Vermaak's evidence that he only instructed a member to shoot once with a R5 rifle;
- 408.3. The statement of Const Rikhotso, who is mentioned in the supplementary statement of Capt Mguye⁶⁰⁰ as having joined them at the ridge. In exhibit OOO15 Const Rikhotso describes what transpired on 13 August, and makes no mention of the shooting described by Const Mguye.
- 408.4. The statement of Capt Yende,⁶⁰¹ who states that the strikers who fled from the scene of the 13th were firing at SAPS members. Furthermore, while he admits to firing at the strikers 'in retaliation', Capt Yende makes no mention of having been instructed by Lt Col Vermaak to shoot. In sharp contrast to Const Mguye's allegation that no one was left behind to guard Mr Sokanyile's body, Capt Yende states that he was left behind to guard Mr Sokanyile's body.

The threats made against Maj Gen Mpembe

409. Lt Col Vermaak testified that on the way back, the TRT members were very unhappy. They said to Lt Col Vermaak that they blamed Maj Gen Mpembe for

⁶⁰⁰ p 3, para 10

⁶⁰¹ Exhibit OOO29.1

the deaths of the SAPS members. They also said that, in relation to Maj Gen Mpembe, 'hy nog vandag langs daai polisiemanne op die grond gaan lê'⁶⁰².

410. Lt Col Vermaak testified that he took the threats seriously because the TRT members were armed. He immediately moved a little away from them and called the provincial commissioner. (Lt Col Vermaak's telephone records⁶⁰³ show a call at 14h44 for 51 seconds.) He testified that during this conversation he informed Lt Gen Mbombo of the threats made by the TRT members. He advised her that he feared for Maj Gen Mpembe's life. According to Lt Col Vermaak, Lt Gen Mbombo then gave him permission to remove Maj Gen Mpembe from the site.

411. Lt Col Vermaak testified that once he arrived at the first scene, he asked Capt Loest to give him two members who could remove Maj Gen Mpembe from the scene. He then walked Maj Gen Mpembe to the vehicle, after which the general left voluntarily.⁶⁰⁴

412. Maj Gen Mpembe testified that after the attacks on the three SAPS members, the emotions were extremely high. However, he took control, cooled members down, and told them not to follow the protesters because by that time there was no longer any attack.⁶⁰⁵

⁶⁰² Day 119 p 25252/7-8

⁶⁰³ Exhibit 0009

⁶⁰⁴ Day 205 p 25257/15-18

⁶⁰⁵ Day 103 p 11093/13-18

413. He testified that at the scene he was approached by Lt Col Vermaak, who told him that his life was in danger. Maj Gen Mpembe testified that he informed Lt Col Vermaak that he could not leave because he needed to hand the scene over to Brig Van Zyl.⁶⁰⁶ This is denied by Lt Col Vermaak, who testified that Maj Gen Mpembe did not offer any resistance and agreed to leave.

414. During her testimony, Lt Gen Mbombo said that to her recollection Lt Col Vermaak did not inform her of threats to Maj Gen Mpembe's life. She testified that Lt Col Vermaak called her to inform her that Maj Gen Mpembe was in a poor emotional state and that, as a result, he might cause problems at the scene.⁶⁰⁷ It was on this basis that he sought permission to remove Maj Gen Mpembe from the scene. Lt Gen Mbombo testified that she did not remember Lt Col Vermaak telling her about threats to Maj Gen Mpembe. She testified that the first she came to know of the threats alleged by Lt Col Vermaak was in the evening of 13 August 2012.⁶⁰⁸ However she testified that, even then, Lt Col Vermaak's allegations were so vague and unsubstantiated that it was difficult to follow it up.⁶⁰⁹

415. We submit that the probabilities favour Lt Col Vermaak's version that the threats were made and that, as a result, he obtained permission from Lt Gen Mbombo

⁶⁰⁶ Day 103 p 11093/19-24

⁶⁰⁷ Day 183 p 22104/1-10

⁶⁰⁸ Day 178 p 21346/15-21

⁶⁰⁹ Day p 22104/13 - p 22105/14

to remove Maj Gen Mpembe from the scene. This conclusion is supported by the following:

415.1. That members would make death threats against an overall commander is so extraordinary, that it is unlikely that Maj Gen Mpembe would have responded as calmly as he claims to the report of such threats. Moreover, Maj Gen Mpembe does not explain why he in fact left the scene as requested by Lt Col Vermaak if he did not consider the threats to be serious. Again, his testimony that he informed Lt Col Vermaak that he would only leave the scene after handing it over to Brig Van Zyl is improbable.

415.2. Lt Col Vermaak's version is consistent with his telephone records,⁶¹⁰ which reflect a number of telephone calls to Lt Gen Mbombo over a few minutes:

415.2.1. The first was at 14h34 when according to Lt Col Vermaak he informed Lt Gen Mbombo about the deaths of the two members;⁶¹¹

415.2.2. The second call was ten minutes later (14h44) when he walked back to the first scene with TRT members.⁶¹² He testified that the reception was bad so he had to call back

⁶¹⁰ Exhibit 0009

⁶¹¹ Day 205 p 25254/7-14

⁶¹² Day 205 p 25255/2-8

a few seconds later. After that he called Lt Gen Mbombo again in order to report that Maj Gen Mpembe had been removed from the scene. This coincides with Lt Col Vermaak's testimony that he telephoned her when he landed to inform her of the deaths of the two members. He then called her later to tell about the threats to Maj Gen Mpembe.⁶¹³

415.2.3. This is in sharp contrast to Lt Gen Mbombo's testimony that she had only one telephone discussion with Lt Col Vermaak on 13 August when he told her that he was removing Maj Gen Mpembe because of his shocked state.⁶¹⁴ In view of the objective evidence, Lt Gen Mbombo's version is patently improbable.

415.3. Other evidence which supports Lt Col Vermaak's version is the following:

415.3.1. Maj Gen Annandale's testimony that Lt Col Vermaak told him that he had informed Lt Gen Mbombo about threats to Maj Gen Mpembe's life;⁶¹⁵

⁶¹³ Day 205 p 25257/2-12

⁶¹⁴ Day 178 p 21345/16 – p 21346/10

⁶¹⁵ Day 205 p 25257/2-12

415.3.2. Lt Col Vermaak's contemporaneous note in his diary⁶¹⁶ in which he states that Maj Gen Mpembe was removed in the face of threats to his life;

415.3.3. Capt Moolman's statement⁶¹⁷ that at the scene on 13 August she saw Lt Col Vermaak looking very anxious. He told her about the threats to Maj Gen Mpembe's life and asked her to get him away from the scene.

416. The evidence of Capt Loest also demonstrates that Maj Gen Mpembe's evidence that he was calm and in control on the scene is questionable. Capt Loest testified that after the violent confrontation, the situation was very tense and Gen Mpembe was running up and down. In his words 'things were hectic'.⁶¹⁸

417. Based on the above we submit that the probabilities are that threats were made by members against Maj Gen Mpembe and that for this reason, he was removed from the scene by Lt Col Vermaak.

Direct responsibility for the deaths on 13 August

The killing of W/O Monene

⁶¹⁶ Exhibit OOO7

⁶¹⁷ Exhibit LLL9

⁶¹⁸ Day 229 p 28300/14-16

418. Maj Gen Mpembe testified that he witnessed W/O Monene being chopped and killed in front of him.⁶¹⁹ At the time he was a 'reasonable distance away from W/O Monene.⁶²⁰ This distance was roughly estimated to be 15 paces which is approximately 15 metres.⁶²¹
419. He testified that W/O Monene was out of the Nyala when the crowd attacked him.⁶²² Maj Gen Mpembe testified that strikers approached W/O Monene from the front and others approached him from the side. He however did not see any strikers behind W/O Monene.⁶²³ While he cannot recall the exact number of strikers who attacked W/O Monene, they were a group of around five strikers.⁶²⁴ When asked what weapons the strikers used in the attack, he testified that he saw pangas, inculas and knobkerries.⁶²⁵ He did however testify that W/O Monene was shot and hacked to death.⁶²⁶
420. Maj Gen Mpembe testified that he would be unable to identify the strikers who killed W/O Monene.⁶²⁷
421. When cross-examined by Ms Masevhe for the Monene family on why he did not rush forward to assist W/O Monene, Maj Gen Mpembe said that the air was

⁶¹⁹ Day 119 p 12263/7-11

⁶²⁰ Day 119 p 12265/16-20

⁶²¹ Day 119 p 12267/2-17

⁶²² Day 119 p 12264/10-12

⁶²³ Day 119 p 12264/12-17

⁶²⁴ Day 119 p 12264/18-25 read with 12265/13-15

⁶²⁵ Day 119 p 12265/1-7

⁶²⁶ Day 119 p 12274/4-8

⁶²⁷ Day 119 p 12271/15-19

filled with teargas and the protestors were closer to W/O Monene. He however stopped short of explaining exactly what he was doing at the time and why he was unable to assist W/O Monene.⁶²⁸

422. Capt Loest testified that after their helicopter landed, he immediately ran to W/O Monene and tried for about 20 minutes to resuscitate him. He however realised that his efforts were unfortunately in vain and that W/O Monene had died.⁶²⁹

423. None of the strikers has claimed that the killing of W/O Monene was in self or private defence. In these circumstances we submit that the Commission ought to find that the killing of W/O Monene was unjustified and unlawful.

The killing of W/O Lepaaku

424. Apart from Maj Gen Mpembe who testified that he witnessed how W/O Lepaaku was killed,⁶³⁰ Lt Col Merafe also testified that he witnessed the killing of W/O Lepaaku. He said that he saw W/O Lepaaku retreat and fall. As he fell, strikers attacked him with sharp weapons.⁶³¹ As SAPS members started to shoot at the strikers, they grabbed W/O Lepaaku's rifle and fled. Lt Col Merafe then saw Maj Gen Mpembe run towards W/O Lepaaku calling for help. Lt Col Merafe then ran towards W/O Lepaaku to attend to him.

⁶²⁸ Day 119 p 12268/6-17

⁶²⁹ Day 229 p 28301/13-24

⁶³⁰ Day 119 p 12263/14-18

⁶³¹ Exhibit QQQ1, p16 para 5.20

425. Lt Col Merafe's account of the attack on W/O Monene was not challenged. From his evidence (and in the absence of a version from the strikers as to how or why W/O Monene was killed) we submit that the Commission should make a finding that W/O Lepaaku was killed by strikers, and that this was unjustified and unlawful.

The killing of Mr Mati

426. The docket dealing with the death Mr Tembelakhe Mati is Marikana CAS 116/08/2012.⁶³² As is evident from exhibit B p3, Mr Mati's body was found outside a dwelling on the other side of the dirt road which ran alongside the scene where the two policemen were killed. Capt Moshwana, who processed this scene, testified that the body was found outside informal house C05.⁶³³

427. All of the SAPS documents indicate that Mr Mati was stabbed to death. This leads to an inference that he was stabbed to death by a striker.⁶³⁴ This line of reasoning is based on the findings of a post-mortem conducted by the Phokeng Forensic Pathology Services. The Phokeng post-mortem report states that the cause of Mr Mati's death was a stab wound to his femoral artery and vein⁶³⁵. However Dr Naidoo⁶³⁶ examined photographs of Mr Mati's body and

⁶³² Exhibit ZZZZ15.9

⁶³³ Day 1 to 7, p642/5-7

⁶³⁴ Exhibit L slide 61; Narrative; Exhibit

⁶³⁵ Exhibit A

⁶³⁶ In exhibit RRRR5

'confidently' disagrees. He states that the wound to the thigh is a gunshot wound and not a stab wound.

428. The conclusion reached by Dr Naidoo and the positioning of Mr Mati's body seem to coincide with Mr Nzuza's explanation, in his statement, of his efforts to assist a striker who had been shot by the police during the pandemonium which ensued after the firing of the teargas and the stun grenade. Mr Nzuza says in his statement:

*'There was pandemonium with strikers running away mainly in the direction of the koppie. Some of the policemen were among the fleeing crowd and there were violent encounters with the strikers. I saw one of the workers collapsing in front of me and realised that he had been shot by the police fire. Some of the workers were fighting back. The majority of us somehow managed to escape and run back to the koppie. Some of us assisted the injured back to the koppie and they were rushed to the hospital. I personally tried to assist another injured worker, but we were forced to leave him next to a shack and continue running.'*⁶³⁷

429. If the person referred to by Mr Nzuza is Mr Mati (as the evidence seems to suggest) then it means that Mr Mati was shot at the scene where the police officers were attacked. Witnesses have described what happened at this scene as 'pandemonium'. In this event it is highly probable that Mr Mati was shot by a SAPS member. However no SAPS member has claimed that he or she shot Mr

⁶³⁷ Exhibit HHH21 para 10

Mati in self or private defence. Shooting in a 'pandemonium' does not provide a valid ground of justification. While we submit that it is probable that Mr Mati was shot by a policeman, one cannot exclude the possibility that Mr Mati was shot accidentally by one of the strikers. We know in this regard that W/O Monene was not only hacked to death but was also shot twice.⁶³⁸ Given the dearth of evidence on exactly how Mr Mati was killed, if it is found that Mr Mati was shot at the scene of the attack on the SAPS members, we submit that the Commission should make a finding that, although not conclusive, it is probable that Mr Mati was shot by a member of SAPS.

430. If however Mr Mati was not the striker referred to by Mr Nzuza, then the probabilities are that he was shot at or near the place where his body was ultimately found. The place where Mr Mati's body was found coincides with the area described by Capt Thupe when he and Sgt Sekgweleya chased after strikers into the informal settlement and shot at them.⁶³⁹ Capt Thupe not only states that both he and Sgt Sekgweleya shot in that area, he also states that there were many civilians around.⁶⁴⁰ On that basis, the probability is that Mr Mati was shot by SAPS members. Neither Capt Thupe nor Sgt Sekgweleya adduced any facts to support a finding that Mr Mati posed a threat. In these circumstances the killing of Mr Mati must be found to be unjustified and unlawful.

⁶³⁸ See exhibit L slide 54

⁶³⁹ Depicted in exhibit RRR8

⁶⁴⁰ Exhibit QQQ9 para 8.3

The killing of Mr Jokanisi

431. In his statement⁶⁴¹ W/O Kuhn explains how he came across one of the strikers at the scene where W/O Lepaaku and Monene were killed. He says that he watched the attack on one of the policemen (he does not identify which of them it was). He ran to where the policeman was and came across a striker who was shot in the shoulder. He searched the striker and handcuffed him. He states that the striker later died on the scene. Mr Jokanisi was the only striker whose body was found in close proximity to that of the two deceased SAPS members. It is therefore apparent that the person referred to by W/O Kuhn was Mr Jokanisi. The proximity of his body to that of W/O Lepaaku and the fact that witnesses testify to seeing a group of strikers attack W/O Lepaaku lead to the conclusion, on a balance of probabilities, that Mr Jokanisi was killed in private defence by members of SAPS attempting to save W/O Lepaaku. We however that it is neither necessary nor desirable for this Commission to make a finding as to whether Mr Jokanisi was in fact attacking W/O Lepaaku.

The killing of Mr Sokanyile

432. According to Lt Col Vermaak, after Maj Gen Mpembe left the scene, he went back to the scene where Mr Sokanyile's body was with Col Moolman.⁶⁴² When they arrived there, Lt Col Vermaak took a picture of Mr Sokanyile's body (marked as exhibit OOO7). Lt Col Vermaak testified that the picture depicts the

⁶⁴¹ Exhibit RRR9

⁶⁴² Day 205 p 25259/12-15

position in which he left Mr Sokanyile's body when he returned to the first scene with TRT members. It was also the way in which he found Mr Sokanyile's body on his return with Col Moolman.⁶⁴³ Exhibit OOO7 shows that there are weapons under Mr Sokanyile's body.⁶⁴⁴

433. Exhibit OOO23 is a presentation prepared by the team acting for the Families, which purports to summarise the facts pertinent to Mr Sokanyile's death. It contends that Lt Col Vermaak's depiction of where Mr Sokanyile's body was positioned across the stream is incorrect, and that Mr Sokanyile's body was actually to the left of the point identified by Lt Col Vermaak in exhibit OOO6. Lt Col Vermaak testified that he plotted the placement of Mr Sokanyile's body in accordance with the placement indicated by LCRC (which can be seen in exhibit B). When Lt Col Botha of LCRC testified about the positioning of Mr Sokanyile's body, his version of where the body was found was not challenged under cross-examination. While it is true that at the time when Lt Col Botha gave evidence none of the parties had as much information as is now before the Commission (he was the very first witness), the evidence of Lt Col Botha and the failure to contest it does raise difficulties for the version contended for on behalf of the Families. In any event, for the reasons set out below, we contend that nothing much turns on exactly where Mr Sokanyile's body was found.

⁶⁴³ Day 205 p 25262/1-9

⁶⁴⁴ Day 205 p 25263/1-8

434. Exhibit OOO23 shows that Mr Sokanyile was shot once. The entrance wound was in his left cheek. The exit wound was in the nape of the right side of his neck. His lumbar spinal and cord were injured. Mr Sokanyile would have died immediately or almost immediately after being shot. He would have been immediately incapacitated. These facts are not contested.

435. Capt Mushwana, who processed the scene where Mr Sokanyile was killed, testified that the cartridges found on the opposite side of the stream (depicted in a circle in exhibit B) included 1 x R5 cartridge and 16 x 9mm cartridges.⁶⁴⁵ However that this may not be an accurate reflection of the full extent of the ammunition used in the entire area in view of:

435.1. The extensive ammunition utilised by SAPS members on 13 August 2012;⁶⁴⁶

435.2. The vast area over which SAPS members claimed to have shot;⁶⁴⁷ and

435.3. The number of shots SAPS members admit to having fired.⁶⁴⁸

436. From the evidence before the Commission, there are three potential explanations for who shot Mr Sokanyile:

⁶⁴⁵ Day 1-7 p 656/9-15

⁶⁴⁶ Declared in the discharge sheet – exhibit HHH23.

⁶⁴⁷ See statements of Capt Thupe, Sgt Sekgweleya, Capt Mguye, W/O Yende

⁶⁴⁸ See statements of Capt Thupe, Sgt Sekgweleya, Capt Mguye, W/O Yende

436.1. He was shot by the group of Lt Col Vermaak;

436.2. He was shot by the group of Const Yende; or

436.3. He was shot by the group of Capt Thupe.

437. For present purposes we submit that it is neither necessary nor desirable for this Commission to make a finding as to the identity of the SAPS member responsible for the death of Mr Sokanyile. It suffices that a finding is made that a SAPS member shot and killed Mr Sokanyile. The evidence advanced by SAPS does not suggest that Mr Sokanyile was killed in self or private defence. In these circumstances the Commission ought to find that his killing was not justified or lawful.

The injury to Lt Baloyi

438. In his affidavit⁶⁴⁹ Lt Baloyi describes the attack on him as follows:

'I was hit on the head with something like a panga. I was tripped and fell down on the ground. They started stabbing me in the chest as I was kicking and ducking. One striker, who was pointing at the approaching police officers with a pistol, then pointed his firearm at me but was disturbed by others who were trying to rob me the shotgun I was resisting to surrender. I was stabbed below the umbilical cord with an assegai and I ended up surrendering

⁶⁴⁹ Exhibit GGG16

*the shotgun out of pain. The nyala driver managed to rescue me by chasing the strikers away. I then realised that my pistol and hand radio were also taken.*⁶⁵⁰

439. According to Lt Baloyi, immediately after the attack he started calling for help. A member from rescue services arrived to assist him. He asked for his bulletproof vest to be removed because it was suffocating him. He then asked to be immediately taken to hospital in a police vehicle because he could not wait for an ambulance. After the chopper crew arrived he was airlifted and taken to Ferncrest hospital.⁶⁵¹

440. Capt Loest testified that after he had spent 20 minutes trying to resuscitate W/O Monene, he went to Lt Baloyi in order to assist him.⁶⁵² He helped Lt Baloyi get into the helicopter and took him to hospital.

441. None of the strikers have claimed that the attack on Lt Baloyi was in private or self-defence (notwithstanding the fact that he fired one of the stun grenades that appears to have precipitated the violence). In these circumstances the Commission must find that the attack on him was caused by the strikers and that it was unlawful.

The responsibility of SAPS for the failed operation of 13 August

⁶⁵⁰ p 4 para 10

⁶⁵¹ p 4 para 11

⁶⁵² Day 229 p 28301/13 to p 28302/3

The lack of proper planning

442. According to SAPS the plan that was in place on 13 August was the contingency plan of 10 August'.⁶⁵³ This plan was described by Lt Col Merafe as a document drawn up to prepare SAPS for anything that might happen. He testified that this was not a 'proper plan' but was merely in place in the event that something occurred.⁶⁵⁴ Under cross-examination on behalf of the SAHRC, Lt Col Merafe conceded that the contingency plan was merely a stop-gap measure until more information could be gathered in order to put together a proper plan.⁶⁵⁵ As we have noted Capt Govender, who was the commander of visible policing at Marikana Police Station, did not know about the existence of the contingency plan,⁶⁵⁶ which was not brought to his attention at the time.⁶⁵⁷

443. In her OB entry in exhibit FFF25, Lt Gen Mbombo states that 'planning has been adjusted' to cater for the dispersal of the marchers. There has however been no evidence of any discussion of adjusting a plan in the manner suggested. On the contrary, Maj Gen Mpembe's testimony was clearly that there was no specific plan in relation to the interception at the railway line. Maj Gen Mpembe however contends that it is not fair to criticise him for this, given that:

⁶⁵³ Exhibit U

⁶⁵⁴ Day 216 p 26620/21-25

⁶⁵⁵ Day 221 p 27235/10-15

⁶⁵⁶ Exhibit U

⁶⁵⁷ Day 274 p 35042/13-15

443.1. The intervention was not a separate operation requiring its own plan; and

443.2. The intervention was a spontaneous event to which he responded within two hours 'of being requested to do so'⁶⁵⁸.

444. It is not altogether clear what he meant by 'spontaneous event'. It was 'spontaneous' in the narrow sense that no formal notice was given of it in advance of the event. However, it was not 'spontaneous' in the sense that it was surprising or could not have been anticipated, and therefore could not have been planned for. In this regard:

444.1. The two contentions advanced by Maj Gen Mpembe are mutually destructive. If the intervention was part of addressing the broader problem (the on-going strike which commenced on 9 August and the violence which accompanied it), and therefore there was no need for a separate plan to deal with it, it must also mean that the intervention cannot be viewed as a genuinely spontaneous event: it should have been dealt with in plans for dealing with the broader problem.

444.2. The affidavit of Brig Engelbrecht shows that SAPS was well aware, by 11 August, of the threats of violence and intimidation. His statement that SAPS was aware of the deaths of Messrs Fundi and Mabelane is confirmed by Maj Gen Mpembe, who testified that he had

⁶⁵⁸ Para 7

been telephonically notified of this. This means that by 13 August, Maj Gen Mpembe was aware of the widespread violence and intimidation that was accompanying the on-going strike.⁶⁵⁹ He must have known that groups of strikers were moving in a group from place to place. He could therefore not have legitimately treated the march to K3 as an unanticipated or spontaneous event which was separate and distinct from the strike, the gathering at the koppie, and the conduct of the strikers. His testimony⁶⁶⁰ that at the time that he confronted the group at the railway line, he was unaware that they were part of the group who were responsible for the violence of the past few days, cannot be accepted. Brig Calitz testified that after the meeting with Lonmin management he returned to the JOC together with Mr Sinclair and the three generals.⁶⁶¹ At the JOC one of Mr Sinclair's subordinates informed them that there were about 2000 to 3000 strikers on the koppie. They also informed him that a small group had broken away from the big group and were sitting next to a pipeline en route to K3 shaft.⁶⁶² Brig Calitz also testified that they were informed that the group at the koppie were armed with a variety of traditional weapons including spears, assegais and pangas. They were told that the small group which had broken away was similarly armed.⁶⁶³ From

⁶⁵⁹ He conceded during cross-examination by Mr Gumbi that before he approached the strikers at the railway line he was aware of the escalation in violence both from a police perspective as well as from Lonmin's perspective.
Day 120 p 12320/23 to 12321/5

⁶⁶⁰ Day 120 p 12324/7-15

⁶⁶¹ Day 152 p 17125/5-14

⁶⁶² Day 152 p 17125/20 to p 17126/3

⁶⁶³ Day 152 p 17126/15-24

this evidence it is clear that there is no way that Maj Gen Mpembe could not have appreciated that the group at the railway line was part of the bigger group on the koppie.

445. Even if Maj Gen Mpembe's explanation that this was a 'spontaneous event' were to be upheld, the enquiry would not end there. One would then need to question whether, having regard to the limited information he claims to have had at his disposal, it was appropriate for Maj Gen Mpembe to attempt to disarm the strikers in the way that he did. Having regard to the strikers' violent conduct of the past few days, it was clearly foreseeable that the strikers would turn violent if attempts were made to force them to disarm.

446. SAPS have not advanced any reasons to support a finding that there was a compelling need for them to disarm the breakaway group of strikers there and then, without the benefit of a properly formulated plan and briefing. We emphasise that at that point the breakaway group was returning from an unsuccessful trip to K3 shaft. There was no evidence that at that stage the strikers had any violent intent. On the contrary, the group had marched to K3 without incident. They did not resist Lonmin security's request that they desist from going to K3 shaft, and appeared to have agreed peacefully to do so. There was no reason for SAPS to act without a proper plan in place.

447. Having regard to the intelligence at their disposal that the strikers had the capacity for violence, even if SAPS wished to protect the informal settlement from the strikers (although there is no evidence that the strikers posed a threat to the informal settlements) it was always open to SAPS to guard, monitor and

even channel the strikers from the railway line to the koppie without the need for an unplanned attempt to disarm and disperse them.

448. The unplanned interception was inherently risky and carried with it the virtual inevitability of violence.

Lack of briefing

449. One of the consequences of a lack of proper planning on 13 August is that there was inadequate briefing of members. Maj Gen Mpembe confirmed in his testimony in chief that no briefing of SAPS commanders or members took place on the 13th prior to their arrival on the scene at the railway line. His explanation was that there was no time for such a briefing.⁶⁶⁴ He testified however that he did ask Lt Col Merafe whether the members had been orientated and Lt Col Merafe confirmed that this had been done. Under cross-examination, Maj Gen Mpembe conceded that if orientation had taken place, this had to be recorded in the occurrence book.⁶⁶⁵ However there is no entry in exhibit FFF25 which reflects that orientation of members took place on 13 August. Furthermore, Lt Col Merafe testified that while he had paraded and orientated members from Kwam and Rustenburg, he did not orientate members from Gauteng or any other area outside of North –West.⁶⁶⁶

450. Maj Gen Mpembe testified that he did not inform his members before he attended to the group at the railway line that the crowd had been violent the day

⁶⁶⁴ Day 108 p 11550/19-25

⁶⁶⁵ Day 120 p 12349/17-23

⁶⁶⁶ Day p 27209/2-14

before and had killed the two security guards. He said that this was common knowledge and therefore there was no need to inform them.⁶⁶⁷

451. Maj Gen Mpembe also testified that there was a time while he was addressing the protestors at the railway line that he called the commanders together and spoke to them. During this discussion he informed them that he would count for the protestors to lay down their weapons but that they should allow them to go.⁶⁶⁸ Lt Col Merafe on the other hand testified that Maj Gen Mpembe did not inform members that they should escort the strikers to the koppie.⁶⁶⁹

Miscommunication amongst personnel

452. A further consequence of the lack of planning and briefing was disarray amongst members as to who should do what.

453. An example of this is the fundamental question of who was the operational commander on the day. Lt Col Merafe testified that he was the operational commander on the 13 August, and that he was surprised when Gen Mpembe took over the operation at the railway.⁶⁷⁰ In any event, Lt Col Merafe testified that the most senior POP commander on the scene takes command of a crowd control operation.⁶⁷¹

⁶⁶⁷ Day 120 p 12360/9-19

⁶⁶⁸ Day 108 p 11552/5-12

⁶⁶⁹ Day p 27212/16-22

⁶⁷⁰ Day 222 p 27410/5-8

⁶⁷¹ Day 222 p 27411/2-3

Inadequate steps taken to avoid the use of force

454. When asked in chief what steps SAPS took to avoid the use of force, Gen Mpembe testified that he did the following:⁶⁷²

454.1. He tried to negotiate with the strikers;

454.2. He tried to persuade the strikers to lay down their weapons.⁶⁷³

454.3. He adopted the principle of situational appropriateness

454.4. The POP members had shotguns, stun grenades and teargas.

455. We examine each of these factors below.

Inadequate negotiations at the railway line

456. Brig Mkhwanazi testified that one of the features of a successful negotiation is to build confidence in each other through a process of 'give and take'.⁶⁷⁴ He also emphasised that a good way to win the confidence of people is by speaking their language.⁶⁷⁵ Furthermore, standing order 262 provides that negotiations must be held with a representative delegation of the crowd.

⁶⁷² Day 108 p 11554/18 to p 11555/7

⁶⁷³ Day 108 p 11553/21 to p 11554/4

⁶⁷⁴ Day 29 p 3156/16-23

⁶⁷⁵ Day 29 p 3157/12-16

457. In view of this, the 'negotiation' purportedly undertaken by Maj Gen Mpembe at the railway line was defective in two material respects:

457.1. Gen Mpembe did not request the group to send forward a delegation to negotiate with. Instead he addressed the group as a whole; and

457.2. At the point when he was demanding that the strikers lay down their weapons, Maj Gen Mpembe was not offering the strikers anything in return. It was for this very reason that he found himself issuing the ultimatum that the strikers must lay down their arms by the time he counted to ten.

Maj Gen Mpembe's reliance on the doctrine of situational appropriateness

458. According to Maj Gen Mpembe,⁶⁷⁶ in deciding to accompany the group of strikers to the koppie instead of immediately disarming them, he relied on the POP doctrine of situational appropriateness. Situational appropriateness is described in the POP policy document on crowd management as 'the assessment of an operational commander of the most appropriate action to be taken at the time'.⁶⁷⁷

459. We do not criticise Maj Gen Mpembe's decision to accompany the breakaway group to the koppie instead of attempting to disarm them. The difficulty however arises in how this decision was implemented in that:

⁶⁷⁶ Day 103 p 11088/2-12

⁶⁷⁷ Exhibit FFF1, p5, para 3.3

- 459.1. Members were not properly briefed, and hence there appeared to be confusion on what they were required to do;
- 459.2. There appeared to be a breakdown in command and control over members;
- 459.3. Notwithstanding Maj Gen Mpembe's claim that he took into account the group's propensity for violence, the instruction was given to fire teargas and stun grenades. As we set out below, on a balance of probabilities, this Commission ought to find that this instruction was issued by Maj Gen Mpembe.

POP use of non lethal force

460. Since there was no plan in place, there was no arrangement that POP should use nonviolent methods to disarm and disperse the strikers.

The disagreement between Maj Gen Mpembe and Lt Col Merafe

461. The disagreement between Maj Gen Mpembe and Lt Col Merafe related to how to deal with the strikers who had gathered at the railway line. Maj Gen Mpembe testified that Lt Col Merafe wanted them to disperse the crowd 'there and then', and that he took a different view.⁶⁷⁸ He testified that he preferred to accompany the strikers to the koppie for the following reasons:

⁶⁷⁸ Day 103 p 11085/24-25

461.1. The scene was near a railway line and he thought that a train may pass at any time;

461.2. There was a road which appeared to be a public road or a service road and therefore it was unwise to disperse;

461.3. There was a business area on the other side of the railway line; and

461.4. He had judged the mood of the strikers and realised that they were agitated.

462. Maj Gen Mpembe testified he took into account the principle of situational appropriateness and decided not to disarm and disperse the strikers but to escort them to the koppie.⁶⁷⁹

463. In response to questions from the chairperson, Maj Gen Mpembe testified that he did not accept the advice of senior officers (presumably Lt Col Merafe) because he took the view that their advice, if implemented, would lead to another Tatane incident.⁶⁸⁰ This must mean that Maj Gen Mpembe foresaw that if SAPS decided to confront the strikers and to forcibly disarm and disperse them, a violent confrontation would ensue which might lead to injuries or even the loss of life (as it did in the Tatane incident).

⁶⁷⁹ Day 103 p 11088/2-14

⁶⁸⁰ Day 108 p 11580/4-11

464. In response to a question from Commissioner Hemraj as to how he proposed to disarm and disperse the strikers at the railway line, Lt Col Merafe testified that he was first going to start talking to the strikers and explain the action that he intended taking. He would also brief his commanders and advise them what positions to be in.⁶⁸¹ He testified that he would throw a stun grenade between the strikers but, before doing so, he would have explained to them what he intended doing.⁶⁸² He testified that in his experience once you explain to people what was going to happen, they would start moving away.⁶⁸³ After using teargas he would have gone in with armoured vehicles in order to disperse the people.

684

Was there an instruction to fire teargas and stun grenades?

465. According to the statement of W/O Kuhn,⁶⁸⁵ on the day in question someone in his right hand side issued the instruction to fire teargas and stun grenades. He asked whether he should fire the teargas and it was confirmed that he should do so.⁶⁸⁶ W/O Kuhn unfortunately did not give evidence before the Commission and his version was accordingly neither clarified nor tested.

⁶⁸¹ Day 216 p 26637/19 to p 26638/3

⁶⁸² Day 216 p 26639/3-8

⁶⁸³ Day 216 p 26639/9-12

⁶⁸⁴ Day 216 p 26639/11-16

⁶⁸⁵ Exhibit RRR9

⁶⁸⁶ Para 4

465.1. Maj Gen Mpembe maintains that he did not issue an instruction for anyone to use teargas and stun grenades. His version is however inconsistent with the evidence and with his conduct at the time.

465.2. For example, the evidence is not clear that during the briefing with the National Commissioner on the evening of 13 August, Maj Gen informed her that W/O Kuhn had fired teargas without instruction to do so:

465.2.1. Maj Gen Mpembe testified that he informed the National Commissioner that the teargas was used by W/O Kuhn, who said that he heard an instruction but that he did not know who had issued the instruction.⁶⁸⁷

465.2.2. Lt Gen Mbombo testified that Maj Gen Mpembe informed the National Commissioner that members had used teargas and stun grenades without his instruction, but did not mention the names of the members involved.⁶⁸⁸

465.2.3. Brigadier Calitz testified that Maj Gen Mpembe did not inform the National Commissioner that members had used teargas and stun grenades without his instruction.

⁶⁸⁷ Day 121 p 121/12-23.

⁶⁸⁸ Day 184 p 22160/22-24.

466. Other evidence which points to the fact that Maj Gen Mpembe issued the instruction is the Marikana Narrative Report which states the following:

'On their way to Koppie 1 some of the protesters changed direction towards the informal settlement. Previous incidents indicated that protesters had been involved in looting shops owned by foreigners and assaulting innocent bystanders who crossed their paths. To protect the lives and property of innocent people, the intention was to allow the protesters to proceed to Koppie 1 around the settlement.

To prevent them from entering the settlement, the police used tear gas and stun grenades to disperse, discouraging them from their intended path. Maj Gen Mpembe issued a command for stun and tear gas, after which WO Kuhn fired a shotgun CS rifle grenade⁶⁸⁹

467. Capt Thupe testified that he heard Maj Gen Mpembe issue an instruction to W/O Kuhn to fire teargas. He also heard W/O Kuhn ask whether he should fire teargas, after which Maj Gen Mpembe confirmed that he should fire the teargas.⁶⁹⁰ Capt Thupe's version therefore corresponds in large measure with that of W/O Kuhn.

468. Capt Thupe and Lt Col Vermaak both testified that at Roots Maj Gen Mpembe said that he could not remember issuing the instruction, but admitted that it was

⁶⁸⁹ HHH28 p35

⁶⁹⁰ Day 227 p 27954/4-16

possible that he did.⁶⁹¹ This contradicts Maj Gen Mpembe's insistence in his evidence before the Commission that he did not issue the instruction.

469. On Maj Gen Mpembe's version of events, W/O Kuhn fired teargas without an instruction to do so. This is in direct conflict with standing order 262. However neither Lt Gen Mbombo nor Maj Gen Mpembe was able to provide a cogent explanation for why there are no disciplinary proceedings against W/O Kuhn. Lt Gen Mbombo testified that she tasked Maj Gen Mpembe with investigating how the teargas came to be fired. According to her this is how he was able at Roots to identify the person as W/O Kuhn.⁶⁹² On being asked by the chairperson whether disciplinary proceedings had been instituted against W/O Kuhn, Lt Gen Mbombo said that an instruction had been sent to the Gauteng office for disciplinary proceedings to be instituted. She was however unable to shed light on whether this had in fact been done.⁶⁹³

The attempts to smear Lt Col Vermaak

470. In his consolidated statement deposed to on 10 April 2014, Lt Col Merafe says for the first time that on 13 August 2012, while he was attending to warrant officer Lepaaku after the attack by the strikers, he saw Lt Col Vermaak grab an R5 rifle from a TRT member who was standing around, and that Lt Col Vermaak

⁶⁹¹ Capt Thupe Day 227 p 27963/7-11; Col Vermaak Day P/

⁶⁹² Day 184 p 22165/3-6

⁶⁹³ Day 184 p 22165/3-6

told the TRT members that they should go with him to chase after the strikers and recover the stolen R5 rifle.⁶⁹⁴

471. This is a remarkable piece of evidence which implicates a Lieutenant Colonel directly in the shooting across the river and possibly in the killing of Mr Sokanyile. Despite this there is absolutely no mention of this in any of Lt Col Merafe's four earlier statements.⁶⁹⁵ Furthermore, this allegation did not feature in any other document before the Commission.

472. Lt Col Merafe's account is far from convincing. He says that he cannot recall the name of the TRT member. This despite his concession that the only TRT unit to attend the scene of the 13th August was TRT North West under the command of Capt Thupe.⁶⁹⁶

473. Furthermore neither Const Sekgweleya nor Sgt Mguye, who were the TRT members who claim to have been with Lt Col Vermaak when they chased after the strikers after the scene in which W/O Monene and Lepaaku were killed, allege that Lt Col Vermaak grabbed their R5 rifles or that they saw him grab an R5 rifle from someone else. In fact, neither of these TRT members alleges that Lt Col Vermaak was in possession of a firearm when they chased after the strikers.

⁶⁹⁴ Exhibit QQQ1 p16 para 5.21

⁶⁹⁵ Col Merafe has 4 previous statements: GGG15 deposed to on (), QQQ2 (November 2012) QQQ3 and QQQ6.

⁶⁹⁶ p 26868/3-11

474. In his statement⁶⁹⁷ Const Sekgweleya stated that he witnessed Lt Col Vermaak alight from the helicopter and advance towards them. He states that when he reached them Lt Col Vermaak informed them that they should chase after the strikers in order to recover the stolen R5 rifle. At no point does Const Sekgweleya refer to Lt Col Vermaak grabbing an R5 rifle from a TRT member who was standing around.

475. Furthermore in his consolidated statement⁶⁹⁸, Capt Thupe, who was the commander in charge of the TRT members at the scene of 13 August 2012 makes no mention of having seen Lt Col Vermaak take an R5 rifle off one of his members. Crucially, he gives no indication of even being aware of this allegation.

476. In these circumstances we submit that the Commission should approach with caution the allegations of Lt Col Merafe, Const Sekgweleya and Sgt Mguye which implicate Lt Col Vermaak in shooting on 13 August. These appear to be a blatant reprisal for his breaking ranks with SAPS.

The ex post facto attempt to justify the decision to resort to teargas and stun grenades on grounds of protecting the informal settlement

⁶⁹⁷ Exhibit QQQ7

⁶⁹⁸ Exhibit QQQ9

477. Maj Gen Mpembe testified that one of the factors taken into account when deciding how to deal with the crowd on 13 August was the protection of the informal settlement. He testified as follows in chief:

*Chairperson, based on the briefing that I received of what was happening with regard to the people that were reporting on duty of the protestors that were injured and also the mine managers or the employees that I did not know where they stay. I did not want that the protestors they should go through the informal settlement or any other place knowing that we don't that those who might be injured where they're staying.*⁶⁹⁹

478. He testified that his experience was that when protestors move in groups, they tend to take their frustrations out on the communities and destroy property.⁷⁰⁰

479. This account seems to be consistent with what appears from slide 181 of exhibit L where the annotations on the slide reflect that the intention behind the planning was to protect the informal settlements. However as it evident from the photograph marked as exhibit EEE14.1, after the deployment of the barbed wire, people were able to disperse in large numbers in a westerly direction from the koppie into Nkaneng. Maj Gen Annandale, in his evidence, denied that the plan was to encircle the protestors with barbed wire. He demonstrated this with

⁶⁹⁹ Day 108 p 11558/24 to p 11559/7

⁷⁰⁰ Day 108 p 11595/21-25

reference to exhibits EEE14.1 and 14.2 and highlighted the fact that the strikers had unimpeded access to the informal settlements from the westerly direction.

Debriefing

480. Gen Mpembe testified that after the incident of 13 August there was debriefing between members and their commanders and between commanders and the operational commander.⁷⁰¹ He was however unable to say whether or not there were video recordings of the debriefings.⁷⁰²

Briefing of the National Commissioner

481. The National Commissioner arrived at Marikana at around 18j00 on Monday 13 August. She was accompanied by the Provincial Commissioner for Gauteng.⁷⁰³ She was briefed by Maj Gen Annandale and Brig Calitz.

482. After the briefing the National Commissioner and her delegation met with Lonmin management.

483. Major Gen Mpembe testified that, during the evening of 13 August, after the meeting during which SAPS members briefed the National Commissioner, SAPS commanders (including the National Commissioner) met with Lonmin management.⁷⁰⁴ According to Lt Gen Mbombo, during this meeting Lonmin

⁷⁰¹ Day 108 p 11560/13-25

⁷⁰² Day 108 p 11561/10-14

⁷⁰³ Testimony of Lt Gen Mbombo; Day 178, p 21310/1-7

⁷⁰⁴ Day 149 p 8/15-20

management emphasised that the strikers were not known to them and that they were 'faceless'.⁷⁰⁵ Lt Gen Mbombo also said that Lonmin management said that the genesis of problem was rivalry between AMCU and NUM around the recruitment of members. At the end of the meeting SAPS and Lonmin agreed that they should find peaceful ways of resolving the impasse.

The SAPS media statement of 17 August

484. In the SAPS media statement of 17 August,⁷⁰⁶ the following is reflected as having occurred on 13 August:

"Monday 13th August 2012 -Three bodies of mine employees were found dead. SAPS members were attacked while escorting the protestors. Two SAPS members hacked to death, one critically wounded is currently in hospital. Three protestors fatally wounded and five wounded in the Police response to the attack."

485. This is an inaccurate and misleading account of what transpired on the day:

485.1. The evidence before the Commission is that one person (Mr Langa) was killed on 13 August prior to the confrontation between SAPS and the strikers;

⁷⁰⁵ Day p 21310/ 24 - p 21311/3

⁷⁰⁶ Exhibit FFF5

- 485.2. The report does not mention that the strikers were walking peacefully until teargas and stun grenades were fired. It is only at that point that the strikers attacked SAPS members;
- 485.3. At least two of the protestors (Mr Mati and Mr Sokanyile) may well have been killed by the police, after the attack on the police.

TUESDAY 14 AUGUST 2012

The new plan

486. Col Scott testified that he was instructed by Brig Fritz to report for duty in Marikana on 13 August 2012. Col Scott testified that he received a call from Brig Fritz who advised him that Maj Gen Annandale wanted him to go to Marikana in order to assist with the planning and co-ordination of an operation there.⁷⁰⁷

487. According to Col Scott he arrived at Marikana in the evening of 13 August 2012 and immediately started 'building the plan'.⁷⁰⁸ He testified further that the operational plan of 14 August 2012 was created after he had had discussions with Mr Sinclair from Lonmin, Col Merafe and other POP officers in the early hours of 14 August 2012.⁷⁰⁹ Col Scott testified that he did not recall what the specific input of the POP officers were but that the discussions took the form of a work session where he went through a problem-solving exercise with them.⁷¹⁰ The time spent with the POP officers was about 20 minutes to half an hour. None of the detail of the plan was discussed at this meeting.⁷¹¹ After being

⁷⁰⁷ Consolidated statement of Col Scott; exhibit HHH20; p17; para 6.1

⁷⁰⁸ Day 134 p 14137/1-2

⁷⁰⁹ Consolidated statement of Col Scott, exhibit HHH20

⁷¹⁰ Day 134 p 14175/5 - 13

⁷¹¹ Day 134 p 14184/11-19

oriented by Mr Sinclair, Col Scott came up with the detail of the plan which was the encirclement and filtering line.⁷¹²

488. According to Col Scott the encirclement and filtering line plan needed to be implemented early because the idea was to do so when there were fewer people on the koppie.⁷¹³ However when none of the commanders came to the JOC early on 14 August 2012 and when he was informed that there was substantial number of strikers on the koppie, Col Scott decided that they could not immediately proceed with the encirclement plan.⁷¹⁴

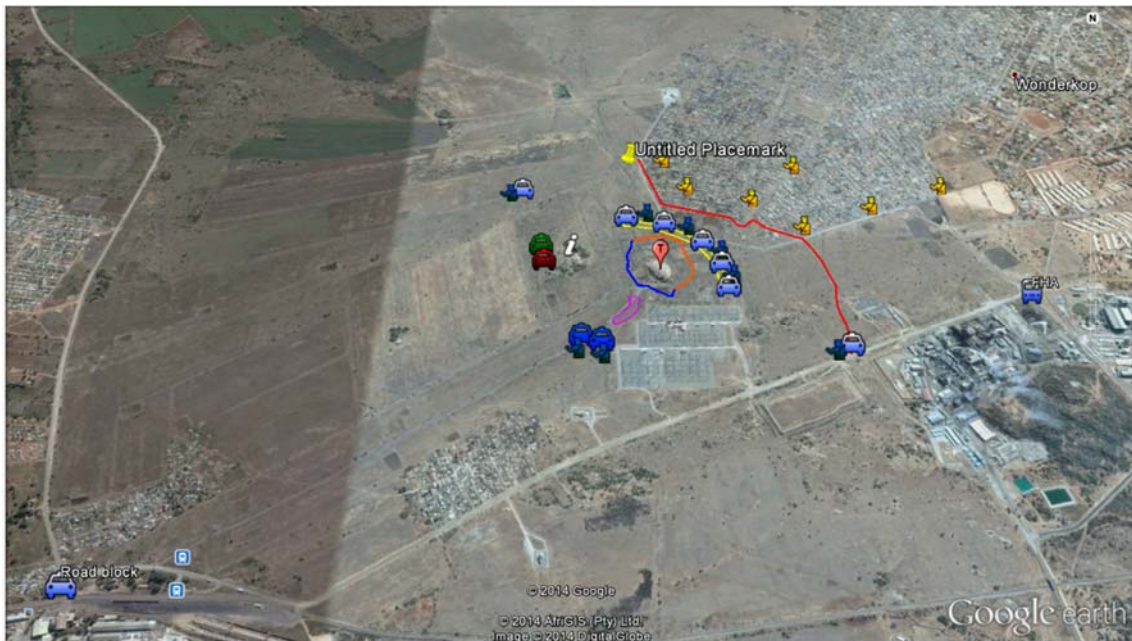


Fig 2: The Plan of 14 August (Source: Exh JJJ49)

⁷¹² Day 134 p 14177/3-7

⁷¹³ Day 134 p 14177/18-20

⁷¹⁴ Day 134 p 14177/17-21

The plan of 14 August 2012

489. Col Scott testified that the plan he had prepared in the evening of 13 August 2012 and in the early morning of 14 August 2012 is Ops Platinum Initial Plan 2.kmz.⁷¹⁵ This google earth presentation is reproduced in Fig 2 above. It shows that the plan was the following:

489.1. A barbed wire cordon to be drawn around the koppie.⁷¹⁶ Col Scott testified that the idea was to deploy barbed wire in two directions around the koppie at the same time to speed up deployment of the wire;⁷¹⁷

489.2. There would be a filtering line of nyalas placed between the informal settlement and the koppie;⁷¹⁸

489.3. There would be NIU and STF reaction teams at koppie 3. There would also be an OP post (observation post) closer to the front of koppie 3.⁷¹⁹ The reaction teams and the observation posts would both be out of sight;⁷²⁰

⁷¹⁵ Exhibit JJJ49

⁷¹⁶ Day 134 p 14170/2-8

⁷¹⁷ Day 134 p 14170/23-25

⁷¹⁸ Day 134 p 14171/18-22

⁷¹⁹ Day 134 p 14172/17-21

⁷²⁰ Day 134 p 14172/22-25

489.4. There would be a processing zone to the south-west of the koppie where suspects would be processed for arrest after the operation had been successfully completed.⁷²¹ Col Scott testified that the idea was that the strikers would have exited through the point where the two lines of razor wire met and would then have been taken to that area to be processed.⁷²²

490. According to Col Scott, the initial operational strategy proposed by him to the JOC on the morning of 14 August 2012 was that the protestors must be prevented from converging on the koppie armed with dangerous weapons. Col Scott proposed that a filtering police line be deployed which would search people who approached the koppie and confiscate dangerous weapons. In view of the fact that at around 6H00 there were only 50 people on the koppie, Col Scott proposed that these people be encircled, disarmed and arrested.⁷²³

491. According to Col Scott this strategy was abandoned because commanders did not report to the JOC early enough. Furthermore the gathering on the koppie became too late for the early version of the encirclement plan which was based on there being 50 people on the koppie.

492. Col Scott testified that he developed the plan further during the morning of 14 August. The first briefing he gave to a structured JOCCOM was at 14H00.⁷²⁴

⁷²¹ Day 134 p 14173/7-17

⁷²² Day 134 p 14173/17-20

⁷²³ Exhibit GGG39, p2, para 2

⁷²⁴ Day 134 p 14192/7-14

The plan presented at the meeting was the detailed strategy plan consisting of phases 1 to 6.⁷²⁵

Phase 1

493. During phase 1, SAPS was to deploy a contingent of POP members together with a negotiation component. The purpose was to engage in dialogue with a view to a peaceful disarmament and dispersion of the protestors.⁷²⁶ Other SAPS deployments which formed part of phase 1 include the following:⁷²⁷

493.1. SAPS armoured vehicles would place a presence between the koppie and the informal settlement and Wonderkop hostel towards the east.

493.2. POP members in armoured vehicles would have a response group of TRT members 100m behind them.

493.3. 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. NIU, STF, Emergency Medical Services, Fire Brigade and Crime Scene and Investigation experts would be based at the nearby forward holding area;

⁷²⁵ Day 134 p 14196/1-5

⁷²⁶ Consolidated statement of Col Scott; exhibit HHH20; p42; para 7.21.1.1

⁷²⁷ Consolidated statement of Col Scott; exhibit HHH20; p42 to 44

493.4. The SAPS helicopter would be used to convey information to the JOC and to the ground forces. This included providing photograph and video footage to enhance situational awareness;

493.5. The SA Airforce Oryx would be utilised as a response platform for the deployment of a STF tactical team.

494. Col Scott testified that at that stage he still saw encirclement as a viable plan for stage 3 on Wednesday, 15 August 2012 should things not go as planned on Tuesday, 14 August 2012.⁷²⁸

Phase 2

495. According to Col Scott phase 2 comprised of an escalation in force levels with reserves from FHA being brought forward. The purpose of the show of force was to dissuade illegal activity or planned violence towards SAPS. Phase 2 was only to be initialised when the threat level against SAPS increased or the strikers appeared to mobilise to anticipated key points behind the police line.⁷²⁹

496. Phase 2 also entailed that POP armoured vehicles with barbed wire trailers were to be pre-positioned between the police line and strikers. This was to enable the barbed wire to be deployed rapidly in the event of a contingency arising. Phase 2 also involved the positioning of the air reaction team from STF

⁷²⁸ Day 134 p 14201/18-22

⁷²⁹ Consolidated statement of Col Scott; exhibit HHH20; p44; para 7.21.2

at the rear staging area. This unit could provide a show of force deployable from the air.⁷³⁰

Phase 3

497. Col Scott testified that phase 3 was a predetermined deliberate tactical option which would be employed if negotiations failed and the show of force was unsuccessful in deterring unlawful activity by the strikers.⁷³¹

498. The operational strategy for phase 3 was based on the initial encirclement strategy and entailed the encircling of strikers with razor wire and offering them an exit point through which they would need to move while handing over their weapons.⁷³²

499. Col Scott testified that at that stage he considered that phase 3 could be successfully implemented when there were a minimum number of strikers on the koppie. He had not fully appreciated how to utilise the tactical option on a larger group.⁷³³

⁷³⁰ Consolidated statement of Col Scott; exhibit HHH20; p44; para 7.21.2.1 to 7.21.5.2

⁷³¹ Consolidated statement of Col Scott; exhibit HHH20; p46; para 7.21.6.

⁷³² Consolidated statement of Col Scott; exhibit HHH20; p46; para 7.21.6.

⁷³³ Consolidated statement of Col Scott; exhibit HHH20; p47; para 7.2.1.5

Phase 4

500. This phase was to be implemented once the strikers had been disarmed and arrested. Essentially this phase involved the processing of the arrestees and the evidence.⁷³⁴

Phase 5

501. Col Scott testified that this phase involved detectives and crime intelligence following up on information obtained from arrested strikers. STF and NIU would be used to carry out high risk arrests and searches of residences.⁷³⁵

Phase 6

502. Col Scott testified that this phase involved the cordon and search of the Wonderkop and Karee hostels. While this phase needed further planning, Col Scott testified that it was envisaged that POP members would cordon while TRT would conduct the search and seizures.

503. Col Scott testified that the briefing with the commanders was concluded at around 14H30. Thereafter the commanders briefed their members. AT about 16H00 the phase 1 deployment took up position at FHA. The negotiation group moved forward to the east of the koppie.⁷³⁶

⁷³⁴ Consolidated statement of Col Scott; exhibit HHH20; p47; para 7.21.7

⁷³⁵ Consolidated statement of Col Scott; exhibit HHH20; p48; para 7.21.8

⁷³⁶ Consolidated statement of Col Scott; exhibit HHH20; p52; para 7.29 to 7.30.

Commencement of phase 1: negotiations

504. In his statement⁷³⁷ Lt Col McIntosh states that he arrived at Marikana at around 12H30 on 14 August 2012. He was briefed by Brig Calitz, Brig Fritz and Maj Gen Annandale. At around 15H20 Lt Col McIntosh was taken by Brig Calitz to the koppie. According to Lt Col McIntosh at the time there were about 4000 to 5000 strikers on the koppie. They were armed with knobkerries, assegais, pangas and other sharp instruments.

505. Lt Col McIntosh stated that they then addressed the crowd through the PA system of the Nyala. A Lonmin employee acted as interpreter. He testified that they would receive information from the group in Fanagalo. They would then discuss it in the nyala. The response would then be given in Fanagalo by the interpreter.⁷³⁸ SAPS informed the group that they came in peace and wanted to find a way for the situation to be resolved peacefully. They requested five of the strikers' bravest men to come forward so that they could negotiate with them.⁷³⁹

506. Five men duly came forward. Mr Noki was one of the five men.⁷⁴⁰ Lt Col McIntosh stated that at this stage he advised them that their safety was their main concern. They assured the five men that they would be safe and free to join the group after the talks had ended. The strikers came towards the

⁷³⁷ Exhibit HHH12

⁷³⁸ Day P/

⁷³⁹ Day 231 p 28628/7-14; Exhibit HHH14 para 3

⁷⁴⁰ Day 231 p 28639/22-24

negotiating nyala twice but then turned around and went back. On the third occasion, the negotiating nyala moved closer to the delegation who stopped about two metres away from the Nyala. Lt Col McIntosh asked them to come closer to the vehicle because they could not hear them. All five men then came right to the nyala with Mr Noki climbing on to the bull bar of the nyala in order to talk to the SAPS members through the port hole.⁷⁴¹

507. Mr Noki informed the negotiation group that the strikers demanded to talk to Lonmin management. He informed them that the strike was about wages and that NUM had killed some of the members on the Friday before.

508. Lt Col McIntosh testified that he informed them that SAPS wanted them to disperse peacefully and to leave their weapons on the ground. He also informed them that SAPS did not want to fight with them and that they wanted a peaceful solution to the problem.

509. According to Lt Col McIntosh, the negotiations ended with the strikers indicating that they wanted to consider what was put to them and that they would revert by 9H00 the next morning. SAPS also undertook to consider the strikers' demand that Lonmin management come to speak to them.⁷⁴²

⁷⁴¹ Exhibit HHH14 para 4

⁷⁴² Day 231 p 28634/20 - p 28635/12

Lack of contemporaneous objective evidence of the encirclement plan

510. While Col Scott provided fine detail in relation to the operational plan in his consolidated statement, it is difficult to assess the veracity of this evidence in light of the fact that SAPS has been unable to produce a complete contemporaneous document which sets out the detail of the encirclement plan. Instead Col Scott testified that, with the exception of the Google Earth diagram of phase 3 of the plan,⁷⁴³ all of the versions of the plan that are before the Commission were altered after 14 August 2012 through a process of 'reverse engineering'. The evidence in this regard is the following:

510.1. Exhibit JJJ53 is a presentation of the plan which was last saved on 16 August 2012.⁷⁴⁴ This was the version of the plan which was submitted to IPID after the tragedy of 16 August 2012. While it is dated 13 August 2012, Col Scott testified that this was not the operational plan for 13 August 2012. This date reflects when Col Scott first started building the plan.⁷⁴⁵

510.2. Exhibit SS3 is a composite document comprising a few plans including the contingency plan of 10 August 2012 as well as the operational plan of 14 August 2012. Col Scott however testified that this was not a contemporaneous document and was 'reverse engineered' in December

⁷⁴³ Exhibit JJJ49

⁷⁴⁴ Day 134 p 14160/3-12

⁷⁴⁵ Day 134 p 14136/23-25

2012.⁷⁴⁶ The 'reverse engineering' done in December 2012 relates to the presentation as it stood on the 14, 15 and 16 August 2012.⁷⁴⁷

510.3. Col Scott also testified that there were slides which comprised JJJ53 which were not contemporaneous.

510.4. Col Scott testified that the final product of the plan as it existed on 14, 15 or 16 August 2012 no longer existed.

Involvement of specialized units

511. The encirclement plan involved POP members as well as members from the specialised units like NIU, TRT and STF. Elsewhere in these submissions we deal with why it is inappropriate to involve these specialist units in crowd control operations. These reservations would also apply to the encirclement plan.

Inadequate POP involvement in the planning

512. The central critique of the encirclement plan was that it was prepared by Col Scott who was a member of the STF. Col Scott admitted that he had limited POP experience and that he had no knowledge or training on standing order 262.

513. In these circumstances, it was vital that Col Scott rely on the knowledge and expertise of POP commanders in preparing a plan that would effectively result

⁷⁴⁶ Day 134 p 14161/14-22

⁷⁴⁷ Day 134 p 14165/12-17

in the disarmament and dispersal of the strikers. This however did not happen. Col Scott testified that he met with Lt Col Merafe and two other POP officers for about twenty to thirty minutes. The discussion took the form of a problem solving exercise. What is clear is that none of the POP members had a hand in actually drafting the plan. This was done solely by Col Scott after his discussions with the POP members and Mr Sinclair from Lonmin.

A flawed approach to negotiations

514. According to Col Scott, the objective of phase 1 was to ensure that the strikers are disarmed and peacefully dispersed. Lt Col McIntosh also testified that SAPS were not there to negotiate on the labour related issues and that the primary purpose behind the negotiation was to get the strikers to surrender their weapons.⁷⁴⁸

515. This is however inconsistent with the statement of Maj Gen Annandale where he states that the negotiators were tasked with persuading the workers to return to their work stations and that mine management would then engage in negotiations on the work related issues.⁷⁴⁹ As Lt Col McIntosh states in his earlier statements, Maj Gen Annandale was involved in the briefing of the negotiation team.⁷⁵⁰ There therefore appears to be at worst a lack of candour or at best a lack of consistency on what the objectives of negotiations were.

⁷⁴⁸ Day 232 p 28838/19-21

⁷⁴⁹ Exhibit GGG1; para 8

⁷⁵⁰ Exhibit HHH4 para 2

516. A further criticism of phase 1 is that the envisaged negotiation did not amount to a negotiation at all. In asking the strikers to lay down their weapons, SAPS had nothing to offer the strikers (apart from arrest). Hence what SAPS have described as a 'negotiation' was merely a demand to lay down their weapons and leave the koppie.

517. Building trust: Lt Col McIntosh testified that it is central to negotiations to build trust between participants. He testified that the negotiating team built trust with the strikers by doing the following:

517.1. They made certain compromises such as that we would stay inside the vehicles;

517.2. They would not try to harm the strikers;

517.3. They would not try to take anybody by force and would ask representatives to come forward.⁷⁵¹

518. SAPS has been strongly criticized for negotiating from within the nyala. Lt Col McIntosh testified that the negotiating group made a request to the JOC that they be allowed to negotiate face to face with the strikers. This request was however denied by the JOC because it was felt that this compromised officer

⁷⁵¹ Day 231 p 28628/7-14

security since, in those circumstances, the JOC could not guarantee the safety of members.⁷⁵²

519. Lt Col McIntosh conceded that this situation was far from ideal and that it did not engender mutual trust and respect.⁷⁵³

520. Finally, the approach to negotiations on 14 August was critiqued on the basis that the lead negotiator, Lt Col McIntosh was a trained hostage negotiator and was not an experienced POP commander. Lt Col Vermaak testified that the approach to hostage negotiation differed markedly from the approach to POP negotiations and therefore that it was necessary for the negotiator to have extensive POP negotiation experience. Lt Col Merafe testified that while there are no POP negotiators, negotiations in POP operations needed to be done by the operational commander or by experienced POP members (not even ordinary POP members). When specifically asked if he would use a hostage negotiator in these circumstances, Lt Col Merafe stated categorically that he would not.⁷⁵⁴ From the evidence of Lt Col McIntosh, it appears that apart from the fact that he briefed the negotiators on 14 August 2012, Brig Calitz the operational commander played no role in the actual negotiation.

The parallel plans of the Provincial Commissioner and her meeting with Lonmin

⁷⁵² Day 231 p 28629/1-12

⁷⁵³ Day 232 p 28919/1-6

⁷⁵⁴ Day 220 p 27098/1-25

521. On 14 August 2012, a meeting was held between General Mbombo and members of Lonmin management. A transcript of the meeting is exhibit JJJ192. The transcript (and accompanying audio file) of this meeting was discovered belatedly by Lonmin.

522. Prior to the belated discovery by Lonmin of the transcript and the audio file, there was no evidence before the Commission that this meeting had taken place:

522.1. The meeting was not mentioned in the initial statements filed by Mr Mokwena⁷⁵⁵ or Lt Gen Mbombo⁷⁵⁶. In her supplementary statement⁷⁵⁷ Lt Gen Mbombo states that she did not mention this 'informal discussion' in her original statement because nothing turned on it.⁷⁵⁸ We submit that this is an unsatisfactory explanation. As the transcript demonstrates this was an extremely important conversation and it was incumbent on both SAPS and Lonmin to inform the Commission about this timeously.

522.2. Neither the transcript nor the audio file were on the SAPS hard drive notwithstanding that it was handed to SAPS by Lonmin in response to the s205 subpoena. That SAPS was in possession of the transcript

⁷⁵⁵ Exhibit OO15

⁷⁵⁶ Exhibit GGG5

⁷⁵⁷ Exhibit LLL1

⁷⁵⁸ Para 61

and audio file is clear from the fact that these were discovered by the evidence leaders on the Scott master hard drive.⁷⁵⁹

523. Lt Gen Mbombo stated in her supplementary statement that she has no knowledge of who recorded the conversation. Furthermore, at the time she was not advised that the conversation was being recorded.⁷⁶⁰ She states that on 14 August 2012 she asked Mr Sinclair to arrange the meeting with Lonmin management in order to ascertain if they had devised ways to address the unrest situation.⁷⁶¹ She also states that she wanted to share with Lonmin the approach adopted by SAPS in policing the situation.⁷⁶²

What was said at the meeting

524. Exhibit JJJ192bis shows that Lt Gen Mbombo informed Lonmin management that she wanted to meet them in order to understand the decisions that Lonmin was taking.⁷⁶³ She wanted to know how Lonmin intended getting the situation back to normal.

525. During the meeting, Lt Gen Mbombo received a telephone call from the national commissioner. In that conversation Lt Gen Mbombo informed Gen Phiyega that SAPS was 'moving in' and that she would give her feedback in an hour.⁷⁶⁴

⁷⁵⁹ Day 138 p 14795/11 – p 14799/3

⁷⁶⁰ Exhibit LLL1, para 61

⁷⁶¹ Para 62.1

⁷⁶² Para 62.1

⁷⁶³ Exhibit JJJ192bis line10-14

⁷⁶⁴ Exhibit JJJ192bis p1 line 26-30

526. Mr Mokwena then explained that Lonmin's priority was getting people arrested. He said that it very clear that AMCU is behind the strike and that AMCU had made media statements that they had presented a demand of R12500 to management. Mr Mokwena also stated that they wanted AMCU leaders arrested.⁷⁶⁵ Under cross examination Mr Mokwena conceded that while he had obtained this information from Jomo Kwadi who claimed to have heard this in a conversation with Mr Dumisani from AMCU, he had no personal knowledge of this.⁷⁶⁶ He testified that he was prepared to retract the statement.⁷⁶⁷ Mr Mokwena also retracted his statement⁷⁶⁸ that AMCU had issued media statements indicating that they had demanded R12500 from the employer.⁷⁶⁹
527. Mr Mokwena mentioned that Lonmin was not forcing workers to come to work because they cannot guarantee their safety. Mokwena states that they wanted to issue an ultimatum the next day but wanted to give SAPS the opportunity to settle things so that they do not ask people to come to work when the situation is tense.⁷⁷⁰
528. Mr Mokwena emphasised that Lonmin would not start to talk to AMCU outside organised bargaining structures. He also made reference to a recording where AMCU said that Lonmin would remain ungovernable.

⁷⁶⁵ Exhibit JJJ192bis p2 line 10 - 26

⁷⁶⁶ Day 291 p 38003/8-14

⁷⁶⁷ Day 291 p 38004/24

⁷⁶⁸ Seen on p4 of exhibit JJJ192

⁷⁶⁹ Day 291 p 38005/10-18

⁷⁷⁰ Exhibit JJJ192bis p3 line 1-10

529. Lt Gen Mbombo then states that this is because the strikers feel like they are in control. This is because the employer is not telling them anything, they are not calling them to work. To make matters worse the police are not arresting them.
- ⁷⁷¹ She stated that she wanted to 'settle' the strikers. She explained that she wanted SAPS to give them an opportunity to put down their weapons and leave one by one. If however they do not surrender their arms, then on the next day 'then it is blood'.⁷⁷² She also alluded to the fact that SAPS members were annoyed because of the incident of 13 August 2012.
530. Lt Gen Mbombo was cross-examined extensively about her comments that if the strikers did not surrender there would be bloodshed. Lt Gen Mbombo conceded under cross-examination that she foresaw that if the strikers did not surrender there would be injury or death.⁷⁷³
531. She testified that she foresaw bloodshed if the police acted on 14 August 2012 hence the need to delay the operation.⁷⁷⁴ This is however contradicted by the evidence of Col Scott (deal with above) who testified that they were planning to implement the initial encirclement plan early on Tuesday, 14 August 2012 but that this did not happen because none of the commanders came to the JOC.
532. There was therefore never consideration given to delaying the implementation of the operation in order to enable the SAPS members who were involved in

⁷⁷¹ Exhibit JJJ192bis p5 line 12-28

⁷⁷² Exhibit JJJ192bis p6 line 2-6

⁷⁷³ Day 181 p 21661/22- p 21662/5

⁷⁷⁴ Day 22229/19-25

the operation of the 13th to get the appropriate care and counselling. This despite Lt Gen Mbombo's testimony that Maj Gen Mpembe considered releasing all the people involved in the operation of 13 August 2012 from further involvement in the operation but that things changed.⁷⁷⁵

The question of an ultimatum to Lonmin employees

533. Lt Gen Mbombo encouraged Mr Mokwena to communicate with their employees and issue the ultimatum for them to come to work. She informed them that it did not matter if the workers were angered because the police were there and were 'prepared to move in a different direction'.⁷⁷⁶ Mokwena agreed that they would prepare a communique which would be delivered by helicopter.⁷⁷⁷

534. In his evidence, Mr Mokwena confirmed that what had been agreed with Lt Gen Mbombo on 14 August 2012 was that Lonmin would issue ultimatums to workers to come to back to work. If they did not do so, the police would act on Wednesday, 15 August 2012 to disperse them.⁷⁷⁸

⁷⁷⁵ Day 291 p 22232/17 – p 22233/8

⁷⁷⁶ Exhibit JJJ192bis p7 line 12-26

⁷⁷⁷ Exhibit JJJ192bis p8 line 1 - 10

⁷⁷⁸ Day 291 p 38013/2-10

535. Mr Mokwena testified further that Lonmin was not prepared to issue an ultimatum that workers should return to work without being satisfied that police were going to take action to resolve the situation.⁷⁷⁹

536. Lt Gen Mbombo was cross-examined on her apparent attitude that Lonmin should not give the strikers any leeway. Mr Mokwena confirmed that the provincial commissioner did not want Lonmin to give the strikers any leeway and that she wanted Lonmin to take a hard stance against them.⁷⁸⁰ Mr Mokwena testified further that to his recollection, at no point after 14 August 2012 did the provincial commissioner urge Lonmin to negotiate with the strikers.⁷⁸¹

Political considerations

537. During the discussion Lt Gen Mbombo referred to a discussion she had had with Abey Kgotle the night before. She mentioned allegations and rumours that management at Impala were colluding with AMCU. She said that this was because Impala was not implementing their policies. She alleged that from a political point of view there was a feeling that the mining industry wanted to replace NUM with a new face and that's why these things were erupting.⁷⁸² Lt Gen Mbombo also referred to a discussion which the national commissioner had with Mr Kgotle the day before in which she apparently raised concerns that

⁷⁷⁹ Day 292 p 38185/8-14

⁷⁸⁰ Day 292 p 38200/6-10

⁷⁸¹ Day 292 p 38200/11-21

⁷⁸² Exhibit JJJ192bis p9 line 1-6

if management gave the strikers leeway they could be seen perceived as supporting them.⁷⁸³

538. Lt Gen Mbombo also mentioned that when she spoke to Min Mthethwa, he mentioned that Mr Cyril Ramaphosa was calling him and pressurising him.⁷⁸⁴

539. Lt Gen Mbombo also said that the National Commissioner asked her the night before who the shareholders of Lonmin were. When she told Gen Phiyega that she did not know who the shareholders were but that the Minister had mentioned Mr Cyril Ramaphosa, Gen Phiyega said 'now I got it'.⁷⁸⁵

540. Lt Gen Mbombo then explained why Gen Phiyega said that 'she got it'. Lt Gen Mbombo referred to the appeal hearing of Mr Julius Malema against the decision of the African National Congress to expel him. This hearing was presided over by Mr Ramaphosa. That appeal was dismissed by Ramaphosa. Lt Gen Mbombo mentioned that Mr Ramaphosa was 'very strong in terms of the decision made'.⁷⁸⁶ Lt Gen Mbombo also referred to Mr Malema's intervention in Impala and the fact that the police were able to manage the situation after Mr Malema's visit. Lt Gen Mbombo stated that if it once again came across that Mr Malema defused the situation it would seem like he has taken charge of the mines.⁷⁸⁷ She added that because of Mr Malema's known

⁷⁸³ Exhibit JJJ192bis p9 line 7-15

⁷⁸⁴ Exhibit JJJ192bis p9 line 29 – p10 line 4

⁷⁸⁵ Exhibit JJJ192bis p10 line 4-8

⁷⁸⁶ Exhibit JJJ192bis p10 line 8-12

⁷⁸⁷ Exhibit JJJ192bis p10 line 15-24

position that the mines should be nationalised, it has a serious political connotation that needed to be taken into account.⁷⁸⁸ Lt Gen Mbombo stated that they needed to act such that they killed 'this thing' (referring to the strike).

541. Lt Col Mbombo and Mr Mokwena referred to being contacted by Mr Themba Godi. They agreed that the situation needed to be arrested because it allowed opportunists the opportunity to comment and then the situation gets out of control.⁷⁸⁹ Mr Mokwena then mentioned that the next day was D-Day.

542. Lt Gen Mbombo was heavily criticised for the above exchange which pointed strongly to a complex political motive for wanting to act against the strikers. She was unable to provide a coherent and compelling explanation for the sentiments she expressed and testified under cross examination that:

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 telephone the police for assistance.⁷⁹⁰ We submit that this explanation is unconvincing to say the least. From JJJ192 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 this if it was an irrelevant fact.

⁷⁸⁸ Exhibit JJJ192bis p10 line 14-30

⁷⁸⁹ Exhibit JJJ192bis p12 line 17-20

⁷⁹⁰ Day 180 p 21527/10-15

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. Her explanation that she feared that Mr Malema would make matters worse⁷⁹¹ is in sharp contrast to the sentiment that she expressed in JJJ192 – namely that he was given the credit for defusing the situation in Impala. Nowhere in JJJ192 does Lt Gen Mbombo even hint at a fear that Mr Malema might worsen the situation in 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 who she considered to be politically influential;

⁷⁹¹ Day 180 p 21544/3-13

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 that Mr Malema supported nationalisation of the mines; and

543.6. 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 six inferences listed above can validly be drawn.

Gen Phiyega's role in the discussion

545. In addition to showing that Lt Col Mbombo took into account irrelevant political considerations in approaching the situation at Marikana, JJJ192bis also reflects that Gen Phiyega participated in inappropriate discussions about political considerations. This much is clear not only from the wording of the transcript, but also from Lt Gen Mbombo's repeated testimony that she and Gen Phiyega discussed the possibility of Mr Malema coming to Marikana and taking credit for defusing the situation.⁷⁹² We contend that Gen Phiyega's testimony that she was unable to recall this specific conversation⁷⁹³ is both unsatisfactory and

⁷⁹² Day 186 p 22407/1-8 and Day 186 p 22409/11-17

⁷⁹³ Day 288 p 37400/17-25

unconvincing. It is however telling that she does not dispute the testimony of Lt Gen Mbombo.

546. We submit that, on the evidence, the Commission to 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.

Mr Sinclair's involvement with the SAPS operation

547. Another controversial part of the exchange is where Mr Sinclair refers to the deployment of SAPS resources but uses possessive terminology. He mentions that 'We have deployed 140 people....' and 'we have got horse units' and 'we want to deploy as well for visible policing'.⁷⁹⁴ A little later Mr Sinclair says 'I will work with your planners on that'⁷⁹⁵.

548. Gen Mbombo testified that she did not understand what Mr Sinclair was trying to say because the deployments by SAPS were separate from the deployment of Lonmin.⁷⁹⁶

⁷⁹⁴ Exhibit JJJ192bis p13 line 4-25

⁷⁹⁵ Exhibit JJJ192bis p14 line 9

⁷⁹⁶ Day 178 p 21330/22 – p 21331/3

The excessive cost of the operation

549. During the course of the discussion Lt Gen Mbombo mentioned that a key challenge facing her was the cost of keeping all the members there every day. She implied that because of this cost she has given the operational commanders until the weekend to sort the thing out.⁷⁹⁷ During her testimony in chief she confirmed that cost was one of the factors to be taken into account. She testified that they had to work together and quickly but that they should not jeopardise the success of the operation.⁷⁹⁸

The video / photos of the sangoma

550. Included in exhibit L⁷⁹⁹ are pictures taken of what appears to be rituals being undertaken by certain strikers on the koppie. The pictures depict strikers standing naked in a line waiting appearing to be waiting for rituals to be performed on them. Lt Col Vermaak testified that these pictures had been taken on his camera by Sgt Venter from a helicopter (chopper 2) on 14 August.

551. Brig Calitz testified that on 14 August chopper 2 reported that approximately 800 naked strikers were behind the koppie and a traditional healer was seen busy with them. The chopper reported that a white Toyota bakkie was seen bringing substances in buckets. The chopper reported that the 800 or so naked

⁷⁹⁷ Exhibit JJJ192bis p15 line 10-15

⁷⁹⁸ Day 178 p 21337/13-23

⁷⁹⁹ Slides 86 and 87

strikers were performing rituals.⁸⁰⁰ A bundle of photographs and screen shots from videos depicting the rituals undertaken on 14 August is marked exhibit KKK1.

552. Lt Col Vermaak testified that on 14 August 2012, he sent these images to Brig Garnett from NATJOC via BBM.⁸⁰¹ These images were accompanied by the words: 'Hulle trek kaalgat uit and doen iets saam met die sangoma. Maak gereed om te baklei'⁸⁰². Lt Col Vermaak testified that this meant that it was clear that the strikers were preparing themselves for a fight. He said that in his experience, muti rituals were commonplace in mine unrest situations and once mineworkers underwent such rituals they believed they were invincible. He testified that he came upon this knowledge during his many years dealing with mine unrest. He testified that he came to know about people's belief in the effects of muti when he interviewed arrested suspects who were alleged to have been involved in mine unrest.⁸⁰³ Lt Col Vermaak was cross-examined on his evidence that the strikers were undergoing rituals in order to make themselves invincible but he maintained that in his experience, in the context of mine unrest, it meant that mineworkers were preparing themselves for a fight.⁸⁰⁴

⁸⁰⁰ Day 153 p 17191/3-8

⁸⁰¹ Day 205 p 25207/14 – p 25208/25

⁸⁰² Exhibit LLL8 para 4

⁸⁰³ Day 205 p 25209/5 – p 25210/8

⁸⁰⁴ Day 215 p 26493/2-14

The killing of Mr Twala

553. The body of Mr Isaiah Twala was found on 14 August 2012 behind the koppie at Wonderkop. The location of his body is depicted in exhibit B8. Mr Twala's post mortem report shows that he died as a result of multiple stab wounds to the body.⁸⁰⁵

554. According to Lt Col McIntosh, at around 17H03 on 14 August 2012, they received information that there was a body lying behind the koppie and the LCRC and detectives wanted to fly in a photographer to process the scene. At around 17H09 the strikers allowed SAPS to land a helicopter in order to photograph and remove the body.⁸⁰⁶

555. Mr Xolani Nzuza who has been charged with the murder of Mr Twala testified that when he arrived at the koppie, he saw Mr Twala standing and talking to the strikers at the koppie. Initially, Mr Xolani Nzuza testified that he was not present at the koppie at the time that Mr Twala was killed.⁸⁰⁷ He did however testify that he saw Mr Twala on the koppie that day.⁸⁰⁸

556. At the time Mr Nzuza did not know Mr Twala's name. Mr Nzuza testified that he heard Mr Twala saying that he (Mr Nzuza) knows him. Mr Nzuza responded by saying that he did not know Mr Twala and only met him once when he wanted

⁸⁰⁵ Exhibit A

⁸⁰⁶ Exhibit HHH14 para 8

⁸⁰⁷ Day p 35513/16-19

⁸⁰⁸ Day p 35513/20-23

goggles from him. Mr Nzuza said that on that day Mr Twala had threatened to get him fired. After this discussion Mr Nzuza left the koppie and went to have a coldrink somewhere in Wonderkop.⁸⁰⁹ Mr Nzuza testified that he saw nothing that day that warranted Mr Twala being killed.⁸¹⁰

557. Mr X directly implicates Mr Nzuza in the death of Mr Twala. He testified that⁸¹¹:

557.1. On 14 August Mr Twala and two other men were called to appear in front of the strikers at the koppie. The other two men were called individually first. Questions were posed to them. They were allowed to move back amongst the strikers. When it was Mr Twala's turn, Mr Nzuza said that Mr Twala was a spy and that he got people fired. Mr Nzuza searched Mr Twala and found a cell phone. He accused Mr Twala of being a spy for NUM because nobody was allowed to have a cell phone at the koppie.

557.2. Five of the leaders of the strikers took Mr Twala to the other side of the koppie. They removed Mr Twala's gun from him. Mr X then heard a gunshot. He looked in the direction of where the shot came and saw Mr Twala's dead body on the ground and one of the strikers placing the skull of a beast on Mr Twala's chest.

⁸⁰⁹ Day p 35514/2-15

⁸¹⁰ Day p 35912/15-17

⁸¹¹ Day p 31735/2 – Day 31736/6

Responsibility for the death of Mr Twala

558. We set out elsewhere in these submissions that we approach the evidence of Mr X with caution. For this reason we contend that there is insufficient evidence before the Commission to sustain a finding that Mr Nzuza killed Mr Twala. Indeed on Mr X's own version, while he saw five men take Mr Twala away, he did not witness when or by whom Mr Twala was killed.

559. Mr Mpofu on behalf of the injured and arrested conceded that responsibility for the death of Mr Twala can be laid at the door of the strikers.⁸¹²

560. We contend that on the strength of the objective evidence, buttressed by the concession from Mr Mpofu on behalf of the injured and arrested, this Commission ought to find that the strikers killed Mr Twala on 14 August and that the killing was not justified. There is however insufficient evidence available to hold a particular individual responsible for Mr Twala's death.

⁸¹² Day 260 p 32775/20 – p 32776/4

WEDNESDAY 15 AUGUST

The intervention of Xolani Gwala

561. On the 15th August 2012, Mr Mathunjwa, Mr Mokoena and Mr Zokwana were interviewed on the SAFM radio show, The Forum @ 8, hosted by Mr Xolani Gwala. The purpose of the discussion was to shed light on what was happening at Marikana.⁸¹³ At that stage the death toll was sitting at 10 and the strike was still ongoing.

562. Once each of the role-players started making input into the discussion, it is clear that their contributions were riddled with inaccuracies and untruths. We summarise some of these inaccuracies below:

Lonmin

563. Mr Mokwena began the discussion by indicating that the strike was unprotected and that the workers had not obtained permission to hold a gathering.

564. Mr Mathunjwa, indicated that the first he came to know about the strike was when Mr Mokwena called to inform him about it about two weeks before 15 August. He said that he was again called by Mr Mokwena on 10 August to inform him about the march to LPD. On both occasions Mr Mathunjwa suggested that Lonmin arrange a meeting with all the unions to discuss the demand and the way forward. Mr Mokwena admitted that he called Mr

⁸¹³ The transcript of the interview is exhibit LL.

Mathunjwa two weeks before but indicated that this was not related to the march on LPD because at that stage they did not know about the march.

565. We note that Mr Mokwena did not inform Mr Gwala about the RDO demand made in July and the RDO allowance offered on 30 July. Given the timing of the call it is highly likely that it was in relation to the RDO demand. Furthermore, in his witness statement Mr Mokwena confirms Mathunjwa's version on the purpose of the call.⁸¹⁴

566. When Mr Mathunjwa eventually mentioned the RDO allowance, Mr Mokwena indicated that this was usual in the mining industry. He however once again failed to link the allowance with the demand by RDO's for R12500. In fact Mr Mokwena disingenuously claimed that RDO's did not demand the allowance. We know that while the RDO's did not demand it, the allowance was introduced in response to a demand by the RDO's for a wage increase.

567. Mr Mokwena gave the impression that the march of the RDOs on the 10th was the start of the unrest, and that it took Lonmin by surprise,⁸¹⁵ and that Lonmin did not know who the strikers were and what their concerns were.⁸¹⁶ This is despite his phone call to Mr Mathunjwa about two weeks previously advising of the intended march by the RDO⁸¹⁷. It is also common cause that at that stage, the RDOs already had an engagement with Da Costa, and that Lonmin up to

⁸¹⁴ Exhibit LL p2/24, p3/1-8, 15-25. p8 /15-21. p9/11-24. p10/1-24 Exhibit 0015 p4 para 3.2

⁸¹⁵ Exhibit LL 8/19-20

⁸¹⁶ Exhibit LL 2/24-25. 3/1-20.4 5-9

⁸¹⁷ Exhibit LL p2/24, p3/1-8, p15-25. p8 p17-20. p15-21. Exhibit 0015 p4 para 3.2

the level of EXCO was aware of the RDOs' discontent with their salaries, which Lonmin sought to address by giving the RDO's an allowance of R750.

568. Thirdly, Mr Mokwena even denied that Lonmin ever engaged the RDOs regarding their salary demand⁸¹⁸. When Mr Mathunjwa exposed this lie⁸¹⁹, he admitted the granting of the allowance but said the allowance was a management prerogative that is done throughout the year⁸²⁰. He further said that the allowance of R750 had not been granted as a result of a demand by the RDOs⁸²¹. We submit that it is common cause that this allowance was given pursuant to the RDOs' demand for an increase that was communicated to Mr Da Costa.

NUM

569. Mr Zokwana maintained that they were caught by surprise by the march of 10 August.⁸²² However, the evidence before this Commission is that the NUM branch structures at Karee were advised by Messrs Nkisi and Da Costa of the RDOs' demands.⁸²³ They must have been well aware of the brewing discontent of the RDOs with their wages.

570. When asked about allegations that NUM members shot at the strikers Mr Zokwana appeared to conflate the incident of 11 August with that of 12 August.

⁸¹⁸ Exhibit LL 8/6-11

⁸¹⁹ Exhibit LL 9/11-14

⁸²⁰ Exhibit LL 10/3--6

⁸²¹ Exhibit LL p1013-15. p 11/1-5

⁸²² Exhibit LL 12/25. 13/1-2

⁸²³ Exhibit 0017 para 3.32-3.33

He indicated that two Lonmin security guards were killed by AMCU as they protected NUM offices.⁸²⁴ He adamantly maintained that NUM members never fired at strikers.⁸²⁵ He accused AMCU of lying in public, and of killing two Lonmin security officers on 12 August and instigating violence⁸²⁶. He alleged that the whole unrest was instigated by AMCU as a ploy to unsettle NUM at Lonmin.⁸²⁷ He further accused AMCU of using violence as a weapon and intimidation.⁸²⁸

AMCU

571. Mr Mathunjwa insisted that the shooting on 11 August occurred when the strikers were marching past the NUM offices. This version is clearly incorrect. Even Mr Mabuyakhulu indicated that they were marching to the NUM offices, albeit on his version to confront NUM (and not to attack the offices). Mr Mathunjwa further said that he knew nothing about the demand until Mr Mokwena called him. He insisted that the demand had not been raised by their members within branch structures and that he only heard about the demand from Lonmin management.⁸²⁹ This is not accurate. That AMCU members must have raised the matter of the increase of their wages is reflected in the minutes of an AMCU meeting held on 19 July 2012, and addressed by AMCU official Stevens Khululekile, where he promised his members that the matter of

⁸²⁴ Exhibit LL 13/4-25. 14/18/10-13

⁸²⁵ Exhibit LL p18/12-16

⁸²⁶ Exhibit LL 14/1-17

⁸²⁷ Exhibit LL 16-20

⁸²⁸ Exhibit LL p32/22-24

⁸²⁹ Exhibit LL p6/16-25. p 7/1-2

increase will be raised at an upcoming meeting with the region.⁸³⁰ Mr Mathunjwa also engaged in the slanging match and accused NUM of failing to address the worker's issues, and of portraying AMCU as instigators of violence.⁸³¹

572. Towards the end of the debate Mr Gwala invited all three parties to come to a solution to the unrest specifically. He suggested they all go immediately to the koppie to address the strikers. He suggested that the leaders of the unions come together and tell their members publicly to go back to work, and thereafter discuss their issues amongst themselves⁸³².

573. Mr Mathunjwa expressed his commitment to addressing the strikers.⁸³³ Mr Zokwana did the same.⁸³⁴ Mr Mokoena also agreed to go. However he articulated Lonmin's position as follows:

'That they agree that the strikers must be disarmed and told to go back to work. Lonmin wants to meet the structures of the unions to discuss any grievances or concerns in the most civilised manner without pangas and guns, and that they can do it at that time, and as soon as possible⁸³⁵.

574. It was on this basis that the two union leaders went to the Lonmin premises.

⁸³⁰ Exhibit CCC3

⁸³¹ Exhibit LL p30/12-18. p 30/23-25

⁸³² Exhibit LL p45/19-24

⁸³³ Exhibit LL p45/14-25

⁸³⁴ Exhibit LL p50/1-4

⁸³⁵ Exhibit LL p51/1-9

The briefing meeting between SAPS, Lonmin and the Unions

575. Once Messrs Mathunjwa, Mokoena and Zokwana arrived at Lonmin's premises, they were met by Maj Gen Mpembe who told them that SAPS required the intervention of the leadership of the unions to go to the *koppie*, talk to the strikers and tell them to disperse, and disarm⁸³⁶. He told them that their intelligence revealed that some of the strikers on the *koppie* belonged to NUM while others belonged to AMCU.⁸³⁷
576. During the briefing the allegations between the NUM leader and the AMCU leader continued to fly. Ultimately both agreed to accompany the SAPS negotiation team to the mountain.
577. Mr Mokwena appeared to back down from the commitment he made to Mr Gwala that he would be prepared to go to the mountain. While the two union leaders seemed committed to doing what they could to get the strikers off the mountain, Mr Mokwena reiterated Lonmin's stance that they would only negotiate in a controlled environment and only within established bargaining structures. It is only significant that Maj Gen Mpembe seemed to confine himself to insisting that the two union leaders go to the *koppie*. He did not insist that Lonmin should also go to the mountain. Ultimately Mr Mokoena asked Mr Mathunjwa to convey Lonmin's position to the strikers as follows:

⁸³⁶ Exhibit 004

⁸³⁷ Exhibit 004 2/3-7. 7/18-20

'We are willing to engage our employees within the structures that are known..... So we are willing to meet with our employees through their structures, through their leaders... So when the workers are back, disarmed, tomorrow tonight, through their leaders, we will meet them.....We are not against meeting discussing issues with employees through the right structures'⁸³⁸.

The address by the union presidents⁸³⁹

578. The union leaders were taken to the koppie in nyalas. Mr Zokwana was the first leader to address the strikers. He did so from within the nyala through a loudspeaker. The strikers however refused to listen to Mr Zokwana, and he was forced to abandon his address. The AMCU delegation was well received by the strikers. An AMCU union official in Mathunjwa's team started off by saying 'Phantsi nge Gundwana phantsi' loosely translated to mean 'Down with traitors down'. Traitor would in this instance refer to workers who did not heed the call to go on strike and continued to work. This could be viewed as encouraging the violence towards such employees. This is especially in view of the killing of Mr Langa on the 13th who is believed to have been going to work when he was killed, and the killing of Mr Mabebe who was at work.

579. Mr Mathunjwa told the strikers that he had asked the employer to give them a guarantee that if the strikers go back to work, the employer would talk to their

⁸³⁸ Exhibit 004 565/1-9

⁸³⁹ Exhibit BB6

union, which is the structures that they (the RDO's) had chosen so that they can get what they wanted⁸⁴⁰. He further advised the strikers that they must go back to work whilst negotiations were going on, so that if those negotiations breakdown, then they can approach the CCMA for arbitration, so that any subsequent strike that they might engage in would be protected. He begged them to listen to him, trust him, and give him an opportunity to intervene.

580. According to Mr Mathunjwa, the workers thanked him and told him that they understood the message from the employer, but because it was getting dark, he must come back the next morning and they would see how they would go to work⁸⁴¹.

The debriefing meetings with the union presidents

581. The transcript of the debriefing meeting held between Maj Gen Mpembe, Mr Mathunjwa and Mr Zokwana is exhibit GGG4. Maj Gen Mpembe held separate debriefings with NUM and with AMCU.

582. Mr Zokwana reported back that the strikers were not prepared to listen to him.

583. In providing feedback Mr Mathunjwa indicated that the workers wanted them to come back at 9H00 the next morning. He said that: "they are prepared that by tomorrow surely there will be a way forward by all these thing will be over. That

⁸⁴⁰ Transcript Day 24 2515/12-24.

⁸⁴¹ Exhibit NN Para 50

is our impression and interpretation – not even interpretation, that is what they said⁸⁴²

584. The transcript reveals the following:

584.1. Maj Gen Mpembe asked the following question: “Are you saying tomorrow they will disperse?”⁸⁴³

584.2. Mr Mathunjwa replied as follows: “Yes”⁸⁴⁴

584.3. Mr Mathunjwa later says ‘I mean from tomorrow we engage them the way forward maybe we will be saying wherever just leave whatever and the police will come and collect it. Maybe sometimes if I can come and bring it to you’.⁸⁴⁵

584.4. At that point, Gen Mpembe asked Mr Mathunjwa to help him strategize as to what they would do if the strikers were to refuse to hand in their weapons the following day, whereupon Mathunjwa responded thus:

‘So I don’t have a specific answer what next will happen. Because I believe that tomorrow will be a day of joy for everyone. So I have no point in that direction of negativity of saying people will say no

⁸⁴² Exhibit GGG4 P11/14-16

⁸⁴³ Exhibit GGG4 p 12/16

⁸⁴⁴ Exhibit GGG4 p 12/18

⁸⁴⁵ Exhibit GGG4 p 13/15

violence or whatever, and again when we say weapon what do we mean? Yes pangas and what exactly?’

584.5. Mpembe said ‘and firearms?’ and Mathunjwa replied ‘firearms’.⁸⁴⁶

Did Mr Mathunjwa provide an undertaking that the strikers would lay down their weapons at 9H00?

585. We submit that the transcript of the debriefing session shows that while he came across as being optimistic (and maybe overly so) Mr Mathunjwa never gives SAPS an unequivocal undertaking that at 9H00 the strikers would lay down their weapons. He said expressly that he did not have a specific answer as to what will happen the next day, but he was optimistic that the next day will be a day of joy.

586. In his evidence before the Commission Mr Mathunjwa explained that he informed the SAPS generals that the strikers invited him to come back the next day because it was getting late. He was to find out the next day whether or not they agreed to disarm and disperse.⁸⁴⁷

587. Mr Mathunjwa was cross examined extensively on the alleged discrepancy between this evidence and the contents of his statement where he stated that “...the workers had been receptive to the proposal that they return to work...”⁸⁴⁸ He testified that his statement clearly conveyed his optimism that the workers

⁸⁴⁶ GGG4 680 Lines 6-10, 13-20. p 681/14-16. p 682/15-18, line 22. Page 683/15-19

⁸⁴⁷ Day 23 p 2440/1-6

⁸⁴⁸ Exhibit NN, para 54

would favourably consider the request. However this optimistic comment did not amount to an undertaking.⁸⁴⁹

588. This explanation accords with Maj Gen Annandale's evidence. He testified that Mr Mathunjwa informed them that the strikers wanted to spend another night on the koppie but that negotiations would again commence at 9H00 the next morning.⁸⁵⁰ Maj Gen Annandale testified categorically that Mr Mathunjwa did not provide an undertaking but that he did appear confident that the strikers would disarm and disperse.⁸⁵¹

The concerns of Maj Gen Mpembe about bloodshed if there was to be a clash between SAPS and the strikers

589. In the briefing session with the union leaders and in the subsequent debriefing sessions, Maj Gen Mpembe repeatedly referred to the possibility (even probability) of bloodshed if SAPS was to try to disarm the strikers. This is evident from the following comments:

589.1. "We are faced with a situation where we do not want to be seen as a police service that is brutally killing its people".⁸⁵²

⁸⁴⁹ Day 23 p 2446/7- p 2447/4

⁸⁵⁰ D83 p 8792/2-5

⁸⁵¹ D84 p 9710/11-25

⁸⁵² Exhibit OO4 p 2/10-12

589.2. "We are policing in a democracy where negotiation is a weapon not bloodshed".⁸⁵³

589.3. "We do not want to be seen as a country that is killing its own people".⁸⁵⁴

589.4. "It is going to be bloodshed".⁸⁵⁵

589.5. "I cannot go there and disarm people. There will be bloodshed".⁸⁵⁶

589.6. "Beating this elephant bit by bit because me going there to the mountain to disarm people it is going to be bloodshed. It is going to be bloodshed".⁸⁵⁷

590. In explaining these comments, Maj Gen Mpembe testified in chief that he did not actually believe that there would be bloodshed if the police went in to disarm and disperse.⁸⁵⁸ He said that he made these statements as part of a strategy to convince the union leaders to take the matter seriously when they went to their members. However under cross examination Maj Gen Mpembe conceded that he foresaw the possibility of strikers shooting at the police and police

⁸⁵³ Exhibit OO4 p 2/10-12

⁸⁵⁴ Exhibit OO4 p 3/9-10

⁸⁵⁵ Exhibit GGG4 p 3/6

⁸⁵⁶ Exhibit GGG4 p 5/29-30

⁸⁵⁷ Exhibit GGG4 p 6/8-10

⁸⁵⁸ D p 11397/5-23

shooting at strikers. He said however that he did not foresee bloodshed on the scale that it ultimately happened at Marikana.⁸⁵⁹

591. Maj Gen 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.

The NMF meeting

The Extraordinary Session

592. It is now common cause that the decision that the strikers would be removed from the Koppie on 16 August was taken not by the operational commanders on the ground in Marikana, but rather by the Provincial Commissioner and 'endorsed' by the SAPS leadership that met after the meeting of the National Management Forum in Midrand on the evening of 15 August 2012.

593. What we know about the 'extraordinary session' of the NMF which took this decision is limited.⁸⁶⁰ It appears that SAPS deliberately attempted to withhold from the Commission information about this meeting. No mention of the meeting or of the decision was disclosed in Exhibit 'L' or on the SAPS hard

⁸⁵⁹ Day 111 p 11904/3-19

⁸⁶⁰ At 4:33 pm on Sunday 26 October 2014, the day before these heads of argument were due, we received some responses from SAPS to the interrogatories about the Extraordinary Session of the NMF that were sent at the instance of the Chairperson. It has not been possible, in the time available, to address these interrogatories. We will do so in our heads of argument in reply.

drive. The existence of the meeting and the decision was drawn to the attention of the evidence leaders by a third party, and it was only after the evidence leaders specifically made enquiries about this meeting in terms which made clear that they were aware of the decision that had been taken, that SAPS finally disclosed the minute of the extraordinary session.

594. The minute is Exhibit ‘**JJJ177**’. It says very little. The terms of the minute appear to have been settled by the National Commissioner herself⁸⁶¹ and state merely the following :

‘The National Commissioner opened the meeting and requested the Provincial Commissioner North West, Lieutenant 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.’

595. When questioned above the meeting on her recall in September 2014, the National Commissioner was of very little assistance. She claimed to have almost no memory of what was discussed at the meeting. What is clear from her evidence is that –

⁸⁶¹ Reference to Phiyega’s recall evidence

- 595.1. The hope that Mr Mathunjwa would be able to persuade the strikers to leave the Koppie when he met with them at 9 o'clock in the morning was raised at the meeting;⁸⁶²
- 595.2. Gen Phiyega claims that the meeting was not told of the impossibility of implementing the existing encirclement plan after 9 o'clock in the morning;⁸⁶³
- 595.3. It is possible that the details of the plan to disarm the strikers were discussed at that meeting, but Gen Phiyega cannot recall whether this took place;⁸⁶⁴
- 595.4. Gen Phiyega denied that the meeting endorsed the proposal for Gen Mbombo without knowing what the details of the operation were;⁸⁶⁵
- 595.5. She suggested that there must have been a discussion in which an assurance was sought that the risk of bloodshed had been adequately considered and that measures were in place to ensure that any blood shed would be kept to a minimum.⁸⁶⁶
596. The Provincial Commissioner was equally vague about what transpired at the extraordinary session of the NMF on 15 August. However she did confirm that

⁸⁶² Phiyega, p 37402, line 21 – p 37403 line 6

⁸⁶³ Phiyega, p 37405, lines 16 - 20

⁸⁶⁴ Phiyega, p 37408, lines 5 - 12

⁸⁶⁵ Phiyega, p 37417, line 23 to p 37418, line 2

⁸⁶⁶ Phiyega, p 37418, line 21 to p 37419, line 6

after the extraordinary session she informed Maj Gen Annandale, Maj Gen Mpembe and Maj Gen Naidoo of the decision that the strikers were to be disarmed on the next day.⁸⁶⁷ The telephone records of Maj Gen Mbombo confirm that she had called these three generals immediately after the extraordinary session of the National Management Forum meeting.⁸⁶⁸ They all claimed that they were not informed by the Provincial Commissioner of the decision to disarm the strikers⁸⁶⁹ but this evidence must be rejected. It is inconceivable that the Provincial Commissioner would have called all three of the senior generals at Marikana in the immediate aftermath of the extra-ordinary session of the NMF but would have failed to inform any of them that a decision had been taken at that meeting that they were going to have to disarm the strikers within the next 24 hours. As we note below, the evidence to the contrary of Maj Gen Annandale, Maj Gen Mpembe and Maj Gen Naidoo is more likely to be the legacy of what seems to have been a co-ordinated original attempt by SAPS not to disclose that the decision to disarm the strikers on 16 August was taken at the extraordinary session of the NMF.⁸⁷⁰

⁸⁶⁷ Mbombo, p 21573 , line 11 to p 21576, line 20

⁸⁶⁸ Exhibit 'LLL3'

⁸⁶⁹ See Mpembe Day 149 p 17044/11 – 17950/21 (note: pages 17044 and 17950 are marked pp 94 and 100 in some versions of the transcript of Day 149) Annandale Day 82 p 8662/2-7 Naidoo Get reference

⁸⁷⁰ This apparent conspiracy to mislead the Commission is discussed in some detail below from para 599.

The telephone calls after the NMF meeting

597. The telephone records of the Provincial Commissioner also show that she spoke to Mr Mokwena of Lonmin at 20:16:26 on the 15th August, which would have been shortly before the extraordinary session of the National Management Forum⁸⁷¹, and that she also spoke to Mr Graeme Sinclair of Lonmin shortly after the extraordinary session.⁸⁷²

598. Apart from Mr Mokwena and Mr Sinclair, the only other people to whom the Provincial Commissioner spoke between 8 p.m. on Wednesday and 6.15 a.m. on Thursday were senior police officers.⁸⁷³ It is likely that the intention to remove the strikers from the Koppie on Thursday the 16th was conveyed to Lonmin by the Provincial Commissioner in her call to Mr Sinclair. Lonmin had always intended to coordinate its ultimatum to the strikers with the police action because it did not want to force strikers to return to work at a date before it was confident that the police would have resolved the situation.⁸⁷⁴ From the SAPS side, the Provincial Commissioner made clear in her meeting with Mr Mokwena on 14 August that she wanted such co-ordination⁸⁷⁵ and at her press conference at 9h30 on the morning of Thursday 16 August, she clearly anticipated that Lonmin had already issued their ultimatum to striking workers.⁸⁷⁶ This was, in

⁸⁷¹ Exhibit 'WWWW4'

⁸⁷² **Get reference.**

⁸⁷³ **Get reference.**

⁸⁷⁴ Mokwena, p 38187, lines 15 – 25 read with page 38184, line 12 to page 38185, line 9

⁸⁷⁵ Exhibit JJJ192 p 5/13 – p 8/12.

⁸⁷⁶ See Exhibit HHH40 p 4/21-4 where she stated at the press conference: 'and I'm supposing and I'm hoping that Lonmin management have issued a statement that says people should come back to work and we are therefore [inaudible] that tomorrow they [inaudible]'

fact, correct - by 6:29 a.m. on Thursday the 16th August, Mr Monroe had conveyed to Lonmin executive managers that the ultimatum had to go out.⁸⁷⁷ That suggests that by 6:29 a.m. on Thursday the 16th August, Mr Munroe was aware of the SAPS decision to take action against the strikers later that day. Mr Mokwena suggests that Mr Munroe would have learnt from this decision from Mr Sinclair who reported to him.⁸⁷⁸

Concealment of the extraordinary session of the NMF

599. SAPS appears to have attempted to conceal the fact that the decision to disarm the strikers on 16 August had been taken (or 'endorsed') the night before at the extraordinary session of the NMF on 15 August. Thus:

599.1. SAPS did not disclose the minute of the extraordinary session of the NMF until the fact of the decision had been independently discovered by the evidence leaders and a specific request for the minute of the extraordinary session had been addressed to SAPS.⁸⁷⁹

599.2. The SAPS presentation, Exhibit L, made no mention of the extraordinary session of the NMF. Despite the fact that it was shown to both Gen Phiyega and Gen Mbombo before it was released to the Commission,⁸⁸⁰ neither of them said that it should refer to the

⁸⁷⁷ Exhibit 'WWWW3' Email from Mark Munroe to Barnard Mokwena and others, 6:29 a.m. 16 August 2012.

⁸⁷⁸ Mokwena, p 38193, line 11 to page 38194, line 5

⁸⁷⁹ **Get reference**

⁸⁸⁰ **Get reference**

extraordinary session of the NMF so that the Commission could know the true facts of the decision making process.

599.3. Prior to the evidence leaders' disclosure that they had independently discovered the decision at the extraordinary session of the NMF, none of the senior SAPS officers with knowledge of that decision had seen fit to disclose it in their statements.⁸⁸¹

599.4. Gen Phiyega did not disclose the decision of the extra-ordinary session in the testimony that she gave in March and April 2013 before the evidence leaders had independently learnt of it.⁸⁸² In cross examination, she disclosed that after the NMF meeting she had met with the Provincial Commissioners and the Divisional Commissioner and Deputy National Commissioner for Operations but she concealed the fact that the decision to disarm the strikers the following day had been taken at this meeting.⁸⁸³

599.5. The version initially advanced by SAPS in the Commission was, instead, the false version that the decision to move to phase 3 of the plan and to disarm the strikers was taken only on 16 August at the 13h30 JOCCOM and had been prompted by an escalation of the

⁸⁸¹ The closest that one comes to any such disclosure is the statement made by Gen Mbombo in November 2012 that while she was attending the NMF meeting she 'took the opportunity to apprise the National Commissioner of the situation in Marikana and that if negotiation efforts fail I shall instruct members to disperse, disarm and possibly arrest the protestors.' Exhibit GGG5 p 7 para 18.

⁸⁸² Annandale Day 79 p 8455/11-15 Day 86 p 9085/6-22, Day 87 p 19197/15 – p 19198/7

⁸⁸³ Phiyega Day 74 pp 7397-7947 at p 79431/1 - 7943/4 in particular.

risks of violence breaking out if the strikers were not disarmed.⁸⁸⁴

After the falseness of this version had been exposed it was disavowed by Counsel for SAPS who stated:

‘... as far as SAPS’ case is concerned, there was going to be a stage 3 if the arms were not voluntarily surrendered by 9 o’clock as promised. That’s our case. That there is evidence different is a different point.’⁸⁸⁵

599.6. However, prior to the disavowal of this version, SAPS had already attempted to support it with real evidence manufactured after the event. Thus, consistent with the original false version

599.6.1. the ‘minute’ of the 06h00 JOCCOM prepared at Roots and disclosed to the Commission by SAPS as Exh TT4 made no mention of announcement at that meeting that this was ‘D-Day’⁸⁸⁶ and instead suggested that phase 3 of the plan would be implemented only if the situation escalated,

599.6.2. the reverse engineered ‘plan’ produced by SAPS and passed off as a true reconstruction of the actual plan of

⁸⁸⁴ Mkhwanazi Day 30 p 3172/3-9; Annandale Day 78 pp 8324-8327 and p 8667/2 – 8668/22 p 8671/7 – 8674/1; Mpembe Day 111 p 11950/7 – 11951/7 and Day 112 p 11960/15-25; Statement of Gen Mpembe Exhibit HHH3 paras 23 and 25. Scott Day 128 p 13483/7-16

⁸⁸⁵ Day 136 p 14483/2-5

⁸⁸⁶ Compare p 1 of the contemporaneous notes of the meeting in Exhibit JJJ168 which were first disclosed to the Commission more than a year after it was established.

16 August 2012,⁸⁸⁷ also suggested that phase 3 was implemented on the basis of 'current information' that the threat had escalated,⁸⁸⁸

599.6.3. the expert engaged by SAPS had been briefed on the basis of this reverse engineered plan,⁸⁸⁹ and had not been informed of the decision taken at the NMF – he only learnt about the NMF decision when this was informally disclosed to him in circumstances that he described as follows:

*'I remember being at a place for a meeting and meeting a third person just for the first time there and who in conversation over a coffee divulged that information and it was new to me.'*⁸⁹⁰

599.6.4. a 2 October 2012 draft of Exhibit L⁸⁹¹ which included a television clip⁸⁹² of the Provincial Commissioner's 9h30 press conference on 16 August which made clear that by 9.30 the decision had already been taken that the

⁸⁸⁷ See Mkhwanazi Day 31 p 3285/3-8

⁸⁸⁸ Exhibit SS3 p 85 Slide Heading 'Current Information'

⁸⁸⁹ The document disclosed by Mr de Rover as the copy of the plan that had been furnished to him was the file 'Ops Platinum 16 August 2012 Stage 3.pptx.' which was the source file for the last 4 pages of Exhibit SS3. See Scott Day 134 p 14164/17 – p 14165/15. Get reference to exhibit number of de Rover's plan

⁸⁹⁰ De Rover Day 285 p 36927/1-4

⁸⁹¹ Exhibit JJJ157

⁸⁹² Exhibit JJJ88

strikers were to be disarmed later that day was replaced by 10 October 2012 with a different clip⁸⁹³ that did not include the crucial words *'today we are ending this matter'*.⁸⁹⁴

⁸⁹³ Exhibit JJJ87

⁸⁹⁴ See generally Scott Day 136 p 14391/14 to 14405/6

THURSDAY 16 AUGUST: BEFORE THE OPERATION MC

Knowledge of the NMF decision and the D-Day announcement at the JOC

600. By the time of the JOCCOM at 6 a.m. on 16 August, the operational leadership at Marikana must have been made aware of the decision taken at the previous night's meeting of the extraordinary session of the National Management Forum. Although none of the individual officers involved admitted as much, Maj Gens Annandale, Mpembe and Naidoo, must have been informed of this decision by the Provincial Commissioner when she spoke to them after the "extraordinary session". There is no reason to doubt the evidence of the Provincial Commissioner in this regard. The fact of the calls that she made to the three General is confirmed by the cell phone records.⁸⁹⁵ Given that the decision was taken at the NMF "extraordinary session", and that she spoke to the three Generals shortly after the decision was taken, it is most unlikely that she would not have informed them of the decision which they would have to implement the following day.

601. The fact that a decision to take action on that day had been communicated to the operational leadership is reflected in the handwritten notes of the 6 a.m. JOCCOM. The first note taken by Captain Moolman states '*D-Day*'.⁸⁹⁶

⁸⁹⁵ Exhibit 'LLL3'.

⁸⁹⁶ Exhibit 'JJJ168', p 2

602. That the decision of the “NMF extraordinary session” had been communicated to the operational commanders is also reflected in the statement of Captain Ntlati who reports that –

*‘We were briefed by Lieutenant Col Scott in the presence of Brig Pretorius. During the briefing we were informed that the National Management instructed that the Police must act against the armed strikers as they have to be disarmed and dispersed’.*⁸⁹⁷

603. Col Scott denied making the statement attributed to him by Capt Ntlati (at p 14387, lines 128), but whether he heard it from Col Scott or from some other source, Capt Ntlati’s knowledge of the decision taken at the NMF level reflects the fact that this had been communicated to police officers at Marikana on 16 August.

The evidence that bloody conflict was anticipated

604. It must have been clear to the Commanders on the ground at Marikana who were going to have to implement the decision taken the previous night, that there was a high risk of bloodshed.

⁸⁹⁷ Exhibit ‘JJJ179’, p 2, para 3

- 604.1. At his meeting with the union leaders the night before, Maj Gen Mpembe had expressly identified the high risk of bloodshed if the SAPS were to intervene on the 16th.⁸⁹⁸
- 604.2. The intelligence report that was before the JOCCOM at the 6 a.m. meeting, indicated that the strikers would not peacefully relinquish their weapons and were likely to resist any attempt to disarm and disperse them.⁸⁹⁹
- 604.3. Quite aside from the intelligence report, this is what any reasonable police officer would have anticipated having regard to the conduct of the strikers earlier in the week.
- 604.4. That a bloody confrontation was anticipated by at least some senior members of the SAPS is evidenced by the fact that 4 000 additional rounds of R5 ammunition were ordered for delivery to Marikana by either Brig Calitz or Col Merafe,⁹⁰⁰ and that attempts were made by Col Madoda and Col Classens at the instance of Brig van Zyl Engelbrecht to procure the attendance of four mortuary vehicles (which would have provided for the removal of sixteen corpses).⁹⁰¹

⁸⁹⁸ Exhibit GGG4.

⁸⁹⁹ Exhibit 'TT5'.

⁹⁰⁰ Merafe Day 217 p 26693/20 – 26694/9 and Exhibit JJJ186. The version of Col Merafe is denied by Brig Calitz at Day 156 17655/3 – p 17662/7

⁹⁰¹ Exhibit HHH66, Exhibit HHH67, Exhs JJJ180 to JJJ184, Exhibit JJJ193 In the event the mortuary department could only spare one vehicle which arrived at Marikana shortly after 1 pm.

The unviability of the encirclement plan and the unavailability of an alternative

605. Quite apart from the risk of bloodshed inherent in any attempt to remove the strikers from the koppie, there was a particular conundrum facing the SAPS. The only plan they had designed to remove the strikers was one that was no longer capable of being implemented on 16 August if Mr Mathunjwa was going to be given the opportunity to attempt to resolve the matter peacefully by meeting with the strikers at 9 a.m. As set out above, the encirclement plan designed by Lt Col Scott with assistance from Col Merafe and other POPS officers on the night of Monday 13th and early morning of Tuesday 14th was a plan that had to be implemented before a large number of strikers had congregated at the koppie.⁹⁰²

606. There is some dispute as to whether the encirclement plan was formally abandoned at the 6 a.m. JOCCOM and replaced with the “disperse and disarm” plan at that meeting, or whether this only took place between the 6 a.m. JOCCOM and the 1.30 special JOCCOM. The evidence overwhelmingly suggests the latter :

606.1. Lt Col Scott’s evidence is that for the full period between 16 August and the Roots workshop, he had recalled the discussions about difficulties with the encirclement plan taking place only on Thursday 16th itself after the 6 a.m. JOCCOM.⁹⁰³

⁹⁰² Scott, Day 135 p 14365, line 14 to p 14366, line 10

⁹⁰³ Scott, Day 134 p 14246 and p 14250, line 25 to p 14251, line 8

606.2. The notes of the 6 a.m. JOCCOM make no mention of any shift in the tactical plan. This would be most unlikely if the meeting had taken a decision as important as to change the tactical plan. They also referred to the tactical option as 'encirclement' and describe the barbed wire Nyalas as the 'encirclement group'. All of this is consistent with the original encirclement plan and inconsistent with the "disperse and disarm" plan.⁹⁰⁴

606.3. On the night of Thursday 16th, Lt Col Scott attempted to reverse engineer the planning process that had taken place over the three days that culminated in the tragedy. The presentation that he produced is consistent with the tactical plan having been changed between the 6 a.m. JOCCOM and the 1.30 JOCCOM, and inconsistent with the suggestion that it had been changed by 6 o'clock. Thus the presentation (Exhibit 'JJJ50') contains the following slides :

606.3.1. Slide 9, which still describes the encirclement plan under the heading 'Operational Overview';

606.3.2. Slide10, which describes the Phase 3 deployment as 'encirclement';

⁹⁰⁴ Exhibit 'JJJ168', pp 26 and 27

606.3.3. Slide 13, which describes the POP Nyalas with razor wire trailers as 'the encirclement group' and provides for two different encirclement groups, one proceeding from forward holding area 1 and the other from forward holding area 2, as was contemplated in the original encirclement plan.

606.4. The next document produced in the immediate aftermath of the tragedy was the presentation 'Nascom media briefing' (Exhibit 'JJJ110'). This document was a revised version of Exhibit 'JJJ50' and was last saved at 8:12 a.m. on the morning of Friday 17 August. Although it included certain revisions from 'JJJ50', it left intact all of the slides on 'JJJ50' that were inconsistent with the decision to replace the tactical phase having been taken at the 6 a.m. JOCCOM.⁹⁰⁵

606.5. The next revised version of this document was the file 'Ops Platinum 16 August' which is Exhibit 'JJJ43' and was last saved at 3:26 p.m. on the 19th August. It, too, retained all of the slides from Exhibit 'JJJ50' which were inconsistent with the suggestion that the tactical plan had changed at the 6 a.m. JOCCOM. It also introduced a new slide which made clear that the plan was revised at 14h00 on 16

⁹⁰⁵ Exhibit 'JJJ110', slides 8, 9 and 11-13

August. Thus, slide 12 of Exhibit 'JJJ43' records the Phase 3 deployment as being 'encirclement', before slide 13 states :

'The plan was revised at 14h00 on 16 August to protect SAPS and the media by deploying the barbed wire between the protestors and the SAPS safe area.'

606.6. The next version of the presentation was a version saved on 20 August at 20h03 under the file name 'Marikana Master 1.PPTX' (Exhibit 'JJJ101A'). It, too, was consistent only with the decision to revise the tactical plan as having been taken between the two JOCCOM meetings.⁹⁰⁶

606.7. The SAPS presentation to the Minister (Exhibit 'JJJ41') that was last saved on 21 August 2012 at 11h46 under the heading 'President Zuma. PPTX' (Exhibit JJJ102B1)⁹⁰⁷ has the same features and is consistent only with the decision to change the tactical plan having been taken between the two JOCCOMs.

606.8. Later on 21 August, Lt Col Scott revised his Marikana Master 1.PPTX presentation and saved it again at 14h19 on 21 August 2012. Despite making several changes to the document, he

⁹⁰⁶ See Exhibit 'JJJ101A', slides 14, 16, 17, 18, 19 and 20.

⁹⁰⁷ See Record, p 14527, lines 11-21

retained the slides that made clear that the encirclement plan was changed only at the 1h30 JOCCOM.⁹⁰⁸

606.9. The barbed wired Nyalas that deployed on the morning of 16 August, did so 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 they would have deployed if they had followed the ostensible deployment instructions relating to the disperse and disarm tactical plan.⁹⁰⁹

606.10. Col Makhubela, who was in charge of the barbed wire trailers on 16 August, indicated in his first statement after the tragedy, that he understood the tactical plan still to involve the encirclement of the Koppie with his barbed wire trailers.⁹¹⁰

606.11. The contemporaneous operational diary of Capt Prinsloo, who was the Commander of Nyala 2, also reflects the fact that when she deployed she was deploying in accordance with instructions for the encirclement plan.⁹¹¹

606.12. The extraordinarily haphazard process by which the Commanders in the field were briefed on the new plan, also suggests strongly that

⁹⁰⁸ Exhibit 'JJJ101B', slides 24, 28 and 30

⁹⁰⁹ Exhibit 'L', slides 149 and 152 and Exhibit 'JJJ91'.

⁹¹⁰ Exhibit 'GGG9', para 2. See also the statements of Constable Thebetsile, 'JJJ62', Constable Mooketsi, 'JJJ61' and Constable Segweleya, 'JJJ164'.

⁹¹¹ Exhibit 'JJJ114'.

the new plan had not been in place for any length of time before that briefing occurred. If the “disperse and disarm” plan had been adopted at the 6 a.m. JOCCOM, it is highly unlikely that an officer as competent and efficient as Lt Col Scott would have failed to prepare any written briefing documents in the seven hours between the conclusion of that meeting and the briefing of the Commanders in the field at 2h30 p.m.

606.13. Finally, there are several obvious flaws in the “disperse and disarm” plan that we discuss below. For present purposes we merely make the submission that some of these flaws are so obvious that if Lt Col Scott had had a reasonable opportunity to reflect on the tactical plan, he would have identified them and would have taken some of the obvious steps to remedy them.

The Provincial Commissioner’s press conference

607. At 9h30, the Provincial Commissioner held a press conference in which she made clear that SAPS would move in to disperse and disarm the strikers later in the day if they did not voluntarily disarm. Her words were the following:

‘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.*⁹¹²

608. Following the Press Conference she amplified her media statement in an interview with eNCA where she said:⁹¹³

'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'

609. By 9h30, therefore, the SAPS had announced to the world that they intended to disarm the strikers in the course of the day. This gave the lie to the version initially advanced by SAPS at the Commission, namely that there was no pre-ordained intention to implement phase 3 on 16 August but that it had become unavoidable by 1:30 pm because of an escalation of violence in the course of the morning.⁹¹⁴ It was a truth which SAPS accordingly sought to conceal from the Commission. Thus

609.1. Exhibit L was edited to remove footage of the Provincial Commissioner stating '*What I told you is today we are ending this matter*'; and

⁹¹² Exhibit HHH40 read with Exhibit AAA13

⁹¹³ JJJ92 at 0:08 and 0:38.

⁹¹⁴ Exhibit L, Slide 133. Exhibit L Slide 174 3rd bullet. Day 280 p8657/11- p8663/25

609.2. Maj Gen Annandale implausibly claimed in his testimony that, at the press conference, he did not understand the Provincial Commissioner in making this statement to mean that the SAPS had already decided to proceed to phase 3 if the strikers did not voluntarily disarm.⁹¹⁵

The meeting between Lonmin and Mr Mathunjwa

610. Mr Mathunjwa spent the first part of the morning of the 16th in a meeting with Lonmin. He testified that the purpose of the meeting was to agree about the reporting process for workers should they decide to return to work.⁹¹⁶ Mr Mathunjwa testified that Mr Kwadi indicated that he needed to caucus with his management team. He then left the AMCU people alone for about 40 minutes.⁹¹⁷ Mr Mathunjwa testified that while Mr Kwadi was away, he bumped into Mr Seedat.⁹¹⁸

611. Mr Kwadi states that during the meeting, Mr Mathunjwa asked that Lonmin “give him something” to take to the striking workers.⁹¹⁹ Mr Kwadi stated that he was under the impression that Mr Mathunjwa meant that Lonmin should allow AMCU to negotiate on behalf of the workers.⁹²⁰

⁹¹⁵ Annandale Day 82 p 8646/9 – p 8647/14

⁹¹⁶ Day 22 p 2331/21-25

⁹¹⁷ Day 22 p 2332/3 – p 2333/4

⁹¹⁸ Day 22 p 2333/3-14

⁹¹⁹ Exhibit KK

⁹²⁰ Para 9.1 to 9.2

612. The transcript of this meeting (exhibit OO13) reveals the following:

612.1. Lonmin took the stance that the company could not afford to pay the R12 500 that the RDOs were demanding.⁹²¹ It also maintained that it would not engage with AMCU on behalf of the strikers as it had an agreement with AMCU only on issues at Karee mine, whereas the RDOs who were on strike were not only from Karee but were from all over Lonmin.⁹²²

612.2. Mr Mathunjwa raised a concern that Lonmin would use AMCU to go and call off the strike and then, at the end of the day say that they have a recognition agreement in place and that NUM is the majority union.⁹²³

612.3. Mr Kwadi states that he was under the impression that the meeting was about how people return to work. He stated that the procedure for return to work is not complicated, people must merely report for duty at the shafts and then the shaft will arrange shaft induction.⁹²⁴

612.4. Mr Mokwena stated that in relation to the 'first part' of what Mr Mathunjwa spoke about, he did not have a mandate to deal with it.⁹²⁵

⁹²¹ Exhibit 0013 p699 Line 16-26

⁹²² Exhibit OO13 p695/20-27

⁹²³ Exhibit OO13 p693/12-30

⁹²⁴ Exhibit OO13 P694/11-15

⁹²⁵ Exhibit OO13 p 694/18-20

612.5. Mr Kwadi then put to Mr Mathunjwa that what he was saying was that AMCU will go to the mountain on condition that Lonmin guarantees that it will negotiate with AMCU on the demands of the people.⁹²⁶ Mr Mathunjwa agreed with this.⁹²⁷

612.6. Mr Kwadi then pointed out that AMCU only has an agreement with Lonmin in respect of Karee mine. The RDO's were however from all over Lonmin. For this reason Lonmin could not agree to Mr Mathunjwa's proposal.⁹²⁸

612.7. Mr Mathunjwa stated that he would go to the mountain only if he was guaranteed a place in a central forum which deals with RDO's issues across Lonmin's Marikana operations.⁹²⁹

Initially Mr Mathunjwa gave a false account of the discussion

613. It is immediately apparent that in his statement and in his evidence in chief Mr Mathunjwa gave an account of the meeting which is completely at odds with what appears from the transcript.

⁹²⁶ Exhibit OO13 p 695/12-16

⁹²⁷ Exhibit OO13 p 695/17-19

⁹²⁸ Exhibit OO13 p 695/20-27

⁹²⁹ Exhibit OO13 p 696/1-5

614. Furthermore, during cross examination on behalf of Lonmin, it was put to Mr Mathunjwa that what he conveyed to Lonmin management on 16 August was that he wanted an undertaking that if the workers went back to work and there was a discussion on wages, AMCU wanted to be part of that discussion.⁹³⁰ Mr Mathunjwa responded by saying that this was not correct.⁹³¹
615. Once he was shown the transcript of the meeting⁹³² Mr Mathunjwa conceded that it is true that AMCU wanted to be part of the solution.⁹³³ Mr Mathunjwa testified that he wanted to be part of the forum to discuss wages since the strike was outside the formal structures.⁹³⁴
616. We submit that whether or not Mr Mathunjwa was referring to the proper bargaining structures or a parallel central forum, his concessions are at odds with his earlier account of the meeting with Lonmin.
617. We submit that Mr Mathunjwa was not candid with the Commission in his initial testimony and that he was seeking to turn the situation to the advantage of AMCU by demanding to be recognised as a bargaining partner in the wake of the strike. Ultimately, however, this demand was rendered redundant because he was unable to get the workers off the koppie.

⁹³⁰ D24 P2551/11-15

⁹³¹ D24 P2551/21

⁹³² Exhibit OO13

⁹³³ D24 P2555/12-15

⁹³⁴ D24 P2566/18-20

The discussion with Mr Seedat

618. It is common cause that during the morning of 16 August, Mr Mathunjwa and Mr Seedat had a brief discussion. The content of this discussion is however hotly contested between the parties.

619. Mr Seedat testified that he and Mr Mathunjwa had a short “banter” and exchanged cell phone numbers.⁹³⁵ According to Mr Seedat, during the discussion Mr Mathunjwa told him that if he was given a place at the bargaining table he would get the strikers off the *koppie*.

620. During cross examination on behalf of AMCU, it was put to Mr Seedat that he misunderstood Mr Mathunjwa and that what Mr Mathunjwa was referring to was not a place at the bargaining table but that a separate central forum be established in order to negotiate the RDO demand.⁹³⁶

621. This version that was put to Mr Seedat is however inconsistent with the contents of Mr Mathunjwa’s statement and his evidence before this Commission. In his statement⁹³⁷ Mr Mathunjwa gave an account of his meeting with Mr Seedat. He stated the following:

“Whilst Mr Kwadi was away, I saw Mr Mohammed Seedat, a director of Lonmin. I knew Mr Seedat from when he was a chief executive at BHP

⁹³⁵ Day 293 p 38385/3-17

⁹³⁶ Day 293 p 38389/7-12

⁹³⁷ Exhibit NN

Billiton. We greeted each other. I advised Mr Seedat of the situation at the mine and we exchanged telephone numbers.”

622. Significantly, in his statement Mr Mathunjwa did not mention any discussion about bargaining, whether in the recognised structures or in a central committee.
623. In his evidence Mr Mathunjwa testified that he and Mr Seedat only spoke about the strike and the violence. He stated that the issue of bargaining was never mentioned or discussed between them on that day.⁹³⁸
624. We submit that in view of the fact that AMCU did not challenge Mr Seedat’s evidence that one of the issues touched on during the brief discussion between him and Mr Mathunjwa was bargaining, this Commission ought to make a finding that bargaining was discussed on the day.
625. Once such a finding is made, it stands to reason that Mr Mathunjwa’s version of what transpired falls to be rejected because he stated categorically in his evidence that bargaining was not discussed.
626. We submit that, on this basis, Mr Seedat’s version that Mr Mathunjwa indicated that he would get the people off the mountain if he was given a place at the bargaining table, must be upheld.

⁹³⁸ Transcript Day 22. 2333/21-25. 2334/1-15. Transcript Day 24 2571/7-8

Did Mr Mathunjwa try to manipulate the situation to get a place at the bargaining table? And if so, can he be faulted for doing so?

627. A question which arises is whether Mr Mathunjwa attempted to manipulate the situation in order to obtain bargaining rights which he did not have at Lonmin.

628. We submit that the evidence does suggest that Mr Mathunjwa attempted to exploit the situation to entrench AMCU's position at Lonmin. This is evident from the following:

628.1. His casual comment to Mr Seedat that if he will get the people off the mountain in return for a place at the bargaining table;

628.2. His request to Mr Mokoena to call a meeting of all stakeholders including AMCU when Lonmin received the demands of the strikers, so that the matter could be discussed;⁹³⁹

628.3. When he first arrived at LPD on the morning of 16 August the first thing he asked was why AMCU was not invited to the press conference whereas NUM was;⁹⁴⁰

628.4. During his discussion with Lonmin on the morning of the 16th, Mr Mathunjwa made the following statements:

⁹³⁹ Transcript Day 24 2538/16-25. 2539/1-25. 2540/1-25. Exhibit NN para. 12, 13,15,16 and 17. Exhibit 0010. Exhibit 0012. 24 2541/1-25. 24 2542/1-25. 2543/1-25. 2544/1-25

⁹⁴⁰ Statement of Mr Mathunjwa; Exhibit NN; paras 56 and 57

“Give me something to take to the koppie;⁹⁴¹ ‘I will go to the mountain on condition that I gets some kind of a guarantee that Lonmin will negotiate with AMCU on the demands of the strikers’, ‘I will go to the mountain only if AMCU is guaranteed a place in the central forum’;⁹⁴² “Give me a place at the bargaining table and I will get the workers off the koppie.”⁹⁴³

628.5. During their addresses to the strikers at the *koppie*, AMCU officials said:

‘AMCU will be part of the demand of the strikers as AMCU is the trade union that the strikers wanted to be represented by’;⁹⁴⁴

‘AMCU was not saying that Lonmin must engage with the strikers, but that it must engage with AMCU who will be acting on behalf of the strikers’;⁹⁴⁵

‘We are with you comrades, we will support you my brothers because we are a trusted organisation, and at all times we will remain trustful to you, an organisation that will not lie to you.’ ‘We are an organisation for employees’. ‘Comrades we will fight this as AMCU.’ ‘We cannot turn back and not fight for you. We will be

⁹⁴¹ Exhibit KK 48 paras 9.1-9.2

⁹⁴² Exhibit 0013 695 Line 22-30. 696 Line 1-5

⁹⁴³ Exhibit 0014 para 5.1

⁹⁴⁴ Exhibit 0013. Exhibit 0013 695 Line 12-19

⁹⁴⁵ Exhibit 0013 693, 694,695

with you at all times. By so doing comrades as AMCU, we have come to support you.’ ‘Will be with you in everything’⁹⁴⁶

‘In order to win the war you will need a strategy: this you must leave it to the leaders. It will take your cause forward’⁹⁴⁷;

‘AMCU as a registered trade union can look into your demand once you have returned to work’; ‘AMCU does not want people to be killed but rather that their demands are met’⁹⁴⁸.

629. However, this attempt by AMCU to exploit the situation to its advantage does not mean that AMCU should be held morally or legally responsibility for the tragedy of 16 August. The evidence clearly suggests that, irrespective of his reasons for doing so, Mr Mathunjwa did everything in his power to convince the workers to disarm and return to work.

The shift to phase 2 of the plan

630. In keeping with the decision that Thursday 16 August was going to be D-Day, it was decided at the 6:00 JOCCOM to move to phase 2 of the plan. This involved the introduction of barbed wire Nyalas into the field both as a pre-positioning for phase 3 and as a precautionary measure so that the SAPS

⁹⁴⁶ Transcript Day 25 2664/1-12. 2664/13-22

⁹⁴⁷ Exhibit 009 15

⁹⁴⁸ Exhibit NN para 74

could draw a barbed wire cordon between themselves and the strikers if there was an imminent threat of an attack by the strikers.

631. The barbed wire Nyalas took position in the field from 10:34 eTV time⁹⁴⁹ to 10:44 eTV time. Although they were supposed to position themselves in accordance with the markings on the gridded map reproduced as slide 149 of Exhibit L, they instead positioned themselves closer to the koppie on the line that had originally been intended as the line along which they would encircle the koppie.⁹⁵⁰

632. The deployment of the barbed wire Nyalas provoked an angry response from the strikers. The JOC OB states that at 11:20 Brig Calitz gave a situation report that Mr Noki had aggressively asked SAPS to remove the barbed wire Nyalas and had stated that he would not ask again.⁹⁵¹ This report seems to refer to an incident that took place around 10:50 eTV time, because Mr Noki can be seen returning to the strikers at the koppie from the direction of Papa 1 at 10:52 eTV time, apparently in a state of some agitation.⁹⁵²

The scramble to prepare a new tactical plan

633. Immediately after the 6:00 JOCCOM meeting, Lt Col Scott was tasked to assist Brig Fritz and Brig Tsiloane to prepare the application for the cordon

⁹⁴⁹ Exhibit JJJ11.1497.

⁹⁵⁰ Exhibit 'L', slides 149 and 152 and Exhibit 'JJJ91'.

⁹⁵¹ Exhibit FFF25 Entry 998 16 August 11:20.

⁹⁵² Exhibit JJJ58.372 – the video begins at 10:52:25 eTV time.

and search operation that was to form phase 6 of his plan.⁹⁵³ Lt Col Scott prepared a presentation in support of the application for a cordon and search warrant. That presentation was saved at 8:54 am on 16 August.⁹⁵⁴

634. It seems most likely that it was only after Lt Col Scott had completed this presentation that it occurred to him and other officers in the JOC that the encirclement plan that had, up to that point, been the plan for phase 3 of the operation, was not going to be capable of implementation later than day. Lt Col Scott testified that *'for many months'*⁹⁵⁵ or at least *'up to Roots'*⁹⁵⁶ he had recalled that it was only on the morning of Thursday 16th that the difficulties of implementing the encirclement plan had been identified. At some stage at Roots, or later, he apparently became convinced that these difficulties had already been identified on the Wednesday.⁹⁵⁷ But this belated memory of the events was probably incorrect. Apart from the fact that Lt Col Scott's original memory post Marikana was that the difficulties of the encirclement plan were identified only on the Thursday, all of the probabilities support the correctness of this memory. In particular, if the difficulties had been identified on the Wednesday, it is difficult to explain

634.1. Why no work began on the details of a new phase 3 plan as soon as the 6:00 JOCCOM had been completed (or at least after the

⁹⁵³ Scott Day 128 13479/17 – 13481/3

⁹⁵⁴ Exhibit JJJ48.

⁹⁵⁵ Scott Day 134 p 14246/7-9.

⁹⁵⁶ Scott Day 134 p 14251/6-8.

⁹⁵⁷ Scott Day 134 p 14246/7-9.

Provincial Commissioner's 9:30 press conference), given that it was by then clear that phase 3 would have to be implemented later that day if the strikers did not consensually leave the koppie.

- 634.2. Why Lt Col Scott, as the chief planner in the SAPS team, was sent to assist Brig Fritz and Brig Tsiloane with the application for a cordon and search operation immediately after the JOCCOM meeting when, if the difficulties in the phase 3 encirclement plan had already been identified, there was a pressing need for the chief planner to be working on a new plan for phase 3;
- 634.3. Why no documents were prepared with details of the new proposed phase 3 plan; and
- 634.4. Why Lt Col Scott cannot recall what he was doing on the morning of 16 August after he completed the cordon and search presentation.
635. When these improbabilities were put to Lt Col Scott by the Chairperson,⁹⁵⁸ he could not offer any explanation for them and conceded that it was possible that the difficulties with the encirclement plan were first identified on the morning of 16 August.⁹⁵⁹

The details of the new plan

⁹⁵⁸ Scott Day 144 p 15967/5 – 15974/24

⁹⁵⁹ Scott Day 144 p 15972/19-21

636. Figure 3 below is a graphical representation of the new phase 3 plan. The details of the plan were the following:⁹⁶⁰

- 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

⁹⁶⁰ Exhibit HHH20 pp 81-90 para 13

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-up 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 residence of that settlement and to stop 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.⁹⁶²

⁹⁶¹ Exhibit L slide 147. Vermaak

⁹⁶² Exhibit L slide 146. Exhibit JJJ72 Supplementary Statement of Brig Fritz p 3 para 4.1.

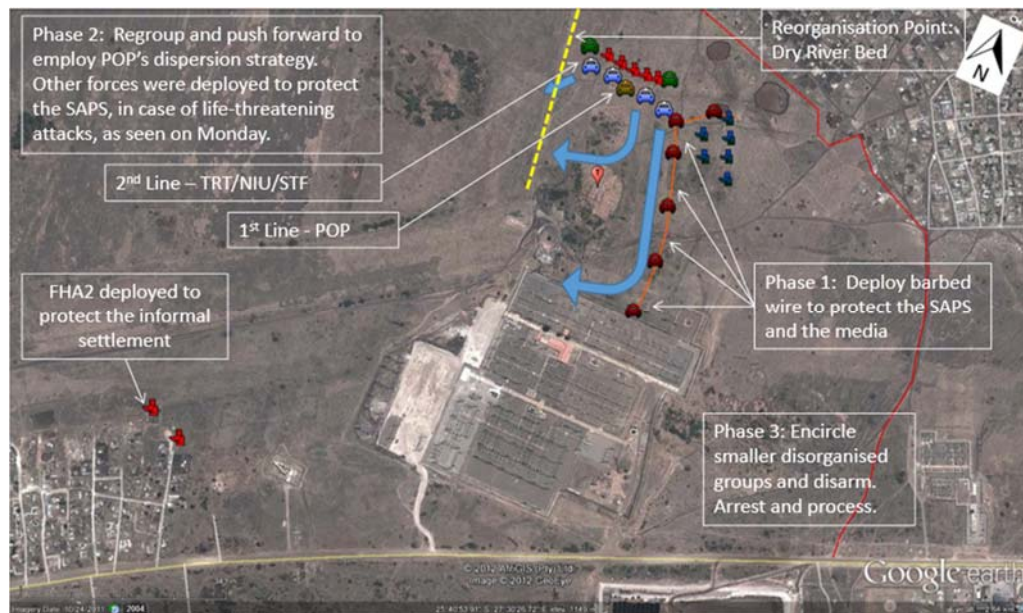


Fig 3: Phase 3 Plan of 16 August (Source: Exh L Slides 181 and 229)

The obvious weaknesses in the plan

637. There were a number of obvious weaknesses in the tactical plan that Lt Col Scott put together in the short time period available to him prior to the 1h30 JOCCOM meeting :

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.⁹⁶³ However, the

⁹⁶³ Scott Day 137 p 14561/15 to p 14566/12.

technical difficulties of rolling-out barbed wire from trailers attached to Nyalas precluded the possibility of a simultaneous roll-out.⁹⁶⁴ 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 1h30 JOCCOM, this obvious shortcoming of the plan was never pointed out to Lt Col Scott.⁹⁶⁵

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.⁹⁶⁶

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

⁹⁶⁴ Calitz Day p 14248/10 – p 17250/15 and Day 156 p 17702/10 – p 17703/8.

⁹⁶⁵ Scott Day 135 p 14317/22 – p 14318/2.

⁹⁶⁶ Calitz Day 155 p 17415/1-10.

*my mind I, at that time, if we were going to go now to Phase 3, its 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 roll-out 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.'*⁹⁶⁷

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,⁹⁶⁸ and the video

⁹⁶⁷ Scott Day 137 p 14563, lines 9 - 20

⁹⁶⁸ Merafe Day 219 p 26921/9-18

evidence that the appearance of the barbed wire Nyalas in the morning of 16 August 2012 did elicit an aggressive response from Mr Noki.⁹⁶⁹

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.⁹⁷⁰

637.3. The next major shortcoming of the plan was the failure to provide any detail for dealing with Koppie 3.⁹⁷¹

637.3.1. The plan contained detailed provisions for clearing Koppies 1 and 2 and for driving the strikers off the Koppies in a westerly direction. It then required the police forces to regroup at a reorganisation line on the dry river bed between Koppies 1 and 2 to the east and Koppie 3 to the west.

637.3.2. Given the geography of the area, this created a substantial likelihood that strikers fleeing from the police

⁹⁶⁹ Exhibit FFF25 Entry 998 16 August 11:20 and Exhibit JJJ58.372 – the video begins at 10:52:25 eTV time.

⁹⁷⁰ White Day 251 p 31675/16 – p 31679/5

⁹⁷¹ Scott Day 137 p 143636/7 – p 14647/14

operation at Koppies 1 and 2, would gravitate to Koppie 3, either to hide from the police or to regroup in an area where they would have some protection. This likelihood was increased because, to the knowledge of SAPS, strikers had been moving between Koppies 1 and 2 and Koppie 3 throughout the week.

637.3.3. But at that point, the plan ran out and left everything to the discretion of the operational Commander, Brig Calitz, possibly assisted by an aerial Commander, Brig Fritz.

637.3.4. Koppie 3 with its rocks and bushes that provide hiding places, is difficult terrain to clear. Yet the plan contained no directions as to how specific units were to proceed at Koppie 3, and everything would depend on the directions of an Operational Commander who, inevitably, would not be able to see what was going on inside Koppie 2 and would be guided only by instructions he might receive from his eye in the sky, Col Vermaak, or the aerial Commander, Brig Fritz, over a radio system which had already been shown to be extremely unreliable.

637.3.5. So if the tragedy at Scene 1 is explicable in terms of the first two shortcomings of the plan described in the subparagraphs above, the tragedy at Scene 2 was predictable in terms of this shortcoming of the plan.

638. A last failure of the plan was the failure of the SAPS to anticipate the difficulties that were encountered with radio communications and to plan around these difficulties so that, at the very least, there would be a reliable system in place to ensure that the commanders of the operation in the field and in the JOC could communicate with each other if the need arose.

638.1. We argue below that the communication difficulties encountered on the day have been deliberately exaggerated by SAPS in an attempt to excuse the inexplicable failure of Brig Calitz and Maj Gen Naidoo in the field, Gen Mpembe in the air, and Maj Gens Mbombo and Annandale in the JOC to stop the operation after the disaster that took place at scene 1.

638.2. It is however clear that there were some communication difficulties on the day. These were foreseeable in view of the prior history of radio communication difficulties, and also in the light of the nature of the operation.⁹⁷²

638.3. In the context of an operation which involved hundreds of members whose movements would not always be visible to one another, and which contained a high risk of bloodshed, there would always be a need for a reliable channel of communication between commanders. SAPS ought therefore to have taken steps in advance to minimise

⁹⁷² And see also the evidence of Mr White as to the predictability of such difficulties: In large public order operations, problems with radios arise very frequently. This was a foreseeable problem in an operation such as the one which took place at Marikana. Exhibit JJJ178 para 7.4.

communication difficulties between commanders. This could have been done relatively simply by

638.3.1. Providing each commander with two handheld radios, one to be used on the general channel and the other to be used on a different channel and only by commanders,⁹⁷³ or

638.3.2. By having a protocol in place for commanders to communicate with each other by cell phone if the need arose.⁹⁷⁴

⁹⁷³ According to Col Scott, there was a back-up channel available. See Scott Day 138 p 14766/20 – 14770/24. SAPS have not explained why this back-up channel was not used to keep the JOC aware of what had taken place.

⁹⁷⁴ Exh JJJ178 Statement of Gary White p 107 para 7.4.3.

The move of Nyala 6 and the change to the geography of the plan

639. The shortcomings of the plan described above were aggravated by the redeployment of Nyala 6 shortly before midday. Col Vermaak's photographs of the morning show groups of strikers congregating directly opposite Nyala 6.⁹⁷⁵ Hearing that Nyala 6 might be isolated in its original position, Maj Gen Allandale directed it to move from a position north of Koppie 2 to a position south of the small kraal. This movement had the inadvertent consequence of opening up the route of the strikers from the Koppie to Nkaneng, and thus subverting the logic of the plan which was to screen the strikers off from Nkaneng and to force them to move in a westerly direction off the Koppies.⁹⁷⁶ Thus, even as the barbed wire started to roll-out, strikers who were leaving the Koppie voluntarily, chose to move along the main path to Nkaneng which had been opened by the redeployment of Nyala 6.⁹⁷⁷

The meeting at the koppie at midday (TL)

The Mood at the Koppie

640. According to Mr Mathunjwa, there was a massive police presence at the koppie. There were armoured vehicles, some with barbed wire. The police were carrying assault rifles. The engines of the hippos were idling. The police

⁹⁷⁵ Exhibit L 160.

⁹⁷⁶ Scott Day 135 p 14329, line 22 to p 14334, line 25. See also : Exhibit 'L', slide 181 and Day 280 p8283/5-10 p 8290/19 and p 11651- p 11655

⁹⁷⁷ Exhibit 'L', slide 193. , slides 193 and 197 Exhibit JJJ10. 4540.

vehicles were moving around.⁹⁷⁸ According to Bishop Seoka, there was frantic movement at the command centre followed by more helicopters taking off into the air⁹⁷⁹. Mr Mathunjwa testified however that when he arrived at the koppie at about 12h00 or thereafter 12h00, the crowd (strikers) was calm, and the atmosphere was calm.⁹⁸⁰

The speeches of the other AMCU leaders

641. The AMCU organiser, Mr Nkalitshani, introduced Mr Mathunjwa and the General Secretary Mr Mphahlele. He told the strikers that they, as AMCU were with the strikers all the time, because they were an organisation that was loyal and trustworthy all the time, and that would never lie to them and would support them.⁹⁸¹ If something that did not go well, AMCU would tell it as it is and not would not lie, so that a strategy could be worked on, and a resolution reached. Employers were oppressing workers together with the NUM that was celebrating 30 years of oppression of workers. But they, as AMCU, would fight for them.

642. In his address, Mr Mphahlele told the strikers that they had come to convey to them the employer's response and to discuss it with them, and to support them. Success was not achieved overnight, there was a long way to go. It was not easy, but they would reach their destination.

⁹⁷⁸ Exhibit NN para 73 & 74. Transcript Day 22 p2344/16-25

⁹⁷⁹ Exhibit M. 3 & 4 paras 11-13

⁹⁸⁰ Transcript Day 22 p2346/3-12. 2351/16-17

⁹⁸¹ Exhibit CC7

The speech of Mr Mathunjwa

643. Mr Mathunjwa had the difficult task of informing the strikers that management was not committing to engage on their demand once they went back to work.⁹⁸² He told them that during the Mpembe briefing of the 15th Lonmin, in the presence of AMCU, NUM and the SAPS Generals, undertook to engage on the workers' demands if they went back to work, that it would listen to the workers' concerns, discuss them, and reach a solution. But because that morning NUM was not present, Lonmin's position was that there was nothing that it was going to say to AMCU. The workers must come back to work, and if they did not, the police would take over. He said that in the circumstances, they needed wisdom and a strategy to deal with the situation. AMCU was a registered union and would fight for the rights of workers. It had attorneys, it obeyed the law and the Constitution. Painful as it was, he was appealing to them to defuse the bomb that had been set by Lonmin and NUM and disperse.
644. He said that by talking to the employees and giving them the increase of R12 500, Lonmin had set a precedent which entitled AMCU to demand to re-open the negotiations and for Lonmin to engage with it on the striker's demand. If it refused, AMCU would be entitled to approach the Commission for Conciliation, Mediation and Arbitration (CCMA). If there was no resolution at the CCMA, AMCU would obtain a certificate of non-resolution and the workers could go on a protected strike.⁹⁸³ He warned the strikers that staying on the

⁹⁸² Transcript Day 22 2356/9-25. Transcript Day 22 2357/1-19

⁹⁸³ Exhibit NN para 74

koppie would lead to more bloodshed. He went down on his knee and begged the strikers to disperse in order to avoid the bloodshed.⁹⁸⁴

The speeches of the strike leaders

645. After Mr Mathunjwa's address, six strikers responded to his speech. The thrust of what they said was that they were not going to leave the koppie until Lonmin came to the koppie to address them.

646. They expressed disappointment that the employer did not come at 09h00 that morning to address them.⁹⁸⁵ They were adamant that they would not leave the koppie until management came to address them.⁹⁸⁶ They said that they were prepared to die at the koppie⁹⁸⁷ because in any event, each and every person who was working in the mine, was a soldier, and was waiting to die anytime. They could not be afraid of the police as they were going to kill them, and they had already killed them, and that they must continue to kill them.⁹⁸⁸

647. They lamented the fact that black policemen had been brought in to kill black people. They warned the police to 'sign' and take a decision, so that they could see what was going to happen in an hour's time. The strikers were going to climb on top of them and eat them, and they (those who had signed) will eat the strikers. That from that day onwards, Lonmin would never have other workers

⁹⁸⁴ Transcript Day 22 2358/1-5

⁹⁸⁵ Exhibit ZZZZ9 Protestor 2 Exhibit CC14

⁹⁸⁶ Exhibit ZZZZ9 Protestor 4 Exhibit CC16

⁹⁸⁷ Exhibit ZZZZ9 Protestor 3 Exhibit CC15

⁹⁸⁸ Exhibit ZZZZ9 Protestor 1 Exhibit CC13

other than them (strikers).⁹⁸⁹ They said it was either them (the strikers), or the police⁹⁹⁰. The policemen who came from the homelands who had been brought there, would be left there, as they would not be able to get into this hippo. They (the strikers) were going to finish them there at the koppie, and they must leave the koppie.⁹⁹¹

648. The strikers were in high spirits when the meeting broke up. They sang the song *'How can we kill the NUM: we hate the NUM'*. They were dancing and clicking weapons.⁹⁹²

The removal of the POPS camera operators

649. According to SAPS, at 13h25 on 16 August 2012

'Capt Dennis Adriaio, the police's media liaison officer, informed both of the video operators of the SAPS that a journalist had reported to him that the video operators of POP who were in civilian clothing, were identified as 'police spies' by the protestors and might be killed if they remained in the general media group. Capt Adriaio informed the video operators of POP about the information. Based on this information, they withdrew from the scene and returned to the JOC.'⁹⁹³

⁹⁸⁹ Exhibit ZZZZ9 Protestor 2 Exhibit CC14

⁹⁹⁰ Exhibit ZZZZ9 Protestor 5 Exhibit CC17

⁹⁹¹ Exhibit ZZZZ9 Protestor 6 Exhibit CC18

⁹⁹² Exhibit CC19

⁹⁹³ See Exhibit L, slide 170.

650. The two video operators were W/O Masinya and W/O Ndlovu. W/O Ndlovu stated that at about 13h30 he was withdrawn from the koppie by Capt Adriaio 'because the workers identified me as a police spy [and] they wanted to kill me.'⁹⁹⁴ He said that Capt Adriaio had asked them if they were from SAPS and W/O Masinya had said that they were.⁹⁹⁵ Capt Adriaio then said that '[y]ou're being identified too as police spies and you should withdraw from this place as the miners said they wanted to kill you.'⁹⁹⁶ W/O Masinya stated that they then went back to the JOC.⁹⁹⁷

651. On 20 July 2012 Gen Phiyega had issued a national instruction titled 'Public Order Policing (POP): Use of Force during Crowd Management'.⁹⁹⁸ Paragraph 3.3 instructs that 'POP Operational Commanders must ensure that video footage is taken of the crowd throughout the phases and including during the use of minimum force.' Gen Phiyega was asked in cross examination whether she found the excuse put forward in Exhibit L, slide 170, for the withdrawal of the video operators and the resultant absence of video material recorded by them to be acceptable. She replied that she did.⁹⁹⁹

652. According to the minute of the Special JOCCOM meeting that was held on 16 August 2012 at 13h30,¹⁰⁰⁰ Maj Gen Annandale raised several matters on a

⁹⁹⁴ See Exhibit GGG31, paragraph 6.

⁹⁹⁵ See Exhibit HHH8, paragraph 11.

⁹⁹⁶ Exhibit HHH8

⁹⁹⁷ Exhibit HHH8

⁹⁹⁸ See Exhibit S.

⁹⁹⁹ Day 75, p 8067/3 to /19.

¹⁰⁰⁰ See Exhibit EE.

check list so as to ensure that everything was in place. One of them was enough video operators to capture sequence of events as it unfolded. During his testimony¹⁰⁰¹ Maj Gen Annandale's attention was directed to the criticism by Mr White of the fact that there was no video evidence of the briefings that were given between 14h00 and 15h45, or of the implementation of Stage 3 of the SAPS plan.¹⁰⁰² Maj Gen Annandale explained that he had not been aware that the SAPS video operators had totally withdrawn from the scene, and pointed to the fact that he had arranged through Brig van Zyl to have Lt Col Botha make additional recordings.¹⁰⁰³ When asked who was responsible for ensuring that his instruction was carried out, Maj Gen Annandale said that the two SAPS video operators themselves were responsible for this.¹⁰⁰⁴ When it was pointed out that they were not in the JOCCOM meeting, he said that he assumed that this instruction concerning video operators would be conveyed to them by Lt Col Duncan Scott and Brig Suzette Pretorius during the briefing that was to be given at Forward Holding Area 1.¹⁰⁰⁵

653. In cross examination Maj Gen Annandale testified that he had been informed that the two SAPS video operators had withdrawn just prior to the 13h30 JOCCOM meeting, by way of a telephone call that he received from Capt Adriaio.¹⁰⁰⁶ He agreed that if W/O Ndlovu and W/O Masinya were under threat

¹⁰⁰¹ Day 79, pp 8440/22 to 8441/21.

¹⁰⁰² See Exhibit WW2, paragraph 4.5.4.

¹⁰⁰³ Day 79, pp 8441/22 to 8442/14.

¹⁰⁰⁴ Day 79, p 8442/15 to /24.

¹⁰⁰⁵ Day 79, pp 8442/25 to 8444/12.

¹⁰⁰⁶ Day 83, p 8772/16 to /25.

then they should have moved back towards the police line, where they could be protected, or into a Nyala, and have continued to record from there.¹⁰⁰⁷ It is to be noted that there is no record in the cell phone records of Capt Adriaio having called Maj Gen Annandale at this time.¹⁰⁰⁸

654. Neither Lt Col Scott nor Brig Pretorius stated that they knew that they were responsible for conveying Maj Gen Annandale's instruction concerning video operators to the relevant SAPS members, whether at the briefing at Forward Holding Area 1 or anywhere else. The only instruction on Maj Gen Annandale's check list that Brig Pretorius mentions as being her responsibility was to contact Dirk Botes of Lonmin to arrange for the provision of generators.¹⁰⁰⁹

655. During the course of 14 and 15 August, W/O Justinus Moatlanegi Nong was the driver of the Nyala that contained the SAPS negotiators. He was given a video camera by Brig Calitz, and he recorded footage on those days from inside of the Nyala.¹⁰¹⁰ Lt Col Scott agreed during cross examination that it would have been possible for another SAPS video operator to record footage from within a Nyala on 16 August 2012.¹⁰¹¹

656. 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

¹⁰⁰⁷ Day 83, p 8773/1 to /9.

¹⁰⁰⁸ See Exhibit ZZZZ11.

¹⁰⁰⁹ See Exhibit JJJ187A, paragraph 24.

¹⁰¹⁰ See Exhibit KKK7, par 6. The footage is Exhibits BB5 and BB6.

¹⁰¹¹ Day 130, pp 1380625 to 13807/8.

national instruction that Gen Phiyega had issued on 20 July 2012. Whilst Gen Phiyega found the excuse that was given for the withdrawal of the two SAPS video operators to be acceptable, we submit that that it was plainly not acceptable: all that had to be done to protect the two video operators was to have them retire behind SAPS lines from where they could have carried on with their duties, or inside a Nyala. Whilst Maj Gen Annandale was aware of the need for video operators to record subsequent events at the JOCCOM meeting at 13h30 on 16 August 2012, his failure to ensure that his instructions in this regard were carried out is inexplicable.

The 1.30 JOCCOM

657. The original version put forward by SAPS at the Commission was that the 1h30 JOCCOM was called because tension had escalated at the Koppie and a decision had to be made whether or not to proceed to Phase 3 of the plan, the tactical phase.¹⁰¹² This version was part of a broader version which sought to conceal the fact that the decision to remove the strikers from the Koppie on 16 August had, in fact, been taken the night before at the “extraordinary session” of the NMF. The overwhelming likelihood is that the 1h30 JOCCOM was called because the morning had passed without any sign that Mr Mathunjwa was going to be able to persuade the strikers to leave the Koppie and, if (as decided at the extraordinary session of the NMF) the tactical

¹⁰¹² Insert reference.

phase was to be implemented before the end of the day, time was running out to do that during daylight.

658. It is common cause that details of the tactical phase first emerged in the JOCCOM at the 1h30 meeting.¹⁰¹³ The process emerged in the cross examination of Col Scott as follows :¹⁰¹⁴

MR CHASKALSON SC: ‘... The question was asked by Major-Gen Annandale to the JOCCOM representatives at the outset how we were going to execute phase 3.’ So at that stage how phase 3 was going to be executed was still something that had to be debated.

COLONEL SCOTT: The detail, yes.

MR CHASKALSON SC: ‘To my understanding, clarity was sought on the actual application of the strategy with regards to the implementation, which had not been discussed at that point.’

COLONEL SCOTT: Yes.

MR CHASKALSON SC: So you had a dispersal and disarm strategy, but detail hadn’t entered the picture in the JOCCOM.

COLONEL SCOTT: That’s right.

¹⁰¹³ Scott Day 135 p 14315, lines 20 – 24.

¹⁰¹⁴ Scott Day 135 p 14316/4 to p 14317/21.

MR CHASKALSON SC: 'I asked if I may suggest a course of action, to which I was given the floor to brief the JOCCOM. I explained on the Google Earth satellite photo which I'd printed out for the commanders that morning for the phase 2 deployment where I felt the dispersion should take place, with the different units in their different roles and areas of responsibility. On conclusion, Major-Gen Annandale requested any further inputs and whether the concept was acceptable.' So even at that stage the concept was up for debate.

COLONEL SCOTT: Yes.

MR CHASKALSON SC: 'There were no objections to the operational concept.' So the concept was accepted. Were there any further inputs in relation to the detail that you'd suggested?

COLONEL SCOTT: No, and I think maybe I'm, or we're misunderstanding the operational concept, but the concept, there's the strategy; the strategy was to disperse smaller groups, disarm, etcetera. The concept is now speaking to the, how we're going to do it in broad terms, in other words the direction to where we would want them to go, the stop and reorganize line, how the teams would be lined up and formed up. That's speaking to the concept here. So there was no objection to that concept, which is, it's not down to the lower level detail. There was more detail given at the actual forward holding area 2 briefing, which was more at a tactical level than it was at this level.

659. There were no POPS officers present at the 1h30 JOCCOM.¹⁰¹⁵ The first time that any detail was given to the plan, was at the 1h30 meeting of the JOCCOM where no POPS officers were present.

660. Nobody other than Lt Col Scott gave any detail to the plan at the meeting.¹⁰¹⁶ He was not even aware of the existence of Standing Order 262, the SAPS standing order dealing with public order policing, still less of its particular terms.¹⁰¹⁷

661. The risks inherent in proceeding to the tactical phase on the basis of a hastily worked out plan ought to have been clear to any reasonable police commander. It seems that they were clear to Maj Gen Annandale, because he took the step of instructing Brig Pretorius to record specifically that the instruction to do so had emanated from the Provincial Commissioner.¹⁰¹⁸ This is apparently the origin of what is, to the best of our knowledge, the only entry in the JOC OB recording a decision taken at a meeting of the JOCCOM, namely the late entry recording the decision taken at the 1:30 JOCCOM to move to the tactical phase.¹⁰¹⁹

¹⁰¹⁵ Exhibit 'EE'. Scott Day 135 p 14317, line 22 to page 14318, line 2.

¹⁰¹⁶ Col Scott Day 135 p 14319, lines 12-17.

¹⁰¹⁷ Scott Day 135 p 14319, lines 18-23.

¹⁰¹⁸ Exhibit JJJ187 Statement of Brig Pretorius 29 August 2012 para 13; Exhibit JJJ187A Statement of Brig Pretorius August 2013 para 26.

¹⁰¹⁹ Exhibit FFF25 entry 1015 15h10.

Lt Col Scott's briefing at 2:30

662. Lt Col Scott's 2:30 briefing to the commanders at FHA1 was the first time that they were introduced to the new tactical plan. He did not brief them with any written materials but he referred to the gridded plans that he had handed out during the 06:00 JOCCOM. These plans, however, no longer reflected the situation on the ground because Nyala 6 had been moved South East, thus changing the shape and orientation of the barbed wire cordon and opening up the main road to Nkaneng.¹⁰²⁰

663. Without any written briefing documents, Lt Col Scott briefed the 20 commanders off a single google earth diagram on the screen of his laptop.¹⁰²¹ He sat just inside a Mercedes Vito vehicle so that there was shade over the screen of the laptop. The 20 commanders gathered around the vehicle while he pointed the screen out towards them and explained the plan with reference to the icons on his screen.¹⁰²²

664. The briefing lasted no more than 30 minutes. The commanders, in turn, then had approximately 20 minutes to brief the members under their command. For this second round of briefings, the commanders had no visual aids whatsoever, not even the single slide that Lt Col Scott had used.¹⁰²³

¹⁰²⁰ Scott Day 135 p 14328/25 – p 14337/3.

¹⁰²¹ The electronic file used by Col Scott showed the image reproduced in Exhibit L slide 181 but did not include the text boxes and white arrows present on slide 181.

¹⁰²² Scott Day 135 p 14337/6 – p 14338/25.

¹⁰²³ Scott Day 135 p 14339/6 – p 14340/15.

665. Brig Calitz claimed that clarificatory questions were addressed to Lt Col Scott by commanders at the briefing, but could not recollect what they were.¹⁰²⁴ Whether or not this was the case, is not clear. What is clear is that certain basic features of the plan were not communicated to the commanders. For example,

665.1. Brig Calitz was unaware that Lt Col Scott required the barbed wire Nyalas to roll out simultaneously;¹⁰²⁵

665.2. Col Makhubela, who was in charge of the barbed wire Nyalas, appears still to have thought that the plan was to encircle the koppie with the barbed wire Nyalas and to leave the single opening that had been contemplated for the processing zone under the original encirclement plan;¹⁰²⁶

665.3. If the evidence of Maj Gen Naidoo is to be believed, he and his driver were not aware of any of the viable routes from FHA1 to the koppie, something that would have been essential for the performance of his function in terms of the plan as commander of the reserve medical and fire brigade services;¹⁰²⁷ and

¹⁰²⁴ Calitz p 17247/15-21

¹⁰²⁵ Calitz p 17248/2-18

¹⁰²⁶ Exhibit GGG9 Statement of Col Makhubela September 2012 paras 2 and 6.

¹⁰²⁷ Naidoo p 23095/3 - 23122/2

665.4. From their inability to get around the kraal for 9 minutes after the shootings, the driver and commander of the North West water cannon appear not to have understood the route of the SAPS forces out of the safe area in terms of the plan.¹⁰²⁸

The visit to the koppie by Bishop Seoka

666. Bishop Seoka testified that he arrived at the koppie at about 13h00. The strikers requested that he secure the attendance of the Lonmin management to address them. He then met the Lonmin management to convey the strikers' request. Mr Kgotle said that management would not meet with the strikers as they were criminals and murderers, in that they had killed their people and security personnel¹⁰²⁹ Mr Mokwena asked the Bishop to accompany Lonmin management to the Provincial Police Commissioner and put his proposal.¹⁰³⁰ However, the Commissioner was unfriendly, anxious and uncooperative.

667. Mr Mokwena then told him go back to the koppie and tell strikers that mine management would talk to them only if they surrendered their weapons, elected between five to eight people to represent them, and dispersed from the *koppie*. Just before he left for the *koppie*, someone whispered into Mr

¹⁰²⁸ The NW water cannon can be seen driving in circles behind the barbed wire line trying to get out to the koppies until it finally finds the path around the kraal at CC20 4:24:30 which is eTV time 16:02:09. See for example WWW3 at 2:46 (eTV time 15:58:50) where it can be seen approaching Nyala 3 at the mast driving in an anti-clockwise direction away from the kraal; it then drives in a circle behind the barbed wire before finding itself in exactly the same position at CC22 at 03:56 (eTV 16:01:26).

¹⁰²⁹ Exhibit M. 2 - 3 paras 8 -11

¹⁰³⁰ Exhibit M 3 para 11

Mokwena's ear. He then told the Bishop that he could no longer return to the *koppie*, as that place had been cordoned off and was now a security risk zone. The Bishop then left.¹⁰³¹

668. By refusing to take advantage of the offer by Bishop Seoka to intervene, Lonmin passed up another opportunity to avoid the tragedy that ensued. It chose to focus on its characterisation of the strikers as criminals rather than to address the need for effective engagement with them.
669. Mr Mokwena's statement that mine management would talk to the strikers if they elected between five to eight people to represent, is unconvincing. It is inconsistent with Lonmin's clear pattern of conduct. If there had been any real intention of talking to representatives of the strikers, Lonmin would have conveyed that intention to Mr Mathunjwa.

The attempt by Mr Mathunjwa to meet with Lonmin

670. After Mr Mathunjwa's first address at the koppie on the 16th, he left the koppie at about 13h30 to convey to Lonmin management a message from the strikers that they were aware that management might not have the R12 500 from the start, but that perhaps such a position could be achieved through a process, and over time.¹⁰³²

¹⁰³¹ Exhibit M Paragraphs 3, 8,9-14

¹⁰³² Exhibit NN 23 paras 75

671. He told Mr Kwadi that he wanted to give management feedback. Mr Kwadi told him that management was not prepared to meet with him and that he should give the feedback to the SAPS Generals¹⁰³³. Mr Mathunjwa phoned Mr Seedat, and complained that management was refusing to meet with him to receive feedback from the workers. Mr Seedat said he could not make any commitments but that he would try to contact Lonmin management. He did not revert.¹⁰³⁴
672. Mr Kwadi stated that the telephone call that he received from Mr Mathunjwa concerned a request that that management organise a meeting with SAPS in order that he be granted permission to go to the koppie, and that he had advised Mr Mathunjwa that the area had been declared a police area and was no longer under the control of management.¹⁰³⁵
673. We submit that if it is accepted, which it should be, that Mr Mathunjwa left the koppie after his first address to convey the response of the strikers to Lonmin management, then it cannot be accepted that Mr Mathunjwa called Mr Kwadi merely to organise a meeting with SAPS in order that he be granted permission to go to the koppie. There would be no reason for Mr Mathunjwa want to be granted permission to go to the koppie, when he had come from the koppie with the intention of conveying a message from the strikers to Lonmin management. Mr Mathunjwa's version is the more credible one. It

¹⁰³³ Exhibit NN24 para 79-81

¹⁰³⁴ Exhibit NN 6 para 82

¹⁰³⁵ Exhibit KK 49 para 9.3-9.5

was Lonmin's position during the morning meeting with Mathunjwa that it had a two year agreement in place with the NUM, and would therefore not enter into further negotiations on the strikers' demands.

674. The strikers had now changed position. Their stance had softened. They were now saying that they understood that the salary of R12 500 could be achieved through a process over time. By failing to engage with them, Lonmin passed up another opportunity to avoid the tragedy.

The second speech at the koppie by Mr Mathunjwa

675. By the time that Mr Mathunjwa returned to the koppie for his second speech after 3pm, it appeared that the mood of the strikers at the *koppie* had changed significantly. None of the bravado of the first speeches was evident. The mood was more one of resignation and the strikers were singing a lament in which they were asking: '*What have we done?*'¹⁰³⁶

676. Mr Mathunjwa told the strikers that neither the police nor management had come to receive his message from the strikers, and there was no one to whom he could give a report of what the workers wanted. He pleaded with them to leave the *koppie*. He said that if they did not, the police would kill them¹⁰³⁷. He emphasized that AMCU did not want people to be killed, it rather their demands to be addressed.¹⁰³⁸ He appealed to the strikers to prevent the loss of blood

¹⁰³⁶ Exhibit KKK55 from 08:28

¹⁰³⁷ Exhibit OO Para 87

¹⁰³⁸ Exhibit 00

and to go back to work. He said that they could go back to the table and negotiate, and that would not mean that they had been defeated, just that they were retreating to re-strategize.¹⁰³⁹ He emphasized that a retreat did not mean that they had lost.¹⁰⁴⁰

677. The strikers were unhappy with the contents of what Mr Mathunjwa had reported to them.¹⁰⁴¹ They thanked him for his efforts, and said that he had done everything that he could do, but that he should leave. They said they would remain at the koppie, and the police could come and kill them.¹⁰⁴²

678. Shortly after Mr Mathunjwa had finished his address, groups of strikers started to leave the koppie.¹⁰⁴³

The alleged threats to Nyala 1 on the departure of Mr Mathunjwa

679. According to the Occurrence Book (Exhibit FFF25) the area was relatively calm during the morning. The police nyalas with barbed wire parked in an arced position around the front of the koppie - six barbed wire nyalas with nyala 6 being closest to the koppie. Nyala 6 was moved back to the vicinity of the kraal in order to avoid being isolated in the event of confrontation with those strikers.¹⁰⁴⁴

¹⁰³⁹ Exhibit KKK56

¹⁰⁴⁰ Transcript Day 22 2375/13-25. 2376/1-16 Exhibit KKK55

¹⁰⁴¹ Exhibit JJJ128. OBNR 1006, 1008, 1009, 1010

¹⁰⁴² Exhibit KKK55

¹⁰⁴³ Exhibit JJJ128. OBNR 1011

¹⁰⁴⁴ Exhibit L slides 152 and 160

680. An 11h20 entry in the Occurrence Book records that a group leader asked the police to remove wire and said he was not going to ask them again, and that he was aggressive. This report was clearly from Papa 1 (Col McIntosh) and appears in his statement.¹⁰⁴⁵
681. At 15h40, Brig Calitz gave a command to Col Makhubela to start with the deployment of the barbed wire. When the first nyala started to deploy the barbed wire, one of the representatives came to the front window of the negotiating nyala and stated that the hippos would not leave, they will all die today, and that he would not be returning again.¹⁰⁴⁶

The movement of strikers to and from the koppie along the path to Nkaneng

682. Throughout their occupation of the koppie, the strikers used the path that runs past the mouth of the kraal at scene one to gain access to Nkaneng. On the 16th, up until the time of 'incident 2', SAPS allowed movement to and from the koppie via that path. A number of strikers who had left the koppie after the deployment of barbed wire but ahead of the departure of the 'lead group', managed to leave for Nkaneng using that same path. After Nyala 1 had started rolling out its barbed wire, and while strikers were moving away from the koppie along this path, Nyala 6 moved its position so that it was on the 'SAPS' side of the path.¹⁰⁴⁷ That movement may well have been interpreted

¹⁰⁴⁵ Exhibit HHH 14, par. 22, Exhibit FFF 25, entry 998.

¹⁰⁴⁶ Exhibit HHH 14, par. 26.

¹⁰⁴⁷ Compare the position of Nyala 6 on the kraal side of the path in slide 191 of Exhibit L as Nyala 1 starts to roll out its barbed wire with its position on the SAPS side of the path in slide 193 when Nyala 1 has reached Nyala 2.

by strikers as an indication that SAPS was happy for them to go back to Nkaneng along the path.

THURSDAY 16 AUGUST: SCENE 1

The rolling out of the Barbed Wire Nyalas and the Movement of the Strikers

683. The roll out of the barbed wire proceeded as follows (all times have been converted to eTV times):

683.1. Nyala 1 started to roll out its barbed wire shortly before 15:42:35.¹⁰⁴⁸

683.2. By 15:46:28, strikers were already moving off koppie 1 in large numbers.¹⁰⁴⁹

683.3. By 15:46:40 Nyala 2 was rolling out its barbed wire.¹⁰⁵⁰

683.4. Nyala 2 reached Nyala 3 at 15:46:58.¹⁰⁵¹

683.5. Less than a minute later, Nyala 4 started moving away from Nyala 3 and closer to Nyala 5.¹⁰⁵² It was still, however, a significant distance to the south of the mast.

¹⁰⁴⁸ Exhibit JJJ11.1514

¹⁰⁴⁹ Exhibit JJJ194.009 at 0:01.

¹⁰⁵⁰ This is the eTV time corresponding to 16:09:09 on the Rowland Headgear camera (Exhibit KKK9). At 16:09:09 Nyala 2 comes into shot, already trailing its barbed wire.

¹⁰⁵¹ Exhibit KKK9 at 16:09:27.

¹⁰⁵² It can be seen already moving towards Nyala 5 at Exhibit JJJ194.010 at 0:01 which is eTV 15:47:51

- 683.6. By 15:48:27 Mr Noki was leading the strikers off the koppie.¹⁰⁵³ By 15:48:56 he had passed the mast.¹⁰⁵⁴ By 15:49:27 all but four of the 'lead group' of strikers had passed the mast.¹⁰⁵⁵
- 683.7. Nyala 3 started rolling out its barbed wire and moving away from Nyala 2 at eTV 15:50:08.¹⁰⁵⁶
- 683.8. Nyala 3 reached Nyala 4 at a position some distance south of the mast at eTV 15:50:22.¹⁰⁵⁷
- 683.9. By this stage most of the 'lead group' of strikers had already moved around Nyala 5 and Nyala 5 was slowly moving back into the SAPS zone.¹⁰⁵⁸
- 683.10. At approximately 15:50:24 Maj Gen Naidoo called Brig Calitz. The call continued for 119 seconds.¹⁰⁵⁹
- 683.11. In the meantime,

¹⁰⁵³ Exhibit JJJ194.011 at 0:06.

¹⁰⁵⁴ Exhibit JJJ194.011 at 0:35.

¹⁰⁵⁵ Exhibit JJJ194.012 at 0:22.

¹⁰⁵⁶ Exhibit KKK9 at 16:12:37.

¹⁰⁵⁷ Exhibit KKK9 at 16:12:51.

¹⁰⁵⁸ Nyala 5 is the Nyala visible in the left of the shot and already passed by the strikers at the start of Exhibit JJJ194.013. 0:00 on Exhibit JJJ194.013 is eTV 15:50:22.

¹⁰⁵⁹ Exhibit MMM4

683.11.1. Nyala 3 and Nyala 4 moved off together, and they both stopped with Nyala 3 at the mast at 15:50:52,¹⁰⁶⁰ and

683.11.2. by 15:50:50 Nyala 5 had moved some distance south of the lead group and had stopped within the SAPS zone.¹⁰⁶¹

683.12. At 15:51:26 Nyala 4 started to deploy its barbed wire and moved away from Nyala 3 at the mast.¹⁰⁶²

683.13. Nyala 4 reached the West edge of the kraal at 15:52:03.¹⁰⁶³ 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.¹⁰⁶⁴

683.14. Neither of the water cannons had, by this point, moved from their starting positions in the SAPS vehicle area to the south of the SAPS zone.¹⁰⁶⁵

¹⁰⁶⁰ Exhibit KKK9 at 16:13:21.

¹⁰⁶¹ Nyala 5 is the Nyala whose trailer is visible in the right of the shot at 0:02 of Exhibit JJJ194.014 and which is thereafter visible to 0:06 of the clip. 0:02 of the clip is eTV 15:50:50.

¹⁰⁶² Exhibit CC38 at 15:56:48.

¹⁰⁶³ KKK9 at 15:14:32

¹⁰⁶⁴ The strikers can be seen moving past Nyala 6 at JJJ194 in an easterly direction from 0:03 to 0:07 of JJJ194.15 (eTV 15:31:42 to 46).

¹⁰⁶⁵ See the NW Water Cannon video, CC20 at 16:14:42 (eTV 15:52:01) which shows that both the NW Water Cannon and the Jhb Water Cannon were both still in their starting positions at that point. See also Exhibit UUUU10.4 Annexure V3 Presentation on the Use of the Water Cannon which shows that the first water was shot long after Nyala 4 reached the kraal.

683.15. No teargas or stun grenades had been used by SAPS by this point.¹⁰⁶⁶

There was no incident 1

684. The video evidence shows conclusively that there was no 'Incident 1' as claimed in Exhibit L.

684.1. The lead group of strikers did not surge forward towards Nyala 4 trying to enter the SAPS zone at the mast as depicted in slide 197 read with slide 196 of Exhibit L. They moved around Nyala 5 on a path that skirted the notional perimeter of the SAPS zone.¹⁰⁶⁷

684.2. Moreover, all but four strikers in the lead group had moved around the mast by 15:49:27.¹⁰⁶⁸ This was more than a minute before Nyala 4 reached the mast at 15:50:52.¹⁰⁶⁹

¹⁰⁶⁶ Exhibit UUUU10.5 Annexure V4 - Video presentation on the use of tear gas and stun grenades at and around Scene 1. That no stun grenades were used prior to 15:53:30 is clear from the audio feed on the Infra Red video from the Flir Camera (CC38). When this audio feed is played at high volume, stun grenades and the TRT volley are both audible. The first sound that could be a stun grenade comes at 15:58:55 (eTV 15:53:33). Allowing just under 3 seconds for the sound to travel approximately 880m from the kraal to the position of the Flir camera (See Exhibit EEEE21.1) this would put the first stun grenade at no earlier than 15:53:30. This is also confirmed by the Rowland Headgear Camera KKK9 which is trained on the kraal almost continuously through the relevant period and which shows stun grenade and teargas smoke clearly. The first stun grenade or teargas smoke to appear on KKK9 is at 16:15:59 which is eTV 15:53:30 and would appear to be the same stun grenade that is audible on the Flir IR video feed at 15:58:55.

¹⁰⁶⁷ Exhibit UUUU10.3 Annexure V2(a) Animated presentation of movement of the strikers from 0:00 to 10:45

¹⁰⁶⁸ Exhibit JJJ194.012 at 0:22.

¹⁰⁶⁹ Exhibit KKK9 at 16:13:21.

685. The video evidence is confirmed by Lt Col Vermaak, who had an aerial view of the strikers and so was better placed to describe their movement than any of his SAPS colleagues on the ground.¹⁰⁷⁰

686. The photograph that SAPS used in Exhibit L ostensibly to show 'Incident 1' does not show strikers attempting to move into the SAPS zone ahead of Nyala 4. The Nyala in the photograph is Nyala 5, and the photograph shows strikers having moved around Nyala 5 to skirt the perimeter of the SAPS zone a substantial distance to the north of Nyala 4.¹⁰⁷¹

There was similarly no Incident 2 as described in Exhibit L

687. The video evidence also shows that there was no Incident 2 as described in Exhibit L. As has been pointed out in para 683 above (which contains the relevant references to the record and exhibits)

687.1. The strikers moved slowly around Nyala 5 and in the direction of the point where the path to Nkaneng passes the West edge of the kraal.

687.2. SAPS did not use any teargas or stun grenades against the strikers before they were cut off by Nyala 4

687.3. The water cannons had not even left their starting positions by the time that Nyala 4 cut off the strikers.

¹⁰⁷⁰ Exhibit OOO17; Vermaak Day 206 p 25472/4 – p 25473/8

¹⁰⁷¹ See Exhibit UUUU10.3 Annexure V2 at 08:52.

688. The absence of teargas, stun grenades or water cannon at 'incident 2' was put to Brig Calitz in cross examination on the basis of the video evidence provided by the Rowland Headgear Camera, Exh KKK9.¹⁰⁷² SAPS were invited to traverse the issue in re-examination if they found any basis to dispute that the Rowland Headgear Camera footage showed that there were no stun grenades or teargas used at 'incident 2'.¹⁰⁷³ They did not do so.

689. The video evidence suggests that it highly unlikely that any shots were fired by the strikers at the SAPS members or vehicles in this process. The 'evidence' of bullet damage to Papa 5 produced by SAPS in slides 201 and 202 of Exh L is misleading. The videos of Papa 5 arriving at Marikana on 15 August show that all of the damage in question was already there before 16 August.¹⁰⁷⁴ SAPS have offered no explanation as to how this damage, which was already present on 15 August, came to be passed off as damage caused by strikers on 16 August.

The calling up of the TRT

690. Brig Calitz testified that the instruction to the TRT to form the basic line was given by the TRT commanders.¹⁰⁷⁵ He said that he did not see the basic line form.¹⁰⁷⁶

¹⁰⁷² Calitz 18335/13 – 18344/24

¹⁰⁷³ Calitz 18339/1 – 18343/15 and 18344/11-21.

¹⁰⁷⁴ See the Evidence Leaders' presentation in Exhibit JJJ194.

¹⁰⁷⁵ Day 155 p 17574/7-16

¹⁰⁷⁶ Day 155 p 17575/2-4

691. Lt Col Claassen testified that when his unit initially arrived at Marikana, they were briefed by Capt Kidd. The briefing was however very succinct and merely told him that he was to be based with Maj Gen Naidoo at FHA1.¹⁰⁷⁷ The second briefing was by Maj Gen Naidoo, who merely informed them that they were there as back-up to POP and that they should only act if something went wrong. The first comprehensive briefing the TRT received was when Lt Col Scott briefed them at 14H30 at FHA1.¹⁰⁷⁸
692. The briefing by Lt Col Scott was that the role of TRT was to give backup to POPS, to assist them with the dispersal, arrest and encirclement of the crowds after they had been dispersed into smaller groups. Furthermore, that TRT was to sweep the smaller koppie.¹⁰⁷⁹
693. Lt Col Claassen said that he could not remember whether it was specifically part of the briefing that TRT should form a basic line. However, he testified that it would have been best to form a basic line in order to perform their function of supporting POP.¹⁰⁸⁰
694. Capt Loest testified that once the TRT arrived at the koppie, the TRT commanders received a further briefing from Brig Calitz. He said that Brig Calitz informed them that the members would at some stage get an instruction to form a basic line and that they were to support POP. If the protestors were to break

¹⁰⁷⁷ Day 236 p 29590/17 – p 29591/6

¹⁰⁷⁸ Day 236 p 29592/1-3

¹⁰⁷⁹ Day 236 p 29592/11-15

¹⁰⁸⁰ Day 236 p 29592/16-22

through and the TRT stood their ground they would not get an instruction to shoot.¹⁰⁸¹ When they arrived at the koppie on 16 August, the members of the TRT met for a briefing in the SAPS 'safe area' in front of his car. The gathering of TRT members is reflected in the photograph marked as JJJ10.4540.¹⁰⁸²

695. Lt Col Claassen testified that he heard Brig Calitz say 'TRT move in'. The TRT members then started running towards the kraal where they formed a basic line to support the POP members.¹⁰⁸³ Capt Loest testified that while he could not recall Brig Calitz instructing the TRT to move in (he testified that he had 'blanks in his memory');¹⁰⁸⁴ as far as he knew, he issued the command for the TRT to form the basic line because he could see from behind him that the protestors were trying to outpace the nyala and to get into the SAPS safe zone.¹⁰⁸⁵ Capt Thupe confirmed that they moved in on the instruction of Capt Loest.¹⁰⁸⁶

696. Lt Col Claassen testified that, as per the briefing, he understood that they were supposed to move into the gap between nyala 6 and the kraal in order to support POP on the other side of the barbed wire.¹⁰⁸⁷ The briefing that they had earlier received was that they were supposed to move through this gap and go forward to sweep koppie 2. Lt Col Claassen testified that he was never informed

¹⁰⁸¹ Day 229 p 28313/3-23

¹⁰⁸² Day 236 p 29476/16 – p 29478/10

¹⁰⁸³ Day 236 p 29478/10

¹⁰⁸⁴ Day 229 p 28440/9-14

¹⁰⁸⁵ Day 229 p 28317/1-5

¹⁰⁸⁶ Day 227 p 27949/19-22

¹⁰⁸⁷ Day 236 p 29480/5-11

of any change in the plan in terms of which nyala 6 was not going to be positioned in that manner.¹⁰⁸⁸

697. Capt Thupe testified that his understanding of the briefing by Lt Col Scott was that the basic line was to form after the barbed wire had been rolled out. Lt Col Claassen agreed with this testimony and indicated that this was in the context of the barbed wire being rolled out until nyala 6.¹⁰⁸⁹

698. Lt Col Claassen testified that they moved away from the position where the briefing took place when they saw nyala 4 reach the south western corner of the kraal.¹⁰⁹⁰ When they formed the basic line they intended to form the line parallel with the road between the shack and the kraal (but a bit away from it to make room for POP).¹⁰⁹¹ He said that he and the other TRT commanders decided where the TRT should form the basic line because, in terms of the briefing, they were supposed to be behind the POP members.¹⁰⁹² However, no one gave a specific instruction as to where they should form up. They stopped where they ultimately were because they were behind a number of POP units.¹⁰⁹³

¹⁰⁸⁸ Day 236 p 29600/1-14

¹⁰⁸⁹ Day 236 p 29593/13-23

¹⁰⁹⁰ Day 236 p 29492/7-19

¹⁰⁹¹ Day 236 p 29482/20-23

¹⁰⁹² Day 236 p 29592/11-15

¹⁰⁹³ Day 236 p 29601/5-22

The Movement of the Strikers from the Western Edge of the Kraal and the Failure of SAPS to Block the Channel down the Eastern Edge of the Kraal

699. As indicated above, Nyala 4 had reached the kraal by 15:52:03. Once it did so, there was only one route that the strikers could take if they intended to enter into the SAPS zone – that was to come around the kraal and move down the channel at the side of the kraal between eastern edge of the kraal and the fence surrounding the shack opposite the kraal.

700. As illustrated in Fig 4 below, there were two points at which this route could have been closed off by the SAPS: the first was the mouth of the channel between the north east corner of the kraal and the corner of the fence surrounding the big kraal to its north (passage A); the second was at the end of this passage between the south east corner of the kraal and the corner of the fence around the shack (passage B).



Fig 4: Access Routes around the Kraal (Source: Exh JJJ10.4542 cropped)

701. 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, in our submission, have anticipated a possible need to seal off the safe zone by closing the access routes A or B if the strikers attempted to advance into the SAPS zone.

702. At various points in his evidence, Brig Calitz pointed out that a block at passages A and B was not part of the plan.¹⁰⁹⁴ This, however, misses the point. The point is that it should have been anticipated by way of contingency plan.

702.1. It could not be assumed that the strikers would helpfully co-operate with the plan by staying where they were during the 10-minute process of rolling out the barbed wire cordon to create the 'SAPS safe zone', and the longer process thereafter of taking the POP Nyalas, TRT, NIU and SIU out of this 'safe zone' to confront the strikers. There was always a risk that the strikers would seek to break into the 'SAPS safe zone'.

702.2. The gap that would be longest available for the strikers to enter the SAPS safe zone was the gap to the east of the kraal. It was also a gap that would never be sealed by barbed wire in terms of the plan.

¹⁰⁹⁴ See for example 18182/16-18183/1 and 18244/18-18245/1.

- 702.3. It was therefore a gap that might have to be blocked by measures other than those contemplated in the plan. This is a contingency that Brig Calitz ought to have anticipated.
- 702.4. At the very least, once the strikers had shown an intention to move into the SAPS zone and Nyala 4 had sealed off that zone from all access routes other than the channel through passages A and B, it was clearly foreseeable that the strikers would attempt to use that channel.
703. It is not clear whether Brig Calitz issued any instruction to block passage A to prevent the strikers entering the SAPS zone by using the channel down the east of the kraal. His evidence in this regard is contradictory.
- 703.1. At some points in his evidence, he testified that he issued a command to block the strikers when he realised that they were moving round the eastern side and wanted to prevent 'incident 3'.¹⁰⁹⁵ When he was asked to indicate where this block was to take place he indicated 'passage A'.¹⁰⁹⁶
- 703.2. At other points he

¹⁰⁹⁵ Calitz 18131/18 – 18132/15 and 18136/11 – 18138/14. See also 18044/7 – 18045/8; 18046/25 – 18047/20; 18125/19 – 18126/2

¹⁰⁹⁶ Calitz 18138/4 – 18143/15

703.2.1. disavowed any intention or instruction to block passage A,¹⁰⁹⁷ and

703.2.2. testified that by the time that he realised where the strikers were headed, there was no time to issue a command to block them.¹⁰⁹⁸

703.3. It does, however, seem clear that when he moved away from his starting position near the mast, he foresaw the possibility that the strikers who had been repelled at 'incident 2' would attempt to move back towards the SAPS zone around the kraal¹⁰⁹⁹

703.4. It also seems clear that he had sufficient knowledge of the geography of the kraal area to be aware of the fact that strikers who attempted to move clockwise around the kraal into the 'SAPS safe zone' could have been blocked at passage A.¹¹⁰⁰

704. If Brig Calitz did issue an order to block the strikers at passage A, that order may not have been heard or it may have been misunderstood.¹¹⁰¹ It in any event was not implemented, because the POPS vehicles did not arrange

¹⁰⁹⁷ Calitz 18152/4-15 and 18182:5-15; 18225:14-19

¹⁰⁹⁸ Calitz 18105/9 – 18106/8; 18153/20 – 18154/11; 18156/1-19.

¹⁰⁹⁹ See in particular Calitz 18198/1-14 read with 18135/21 – 18137/3

¹¹⁰⁰ Calitz 18183/16 – 18184/20; 18245/2-9

¹¹⁰¹ Scott (Day 137 14709/24 14710/2) suggested on a hearsay basis that the intention of the POPS commanders was to form a block, but not at passage A:

'if I can speak on what I've heard the strategy was to be from numerous of the commanders on the ground, that they were going out to line up, line abreast, but the place to do that that they had identified, and it was possibly in the timeframe you were talking about, was around the kraal, just outside of the kraal to try and block.'

channelling them in that direction through passage A, towards passage B and into a fusillade of TRT fire.¹¹⁰⁴

706. The families of the deceased and the injured and arrested parties have argued that the arrangement of Nyalas at scene 1 should be seen as evidence of a deliberate intention on the part of SAPS to direct the strikers towards the TRT and to set up a situation where the TRT line would appear to have reason to fire at the strikers. While this was plainly the effect of the formation, we do not agree that it was an intended effect.

707. In this regard, we are prepared to accept that

707.1. some members of SAPS at Marikana on 16 August 2012 might have been looking for an opportunity to take revenge on the strikers for the killing of their colleagues three days earlier,

707.2. the conduct of Brig Calitz and Maj Gen Naidoo at scene 2 suggests that they, as commanders, were more than willing to turn a blind eye to members who shot indiscriminately at the strikers, and

707.3. the ordering of 4000 additional R5 rounds for the operation apparently by Brig Calitz (or by Col Merafe) suggests that the prospect of an R5 fusillade being directed at the strikers was

¹¹⁰⁴ Calitz 18270/6 to 18286/12

contemplated in advance of the operation at a senior level within SAPS;

- 707.4. the ordering of hearses is a further indication of an anticipation that there would be deaths during the operation.
708. Nevertheless, we cannot conclude that the Nyala formation at scene 1 was deliberately planned to create the scene 1 shootings.
- 708.1. First, even having regard to some of the unacceptable conduct of some members of the SAPS on 16 August 2012, we do not accept that the operation involved a deliberate co-ordinated plan to murder large numbers of strikers.
- 708.2. Second, a deliberate plan of the sort postulated by the families of the deceased and the injured and arrested, would have involved the co-operation in implementation, and subsequent silence about the true SAPS intent, of too many SAPS officers whose bona fides cannot reasonably be put into question, including several officers whose co-operation in respect of this conspiracy would have been required, such as Col Classens, Capt Loest, Capt Thupe and Col Vermaak.
- 708.3. Third, it is our view that the investigation of the evidence leaders has been sufficiently thorough to ensure that if such a deliberate plan existed, we would have uncovered at least some evidence of it beyond the configuration of the SAPS Nyalas at scene 1.

- 708.4. Finally, the planning and execution of such a plan would, in our view, have been far beyond the capacity of the SAPS members in the field at Marikana. The haphazard execution of much of what SAPS attempted during the operation on 16 August does not suggest a capacity seamlessly to put together a crescent formation of armoured vehicles at precisely the right time and place to channel strikers into a fusillade of TRT fire.
709. This is not to suggest that we regard SAPS and its commanders as free from culpability in relation to the manner in which the formation of the Nyalas channelled the strikers towards the TRT line. We have pointed out above that a reasonable operational commander in the position of Brig Calitz, upon witnessing 'incident 2', would have anticipated the possible need to seal off the safe zone by closing the access routes through passages A or B if the strikers attempted to advance into the SAPS zone. In our view, it should have been reasonably possible from that point to close either passage A or passage B.
710. In relation to passage A:
- 710.1. Passage A was measured at less than 19m at the inspection in loco. Because of a change in the fence position, this measurement

incorporates an estimate, but it corresponds with the Google Earth measurement of 18.5m based on a 2012 satellite image.¹¹⁰⁵

710.2. Nyala 4 reached the kraal at 15:52:03.¹¹⁰⁶

710.3. The strikers were still a few seconds away from reaching passage A by 15:53:26, the time of Lt Col Vermaak's aerial photograph at slide 205 of Exhibit L¹¹⁰⁷

710.4. On Lt Col Vermaak's aerial photograph the armoured vehicle which has passed through passage A is Papa 11, behind it is the STF Casspir, and behind it is the POPS Casspir.

710.5. Out of shot on Lt Col Vermaak's photograph to the right of the STF and POPS Casspirs as they faced were

710.5.1. Papa 7 and Papa 18, both of which had entered the channel to the east of the kraal through passage B before either of the two Casspirs, and are visible driving in the channel around the kraal from 15:52:13¹¹⁰⁸ ahead of the STF Casspir which enters the channel at

¹¹⁰⁵ Calitz 18301/16-17

¹¹⁰⁶ KKK9 at 15:14:32

¹¹⁰⁷ Exhibit JJJ11.1516

¹¹⁰⁸ See Exhibit UUUU10.3 Annexure V2 'movement of the strikers at scene 1' from 17:59.

15:52:26,¹¹⁰⁹ and the POPS Casspir which enters the channel at 15:52:28¹¹¹⁰

710.5.2. Nyala 6 which was the next vehicle to enter the channel after the POPS Casspir at 15:52:46¹¹¹¹

710.5.3. Brig Calitz's own Papa 1, which had entered the channel at 15:52:56¹¹¹² and had already passed the POPS Casspir on the far right of that vehicle by 15:53:13,¹¹¹³ and

710.5.4. Papa 9, which entered the left hand side of the channel at 15:53:01¹¹¹⁴ shortly after Papa 1 had entered the channel and which had passed between the POPS Casspir on its left and Papa 1 on its right by 15:53:14¹¹¹⁵

710.6. Before the strikers reached passage A, all eight of these armoured vehicles had travelled further in the channel than they would have needed to travel to reach the mouth of passage A.

¹¹⁰⁹ See Exhibit UUUU10.3 Annexure V2 'movement of the strikers at scene 1' at 18:02.

¹¹¹⁰ See Exhibit UUUU10.3 Annexure V2 'movement of the strikers at scene 1' at 18:34.

¹¹¹¹ See Exhibit UUUU10.3 Annexure V2 'movement of the strikers at scene 1' at 19:22.

¹¹¹² See Exhibit UUUU10.3 Annexure V2 'movement of the strikers at scene 1' at 19:56.

¹¹¹³ See Exhibit UUUU10.3 Annexure V2 'movement of the strikers at scene 1' at 20:15-20:17

¹¹¹⁴ See Exhibit UUUU10.3 Annexure V2 'movement of the strikers at scene 1' at 19:59-20:02

¹¹¹⁵ See Exhibit UUUU10.3 Annexure V2 'movement of the strikers at scene 1' at 20:13-20:18

- 710.7. Assuming a Casspir or Nyala width of 2.5m and a distance of 1 metre between Casspirs or Nyalas to allow members to debus in accordance with the standard blocking procedures described by Brig Calitz in his evidence,¹¹¹⁶ it would have required no more than 5 armoured vehicles to block passage A.
- 710.8. It follows that if a clear command to do so had been given shortly after Nyala 4 had reached the kraal, and that command had been properly implemented, passage A would have been blocked by SAPS well before the strikers reached it.
711. In relation to passage B, a block would have been even simpler because there was more time for it. The strikers only reached passage B at the point of the shootings at 15:53:50, almost two full minutes after Nyala 4 reached the West edge of the kraal at 15:52:03. There were three different ways in which SAPS could have blocked passage B if Brig Calitz had given a clear command to do so when he appreciated the need for such a block while 'incident 2' was taking place.
- 711.1. It would have taken six or seven vehicles to block the 23m gap at passage B in the manner described above in relation to passage A. All eight of the vehicles referred to above in relation to passage A would have been available to block passage B. So too would have been Papa 2, Papa 4, Papa 5 and Papa 10, all of which had joined

¹¹¹⁶ Calitz 18251/2-17

the crescent formation on or beyond passage B by the time of the shootings.¹¹¹⁷ Nyala 5 would also have been available for this purpose.¹¹¹⁸

- 711.2. Because passage B was accessible from open ground in either direction, it would not have been necessary for blocking Nyalas to drive in side to side – they could also have formed a blocking line head to toe. Lt Col Scott estimated that each Nyala has an approximate length of 5m, and so it would have required only 5 Nyalas arranged in this manner to block passage B.¹¹¹⁹ It follows that any five of the thirteen armoured vehicles mentioned in the previous paragraph could have blocked passage B.
- 711.3. Finally, when Brig Calitz ordered Nyala 4 to make for the kraal, he could simultaneously have ordered Papa 5 or Papa 6 to make ready to deploy its barbed wire to close passage B if there was a need to do so. This would have given the POPS team on Papa 5 or Papa 6 an opportunity to remove the triangle behind their barbed wire trailer with ample time to deploy the barbed wire over the 40-50 metres they would have had to traverse to reach the fence around the shack

¹¹¹⁷ Exhibit JJJ178.2 at p 55.

¹¹¹⁸ Exhibit JJJ178.2 at p 55.

¹¹¹⁹ Scott Day 137 p 14709/11-16.

from the point at which Nyala 4 had stopped at the East edge of the kraal.¹¹²⁰

712. Brig Calitz testified that a block at passage B would have been undesirable because it would have created a risk of a stampede of strikers in a relatively small area enclosed with barbed wire.¹¹²¹ That may well have been so, but it was plainly a less catastrophic alternative than the fusillade of TRT fire that took place at scene 1.

713. Brig Calitz also suggested that a block at passage B would have trapped the SAPS vehicles in the 'safe zone' and prevented them from getting out to perform their dispersion action, while isolating their colleagues on the other side of the block.¹¹²² This, of course, is no answer to the two possible means discussed above of blocking passage B using armoured vehicles as opposed to barbed wire. It is not even an answer to the possibility of blocking with barbed wire because, as Brig Calitz was ultimately obliged to concede, at the appropriate point SAPS Nyalas could have broken out of the 'safe zone' by driving through the fence around the shack, thus opening up a route for all SAPS vehicles that were needed in the dispersion action.¹¹²³

¹¹²⁰ Brig Calitz claims to have issued his instruction to Nyala 4 before it started deploying its barbed wire (15:51:26)

¹¹²¹ Calitz 18145/3-11

¹¹²² Exhibit JJJ107 p 28 para 146.

¹¹²³ Calitz p 18311/6 – 18319/2.

When teargas, stun grenades and water cannons were first used

714. SAPS were also culpable at scene 1 in delaying as long as they did before using the POPS methods available to them to disperse the crowd of strikers that was attempting to enter the SAPS zone.

715. According to the SAPS discharge report, Exh FFF35

715.1. Only 3 stun grenades were fired at scene 1. (They were fired by W/O Kgosana, W/O Janse van Rensburg and Const Ntshingila).

715.2. Only two members fired teargas at scene 1: Const Mokoena and W/O Malesoema who each fired four teargas canisters.

716. The video evidence shows that

716.1. there is no evidence that teargas or stun grenades were fired before 15:53:30 – 20 seconds before the scene 1 shootings – and it is extremely likely that all of the teargas and stun grenades were fired after this point;¹¹²⁴ and

¹¹²⁴ Exhibit UUUU10.5 Annexure V4 - Video presentation on the use of tear gas and stun grenades at and around Scene 1 at 7:50 – 9:57. That no stun grenades were used prior to 15:53:30 is clear from the audio feed on the Infra Red video from the Flir Camera (CC38). When this audio feed is played at high volume, stun grenades and the TRT volley are both audible. The first sound that could be a stun grenade comes at 15:58:55 (eTV 15:53:33). Allowing just under 3 seconds for the sound to travel approximately 880m from the kraal to the position of the Flir camera (See Exhibit EEEE21.1) this would put the first stun grenade at no earlier than 15:53:30. This is also confirmed by the Rowland Headgear Camera KKK9 which is trained on the area of the 'lead group' almost continuously through the relevant period and which shows stun grenade and teargas smoke clearly. The first stun grenade or teargas smoke to appear on KKK9 is at 16:15:59 which is eTV 15:53:30 and would appear to be the same stun grenade that is audible on the Flir IR video feed at 15:58:55.

716.2. neither of the water cannons sprayed any water before 15:53:30 – 10 seconds before the scene 1 shootings.¹¹²⁵

So the non-lethal POPS measures were implemented only after the lead group of strikers was already moving down the channel to the east of the kraal – they were not used to prevent them from entering this channel.

717. Moreover, when the teargas, stun grenades and water cannons were used against the strikers in the channel in the 20 seconds prior to the shootings, they were not used in a manner calculated to prevent the leading group of strikers from continuing to advance towards the 'SAPS safe zone'. Thus,

717.1. No water was shot at, or in front of, the lead group of strikers,¹¹²⁶ and

717.2. All of the teargas and stun grenades fired before the shootings were fired behind the leading group of strikers. So if they tried to move away from these teargas canisters or stun grenades, they would move in the direction of the TRT line.¹¹²⁷

718. The late and imprecisely directed use of non-lethal POPS methods was particularly unfortunate because the video evidence shows that when teargas and stun grenades were finally used, they had the effect of breaking up the leading group of strikers and moving individual strikers away from the point at

¹¹²⁵ See Exhibit UUUU10.4 Annexure V3 Presentation on the Use of the Water Cannon.

¹¹²⁶ Exhibit UUUU10.4 Annexure V3 - Video presentation on the use of water cannon prior to Scene 1 at 11:12 – 12:45.

¹¹²⁷ Exhibit UUUU10.5 Annexure V4 - Video presentation on the use of tear gas and stun grenades at and around Scene 1 at 0:24 – 06:00.

which the teargas and stun grenades had been fired. Thus if one analyses the JJJ194 footage, one sees the following

718.1. While the large group of strikers that approaches passage A at 15:53:22 numbers well over 100, by 15:53:36 a leading group of less than 40 has split off this group¹¹²⁸ and the split appears to have taken place around the location of the stun grenade that is fired at 15:53:30, with those strikers ahead of the stun grenade moving forward down the channel away from it, and those behind it having their progress down the channel halted;¹¹²⁹ and

718.2. 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 there is a clear gap between Mr Noki's group of 11/12 strikers at the front ('the 12 leading strikers') and the rest of the group of less than 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 are behind Papa 2. The latter have not yet reached the gap and are behind Papa 4.¹¹³⁰ This is illustrated in Fig 6 below.

¹¹²⁸ Compare JJJ194.16 01:09 (eTV 15:53:22) with JJJ194.17 00:00 to 0:14 (eTV 15:53:36 to 15:53:50)

¹¹²⁹ Exhibit UUUU10.5 Annexure V4 - Video presentation on the use of tear gas and stun grenades at and around Scene 1 at 1:13 – 01:50

¹¹³⁰ See JJJ194.17 at 0:014. That there were only 11/12 strikers in Mr Noki's splintered lead group is clear from the photo taken at the point of the shootings at 15:53:50 and appearing in Exhibit UUUU10.3 Annexure V2 - Video presentation on movement of the strikers at 24:29. Mr Noki is partially visible in this shot. He is the striker furthest to the left of the shot and is identifiable by his green blanket. That there were no strikers to the left of Mr Noki or to the right of the man in the dark jersey to the right of this shot is clear from the Reuters footage of the



Fig 6: Splitting of the Lead Group of Strikers by POPS Methods (Source Exh JJJ194.17)

718.3. The kraal edge group appears to have been halted and pushed towards the kraal by the POPS 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 POPS Casspir shortly before the smoke becomes visible at eTV 15:53:42 – see Fig 7 below). They accounted for all of the strikers who were shot up against the kraal edge. The 12 leading strikers continued forward and accounted for all of the strikers who ultimately were killed on and around the path to Nkaneng. (See Fig 8 below)

same scene from behind the TRT line. See Exhibit UUUU10.6 Annexure V5 - Video presentation on shots fired at scene 1 in the frame by frame section from 03:40.



Fig 7: Teargas Near Kraal Edge Group of Strikers at Scene 1 (Source Exh JJJ194.17)



Fig 8: Further Fragmentation of Lead Group by Time of Shootings (Source Exh JJJ10.4542)

718.4. There is accordingly reason to believe that if SAPS had engaged non-lethal POPS measures earlier, and in a more focussed manner designed to prevent the lead group of strikers from entering the channel to the east of the kraal, they may well have been able to prevent the group from entering the channel, or at least to disperse the bulk of this group, thus avoiding any need to resort to lethal force.

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 paper stating that *'we are going to kill each other today'*.¹¹³¹

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'*.¹¹³²

722. Mr Noki also gave a speech about two bulls in one kraal. The 'two bulls' referred to the strikers and the police. According Mr Mtshamba, Mr Noki meant that either the strikers or the police should leave the mountain. As the police found

¹¹³¹ Exhibit HHH 14, par. 23.

¹¹³² Exhibit JJJ142

the strikers there, the police should leave. The police and the strikers were fighting for one territory.¹¹³³

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'.*¹¹³⁴

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.'

¹¹³³ Day 275 page 35166 line 6 to page 35167 line 3.

¹¹³⁴ Exhibit L 168

The likely intention of the members of the group that advanced on the kraal

725. At the outset, we emphasize 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.¹¹³⁵ 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,¹¹³⁶ 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 1.¹¹³⁷ One cannot leap from the fact that people stayed behind together and then started out 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

¹¹³⁵ See Exh UUUU10.3 Annexure V2 Movement of the strikers at Scene 1 at 21:05

¹¹³⁶ At the end of Mr Mathunjwa's second address, Mr Noki can be seen conferring with some of his fellow strikers but one cannot from this infer that they were planning an attack on the SAPS. See Exhibit KKK55 at 10:07 to 10:40. Similarly, the fact that the 'lead group' of strikers did not disperse like many of their colleagues after Mr Mathunjwa left the koppie is not evidence that they had decided to attack the SAPS. See Exhibit L Slides 193 and 197

¹¹³⁷ Mr X testifies that the group collectively had a single intention and that was to attack the police. But Mr X is a witness without any credibility and his testimony in this regard cannot be given any weight. All of the strikers who testified give exactly the opposite version. They say that the members of the group all had the benign intention of returning to Nkaneng. But this version, too, is not capable of being believed. At the very least, it cannot account for the fact that at least one striker shot at the SAPS members to the East of the kraal before the TRT had opened fire.

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 proposition is quickly illustrated if we focus on the movements and responses of individual members of the group. Mr Ntsenyeho provides a good example for 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 a 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 that 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 was 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 and 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 of the same video (eTV 15:53:46), still striding forward and walking tall before he disappears behind Papa 2.
- 727.8. Shortly after Mr Ntzenyeho 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 4.¹¹³⁸
- 727.9. Mr Ntzenyeho never crossed the gap between Papa 2 and Papa 4.¹¹³⁹ 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 Ntzenyeho 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 back pack

¹¹³⁸ That there were only 11/12 strikers in this group is clear from the photo taken at the point of the shootings at 15:53:50 and appearing in the CALS video presentation on movement of the strikers at 24:29 See Exhibit UUUU10.6 Annexure V5 - Video presentation on shots fired at scene 1 from 03:45. Mr Noki is partially visible in this shot. He is the striker furthest to the left of the shot and is identifiable by his green blanket. That there were no strikers to the left of Mr Noki or to the right of the man in the dark jersey to the right of this shot is clear from the Reuters footage of the same scene from behind the TRT line. See CALS video – shots fired at scene 1 in the frame by frame section from 03:40.

¹¹³⁹ See JJJ194.17 at 0:14 where the last striker in the group of 11/12 moves past this gap which then remains clear until 0:17 to 0:18 when a single striker from behind the group of 11/12 runs across the gap while one of the group of 11/12 runs back across the gap in the direction of the mouth of the kraal. The latter striker is visible in CALS video – shots fired at scene 1 in the frame by frame section from 05:08 to 05:17.

on the aerial photographs of Lt Col Vermaak JJJ10.4541 and 4542 which were taken before the SAPS had moved any bodies.¹¹⁴⁰

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 or foreseen that other strikers in the group would attack the group 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

¹¹⁴⁰ His body is also visible in approximately the same position in the later shots of W/O Ramanala and Capt Loest which were taken after some of the bodies had been moved. See JJJ29.138, JJJ29.155 and JJJ29.188 and JJJ5.55.

or violently to resist any attempt by the police to interfere with the strikers' occupation of the koppie;¹¹⁴¹ and

- 728.2. the striker who fired at the SAPS at the very least showed an intention or willingness to attack 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 reasonably have 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:

¹¹⁴¹ See Exhibit L slides 167 and 168.

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 on top of them and eat them, and they (those who had signed) will eat the strikers.¹¹⁴²

731.3.2. 'Protestor 4' said it is either them (the strikers), or the police.¹¹⁴³

¹¹⁴² Exhibits ZZZZ9 Protestor 2

¹¹⁴³ Exhibits ZZZZ9 Protestor 5

- 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 strikers 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,¹¹⁴⁴ and the false evidence of Mr Magidiwana when confronted with this fact;¹¹⁴⁵
- 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 kraal¹¹⁴⁶ - this is evidence which has to be

¹¹⁴⁴ Exhibit EEE14.1

¹¹⁴⁵ Transcript day 55. 5909/ 5-11

¹¹⁴⁶ See for example the affidavits of W/O Mamabolo (Exhibit KKK60) at para 11 and his fellow occupants of Papa 11 who confirm his statement (eg Sgt Mathavha – Exhibit MMM29). W/O Mamabolo and the members who confirm his affidavit, testify to several facts that are plainly adverse to the SAPS case advanced by officers senior to him. Thus, he admits in para 12 that he could hear the shooting at scene 1 from within his Nyala which was considerably further away from the shooting than Papa 1. Similarly, in para 13 he states that he could hear the gunfire at scene 2 from his position where the arrests were being made to the north of the koppie (ie alongside Papa 1). In para 15 he states that the shooting from the group of SAPS members accompanying Gen Naidoo over the rocks at koppie 3 continued after he had tried to stop it by shouting for a cease-fire. There is thus no reason to doubt his evidence in para 11 that Papa 11 was attacked to the East of the kraal, particularly because it is confirmed by all of the other deponents within Papa 11, all of whom confirm the evidence of W/O m

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.¹¹⁴⁷ 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

¹¹⁴⁷ See JJJ10.4540 (eTV 15:43:56) which shows strikers taking this route and Nyala 6 moving itself to a position which will allow strikers to take this route without crossing between it and the rest of the SAPS members.

of the bravado of the first speeches is evident – the mood is more one of resignation, and the strikers are singing a lament;¹¹⁴⁸

732.4. If the strikers were intending to attack 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 15:42:35¹¹⁴⁹ and the point at which Nyala 4 closed off the route past the kraal with its barbed wire at 15:52:01¹¹⁵⁰. Even after they moved off the koppie at eTV 15:48:22,¹¹⁵¹ 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 SAPS members, it is difficult to explain why they chose a route that went out of its way to go around Nyala 5;¹¹⁵²

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

¹¹⁴⁸ Exhibit KKK56 from 08:28

¹¹⁴⁹ Exhibit JJJ11.1514

¹¹⁵⁰ Exhibit UUUU10.3 Annexure V2 'movement of the strikers at scene 1' at 15:01

¹¹⁵¹ Exhibit JJJ194.11

¹¹⁵² Exhibit UUUU10.3 Annexure V2 'movement of the strikers at scene 1' from 5:34 to 14:42. Exhibit OOO17 read with Vermaak Day 206 p 25472/1 to p 25473/8/

members and their Casspirs in the crescent formation to the East of the kraal;¹¹⁵³

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;¹¹⁵⁴

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;¹¹⁵⁵

732.9. There was a significant gap between the lead group of 12 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.¹¹⁵⁶

¹¹⁵³ Exhibit UUUU10.3 Annexure V2 'movement of the strikers at scene 1' from 20:29 to 21:50

¹¹⁵⁴ Exhibit UUUU10.3 Annexure V2 Video presentation on the movement of strikers from koppie to the kraal at 23:42; and Exhibit UUUU10.6 Annexure V5 - Video presentation on the shots fired at Scene 1 from 03:55 to 04:24.

¹¹⁵⁵ See the photo taken at the point of the shootings at 15:53:50 and appearing in Exhibit UUUU10.3 Annexure V2 'movement of the strikers at scene 1' at 24:29

¹¹⁵⁶ See JJJ194.17 at 0:14 where the last striker in the front group of 11/12 moves past the gap between Papa 2 and Papa 4 which then remains clear until 0:17 to 0:18 when a single striker from behind the group of 11/12 runs across the gap while one of the group of 11/12 runs back across the gap in the direction of the mouth of the kraal. The latter striker is also visible in CALS video – shots fired at scene 1 in the frame by frame section from 05:08 to 05:17.

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.¹¹⁵⁷

733.4. Nor would they have had time to see the true scene developing. Because of the last minute move of Papa 10 (Papa 19), many of the

¹¹⁵⁷ Exhibit UUUU10 Annexure V1.9 - Reuters Camera (Exhibits UU3, RRR17) at 0:09 to 0:26

TRT members would not have had any view of the advancing strikers until they were at close quarters.¹¹⁵⁸

In all these circumstances, it would not be reasonable to criticise individual TRT members for thinking that they were facing an imminent attack.

The use of shotgun pellets at scene 1

734. Amongst those who were killed and injured at scene 1, there are those who suffered injuries from shotgun pellets.¹¹⁵⁹ As far as we can ascertain the victims of shotgun are:

734.1. Nkosipheindule Fanteso;

734.2. Zwelinzima Tikimana;

734.3. Nfaneleko Hlungulwana;

734.4. Cebisile Yawa (deceased);

734.5. Bongani Mdze (deceased);

734.6. Bonginkosi Yona (deceased);

¹¹⁵⁸ See the obscured views that one has on the Reuters footage and the SABC footage: UUUU10 Annexure V1.9 - Reuters Camera (Exhibits UU3, RRR17) at 0:09 to 0:26 and Annexure V1.7 - SABC Camera at 01:33 to 01:38.

¹¹⁵⁹ Shot gun pellets is a generic term used for, birdshot, buckshot, SSG's, AAA and No 5 shotgun rounds, all of which have been banned from being used by the SAPS in crowd control situations. It does not refer to rubber balls or pellets fired from a shotgun. No ballistics examinations were done to determine which type of shotgun pellet was used.

734.7. Mphangeli Tukuza (deceased).

735. All the victims of shot gun pellets were shot on their left hand side as they were coming around the small kraal. The kraal would have been on their right hand side and the left hand side was occupied by various police members, vehicles and units.¹¹⁶⁰

736. To the extent that we can establish, apart from the strikers and journalists, it was only the members of the SAPS who were around or in the vicinity of scene 1. Vehicle tracking records and all the other available objective evidence suggest strongly that there were no Lonmin security officers around scene 1 at the time of the shooting on 16 August 2012.

737. The use of shotgun pellets in crowd management situations has been withdrawn or discontinued by SAPS.¹¹⁶¹ SAPS deny the use of shotgun pellets by any of their members on 16 August. None of the SAPS members have admitted to shooting or possessing shot gun pellets on 16 August.

738. However, when shotgun pellets were banned from operational use, they were never collected and removed from stores at SAPS police stations. Thus birdshot and buckshot are still available at various SAPS police stations. They are still being used for target shooting practice.¹¹⁶²

¹¹⁶⁰ Exhibit KKK 11, Exhibit VVV9.

¹¹⁶¹ Naidoo Day 204 p 24407/6-8.

¹¹⁶² Naidoo Day 204 p 25110/4-10.

739. The source of the shotgun pellets that were used on the strikers in Marikana on the 16th of August 2012 is not clear. SAPS in the North West Province had stockpiles of birdshot pellets in 2012,¹¹⁶³ and members would have had access to these stockpiles for training purposes. Shotgun pellets like birdshot are also available on the open market, and members may have purchased their own pellets. A third potential source is Lonmin Security, which uses birdshot for crowd management purposes. For example on 12 of August Mr Botes used eight shotgun birdshot rounds to disperse the crowd at the scene of the security killings.¹¹⁶⁴

740. Although it every SAPS member is required to disclose on the SAP15 form all ammunition in his/her possession when going into an operation, it is possible for members to bring their own extra ammunition which is not declared. This possibility was admitted by Maj Gen Naidoo.¹¹⁶⁵ During the proceedings of the Commission, evidence emerged that had SAPS members recently used undeclared shotgun pellets during a public order policing operation in Brits.

741. Gen Naidoo suggested that the shotgun injuries at scene 1 could have been caused by 'friendly fire' from the strikers using shotguns stolen from the Lonmin security guards on 12 August 2012.¹¹⁶⁶ This appears to us to be an unconvincing explanation for the shotgun injuries.

¹¹⁶³ Naidoo Day 194 p 23666/2 – 5

¹¹⁶⁴ Botes Day 264 p 33337/5 - 8

¹¹⁶⁵ Naidoo Day 197 p 24102/14 – 21.

¹¹⁶⁶ Naidoo Day 199 p 25119/13-21.

- 741.1. Anyone shooting a shotgun would have had to be shooting from the left hand side of the victims as they came down with the kraal on their right hand side. This is because the shotgun victims all suffered injuries on their left hand side.
- 741.2. The left hand side of the victims was covered by various police vehicles and units.¹¹⁶⁷
- 741.3. In order to postulate a striker's mistakenly causing the shotgun injuries while shooting at the SAPS, one would then have to postulate a striker who fired shots from the eastern side of the police vehicles, missing the SAPS members sheltering behind those vehicles, and passing through the gaps between the vehicles and hitting the strikers. This is an unlikely scenario.
- 741.4. No SAPS members gave evidence that the POPS members were shot at from the eastern side at the kraal. There is no evidence in the video footage which supports this hypothesis.
742. It was suggested by the Families team during the cross-examination of Mr Botes, a Lonmin security official, that the pellets shot at scene 1 were probably shot from inside nyala P5 or nyala P19.¹¹⁶⁸ The submission went further to suggest the possibility of Lonmin security officials being inside the police Nyalas during the operation, or of Lonmin security officials giving shotgun pellets to the

¹¹⁶⁷ Exhibit KKK 11 page 31

¹¹⁶⁸ Day 265 page 33547 line 10 - 18

police for use during the operation.¹¹⁶⁹ There is, however, no evidence to support the contention that Lonmin were involved in the use of shotgun pellets at scene 1.

743. In all the circumstances, it is accordingly most likely that it was SAPS members who fired the birdshot that injured the scene 1 victims mentioned above.

The Scene 1 shootings

Was there a reasonable basis to shoot in self / private defence / putative private defence

744. As stated, we are of the view that the first members of the TRT to fire at the approaching strikers would have had reasonable ground for believing that they were under imminent threat of violent attack. They would thus have had a case of putative self-defence if they fired in a manner which was calculated to stop the putative attack without creating an unnecessary risk of killing the strikers.

Warning shots

745. It is clear from the video footage that some members of the TRT fired warning shots into the ground at scene 1. It is possible that other members of the TRT

¹¹⁶⁹ Day 265 p 33551/17 - 23

may have fired warning shots into the air over the heads of the strikers at scene 1.

746. The warning shots that were fired, however, did not give strikers any real opportunity to stop or to change their direction: before there was time for them to do so, other TRT members had fired shots which either directly or indirectly hit the strikers. The frame by frame section of the CALS video on the shootings makes this clear.

746.1. The first shot from the TRT line is timed at eTV 15:53:50.00.¹¹⁷⁰

746.2. By 15:53:51.07 Mr Ntenetya appears to have been hit and is falling down as a puff of dust rises behind him to the left of the shot as the camera faces it.¹¹⁷¹

746.3. By 15:53:51.20 two more strikers appear to have been hit and are falling down.¹¹⁷²

746.4. By the time that the shot from the Reuters camera becomes obscured by the dust cloud created by the shooting at 15:53:54.10, it appears that all but three of the front group of 10/11 strikers have fallen down.¹¹⁷³

¹¹⁷⁰ Exhibit UUUU10.6 Annexure V5 - Video presentation on shots fired at scene 1 at 03:39.

¹¹⁷¹ Exhibit UUUU10.6 Annexure V5 - Video presentation on shots fired at scene 1 at 03:52.

¹¹⁷² Exhibit UUUU10.6 Annexure V5 - Video presentation on shots fired at scene 1 at 04:12.

¹¹⁷³ Exhibit UUUU10.6 Annexure V5 - Video presentation on shots fired at scene 1 at 05:16.

746.5. It is common cause that the shooting continues for at least another four seconds after this.

746.6. The video evidence makes clear that after the first shot was fired, there was simply no opportunity for any of the strikers in the leading group to avoid the bullets by changing direction or indicating that they were surrendering:

746.6.1. Any striker who fell to the floor would have been likely to have been hit by bullets aimed low.

746.6.2. The striker indicated as 'striker 1' on the SAHRC video presentation turns his back on the shots and appears to attempt to take evasive action, to no avail.¹¹⁷⁴

746.6.3. Immediately after the shooting started, one of leading strikers threw down (or at least dropped) his weapon, but that did not save him from the funnel of fire.¹¹⁷⁵

746.6.4. The funnel of fire was such that no striker in the leading group could have ensured that, by surrendering, he was likely to avoid being shot.

¹¹⁷⁴ Exhibit UUUU10.6 Annexure V5 - Video presentation on shots fired at scene 1 at 07:55 to 08:43.

¹¹⁷⁵ Exhibit UUUU10.2 Annexure V1.9 - Reuters Camera (Exhibits UU3, RRR17) at 0:23; Exhibit UUUU10.6 Annexure V5 - Video presentation on shots fired at scene 1 at 08:26.

747. However, given the speed within which the TRT members were confronted with the putative attack, it is not clear to us that any individual TRT member who fired at the start of the shooting could reasonably have fired warning shots that would have afforded strikers the opportunity to show that they did not or did not any longer pose a threat to the SAPS.

Was there shooting which exceeded the bounds of reasonable self/private defence?

748. It is clear that there was considerable shooting which exceeded the bounds of reasonable self/private defence, for the following reasons.

749. Inadequate care was taken to shoot at lower limbs:

749.1. Many of the deceased and injured strikers have wounds in their chests or heads. Some of these may have been the inadvertent product of shots that were fired in the direction of feet and legs, but hit victims who had already fallen down or lain down. However, the number of these lethal and potentially lethal wounds is too large for them all to be explained away in this manner.

749.2. There is clear evidence of shooting at head/chest height. Thus

749.2.1. W/O Kuhn can be seen shooting repeatedly at head and chest height on the Reuters footage.¹¹⁷⁶

¹¹⁷⁶ Exhibit UUUU10.6 Annexure V5 - Video presentation on shots fired at scene 1 at 08:40 to 09:12

749.2.2. Several other TRT members can be seen on the Reuters footage shooting at a potentially lethal height.¹¹⁷⁷

749.3. All four of the victims who were killed at a considerable distance from the TRT line, Mr Ndongophele, Mr Ledingoane, Mr Mtshazi and Mr Gwelani, had gunshot wounds to the head, neck or chest. None of these victims had any wounds to their lower limbs.¹¹⁷⁸

750. There is evidence that shooting continued beyond the point at which a reasonable police officer would have stopped shooting.

750.1. The Reuters footage shows that at least four seconds before the shooting stopped, the strikers had been obscured by a dust cloud. So the SAPS members who were shooting after 15:53:54 were not shooting at particular targets – they were just shooting at the crowd.¹¹⁷⁹

750.2. The JJJ194 series shows that none of the strikers behind the leading group of 11/12 crossed the line of sight in the gap between Papa 2 and Papa 4 in the four seconds before the dust cloud arose. The Reuters footage shows that all of the strikers in the leading group of

¹¹⁷⁷ Exhibit UUUU10.2 Annexure V1.7 - SABC Camera at 01:40

¹¹⁷⁸ Day 280 pp 18484-5.

¹¹⁷⁹ Exhibit RRR17. Day 280 p 28400/3-17

11/12 were visible in this period and had all either fallen down or turned around before the dust cloud obscured them.¹¹⁸⁰

The Victims Killed by Stray Bullets

751. Four of the victims killed at scene 1 were shot at a substantial distance from the TRT line, and could not reasonably have been perceived to be presenting an imminent risk to the safety of anyone else. At best for the SAPS, these are victims who were accidentally killed in the TRT volley.

Mr Gwelani

752. Mr Gwelani is the starkest example of a victim in this category. His case provides the clearest illustration (if any were needed) of why the use of military assault rifles like R5s should be banned in public order situations:

752.1. Mr Gwelani was not a striker. He was an unemployed man who came to Marikana looking for work. According to his family, on the day of the shootings he had gone to the koppie to bring food to his uncle.¹¹⁸¹

¹¹⁸⁰ Exhibit RRR17. E-tv at 15:53:52 – 15:53:54

¹¹⁸¹ Gwelani family presentation p 34951/16 – p 34953/24

- 752.2. He was shot through the back right hand side of his head. According to the post mortem evidence, he would have been immediately incapacitated and dead almost immediately after being shot.¹¹⁸²
- 752.3. His body was found lying on the path to Nkaneng north of the koppies more than 250m away from the position of the TRT line but within the funnel of fire.¹¹⁸³ It was already visible at that location 153 seconds after the start of the TRT volley at scene 1.¹¹⁸⁴
- 752.4. His injuries are consistent with being shot where his body was subsequently found more than 250m away from the TRT line, as he walked back to Nkaneng along the main path that would take him to the northern part of Nkaneng, away from the koppie and away from the SAPS.¹¹⁸⁵
- 752.5. A deformed R5 bullet / bullet fragment was recovered from the soft tissue on the back left of his head.¹¹⁸⁶ Due to the deformity of the bullet it could not be positively linked to any of the R5 weapons fired by SAPS on the day.¹¹⁸⁷

¹¹⁸² Exhibit A pp 631-633(a); Exhibit Abis pp 239-245; Exhibit FFF20 p 20 Item 29 (DR593).

¹¹⁸³ Exhibit ZZZZ12

¹¹⁸⁴ Exhibit KKK16.5108 (eTV time 15:56:23) and Exhibit ZZZZ12

¹¹⁸⁵ Exhibit ZZZZ12

¹¹⁸⁶ Exhibit Abis p 241 para 4; Exhibit A p 631(a) para 4.5

¹¹⁸⁷ Exhibit MMM31 p 7 of 16 para 10.3.3 (bullet X from case 593/12) and p 15 of 16 para 29.

Mr Ndongophele

753. Mr Ndongophele presents a case that is only slightly less stark:

753.1. Mr Ndongophele was killed by a single R5 bullet that ricocheted and hit him close to his right eye and injured his brain.¹¹⁸⁸

753.2. He must have survived for at least an hour, because he received medical treatment at scene 1 and there is evidence of an intravenous line being inserted into his arm.¹¹⁸⁹

753.3. Nevertheless, his injuries were of such a nature that it is unlikely that he would have been able to move after being shot.¹¹⁹⁰

753.4. He ultimately died in the position to which he had been moved to receive medical attention.¹¹⁹¹

753.5. The position where he was shot, was a considerable distance to the north west of the kraal, approximately 90m from the nearest member of the TRT line.¹¹⁹²

¹¹⁸⁸ Exhibit Abis p 199 para C.1A; Exhibit FFF20 p 20 Item 26

¹¹⁸⁹ Exhibit Abis p 198 para 4B – no paramedics reached the scene 1 victims in the first hour after the shootings.

¹¹⁹⁰ Exhibit Abis p 202

¹¹⁹¹ That is the position marked as body M in Exhibit B at p 15.

¹¹⁹² That position can be identified by noting the location of Mr Ndongophele relative to the blue SAPS water barrels that are visible in Capt Loest's photo of Mr Ndongophele, Exhibit JJJ5.062 and identifying his body and the blue water barrels a distance to the north west of the kraal as they are visible on Col Vermaak's aerial photograph JJJ10.4549. See Exhibit VVV8 and Claassen p 29913/17 – 29916/23.

Mr Ledingoane and Mr Mtshazi

754. Mr Mtshazi and Mr Ledingoane were killed in a position just to the north-west of the kraal.

754.1. They are bodies N and O respectively on the plans of scene 1 that were prepared by W/O Thamae¹¹⁹³ and are more than 45m away from the closest point on the TRT line.

754.2. Mr Mtshazi was killed by a single R5 shot through his spine. He would have been immediately incapacitated by this shot.¹¹⁹⁴

754.3. Mr Ledingoane was killed by a single R5 shot through the neck although another shot grazed his head. He too would have been immediately incapacitated by the shot that killed him.¹¹⁹⁵

754.4. The shots that killed Mr Mtshazi and Mr Ledingoane appear to have been direct shots.¹¹⁹⁶

¹¹⁹³ Exhibit B pp 15 and 16.

¹¹⁹⁴ Exhibit A pp 616-8; Exhibit Abis pp 229-237 at 234 in particular.

¹¹⁹⁵ Exhibit A pp 600(a)-603; Exhibit Abis pp 215-228 at 221 in particular.

¹¹⁹⁶ Exhibit FFF20 p 20 Items 27 and 28

THURSDAY 16 AUGUST: THE RESPONSE TO THE SHOOTINGS AT SCENE 1

The conduct of SAPS members at the scene

755. During the cross examination of several SAPS witnesses, Exhibit EEE16 was shown to them and their attention was directed to scenes where, after the shooting at scene 1, SAPS members are seen to be dragging the bodies of dead and injured strikers, and an instance of an SAPS member placing a boot on the face of a striker.¹¹⁹⁷ It was put to these witnesses that this conduct was unacceptable - it is inhumane, and it also amounts to tampering with a crime scene.

756. According to Brig Calitz's testimony, as a general rule it is undesirable to move bodies around because it is inhumane and because it changes the crime scene, but there may be occasions when this conduct would be justified because of a fear that there is a weapon under the body.¹¹⁹⁸

757. The reason why the SAPS members moved amongst the strikers as depicted in Exhibit EEE16 emerged from the evidence of Capt Loest. He stated that after the shooting he 'instructed the members present with me to remove and search for all the weapons from the deceased and injured strikers and to put them in a heap. The reason for doing this was that we were not sure if the injured could still use the weapons to attack members and for the safety of the members on

¹¹⁹⁷ Day 98, pp 10441/8 to 10459/9 (Gen Phiyega); Day 172, pp 20255/10 to 20258/14 (Brig Calitz); Day 199, pp 24369/3 to 24373/25 (Maj Gen Naidoo); Day 228, pp 28134/8 to 28139/24 (Capt Thupe); Day 230, pp 28504/25 to 28507/18 (Capt Loest); and Day 239, pp 29944/14 to 29954/10 (Col Classen).

¹¹⁹⁸ Day 172, pp 20257/25 to 20258/14.

the scene.¹¹⁹⁹ He testified that the scene had to be made safe and so he gave the instruction 'that all persons lying down or that are still at the scene need to be searched and all weapons and firearms found need to be removed and then only after that I can then basically declare the scene safe.'¹²⁰⁰ Col Classen likewise testified that the reason why the SAPS members dragged the bodies of dead and injured strikers around was that they were looking for weapons.¹²⁰¹

758. In cross examination Capt Loest said that he did not see a SAPS member drag an injured or deceased striker, but if he had seen this he would have stopped the SAPS member from doing so; he also said that if he had seen a SAPS member put his boot in the face of a striker he would have stopped the SAPS member from doing that because such conduct is inhumane.¹²⁰²

759. In cross examination Col Classen also testified that what he had seen in the video clips of the conduct of the SAPS members after the shooting distressed him and that he was unable to justify this.¹²⁰³

760. The conduct of the SAPS member after the shooting on 16 August 2012 at scene 1 in the manner in which they treated the dead and injured striker was unacceptable. It was cruel, inhuman and degrading. The object of searching

¹¹⁹⁹ See Exhibit HHH44, paragraph 8.

¹²⁰⁰ Day 229, pp 28323/16 to 28324/4.

¹²⁰¹ Day 236, p 29463/7 to /10.

¹²⁰² Day 230, pp 28506/9 to 28507/10.

¹²⁰³ Day 239, p 29953/15 to /22.

for weapons amongst the strikers could have been accomplished by the SAPS members without them having to resort to such conduct.

The failure of members at the scene to provide emergency medical treatment

761. Capt Loest, who was in charge of the TRT responsible for the shootings at scene 1, stated that after the shooting, he realised that the strikers required medical assistance. However they had weapons, and he had therefore instructed his members to collect the weapons and to search the strikers to make sure that there are no weapons amongst them that could launch a separate attack, and to ensure that the crime scene was safe for the medical personnel that would attend to the injured ¹²⁰⁴.

762. He then called Brig Pretorius and asked that medical personnel be sent to the scene and gave directions. ¹²⁰⁵ He testified that he had no idea why the medics took so long to arrive.

763. He testified that none of the SAPS members present in Scene 1 provided any medical assistance to the injured after the shooting, as none had any medical training except him. He did not provide any medical assistance as he had last received training in first aid in the 90s, and therefore could not treat anybody for fear of opening himself up for legal disputes. The training he received only allowed him to perform invasive procedures on members of the armed forces

¹²⁰⁴ Transcript Day 229 28322/11-25. 28323/1-25. 23496/6-24

¹²⁰⁵ Exhibit SSS1. SSS3. Para 12

not civilians¹²⁰⁶. His first role was to attend to his members who were traumatised, as it had happened before that a member takes out his own fire-arm and takes his life there and there.¹²⁰⁷

764. Col McIntosh, who was trained in first aid, testified that due to the noise at his nyala, he did not hear the call for medical assistance over the radio. He also did not hear Lt Col Vermaak's report on the radio that there were bodies down at scene 1. He only found out about the bodies when he got back from the koppie 3.¹²⁰⁸

The stand-off at K2 and its duration

765. In the immediate aftermath of the scene 1 shootings, Brig Calitz proceeded to Koppie 2 together with a large number of the SAPS armoured vehicles. They formed a line of eight armoured vehicles that stretched for well over 100 metres to the north north east of Koppie 2. By this stage, the strikers who had managed to avoid or to escape scene 1 and had not fled to their homes, had gathered in a long line stretching back from Koppie 2 to the south west. This line was at approximately a right angle to the line of armoured vehicles set-up opposite Koppie 2. The scene is shown in Fig 9 below.

766. The stand-off between the SAPS armoured vehicles and the strikers stretching out from behind Koppie 2 had already started by 15:56:16 when Papa 4, the

¹²⁰⁶ Transcript Day 230 28499/2-6

¹²⁰⁷ Transcript Day 230 28499/12-21

¹²⁰⁸ Transcript Day 230 28498/19-22. 28498/7-14. 28494/12-21. 28749/1-4. 28750/5-11. 28750/16-19. 28750/23-25. 28751/1-8. 28752/4-7

vehicle at the far south eastern end of the SAPS line, had moved into position.¹²⁰⁹ This was less than 2½ minutes after the scene 1 shootings at 15:53:50. The stand-off continued for 7 mins 35 secs until the north-west water cannon reached the SAPS vehicle line at 16:03:51.¹²¹⁰ During this period the SAPS armoured vehicle line did not move in any material respect, and the STF Casspir was in a stationary position to the south of Koppie 2 cutting off access from Koppie 2 to Koppie 1. (See Fig 9 below).



Fig 9: The Stand-off at Koppie 2 (Source: Exh JJJ10.4543)

767. It appears that the reason for this delay was that the SAPS needed to coordinate the future conduct of the operation with the two water cannons, each of which was experiencing different difficulties. The Johannesburg water cannon had reached the SAPS line of armoured vehicles by

¹²⁰⁹ Exhibit WW3 at 0:12.

¹²¹⁰ See : Protea Coin video, Exhibit CC22 at 6:21 and Flir camera, Exhibit CC38 at 16:09:13.

15:59:50.¹²¹¹ However, it did not have a radio and so could not be directed by Brig Calitz in Papa 1, and could not communicate with Lt Col Vermaak who was the eye in the sky in Chopper 1. This problem was resolved at 16:01:36 when Papa 1 reversed slightly from its position to draw up alongside the Johannesburg water cannon, and Lt Col McIntosh carried a spare police radio over to the crew of the Johannesburg water cannon.¹²¹²

768. The problem of the north-west water cannon was different. It had a police radio, but seemed unable to make its way out of the barbed wire enclosure to join the line of armoured vehicles at Koppie 2. The north-west water cannon can be seen driving in circles behind the barbed wire line trying to get out to Koppie 2 until it finally found the path around the kraal at 16:02:09.¹²¹³

Did Brig Calitz know about the shootings?

769. Faced with the argument that he should have stopped the operation after the tragedy at scene 1, Brig Calitz maintained that he was at all times unaware of the scene 1 shootings and the fatalities at the kraal. This claim is palpably false.

769.1. It is utterly implausible that Brig Calitz would not have heard the more than 300 gunshots that were fired in 8 seconds at scene 1.

¹²¹¹ See Protea Coin video, Exhibit CC22 at 2:20

¹²¹² Protea Coin Video Exhibit CC22 at 04:06. See also McIntosh Day 232 p 28666/20 – p 28667/3.

¹²¹³ See, for example, Exhibit WW3 at 2:46: etv time 15'58'50 (where it can be seen approaching Nyala 3 at the mast driving in an anti-clockwise direction away from the kraal; it then drives in a circle behind the barbed wire before finding itself in exactly the same position at 16:01:26 (Exhibit CC22 at 03'56). It finally can be seen driving through the path around the kraal at 16:02:09 (Exhibit CC24:24:30).

There does not appear to be a single other police officer at scene 1 who claims not to have heard the fusillade of fire from the TRT. People within Brig Calitz's own vehicle, Papa 1, said that they heard these shots.¹²¹⁴

- 769.2. Quite apart from the implausibility of not hearing the shots 'live' when they were fired, Brig Calitz would have been aware of the TRT fusillade because he was sitting at the commander's radio in Papa 1 and the evidence is clear, that the shots were audible over the radio. Mr Botes, a Lonmin employee, was at the JOC. He testified as follows :

'MR BOTES: Mr Chairman, sometimes when Brig Calitz spoke on the radio, after he said 'engage' you could hear on the radio, that there was shooting taking place, so that was basically immediately after he said 'engage' that the shooting started, which we could hear.

...

CHAIRPERSON: Hear the shooting - for how long could you hear the shooting ? For what you told me, obviously you couldn't in the 8 seconds for the reasons you have given, but for how long did you hear the shooting?

¹²¹⁴ Check statements of Nong and McIntosh and confirm oral evidence of McIntosh.

MR BOTES : *Mr Chair, I cannot recall, maybe a second or two, or three seconds, I cannot recall but I could hear shootings taking place while somebody was talking on a radio which is close by, whether it was his radio or another radio, where there is a radio keyed in, I could hear directly after 'engage' that the shooting is taking place.*

CHAIRPERSON : *It sounds from what you say, it wasn't just one firearm being fired.*

MR BOTES : *No there –*

CHAIRPERSON : *There was quite a lot.*

MR BOTES : *Ja, definitely.*

CHAIRPERSON : *It has been described a fusillade of volleying, various words like that. It sounds to me that's more or less what you heard.*

MR BOTES : *Correct.*

CHAIRPERSON : *Obviously not for the full 8 seconds but you did hear it.*

MR BOTES : *It was a burst of shots. So it wasn't one person.*

CHAIRPERSON : So it must have been obvious to everyone in the JOC that something quite serious had happened.

*MR BOTES : That's correct, Mr Chair.*¹²¹⁵

Just as this would have been obvious to everyone in the JOC, it would also have been obvious to Brig Calitz sitting next to the commander's radio in Papa 1.

- 769.3. Brig Calitz conceded that when the lead group of strikers passed down the channel to the east of the kraal and out of his sight from within Papa 1, there was likely to be a confrontation between the strikers and the SAPS members who were trying to prevent their access to the SAPS 'safe zone'.¹²¹⁶ He also conceded that he anticipated that the TRT would be forming up in the position where they ultimately formed up.¹²¹⁷ He conceded further that he then heard Lt Col Vermaak reporting that there were bodies lying on the ground and that the TRT were staying behind, and that he heard Lt Col Vermaak counting bodies in this context. But he claims that he thought that the 'bodies' to which Lt Col Vermaak referred were

¹²¹⁵ Botes, p 33640/21 – p 33643/14. See also the evidence of Cpt Kidd who heard the shooting on the radio from his position at forward holding area 2. Kidd Day 235 p 29004/3-23.

¹²¹⁶ Calitz, p 18111/24 – p 18113/10

¹²¹⁷ Calitz, p 18185/1 – p 18186/1

strikers who had been injured by rubber bullets.¹²¹⁸ This is simply not credible.

769.3.1. Brig Calitz knew that the TRT were armed with military assault rifles, and that they had a brief to intervene when the POP retreated.

769.3.2. He also knew that the POP had retreated and the strikers were advancing towards where he expected the TRT to be.

769.3.3. Shortly thereafter he received a report of 18 bodies being down, and the TRT staying behind at the scene.

769.3.4. Unless he was deliberately closing his eyes and his mind to what had happened at scene 1, he would have inferred that that the bodies down would be strikers who had been shot by the TRT with their R5 rifles and would, in all likelihood, include several fatalities.

769.3.5. At the very least, he would have recognised that this was a very strong possibility, in which event it was incumbent upon him to obtain clarity in this regard. If he had asked on the radio for a report from anyone as to what had

¹²¹⁸ Calitz, p 17341/5 – 25. See also Calitz, p 17785/19 – p 17791/10.

happened at scene 1 and whether the bodies were persons injured by rubber bullets or included fatalities, he would very quickly have been informed of the truth.

769.4. At the point at which the SAPS operation started to roll forward from the stand-off at Koppie 2 towards the strikers fleeing in the direction of Koppie 3, Brig Calitz can be heard on the radio stating the following :

*'No lethal firearms now unless the target engage you. No need to shoot while they are running unless the target engages you.'*¹²¹⁹

769.4.1. When Brig Calitz was led in chief on relation to this instruction, he gave a patently false version :

'Brig Calitz : ... 'Do not shoot unless the target engages you'. Die 'target' verwysende na 'n persoon wat met 'n wapen of 'n panga of 'n gevaarlike wapen op jou wil afstorm en dit so dan 'n tyken word waarop jy gerug is om uiteen te dryf. So dit was die bedoeling rondom die worde.'

¹²¹⁹ Exhibit CC22, Protea Coin video, 07:10 – 07:19 – see transcript Exhibit OOO12 at p 2 first item

Mr Semenya : And the word 'shoot' you
meant what?

Brig Calitz : Meneer die Voorsitter, ons praat die
heeltyd met die Openbare Orde

Polisiëringsvoertuie, met die Papa Nyalas, en ek
dink my opdragte is duidelik; as ons luister na die
video het ek heeltyd gepraat met die Nyala voertuie
kom voorentoe, Nyala voertuie doen dit. So dit is
net die Openbare Orde Polisiëringsvoertuie wat op
daardie stadium saam met my vorentoe beweeg
het. As ons praat van 'shoot' sou dit wees
haalgeweer rubber.'

769.4.2. Brig Calitz was able to offer this false version because,
at that time, the Commission had before it an inaccurate
transcript, which stated that his words had been –

*'No need for firearms now unless the target
engages you. No need to shoot while they are
running unless the target engages you.'*¹²²⁰

In fact, as later became apparent, his words were 'No
lethal firearms now'.

¹²²⁰ See the original uncorrected transcript: GGG35 at p 2.

769.4.3. It is difficult to imagine that Brig Calitz would have seen a need to caution against the use of lethal firearms when 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. His opportunistic misrepresentation of the nature of his instruction and its purpose suggests that the obvious inference that he was, indeed, aware of what had happened at scene 1 and was trying to conceal this fact from the Commission.

769.5. Brig Calitz's casual indifference to the shootings at scene 2 throws light on his attitude to the shooting by members under his control. Although he was the Operational Commander, he took himself approximately 150 metres to the north of scene 2, to attend to the rather mundane task of arresting stray strikers who had attempted to flee in that direction, and then stayed in the position away from scene 2 while the troops ostensibly under his control fired 295 rounds of live ammunition into the Koppie. He did nothing to exercise any control over this free-for-all. This conduct is fully consistent with his conduct in doing nothing to stop the operation after scene 1.

769.6. In order to sustain his false version that he was wholly unaware of the scene 1 shootings, he had therefore to compound it by contending that he was also unaware of the scene 2 shootings. The latter proposition was as implausible as the former :

769.6.1. Brig Calitz's Nyala was not moving at any stage during the shooting at scene 2. The only noise that it would have made would have been the noise of idling. The doors of this Nyala were open for much of the time that it was stationary in its position north of Koppie 3.¹²²¹ The sound of 295 gunshots would have been readily audible through the open doors.

769.6.2. Brig Calitz concedes that he got out of Papa 1 on several occasions at the scene to the north of Koppie 3.¹²²² That would have increased his ability to hear gunshots at the koppie.

769.6.3. Brig Calitz had difficulty accounting for the claim that he was unable to hear any live ammunition being fired at Koppie 3 whereas W/O Mamobolo, the Commander of Papa 11 which was parked with Papa 1 at the scene north of Koppie 3, did hear the live ammunition and as a result took his Nyala into the Koppie to investigate what was taking place.¹²²³

769.7. There is a wide range of other implausibilities relating to Brig Calitz' contention that he was unaware of the shooting at scene 2. These

¹²²¹ Calitz, p 18871/10 – p 18876/21. Exhibit JJJ6.1248 and Exhibit JJJ6.1245

¹²²² Calitz, p 18865/14 – p 18868/5

¹²²³ Calitz, p 21248/4 – p 21249/1. See also Statement of WO Mamobolo, Exhibit KKK61 at para 13.

have been assembled in a single document by the South African Human Rights Commission.¹²²⁴

769.8. In order to sustain his implausible version, Brig Calitz had to maintain that when he left Papa 1 to investigate the shooting of Mr Mpumza, he left behind his radio and thereafter lost all radio contact until he returned to scene 2 following his telephone conversation with Major Gen Annandale at 16:47. It was during that telephone conversation, he claimed, that he was first made aware that people had been killed in the operation under his control.¹²²⁵

769.9. In order to support this claim, Brig Calitz had to perjure himself by denying that the voice on the radio transcript at 16:27:37 was his own.¹²²⁶

769.9.1. On listening to the audio, it is clear that this is his characteristic voice.

769.9.2. That it was his voice was confirmed categorically by Lt Col Vermaak¹²²⁷ (who as the head of the North West Air Unit at the time and Brig Calitz's eye in the sky, is probably the person best placed to identify Brig Calitz's

¹²²⁴ Exhibit KKK41 'Chronology of Opportunities for Brig Calitz to have known of the shooting incidents.

¹²²⁵ Calitz, p 17353/3 – 13

¹²²⁶ Exhibit CC22 Protea Coin video, 30:07; Calitz, p 19265/18 – p 19267/27

¹²²⁷ Vermaak, p 25434/3 – 17; p 25971/4 - 15

voice on a SAPS radio transmission). This evidence of Lt Col Vermaak was never challenged by the SAPS.

Did the JOC know about the shootings?

770. It is clear that the JOC knew about the shootings at scene 1 shortly after they had taken place. The evidence of Mr Botes, who was in the JOC, has been set out at length above. That evidence is dispositive of the issue.

771. In any event, apart from the evidence of Mr Botes, there is the evidence of Capt Kidd referred to above, and the inferential reasoning discussed above in relation to what Brig Calitz must have known having regard to the fact that the strikers had moved down towards where the TRT line were going to be and shortly thereafter there was a report of 18 bodies down at the scene. In this regard, it must be borne in mind that the JOC heard a radio report that the strikers were attacking the TRT shortly before they received the report of the bodies down. In this context, even Maj Gen Annandale was forced to concede that the likely corollary of reports that the strikers were attacking the TRT and that bodies were down, was that the TRT had been forced to use their military assault rifles to protect themselves, and that there was a strong likelihood that the '*bodies*' referred to strikers who had been killed or seriously injured.¹²²⁸

¹²²⁸ Annandale Day 83 p 8743/11 to p 8745/12

772. Any doubt as to whether the JOC knew about the shootings shortly after they took place, is removed by the SMS message that Brig Pretorius sent from the JOC to Mr Molatedi of IPID at 16:03:34 on the 16th. It reads as follows :

*'Having operation at Wonderkop. Bad. Bodies. Please prepare your members as going to be bad.'*¹²²⁹

773. The knowledge within the JOC of the shootings would appear to be the most likely reason for the SMS that Maj Gen Mbombo sent to the National Commissioner at 16:02:19 on the 16th.¹²³⁰ As we point out below, however, it appears that Gen Phiyega did not receive this text until sometime after the shootings.

Did Gen Mpembe know about the shootings?

774. According to Maj Gen Mpembe, he was at the JOC after the special JOCCOM at 13H30 on 16 August. He testified that the dispersal process had not yet started when he decided to fly over the area in a helicopter.¹²³¹ He testified in chief that he got into the helicopter between 15h30 and 15h55.¹²³² Under cross-examination, he stated that at the time that the barbed wire was rolled out, he was not in the JOC but was attending to other matters. At the time he had not

¹²²⁹ Exhibit UUU7, Statement of Molatedi. See also Exhibit JJJ188 and Exhibit ZZZ11 – Consolidated cell phone records between SAPS members at p 48, l 2 and Exhibit JJJ187A – Statement of Brig Pretorius, August 2013 at para 33.

¹²³⁰ Exhibit LLL3, Gen Mbombo phone records, 14 – 16 August 2012.

¹²³¹ Day 106 p 11472/12-21

¹²³² Day 106 p 11473/11-15

yet walked to the helicopter.¹²³³ He testified that he did not return to the JOC before walking to the helicopter.¹²³⁴ In his statement, he said that at this time he had his hand-held radio with him, as did Brig Tsiloane.¹²³⁵

775. Maj Gen Mpembe testified that he was aware that the operation was due to commence at 15H30. For this reason he was always listening to the radio in order to find out when it started.¹²³⁶ When questioned by Commissioner Hemraj on what exactly he had heard on the radio, he said that he heard on the radio that the protestors were moving towards the TRT line.¹²³⁷ He said that he thought to himself that this was a mistake and that the strikers must have been moving towards the POP line and not the TRT line.¹²³⁸ He said that at the time when he received this report he was moving towards the helicopter.

776. He testified further that once they were in the air, from his position in the helicopter he could see the dispersal action by the nyalas. He could also hear the instructions given by Brig Calitz over the radio. He said that the only thing he could not see was people on the ground.¹²³⁹ He said however that he could hear Lt Col Vermaak's report of bodies down. At this stage he wanted to go

¹²³³ Day 106 p 12830/9-18

¹²³⁴ Day 106 p 12830/20-25

¹²³⁵ Day 106 p 11475/8-20

¹²³⁶ Day 106 p 11474/21-24

¹²³⁷ Day 106 p 11472/12-21

¹²³⁸ Day 106 p 11475/11-15

¹²³⁹ Day 106 p 12084/20-24

back to the JOC. He said that he was unable to contact Brig Calitz over the radio. He did not consider contacting him telephonically.¹²⁴⁰

777. We submit that the following factors support a finding that it is highly improbable that Maj Gen Mpembe was unaware of the shooting that had taken place:

777.1. He had his hand-held radio with him at all times before and during the helicopter ride, and was closely following the reports heard on the radio;

777.2. He heard the report that the strikers were approaching the TRT line;

777.3. This means that he ought to also have heard Brig Calitz's instruction over the radio (testified to by Lt Col Vermaak) to 'engage, engage, engage';

777.4. He would also have heard Lt Col Vermaak repeat the instruction to 'engage, engage, engage';

778. Hence, should the Commission make a finding that I was the shooting was reported over the radio (as we submit it was), it must inevitably lead to a finding Maj Gen Mpembe was aware of the shooting. This is compounded by the fact that he was able to see the dispersal action by the nyalas, and therefore know the operation was in progress. His unexplained failure to make telephonic contact with the JOC, the operational commander or any of the other

¹²⁴⁰ Day 106 p 12085/3-13

commanders must lead to the inference that he deliberately failed to make contact because he was aware of the shootings.

Did Gen Phiyega know about the shootings?

779. Gen Phiyega testified that she did not learn about the shootings until some time after they had taken place. This evidence appears to be supported by her cell phone records. Brig Mashigo of SAPS public relations was notified of the shootings by Capt Adriaio shortly after they took place. She attempted unsuccessfully to contact the National Commissioner on several occasions, but these calls all went on to voicemail. The first time that the National Commissioner appears to have switched on her phone after the shooting is shortly before she took Lt Gen Mbombo's call at 16:32:48.¹²⁴¹

The failure to stop the operation

780. For the reasons set out above, it is clear that very shortly after the shootings at scene 1, the fact that shootings had taken place, and the fact (or at least the likelihood) that people had been injured and killed, were known at least to Brig Calitz, to Maj Gen Mpembe, and to the JOC leadership including Brig Pretorius, Maj Gen Annandale, and Lt Gen Mbombo.

781. At the time when Mr De Rover compiled his first report, he was under the impression that the leadership of the operation had not been aware of the

¹²⁴¹ See Exhibit FFF44 – Cell phone records of Gen Phiyega, p 37388/1 – p 37392/2

shootings shortly after the event, and only became aware of it some time later.

He was not aware of the evidence which later emerged in this regard.¹²⁴²

None of the persons whom he interviewed said to him that they wanted to call a halt to the operation, but were unable to do so.¹²⁴³

782. Mr De Rover was unequivocal in his view as to what should have happened if the leadership of the operation had become aware of this:

‘At the timing of scene 1 and immediately thereafter the problems with the analogue radio network conspired to prevent the overall commander to stay abreast of developments and to call a halt to police operations in a bid to re-group and re-assess. It virtually goes without going that SAPS doctrine and experience in crowd management dictate such a decision.’¹²⁴⁴

783. The correctness of his opinion, namely that if the events at scene 1 were known, SAPS leadership was required to call a halt to the operation, is confirmed by the evidence of Lt Gen Mbombo in relation to the events on Monday 13 August 2014. She stated that when Maj Gen Mpembe informed her on the telephone that members of the SAPS and strikers had been killed and injured:

¹²⁴² Day 285 page 36905/20 to 36907/13.

¹²⁴³ Day 285 page 36910/22-25.

¹²⁴⁴ Exhibit FFF11, para 81, p 19.

*'that is when I told him they should stop the operation ... I was on the way when he phoned me and he told me that there were people injured. I told him if that is the case they should stop the operation, I'm on the way, I'm coming.'*¹²⁴⁵

784. The 7½ minute delay at the stand-off at Koppie 2 provided a perfect opportunity for the SAPS Commanders to pause to reflect on what had happened at scene 1 and to take immediate steps to stop the operation so as to ensure that no further loss of life took place and that the many injured persons at scene 1 were given immediate medical attention. This, however, did not happen. As soon as the north-west water cannon reached the line of armoured vehicles at Koppie 2, it proceeded straight through that line to break-up the group of strikers gathered behind Koppie 2 by spraying them with water. As those strikers dispersed and many of them sought refuge in Koppie 3, the operation rolled forward. SAPS armoured vehicles and tactical forces with military assault rifles surrounded Koppie 3 and fired indiscriminately into the Koppie. Brig Calitz took himself away from the scene to arrest strikers who were fleeing to the north of Koppie 3. He exercised no command or control over the shooting by SAPS members at Koppie 3. In the process another 17 strikers lost their lives.

785. We have addressed above the spurious claim of Brig Calitz that he did not stop the operation because he was not aware of the shootings at Scene 1.

¹²⁴⁵ Day 178, p 21306/22 – 21307/10.

For the reasons which we have given above, that explanation falls to be rejected. He, as Operational Commander, must be held responsible for the consequences of proceeding with the operation to scene 2.

786. As to the senior officers at the JOC:

786.1. Maj Gen Annandale was in substantial measure in control of the operation, notwithstanding the fact that Maj Gen Mpembe had been designated as the Overall Commander. That emerges from the fact that he chaired the JOCCOM, he gave instructions at the JOCCOM, and he was the person to whom Lt Gen Mbombo gave the instruction that the operation should move to the tactical phase, which he then required to be recorded in the Occurrence Book. He did not suggest that he did not have the authority to stop the operation. He should have done so.

786.2. As we have noted, Lt Gen Mbombo had no hesitation in giving an instruction to stop the operation of 13 August 2012, when she heard of the shooting and the injuries and deaths. She should have done so when she received news of the events at scene 1 while she was at the JOC.

786.3. Maj Gen Mpembe was formally the Overall Commander. He too was aware of the fact of the shootings (or at least of the strong likelihood that there would have been fatalities at scene 1). He too ought to have acted to stop the operation after scene 1.

787. The following conclusions are inescapable:

- 787.1. Several members of the SAPS leadership should have given the instruction to stop the operation after the events at scene 1. They include Lt Gen Mbombo, Maj Gen Annandale, Maj Gen Mpembe, and Brig Calitz.
- 787.2. If any one of them had done so, the shootings at scene 2 (koppie 3) would not have taken place, and 17 people would not have lost their lives;
- 787.3. The persons whom we have mentioned, and the SAPS institutionally, are therefore responsible for the deaths of the 17 people who died as a result of the shootings at scene 2, and the injuring of a substantial number of other persons;
- 787.4. This responsibility arises whether or not, in the circumstances which subsequently arose at Scene 2, those shootings could be justified. If the persons concerned had done what they should have, Scene 2 would not have taken place.

The failure of Gen Naidoo to bring in the paramedics

788. It is self-evident that after an event like the scene 1 shootings, there was an urgent need to bring in paramedics to provide medical assistance to those scene 1 victims who were still alive. Yet none of the victims received any medical assistance until an hour after the shootings. The first paramedic

vehicles reached the area behind the police line surrounding the victims only at 16:53:14.¹²⁴⁶

789. The plan provided for paramedics to be on standby. They were supposed to be on call, waiting under the control of Maj Gen Naidoo at IRA1 to be summoned to the scene. They had been moved to IRA1 from their original position at FHA1 specifically so that they would be able *‘to respond quicker where seconds counted’*.¹²⁴⁷

790. Shortly after the shootings, Lt Col Vermaak counted bodies at scene 1 and called on the radio for medical assistance and made clear that it was safe for the medics to be brought in.¹²⁴⁸ Maj Gen Naidoo heard the call for medical assistance on the radio and was aware of the need to bring the medics to the scene as quickly as possible.¹²⁴⁹ From his waiting position with the medics, he had heard the volley of more than 350 shots at scene 1¹²⁵⁰ and must have anticipated that it would have left in its wake gunshot victims needing urgent medical attention.¹²⁵¹ Yet he failed to ensure that medics were brought to scene 1 until it was too late for them to receive treatment in the ‘golden hour’ immediately after the shootings where that treatment would have been most

¹²⁴⁶ Flir Camera Exhibit CC38 at 16:58:36. See also JJJ10.4540 which shows two paramedic vehicles at the scene and one paramedic out of his/her vehicle approaching a victim at the north-east corner of the kraal at eTV15:53:20.

¹²⁴⁷ Consolidated statement of Col Scott Exhibit HHH20 at p 88 para 13.6.1.

¹²⁴⁸ Vermaak p 25942/3 – 25943/10

¹²⁴⁹ Naidoo p 23046/11 – p 23047/5.

¹²⁵⁰ Consolidated statement of Gen Naidoo Exhibit JJJ108 p 9 para 59.

¹²⁵¹ In his cross examination he attempted not to make this concession, but he was not always successful in this attempt. See for example Naidoo p 23081/13 – 23088/25

crucial.¹²⁵² In the process, wounded strikers lay bleeding on the ground at scene 1 without medical assistance and at least one, Mr Mdze, bled to death in circumstances where basic medical assistance should have been able to save his life.¹²⁵³

791. Maj Gen Naidoo's explanation for his failure to attend to his duties in relation to medical assistance is twofold:

791.1. First, he contended that because there were soft skinned vehicles in his group the only route to scene 1 that was available to him was the route round the west of the power station.¹²⁵⁴

791.2. Second, he claims that when he made his way around the power station gunshots had already broken out at scene 2, and he decided to take himself and his K9 members into scene 2 to investigate whether his assistance was required there and to assist in sorting out the problem at scene 2 as quickly as possible to allow his medical personnel to be taken to scene 1.¹²⁵⁵

Both parts of this explanation are unacceptable. The second is definitely fabricated, the first is probably fabricated.

¹²⁵² Loest p 28493/6-23

¹²⁵³ See Exhibit MMM10 Medico-legal report of Prof Boffard p 24.

¹²⁵⁴ Exhibit JJJ108 Consolidated Statement of Maj Gen Naidoo at p 10 para 62

¹²⁵⁵ Exhibit JJJ108 Consolidated Statement of Maj Gen Naidoo at p 10 para 61 – p 11 para 67.

792. At the time of the shootings, Maj Gen Naidoo was waiting behind the small power station with his vehicle's ignition turned off at the position marked with a red square in block G7 on the copy of Exh MMM5 reproduced below in Fig 10.¹²⁵⁶

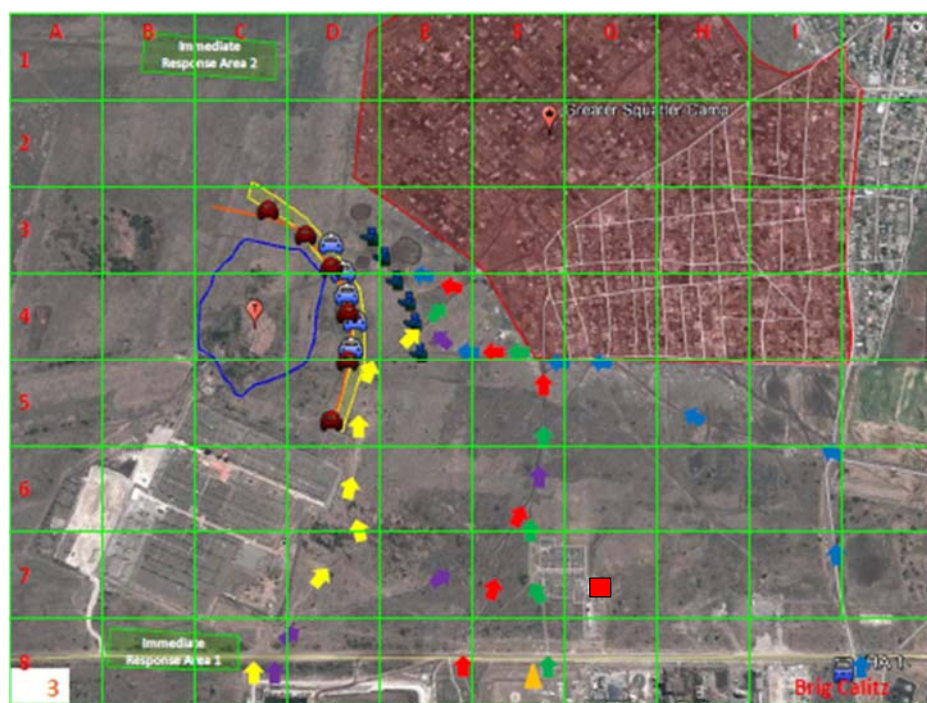


Fig 10: Routes Available to Gen Naidoo at Time of Scene 1 (Source Exh MMM5)

793. From his position at the time of the shootings, there were five different routes that Maj Gen Naidoo could have used to reach scene 1. These are the routes marked on Fig 10 with arrows in yellow, purple, red, green or blue. As was pointed out at the inspection in loco, the turn-offs to these routes are all visible from the main gravel road that runs along row 8 in Fig 10 and is the road that

¹²⁵⁶ See Exhibit MMM9A Maj Gen Naidoo AVL.PNG

he took on 16 August 2012 in order to reach the west side of the power station in column A on Fig 10.

794. Apart from the fact that he was holding a gridded map which, even in its creased form two years after the shootings,¹²⁵⁷ showed that the routes to scene 1 closest to his position were those marked in green, red and blue arrows on Fig 10 above, Maj Gen Naidoo must have known about at least three of these routes because a short while before he set out from his starting position behind the small power station, ostensibly to reach scene 1 -

794.1. he had been told that the best route to reach the koppies was along the East side of the power station,¹²⁵⁸

794.2. he directed Lt Col Claassens in his soft skinned, low clearance Mercedes Vito and his convoy to the staging area near scene 1 along the route marked in blue arrows,¹²⁵⁹ (he also knew that other people who had passed him at FHA1 along this route earlier in the day had managed to reach the koppie),¹²⁶⁰ and

794.3. a whole convoy of soft skinned SAPS vehicles turned off ahead of him to take the route marked in green arrows.¹²⁶¹

¹²⁵⁷ Exhibit MMM11.

¹²⁵⁸ Naidoo p 23435/9-14

¹²⁵⁹ See Exhibit RRR10 State of Claassens p 3 para 8 read with Claassens p 29525/17 – 29533/20.

¹²⁶⁰ Naidoo p 23435/3-8

¹²⁶¹ See Exhibit JJJ.4533 and JJJ10.4534 and Get Reference: CALS presentation: The movement of Maj Gen Naidoo between 15:19:23 – 15:38:50 (ETV time) at pp 12 – 17. See also Exhibit MMM43 CALS Analysis- Routes from FHA1 to Scene 1.

795. Moreover, the route actually taken by Maj Gen Naidoo in his ostensible attempt to reach scene 1 was one which would never have given him access to scene 1 because it would have taken him onto the wrong side of the barbed wire cordon. According to his evidence, he was briefed specifically that if the medics were to be brought in, they would have to be brought into the 'safe zone' side of the barbed wire.¹²⁶² When confronted with this in cross examination, he was unconvincing. First he contended that he had not given any attention to the barbed wire.¹²⁶³ Then he changed his version and claimed that he had assumed that he would be able to pass around the barbed wire at the point that it started at the power station by moving the A frame from which it had been rolled out.¹²⁶⁴ He then changed his version again to saying that he had merely given an instruction to his driver to get him to scene 1, and he assumed that his driver would know how to do so.¹²⁶⁵
796. At best for Maj Gen Naidoo, he was grossly negligent in failing to take any of the routes that would have brought him and the paramedics to scene 1, and, instead, taking a route around the power station that would put him on the wrong side of the barbed wire. A more likely explanation is that he was not negligent at all – he had no intention of bringing the medics to scene 1 and instead was hoping to join in the action when the dispersion operation proceeded to drive the strikers west into the area above the power station.

¹²⁶² Naidoo 23133/20 – 23134/5.

¹²⁶³ Naidoo p 23125/18 – 23126/24

¹²⁶⁴ Naidoo p 23127/4 - 24

¹²⁶⁵ Naidoo p 23132/20 – 23133/21.

This explanation gains added force from the false testimony given by Maj Gen Naidoo to explain his movements when he moved around the power station.

797. The vehicle tracking records of Maj Gen Naidoo show that he appears to have been in no particular hurry to bring his convoy to scene 1. These vehicle records were mapped in Exh MMM9A which is reproduced in Fig 11 below.



Fig 11: Vehicle Tracking Records of Maj Gen Naidoo (Source Exh MMM9A)

They show that after he turned around the west of the power station, Maj Gen Naidoo spent from 15:58:05 to 16:02:05 (eTV 15:58:25 – 16:02:25) with his vehicle idling on the south west corner of the power station ('the first idling period'), before spending another four minutes with his vehicle idling on the north west corner of the power station from 16:03:05 to 16:07:05 ('the second idling period' - eTV 16:03:25 – 16:07:25). That is not the conduct of a man looking to bring emergency medical assistance as quickly as possible to victims of a volley of gunfire that he had heard.

798. In an attempt to explain this conduct, Maj Gen Naidoo gave a series of false answers:

798.1. First, he suggested that the first idling period was to be understood as a period in which he realised he was on the wrong side of the power station and was attempting to remedy this when shooting broke out at scene 2.¹²⁶⁶ That is plainly incorrect because there was no shooting at all before long after the first idling period had ended. At the end of the first idling period (eTV 16:02:25) the standoff between the SAPS and the strikers at koppie 2 was still underway, and there would be no shooting for at least another 5 minutes.

798.2. Then he retreated from his first answer and suggested that the first idling period had been spent reassessing the position of the convoy, and it was only in the second idling period that shots had been heard.¹²⁶⁷

798.3. He then qualified that retreat by suggesting that it was probably between the first and second idling periods that the shots had been heard,¹²⁶⁸ and that the purpose of the second idling period was to reassess his position in the light of shooting at the koppie.¹²⁶⁹ That answer was, itself, false.

¹²⁶⁶ Naidoo p 23429/22 – p 23430/25

¹²⁶⁷ Naidoo p 23433/23 – p 23434/20

¹²⁶⁸ Naidoo p 23438/7 – p 23439/19.:

¹²⁶⁹ Naidoo p 23442/4-9.

- 798.3.1. First, it is most unlikely that it would have taken him and his entourage 4 minutes to reflect on where they had gone wrong, only to proceed further in the wrong direction up the West of the Kraal.
- 798.3.2. Second, it is clear that no shots had been fired at scene 2 before the start of the second idling period. The second idling period started at eTV 16:03:25; the stand-off at koppie 2 continued until the NW Water Cannon sprayed the line of protestors behind koppie 2 at 16:04:24,¹²⁷⁰ the SAPS armoured vehicles only reached the edge of koppie 3 at 16:05:00¹²⁷¹ and the first SAPS members to reached koppie 3 on foot (Capt Kidd's TRT members) did so shortly after eTV 16:07:24.¹²⁷²
- 798.3.3. Shooting from the direction which Maj Gen Naidoo claims to have heard would have had to come from the NIU. Col Modiba indicated that his line had already advanced to column J on Exh MMM2 by the time that the first shooting took place.¹²⁷³ The NIU line only reached

¹²⁷⁰ NW Water Cannon Video Exhibit CC20 at 16:26:39. See also the first shot on the Protea Coin video Exhibit CC22 of water being sprayed at the strikers behind koppie 2 at 6:59 which is eTV 16:04:29.

¹²⁷¹ Protea Coin video Exhibit CC22 at 7:30.

¹²⁷² Capt Kidd's members can be seen still approaching the dry dam from the South West in JJJ10.4547.

¹²⁷³ Modiba p 30574/4 – 30581/13.

that position long after Maj Gen Naidoo's bakkie had already reached koppie 3.¹²⁷⁴

- 798.4. Not one of the K9 members who moved in to koppie 3 with Maj Gen Naidoo corroborates his version that they moved in after, and because of, the start of shooting at koppie 3. On the contrary, those who say anything about shooting all confirm that the shooting at koppie 3 started after they had already moved in. None of them said that they were attempting to bring paramedics to scene 1 when they were diverted by shooting at scene 2.¹²⁷⁵
799. In fact, the evidence shows that Maj Gen Naidoo and his entourage started advancing on koppie 3 before the SAPS vehicles under the command of Brig Calitz had reached the koppie, and had already proceeded far across the road to koppie 1 by the time that the Papa vehicles first reached the edge of koppie 3.¹²⁷⁶
800. Moreover, on his own evidence, Maj Gen Naidoo instructed the members who came to koppie 3 with him to form a basic line and to proceed to the koppie at walking pace between the K9 vehicles which would drive slowly enough for

¹²⁷⁴ See Exhibit MMM26 slides 6-9.

¹²⁷⁵ See Exhibit MMM6 Statement of Const Molangoanyane, MMM7 Statement of Const Mutsi; MMM8 Statement of Const Motsemme; MMM15 Statement of Const Biyela; MMM16 Statement of Const Kwela; MMM17 Statement of Const Dintwe.

¹²⁷⁶ See Exhibit MMM14; Protea Coin video Exhibit CC22 at 9:30;

them to keep pace.¹²⁷⁷ This instruction is wholly incompatible with the evidence that he gave to the Commission as to his intentions and concerns:

800.1. If he was genuinely concerned about bringing medical assistance to the victims of scene 1, he would not have proceeded at walking pace to scene 2, and

800.2. If shooting had already broken out at scene 2, he would not have instructed his members to form a basic line which would have presented any strikers with firearms with a wide target slowly approaching into shooting range.

801. He also packed two stun grenades before advancing on scene 2, a strange course of conduct for someone whose intentions were supposedly to investigate what was happening and to return as quickly so that the paramedics could be brought to scene 1.¹²⁷⁸

802. Finally, Exh L makes no mention of Maj Gen Naidoo's supposed intention to bring paramedics to scene 1, nor of any diversion caused by shooting at scene 2 and the need to clarify what was taking place. Rather slide 230 describes the movement of Maj Gen Naidoo and the members who came in with him as follows:

¹²⁷⁷ Naidoo 23197/2 – 25.

¹²⁷⁸ Naidoo p 23325/18 – 23332/3

'Blue depicts the FHA 1 members – K9 dog handlers moving forward to assist at koppie 3. Their role was to use their dogs to search for firearms hidden in the rocks/brush and to assist the NIU sweep line if required with their dogs.'

803. Having regard to all the evidence, there can be little doubt that Maj Gen Naidoo had no intention of bringing paramedics to scene 1 victims as a priority. He chose, instead, to join in the action at scene 2.

The consequences of Maj Gen Naidoo's failure to carry out his duties in relation to medical assistance

804. We have already referred to the consequences of Maj Gen Naidoo's failure to carry out his duty to bring paramedics to scene 1 as soon as possible. They are essentially two-fold:

804.1. Many seriously wounded strikers were left lying on the ground at scene 1, without any medical assistance, for at least an hour. This would have subjected them for an unnecessarily lengthy period to the experience of acute pain caused by gunshot injuries, without any pain relief. Although it is an issue which has not been investigated by the Commission, common sense suggests that that the consequences of some of these injuries would have been aggravated by the absence of any medical attention in the 'golden hour' after the scene 1 shooting.

- 804.2. At least one striker, Mr Mdze, lost his life by bleeding to death in circumstances which could have been avoided if medical assistance had been brought in promptly.
805. Mr Mdze sustained R5 wounds to his left arm and leg and shotgun injuries to his back and head. His case is described by Prof Boffard as follows:

'This patient has significant (high energy) injuries to his arm, and to a lesser extent, his leg. His head wound (from a shotgun pellet) was relatively minor, with a small sub-arachnoid haemorrhage. He had eight shotgun pellets enter his lower torso from behind. It appears that most of these lodged in muscle, with a laceration of the upper pole of the right kidney. All of these would be classified as low energy wounds. Although there was bleeding described, there was no intraperitoneal blood collection, and some blood in the retroperitoneal space and extraperitoneal pelvis. It should be noted that the blood loss described above, was probably not an immediate threat to life on its own. Although it is conjecture, it seems that he exsanguinated externally, and I would suggest that the most likely site of massive bleeding was from the upper limb fracture with massive damage to the vessels and soft tissue. With regard to TRISS scoring, he is predicted as having a >90% chance of survival, and the cause of death was failure to control bleeding in a timeous fashion due to non-availability of medical

*personnel. Bleeding in the upper (and lower) limb could have been controlled by direct pressure on the vessels, or a tourniquet.*¹²⁷⁹

In other words, Mr Mdze probably bled to death in circumstances which were wholly avoidable and his life would probably have been saved by anyone who applied a tourniquet to the wound on his left arm.

806. Over the period of an hour after the shootings, we have several images of Mr Mdze bleeding slowly to death unattended at the mouth of the kraal, while Maj Gen Naidoo went off on his inappropriate and unplanned mission at scene 2:

806.1. On the video JJJ194.C00032 (eTV 16:08:05) Mr Mdze can be seen breathing heavily, lying on his back unattended at the mouth of the kraal. This video starts 14 minutes and 15 seconds after the shootings (15:53:50).

806.1.1. Maj Gen Naidoo did not dispute that his convoy with the paramedics would have reached Mr Mdze before 16:08:05 if he had proceeded directly to the scene as he should have done immediately after the shootings, or even he had turned around and proceeded to the scene after he found himself on the wrong side of the power station;¹²⁸⁰

¹²⁷⁹ Exhibit MMM10 Medico Legal Report of Prof Boffard at p 24 (emphasis added).

¹²⁸⁰ Naidoo p 23496/5 – p 23499/6.

806.1.2. Given that the journey from the power station to scene 1 along the longest route marked with blue arrows on Fig 10 is only 3km, Maj Gen Naidoo could probably have brought the paramedics to Mr Mdze before 16:08:05 even if he only decided to do so at the end of his first idling period to the west of the power station (eTV 16:02:25).

806.2. W/O Ramanala took a photograph of Mr Mdze still lying in the mouth of the kraal 27 minutes after the shooting at 16:18:02.¹²⁸¹ The bleeding from his left arm is clear from the photograph. No-one is attending to him.

806.3. When the paramedics finally reached scene 1 an hour after the shootings at 16:53 Mr Mdze was still lying in the same position in the mouth of the kraal.¹²⁸²

806.4. The paramedics attended to Mr Mdze relatively soon after they arrived on the scene: there is footage of him already having been bandaged, being removed on a stretcher at 17:25:01.¹²⁸³

¹²⁸¹ Exhibit JJJ29.161

¹²⁸² Exhibit JJJ10.4551

¹²⁸³ Exhibit JJJ194.061

However, the treatment came too late and he died later on the 16th in the Andrew Saffey Hospital.¹²⁸⁴

¹²⁸⁴ See Exhibit MMM21 medical reports of Mr Mdze

THURSDAY 16 AUGUST: SCENE 2

807. Seventeen people were killed by SAPS at koppie 3. In addition to the 14 strikers whose bodies were found on the scene, three more were wounded at koppie 3 and subsequently died in hospital: Mr Mohai, Mr Sagalala and Mr Ntsoele. We set out below the evidence in relation to the killing of two of these 17 strikers, Mr Mpumza (Body C) and Mr Mkhonjwa (Body N). Save in the case of these two victims, SAPS was able to produce no evidence whatsoever in relation to the specific circumstances in which any of the other victims were killed. In Exhibit L, versions are put forward that might possibly account for the deaths of Mr Mdizeni (Victim A) and Mr Thelejane (Victim B).¹²⁸⁵ However, in the evidence of Col Modiba, it became clear that SAPS were unable to account for the deaths of Mr Mdizeni and Mr Thelejane, and that the incident reflected in Exhibit L was a separate incident which apparently did not result in the deaths of any strikers.¹²⁸⁶

808. The bare facts in relation to scene 2 are therefore that SAPS killed 17 people, and in relation to 15 of these 17 victims, SAPS has not been able to provide any evidence at all relating to the circumstances of their killing, still less evidence that would justify the conduct of SAPS in killing these strikers.

809. Of those 17 strikers killed at scene 2, at least ten were killed in what has been described as 'the killing zone' - a small rocky area in the heart of the koppie

¹²⁸⁵ Exhibit L, Slide 232 – Incident 6

¹²⁸⁶ Modiba, Day 242, p 30593/15 – p 30618/5

where strikers had sought refuge during the scene 2 operation. Some of the horror of being trapped in the killing zone was conveyed by Mr Mtshamba in his statement and his evidence:¹²⁸⁷

'I saw water cannon and police coming from that direction as well. I then ran back and hid myself at Koppie 3. At that time shots were being fired from the helicopter as well. Most people in that vicinity were trying to take cover by hiding either among the rocks or the trees. It was very chaotic and the koppie was surrounded by policemen and police vehicles in all directions. All those who had chosen to run in that direction were trapped inside Koppie 3.

At Koppie 3 (scene 2) I joined other fellow protesters and we hid ourselves behind big rocks. I could observe more or less 50 (fifty) in number in my immediate vicinity. I later realised that there were a few hundred of us.

As I was hiding myself I heard lots of gunshots coming from different directions. I was scared for my life and I covered my face with my hand for some time expecting to be shot at at any time. Some of the shots were single shots and others were short bursts of fire.'

810. The position of nine of the ten victims who were killed in the killing zone is shown in Fig 12 below. The 10th victim who was killed in the killing zone is Mr Mohai, who later died in hospital but was shot in a position near Mr Ngxande

¹²⁸⁷ Exh MMM50 at paras 22-4. See also Mtshamba p 35137/17 – p 35140/4.

(victim K), and can be seen propped up against a rock next to the body of Mr Ngxande in photographs and videos.¹²⁸⁸ There is no evidence to suggest that any of these strikers posed an imminent threat to any of the SAPS members at the koppie. The photographic evidence that we have of the strikers in the killing zone during the operation shows a large group of men huddling together, apparently trying to shelter themselves from the spray of the NorthWest water cannon.¹²⁸⁹

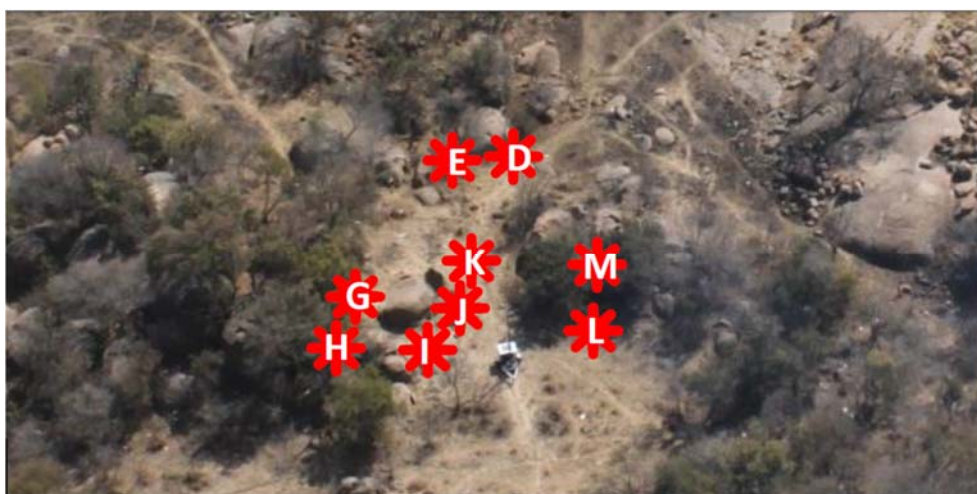


Fig 12: Bodies in the 'Killing Zone' in Scene 2 (Source Exh ZZZ5 Annexure B)

The fallacy of the “disruption of the plan” argument

811. At the outset, we emphasize that whatever effect the action of the strikers may have had on disrupting the plan at scene 1, the action of the strikers before scene 1 was completely irrelevant to what happened at scene 2. By the time of the stand-off at koppie 2, the SAPS forces had regrouped and configured

¹²⁸⁸ See for example JJJ29.248-249 and CC48.

¹²⁸⁹ See for example JJJ6.1242. See also JJJ6.1233-1239 and 1249-1251.

themselves in much the same manner as they had planned to do: the POPS armoured vehicles with STF and NIU support had lined up opposite the strikers outside the SAPS safe zone with water cannons at the ready to disperse the strikers. For the 7½ minutes of the stand-off, they also had time to consider how the next phase of the operation was to proceed.

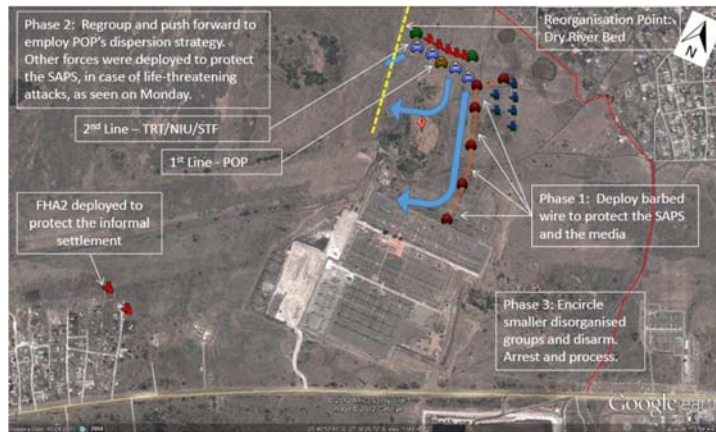
812. That any disruption of the plan was no longer relevant can be illustrated by comparing the arrangement of vehicles and SAPS units contemplated by the plan with the arrangement of vehicles and SAPS units at the stand-off at koppie 2, as is illustrated in Fig 13 below:

812.1. The barbed wire had been rolled out essentially in accordance with the plan;

812.2. The POPS armoured vehicles with STF armoured vehicle support had positioned themselves to the north of the koppies as required by the plan;

812.3. The NIU and STF were available to support the POPS members as required by the plan, if there was any need for them to do so; and

812.4. Although not visible in the photograph JJJ10.4543 reproduced below, the FHA2 forces were in position to the north of the informal settlement as required by the plan.



*Fig 13: The Recovery of SAPS's Organisation at Koppie 2
(Source Exh L Slides 181 and 229 and JJJ10.4543)*

The only feature of the plan that had been disrupted by the events at scene 1 was that the TRT had stayed behind to secure the kraal area, and so were not available to join the NIU and STF as part of the second line behind the POP. It can hardly be suggested that this 'disruption' of the plan had any material

effect on what happened at scene 2. Lt Col Scott, the designer of the plan, conceded as much in evidence.¹²⁹⁰

The movement and conduct of Brig Calitz

813. After the NW water cannon ended the stand-off at koppie 2 by breaking up the line of strikers behind the koppie, Brig Calitz took himself off to a position approximately 150m north of the koppie to supervise the arrest of strikers who had fled in that direction. Brig Calitz was already making his arrests north of koppie 3 by 16:08:16 when he can be heard on the Protea Coin video shouting:

*'Move out there, move move move. ... make arrests guys, make arrests. Take the panga'.*¹²⁹¹

He stayed in that position north of koppie 3 until 16:22:52¹²⁹² when his Papa 1 vehicle can be seen on the Protea Coin video moving from that position to the koppie itself, some three minutes after Mr Mpumza (victim C) had been killed and Col McIntosh had run to the scene of his killing.¹²⁹³ In the 14½ minutes that he was in his position north of scene 2, all of the victims who died at scene 2 had already been killed.¹²⁹⁴

¹²⁹⁰ See p 14650/5 – 14656/15

¹²⁹¹ Exhibit CC22 at 10:46. See also Exhibit OOO11 at p 1.

¹²⁹² Exhibit CC22 at 25:22.

¹²⁹³ These times were put to Brig Calitz in the passage from p 18939/11 – p 18941/25 at 18939/21-24. Brig Calitz responded to the whole passage that was put to him the following day to identify any points of dispute that he had. See p 18980/12 – 19030/25. He did not take issue with these times.

¹²⁹⁴ See Calitz p 19063/22 – 19064/4.

814. Brig Calitz claimed that he was not aware of any of the shooting at scene 2.

For the reasons which we have already discussed, that contention has to be rejected. Once shooting had broken out at scene 2, it was incumbent on him, as Operational Commander, to take control of the situation, to ensure that his own members were not at risk of being shot, and to restrain them from shooting at strikers. He took no steps whatsoever to exercise this control. He must accordingly be held responsible for the deaths of all victims who were killed after the first shooting at scene 2.

815. Apart from failing to control the shooting at scene 2, Brig Calitz failed properly to supervise the POPS dispersal operation at scene 2.

815.1. He could provide no reasonable explanation for his failure to issue any warning to the strikers at scene 2 after he was aware that they were surrounded ('ingeboks') in the koppie.¹²⁹⁵ Thus the strikers at scene 2 who were merely seeking shelter and had no intention of engaging violently with the SAPS were not given the opportunity to surrender peacefully before SAPS resorted to lethal force at scene 2.

815.2. Moreover, after it was clear that some strikers had entrenched themselves in koppie 3, he failed to take the obvious step of ordering the use of teargas to force them out of their hiding places at koppie 3 and into the open where they could be disarmed and arrested at much less risk to the SAPS members or them. He could not offer

¹²⁹⁵ Calitz p 21241/12 – p 21244/25

any explanation for this omission.¹²⁹⁶ No teargas whatsoever was used at scene 2. Instead, the strikers stayed inside the koppie and SAPS members fired indiscriminately into the koppie.

816. A final feature of Brig Calitz's testimony in relation to scene 2 merits comment. It is his unjustified attempt to slough off the blame for his omissions at scene 2 onto Col Vermaak.¹²⁹⁷ His evidence that he handed over to Col Vermaak command of the operation in relation to koppie 3 was patently false, and can only be seen as an attempt to avoid responsibility for what was a completely unjustifiable operation that left 17 people dead. He then compounded this false evidence by calling Col Vermaak in the tea break after he had given this evidence, and suggesting to Col Vermaak (his subordinate in the SAPS) that he had handed over command of the operation at koppie 3 to him.¹²⁹⁸

The movement and conduct of Maj Gen Naidoo

The Unsolicited Intervention by Maj Gen Naidoo at Scene 2

817. As has been discussed above, Maj Gen Naidoo appears to have ignored his primary obligation to bring medical assistance to the victims at scene 1 and to have decided instead to join the action at scene 2. It is common cause that he

¹²⁹⁶ See Calitz p 19182/10 – p 19186/23

¹²⁹⁷ See Calitz p 19137/24 – p 19150/24

¹²⁹⁸ Brig Calitz was cross examined on 9 Jan 2014 on his claim that Col Vermaak was in command of the operation at koppie 3. Shortly after the relevant section of the cross examination, the Commission adjourned for tea and reconvened at 15:29 (see p 19149/24). Col Vermaak noted in his diary for 9 Jan 2014 that around 15:30 he received a call from Brig Calitz in connection with Brig Calitz's his evidence that he was in control of koppie 3 ('Oproep ontvang van 17 brigadier Calitz in verband met sy getuienis dat ek in 18 beheer was van koppie 3.'). See the 9 January 2014 extract from Lt Col Vermaak's diary Exhibit OOO16 and Vermaak 25446/16 – 25451/4. The relevant evidence of Lt Col Vermaak was not challenged in cross examination.

did this without notifying Brig Calitz or the JOC.¹²⁹⁹ This left the JOC ignorant of the fact that someone else was now needed to bring medical assistance to scene 1 and Brig Calitz ignorant of the fact that the dispersion route of the strikers out of the koppie to the south was now being blocked by the K9 members, who were shooting into the koppie having been brought there by Maj Gen Naidoo. Maj Gen Naidoo claims that it was not possible for him to use the radio to announce his advance on the koppie, but he could offer no explanation for his failure, at the very least, to have notified the JOC of his change of purpose.¹³⁰⁰

818. The effect of the unannounced arrival of Maj Gen Naidoo and the K9 at scene 2 was not only to expose the wounded at scene 1 to lengthy delays before they received medical attention. It also disrupted the operation at scene 2 in two ways:

818.1. First, by surrounding the koppie in an arc from the south to the east, Maj Gen Naidoo and the K9 closed off one of the two dispersal routes out of the koppie. (The TRT under Capt Kidd, who also arrived uninvited and unannounced, closed off the other dispersal route to the west). As a result, the koppie was completely surrounded by SAPS members, and there was little prospect of the strikers being dispersed into open ground where the POP and

¹²⁹⁹ Naidoo p 23219/10 – p 23222/9

¹³⁰⁰ Naidoo p 23219/10 – p 23222/9

tactical teams could disarm small groups in circumstances that were far less risky.

818.2. Second, the uncontrolled shooting of the K9 forces effectively removed the STF from the operation. The STF were about to move in to sweep the koppie when the K9 members started shooting into the koppie through their lines. Faced with exposing his men to the risk of being shot by their own colleagues, the STF commander, Col Gaffley ordered the STF back into their armoured vehicles.¹³⁰¹ Thus the unit that was best qualified to sweep the koppie and disarm any strikers who sought conflict with the police was prevented from performing its function by the K9 members, who would not have been present at scene 2 but for Maj Gen Naidoo's decision to move in uninvited and unannounced.

His failure to exercise control appropriately

819. Once at the scene, Maj Gen Naidoo was, to his knowledge, the senior ranking officer on the scene. He accepted in evidence that, as the senior ranking officer, he was in command and control of all of the troops at scene 2, and he claims to have exercised command and control at scene 2.¹³⁰² He must

¹³⁰¹ Exhibit FFF10 Statement of Col Gaffley p 2 paras 11-13.

¹³⁰² Naidoo p 23707/3 – 23708/3. See also p 23707/20 – 23708/24 where he accepted that, in relation to the SAPS members of whose presence he was aware at scene 3, if there were failures of command and control he could be held accountable.

accordingly be held responsible for the manifest failures of command and control at scene 2.

820. As Mr White indicates, when there is gunfire in a public policing situation, the appropriate response of a commanding officer is to order his/her members to seek cover while they assess where the gunfire is coming from so that steps can be taken to isolate the problem and to deal with it.¹³⁰³

821. Maj Gen Naidoo was the senior ranking officer present while SAPS members fired 295 rounds of sharp ammunition at the strikers in the koppie, in what appears to have been a completely chaotic free for all which cost 17 people their lives. The firing free for all that unfolded at scene 2 called for immediate command and control to direct the SAPS to positions of cover, stop the SAPS shooting, and isolate the problem if it still existed. That was the responsibility that Maj Gen Naidoo should have assumed at scene 2. Had he done so, it is likely that many of the 17 fatalities at scene 2 would have been avoided.

822. As *de facto* officer in command at scene 2, Maj Gen Naidoo also failed to exercise any proper control over the crime scene. We discuss below, the apparent planting of weapons on the dead bodies of strikers and the disturbance of evidence at the scene. The former has brought the SAPS into disrepute; the latter may compromise the prospects of securing convictions against suspects arrested at scene 2. Both of these failings would have been

¹³⁰³ Exhibit JJJ178 Statement of Gary White p 119 para b ii.

avoided had Maj Gen Naidoo taken proper steps to secure the crime scene at scene 2 and he must, accordingly, be held responsible for them.

The circumstances of his shooting at a striker

823. Maj Gen Naidoo's version is that he and the NIU were coming up over the rocks on the eastern side of koppie 3 when he and the NIU shot in self- defence at a striker who was shooting at him from his left. According to his version he had Sgt Harmse and some NIU members on his left and some other NIU members on his right as he came over the rocks. After the shots that he and the NIU members fired in self-defence in this incident, they did no more shooting on the day.

824. This version is inconsistent with the statement of W/O Mamabolo, who was the commander of Papa 11 which had entered the koppie below the rocks from which Maj Gen Naidoo shot. W/O Mamabolo states the following :

'At the time that we arrived at the koppie the firing applied ammunition was still occurring. ...

We parked our Nyala such that the police and the arrested protestors were separated. I got out of the Nyala on the side of the police who were on top of the boulder, firing live ammunition towards the direction of the protestors. I expected the members to notice me and I shouted at them 'cease fire and stop fire'. I raised my hands to indicate to the police to stop and cease fire but the shooting continued. As the shooting of live ammunition described above continued, I observed Gen Naidoo

emerging on the top of the boulder from the same direction that the firing occurred with a pistol in his hand but I am not in a position to state whether or not he shot. Except for Gen Naidoo, other police officers had rifles in their possession. At the koppie at that stage I did not see any deceased persons.

*Once the shooting of live ammunition stopped I observed some of the protestors coming out of the bushes behind the boulder/rocks with their raised hands. Suddenly I saw one of the protestors falling on the ground. Some of the protestors were crawling towards the open area where the arrested protestors were. The shooting of live ammunition that I observed was not by POP members. I instructed the crew of PAPA 11 to get out of the Nyala and to direct the protestors to the area where other arrested protestors were. I did not see any protestor shooting at the police using firearms or attacking the police with dangerous weapons.*¹³⁰⁴

825. The statement of W/O Mamabolo is confirmed by six other occupants of Papa 11 – Cst Dzivhani, Cst N.R. Zondi, Cst R. Khosa, Cst M. Malesa, Cst T.P. Mathabha and W/O Mokonyama.¹³⁰⁵

¹³⁰⁴ Exhibit KKK 61; Supplementary Statement of W/O M.P. Mamabolo at paras 14 – 16

¹³⁰⁵ Naidoo Day 196 p 23968/7-25

826. Cst Mathabha saw Maj Gen Naidoo firing his pistol into the bush on the southern side of the koppie while he took cover behind a rock.¹³⁰⁶

827. If the version of the occupants of Papa 11 is true, Maj Gen Naidoo and the NIU members with him were shooting at strikers when there was no shooting at them visible to anyone within Papa 11, and they carried on shooting after a colleague had ordered there to cease fire. In our submission, the version of the occupants of Papa 11 is far more plausible than that of Maj Gen Naidoo, and his version must be rejected. In this regard we point out:

827.1. His version appears nowhere in Exhibit L. This suggests strongly that it was thought up at a stage after Exhibit L was finalised in October 2012. In particular, the versions in Exhibit L that describe the shooting by Maj Gen Naidoo and his NIU members, do not suggest in any way that the shooting was a response to shooting from a striker.¹³⁰⁷

827.2. From the discharge list in relation to scene 2, it appears that 24 NIU members fired their weapons at koppie 3. Not a single one of them provides any confirmation in his or her statement for the version of Maj Gen Naidoo.¹³⁰⁸

827.3. Sgt Harmse was, according to Maj Gen Naidoo, next to him on his left hand side when he shot. He does not corroborate the version of Maj

¹³⁰⁶ Exhibit MMM 29 Supplementary Statement of Sgt T. Mathabha at para 3.4

¹³⁰⁷ See Exhibit L Slide 232 Incidents 7 & 8 and Slide 243 Second Bullet Point

¹³⁰⁸ Naidoo: Day 196 p 23899/21 to p 23992/12

Gen Naidoo. In fact, the only shooting incident described in the statement of Sgt Harmse that could have been the shooting by Maj Gen Naidoo, suggests very different circumstances, which are plainly insufficient to justify the use of potentially lethal force. In this regard, Sgt Harmse states the following:

‘Ons het verder inbeweeg in die koppie in. Ek het opgemerk dat daar ‘n man van links af uit die bosse uitkom na ons rugting toe, leerder van NIU het vir die man gesê hy moet op die grond lê maar die man het nie gaan lê nie, waarna daar op die man geskiet is van my regte kant af maar kannie sê wie nie.’¹³⁰⁹

827.4. Finally, the version Maj Gen Naidoo gives of his shooting in his oral evidence, which we have described above, is materially inconsistent with the version of the shooting that he gave in his two statements where he said the following :

‘Just as we moved forward towards the second line of rocks we came under fire from one of the strikers to my left approximately 50 metres and the bullets narrowly missed me and struck the rocks around me. I immediately returned fire with two rounds from my pistol Z88Q010032 at the individual I could see taking cover between rocks and trees with a firearm in his hand. Several other NIU members to my left also simultaneously

¹³⁰⁹ Exhibit MMM 30, Statement of Sgt Harmse, p2, para 1

*returned fire in the direction of the shots which immediately stopped. When the NIU line reached the rocks where the shots had emanated from they did not find anybody there as the assailant had fled further in. Two individuals were arrested in that area by other members with firearms in their possession, one of whom admitted to firing on the police as they advanced.*¹³¹⁰

827.5. The original version of Maj Gen Naidoo was thus that he shot, not from on top of the rocks, but while he was approaching the rocks. This is clear not only from the extract quoted above, but also from the succeeding paragraphs which describe incidents which took place before he, and the NIU members with him, moved onto the high ground on the rocks.¹³¹¹

827.6. If Maj Gen Naidoo knew that he had shot in unjustifiable circumstances that would have been witnessed by the crew of Papa 11 whose commander (W/O Mamabolo) had attempted to stop that shooting, the version in his statements would have been convenient for him, because it would have placed his shooting in a position from which it would not have been visible from Papa 11, and thus would have cast doubt on any statements from the crew of Papa 11 to the effect that he had shot in their presence. However, the original

¹³¹⁰ Exhibit JJJ108, Statement of Gen Naidoo at para 75. This wording in Maj Gen Naidoo's consolidated statement is taken verbatim from his original statement. See Exhibit DD original statement of Maj Gen Naidoo at p 6

¹³¹¹ Exhibit JJJ108, Statement of Gen Naidoo at paras 76 – 78. See also Exhibit DD original statement of Maj Gen Naidoo at p 6

version of Maj Gen Naidoo was plainly false. The cartridge case from one of the shots that Maj Gen Naidoo fired was found on top of the rocks near the highest point of the rocks, in a position from which he would have been visible to Papa 11 on the ground below him in the koppie.¹³¹²

828. It appears that the reason for the shift in Maj Gen Naidoo's version from a convenient version that placed him out of sight of Papa 11 to an inconvenient version that placed him in their sight, has to do with the ballistics evidence.

828.1. The sketch plan of Capt Mohlaki at page P47 of Exhibit B shows the position where cartridge P was found on top of the rocks on the high ground at the east entrance to koppie 3. A better illustration of the position of Maj Gen Naidoo's cartridge can be found on the video of the final inspection in loco¹³¹³ where the videographer pans around koppie 3 from a position on the exact coordinates of Maj Gen Naidoo's cartridge.

828.2. The linking of Cartridge P to Maj Gen Naidoo's gun took place only through the ballistics investigation. Maj Gen Naidoo's firearm has

¹³¹² Exh MMM32 paras 14 & 16; Exh B p47; Day 196 p 24008/24 to p 24009/19. See also Final Inspection in loco video (Exhibit number forthcoming)

¹³¹³ Final Inspection in loco video (Exhibit number forthcoming)

serial number Q010032. It was made available to the ballistics examination only on 20 November 2012.¹³¹⁴

828.3. Maj Gen Naidoo's original statement was signed on 7 November 2012.¹³¹⁵ On 7 November 2012, Maj Gen Naidoo did not know that a cartridge found on the high ground on the rocks at koppie would be positively linked to his gun, because the ballistics investigation was still underway and no report had been furnished by Col Pieterse. So the version he set out in his original statement had not been framed to account for that objective evidence.¹³¹⁶ He was then obliged to follow that version in his later consolidated statement.¹³¹⁷

828.4. Once the ballistics evidence had shown that Maj Gen Naidoo shot from on top of the rocks at koppie 3, he had to change his original false version in oral evidence, in order to render it consistent with this objective evidence. That the changed version was itself false, has been shown above.

829. In the light of the importance of the ballistics evidence in exposing the falsity of Maj Gen Naidoo's original version of his shooting, it is a matter of some concern

¹³¹⁴ See Statement of Col Pieterse, Exhibit MMM 31, p 13, para 18.1 (the linking of this firearm to Cartridge P appears at p 14, para 21.1 of Exhibit MMM 31).

¹³¹⁵ Exhibit DDD, Statement of Maj Gen Naidoo 7 November 2012.

¹³¹⁶ The cartridge of Maj Gen Naidoo is Cartridge P – see Exhibit FFF 8, Discharge List Scene 2

¹³¹⁷ Exhibit JJJ108, Statement of Gen Naidoo at paras 75 to 78.

that he appears to have hindered the ballistics investigation into his own firearm.

830. Although he was in charge of the liaison between SAPS and IPID in relation to the shootings on 16 August 2012, he did not submit his own firearm for inspection by Col Pieterse in the IPID ballistics investigation together with the other firearms of SAPS members who had shot on the day. The general collection of firearms and delivery of these firearms to Col Pieterse took place between 18 August 2012 and 4 October 2012.¹³¹⁸ In this process 646 firearms were made available to Col Pieterse. These did not include Maj Gen Naidoo's firearm. His firearm was one of a batch of five 9 mm firearms which were belatedly made available to Col Pieterse only on 20 November 2012.¹³¹⁹ The firearm itself was only made available to IPID on 15 November 2012.¹³²⁰

831. Maj Gen Naidoo could not provide a satisfactory explanation for his failure to make his firearm available to IPID for the ballistics investigation until two full months had passed from the date of the shootings. The only explanation he could offer was that he was waiting for the firearm to be requested.¹³²¹ But he was aware that as early as 20 August 2012, IPID had asked for a list of all members who had not handed their firearms over for ballistic investigations.¹³²²

¹³¹⁸ Statement of DSL Pieterse, Exhibit MMM 31 at p 3, para 3

¹³¹⁹ Exhibit MMM 31, Statement of Col Pieterse at p 13, para 16. The serial number of Maj Gen Naidoo's firearm is Q010032. See Exhibit MMM 38, IPID Occurrence Book, Entry B, 46

¹³²⁰ See Exhibit MMM 37, Email from Brig Pretorius to Van Velden Duffy Inc, para 4

¹³²¹ Naidoo, p 24039/16 – p 24044/2

¹³²² Exhibit MMM 32, Letter from IPID to Provincial Commissioner, 20 August 2012, p 2, Item 9
Naidoo, p 24013 - 23

He knew that his firearm had not been made available for ballistics testing. Yet he took no steps, proactively, to remedy the situation until his firearm was specifically requested from him on 15 November 2012.¹³²³

832. Maj Gen Naidoo also appears to have misled the IPID investigation in relation to their request for video evidence.

832.1. In a letter addressed by IPID to the Provincial Commissioner on 20 August 2012, IPID had asked for video footage of the incident.¹³²⁴ In the response that Maj Gen Naidoo sent on 24 August 2012, he said the following:

*'As this was a field operation, facilities were not available for video/radio recordings of the operation and this office can therefore not provided the requested recordings.'*¹³²⁵

832.2. Maj Gen Naidoo was, at the time that he wrote the letter of 24 August 2012, aware of the fact that there was substantial video footage taken by SAPS operators of the incidents of 13 and 16 August 2012. He could not satisfactorily explain why he made the statement quoted above when he knew that there was footage available.¹³²⁶

¹³²³ Naidoo, p 24038/14 – 24040/12

¹³²⁴ Exhibit MMM 32, Letter from IPID to Provincial Commissioner, 20 August 2012, Item 7

¹³²⁵ Exhibit MMM 34, Letter from Maj Gen Naidoo to Acting IPID Provincial Head, 24 August 2012

¹³²⁶ Naidoo, p 24030/21 to p 24034/19

832.3. In the event, it was only through the proceedings of the Commission that IPID finally came to learn that notwithstanding the letter of Maj Gen Naidoo of 24 August 2012, that there was SAPS video footage of the incidents of 13 and 16 August 2012.¹³²⁷

832.4. Having been alerted to the existence of missing video footage by evidence in the Commission, IPID demanded this footage from SAPS and it was provided. Maj Gen Naidoo conceded that it ought to have been provided earlier, but would not explain why this had not taken place.¹³²⁸

The movement and conduct of Col Modiba

833. As the operation moved forward towards koppie 3 following the dispersion of the line of strikers behind koppie 2, the NIU advanced in a line from behind koppies 1 and 2 towards koppie 3. The progress of the NIU line is charted in Exhibit MMM 26.

833.1. By the time that the first SAPS vehicles approached koppie 3 at 16:06:32, the NIU line had formed up in front of koppie 2. This is the scene reproduced in Slide 230 of Exhibit L.

833.2. The NIU line had not moved from this position by 16:08:30, by which stage the K9 bakkies with Maj Gen Naidoo at the south eastern side

¹³²⁷ Exhibit MMM 36, Letter from IPID to Provincial Commissioner, 12 November 2012

¹³²⁸ Naidoo, p 24035/4 to p 24038/13

of koppie 3 and the POPS dispersion Nyalas had covered both sides of the koppie as well as the area to the north of the koppie where Brig Calitz would arrest his fleeing protestors.¹³²⁹

833.3. The NIU line started to move forward sometime between 16:08:30 and 16:08:42. This is evident from its position in relation to the blue dye stain on the ground from the North West water cannon's engagement with the strikers behind koppie 2. By this stage, Maj Gen Naidoo's entourage had almost reached their final position at koppie 3 and the POPS Nyalas and water cannons and the two STF armoured vehicles had arranged themselves around the koppie and the area to the north where strikers were being arrested.¹³³⁰

833.4. The forward advance of the NIU line continued and it had reached the eastern side of koppie 3 by 16:10:33.¹³³¹

834. Col Modiba did not notify Brig Calitz of his advance on koppie 3. Brig Calitz says that he was unaware of the movement of the NIU towards koppie 3.¹³³² It is not clear whether it is true that he was unaware of the advance of the NIU line. That line stretched far beyond the north east corner of koppie 3 in a northerly direction, and would have been clearly visible from Brig Calitz's

¹³²⁹ Exhibit MMM 26 at Slide 5

¹³³⁰ Exhibit MMM 26 at Slide 6

¹³³¹ Exhibit MMM 26 at Slide 9

¹³³² Calitz, p 19006/11- 14

position to the north of scene 2 if he had looked in that direction.¹³³³ The NIU line stretching north of koppie 3 is the dark line of SAPS members just to the left of the Canter on the right side of the photograph just above the middle of the photograph. Brig Calitz's Papa 1 vehicle is the vehicle closest to this line in the cluster of vehicles towards the top of the photograph in the centre of the page. Whatever the knowledge of Brig Calitz, the intervention of the NIU at scene 2 was not in any way coordinated or controlled by him.

835. The uncoordinated intervention of the NIU from the east meant that the first engagement between strikers and SAPS members on the east side of the koppie was an engagement between the strikers coming off the rocks on the eastern edge of the koppie and an NIU line armed with R5 rifles and proceeding on foot without any armoured vehicle cover. Mr White comments on this as follows :

'Having proceeded with the plan to encircle, disarm and arrest those protestors who had fled to koppies 2 and 3, the decision to do so using an NIU 'baseline' was irresponsible for two reasons. First, if the police believed that the protestors were violent, armed and would resist arrest, then faced with that resistance, the NIU was armed only with live ammunition to ensure compliance. Secondly, if it were true that the protestors on koppies 2 and 3 were violent and armed with firearms, the baseline formed by the NIU created a large target for the protestors

¹³³³ See for example KKK 16.5141 which shows the scene at 16:16:57.

*to fire at, placing the NIU members at undue risk. In my view it would have been better to try to contain the crowd within the koppies by surrounding them from a safe distance and then negotiating. If it was not considered safe to enter the koppie because there was a risk of attack, then the decision to send members into the koppie to make arrests, placed those members at unreasonable risk and carried huge risks for the need to use lethal force. Alternatively, if it was considered safe to enter the koppie to encircle and arrest the protestors, it would have been far preferable to utilise the POP members with less lethal tactical options or dogs in the first instance to do so.*¹³³⁴

836. Mr White's comments are borne out by the discharge report. The members of the NIU who had advanced on koppie 3 without the protection of armoured vehicles ended up shooting 115 rounds of live ammunition at scene 2. 103 of these rounds were R5 rounds.¹³³⁵

The movement and conduct of Capt Kidd and the TRT

What the actual briefing was

837. On the morning of 16 August Capt Kidd was posted to FHA2, on the western side of the koppies, as part of a reserve group under the command of Lt Col Pitsi.¹³³⁶ At about 10h00 Lt Col Pitsi was redeployed to the SAPS area on the

¹³³⁴ Exhibit JJJ 178, Statement of Gary White at pp 116 to 117, para 7.6.4

¹³³⁵ Exhibit FFF 8, Discharge List, Scene 2

¹³³⁶ See Exhibit UUU2, paragraphs 4 and 5.1.

eastern side of koppie 1 leaving Capt Kidd in charge of the remaining SAPS members at FHA2.¹³³⁷ The remaining SAPS members at FHA2 were 55 TRT members, 29 POP members, and six K9 members, totalling 90 members.¹³³⁸

838. At approximately 14h30 Capt Kidd attended a briefing that was given by Lt Col Scott at FHA1. According to Capt Kidd, the role that was assigned to his group was-¹³³⁹

'to protect the informal settlement situated at the western side of the Koppie, by forming a basic line. Members were to specifically move in a straight line once the deployment of the barbed-wire commenced to form a barrier between the Koppie and the informal settlement. The members were to protect the informal settlement from attack. The members would also disarm and confiscate any dangerous weapons in [the] possession of the strikers that would be approaching the line and allow them to proceed.'

839. This statement is inconsistent with an earlier statement in which Capt Kidd described the following:¹³⁴⁰

'I was called to a briefing where information was given to myself by Brig. Calitz that instructions would be given over the radio as to deploy my 90

¹³³⁷ Exhibit UUU2, paragraph 5.2.

¹³³⁸ See Exhibit TTT8, paragraphs 6 and 7; Day 232, pp 28992/22 to 28993/6.

¹³³⁹ See Exhibit UUU2, paragraph 6; Day 232, pp 28994/6 to 28995/8.

¹³⁴⁰ See Exhibit TTT8, paragraphs 6 to 9.

members. I was to perform a straight line with members by walking towards the hill area.

I returned to the members and briefed them with regard to the operational briefing I received from Lt. Col. Scott. ...

Once we received instructions to deploy over the radio, I instructed the members to exit their vehicles and to make one long straight line facing the hill.

We proceeded to walk towards the hill in the line facing the hill. The line was about 150 metres long. While approaching the hill I noticed people running from that direction. These people were carrying weapons in their hand.'

840. The two versions differ: in the later version which Capt Kidd offered in oral evidence and in his later statement, he asserts that the primary role of his group was to protect the informal settlement that is situated to the west of the koppies; in his original version he stated that the primary role of his group was to form a line and to approach the koppies.

841. It is significant that in his earlier statement Capt Kidd records that the instructions given to him early on the morning of 16 August 2012, and prior to the briefing that occurred at about 14h30, were:¹³⁴¹

¹³⁴¹ Exhibit TTT8, paragraph 4.

‘... to cover the western side of the hill and to find a place to stand where we could gain quick access to the hill if required.’

842. Capt Kidd attempted to explain this discrepancy by suggesting that the original version was made in a statement produced for purposes of a police docket, and he did not see the need to mention every detail in it.¹³⁴²

843. We submit that it is probable that Capt Kidd’s original version was correct, and that the version in his later statement was an afterthought to fit the SAPS version that members at FHA2 were deployed to protect the informal settlement to the west of the koppies.¹³⁴³

843.1. First, the contemporaneous statements of the men under the command of Capt Kidd provide overwhelming support for his earlier version, and no support for his later version. Capt Rylands, W/O Swarts, Sgt Banda, and Constables Mabasa, Magodi, Mashishi, Matlala Mlombo, Mokgetla, Mosetla, Mphahlele, Motloheloa, Ngcama, Somo, Thobela and Thoka all furnished statements in the immediate aftermath of the 16th in which they describe being briefed that they were to advance on the koppies.¹³⁴⁴ None of them mentioned any briefing about protecting the informal settlement. In fact, the evidence leaders have been unable to find a single statement

¹³⁴² Day 235, pp 29362/15 to 29369/10.

¹³⁴³ See Exhibit L, slide 181.

¹³⁴⁴ See their statements in Exhibit ZZZZ3.

from a member of the FHA2 group that suggests a briefing to protect the informal settlement.

843.2. If Capt Kidd's primary function had been for his group to protect the informal settlement, he would not have omitted to mention this in his earlier statement whilst only recording his secondary function; if he was going to omit anything, he would have omitted mention of his secondary function.

843.3. Further, no evidence was presented at the Commission that the strikers posed an imminent threat to the people who lived at the informal settlement, such that a large body of SAPS personnel was required to the settlement, or that the strikers had ever threatened the well-being of the people who lived there.

843.4. Finally, the instruction that Capt Kidd had received on the morning of 16 August entailed that his group would not remain at or near the informal settlement, but would approach the koppies from the west. No evidence was presented at the Commission which would have justified or called for this instruction to be changed between the morning of 16 August and the afternoon of the same day.

844. We point out that Capt Kidd's changed version that members at FHA2 were deployed to protect the informal settlement, dovetails with the false version that SAPS produced in relation to the events of 13 August 2012, namely that they had to intervene on 13 August 2012 to protect residents of the informal settlement. It may well have been contrived for this purpose.

The movements of Capt Kidd

845. Capt Kidd stated that at about 15h40 he heard an instruction over the radio that the barbed wire was to be deployed, and he thereupon instructed the members under his command to exit their vehicles, to form a line, and to move forward.¹³⁴⁵ Capt Kidd stated that he heard over the radio that the police were being attacked and then-¹³⁴⁶

'I first tried on numerous occasion to establish on the radio what exactly was happening but the radio was not accessible. I ordered the members to move in the direction of the Koppie where I thought the police were under attack. The decision to move forward in the direction of the action was my own as I thought it was necessary to give other members our support.'

846. Capt Kidd testified that he tried contacting Brig Calitz, the JOC and Lt Col Vermaak on the radio but with no success.¹³⁴⁷ He carried on trying but still met no success, at which time he consulted with Capt Ryland and decided to move to the koppie.¹³⁴⁸ Capt Kidd testified that both he and Capt Ryland had cellular telephones with them but that they did not think of using these to try and make contact with anyone.¹³⁴⁹ Capt Kidd acknowledged that it would have been

¹³⁴⁵ See Exhibit HHH12, paragraph 10, read with Exhibit TTT8, paragraph 8, and Exhibit UUU2, paragraph 8.

¹³⁴⁶ See Exhibit UUU2, paragraph 8.

¹³⁴⁷ Day 232, p 29003/19 to /23.

¹³⁴⁸ Day 232, p 29005/1 to /5.

¹³⁴⁹ Day 232, p 29005/11 to /22.

sensible to inform the JOC of the movement of his group.¹³⁵⁰ This was because Brig Calitz, the Operational Commander, had no idea that Capt Kidd's group was approaching koppie 3 from the west.¹³⁵¹

847. As it turned out, the first SAPS members to reach koppie 3 on foot were Capt Kidd's group, who arrived there shortly after eTV 16:07:24.¹³⁵²

848. As we have pointed out, the effect of the arrival of Capt Kidd's group from the west, coupled with the arrival of Maj Gen Naidoo's group in an arc from the south to the east, and the NIU from the east, was to close off the east, south and west of koppie 3 as possible dispersal routes for the protesters gathered in koppie 3. This contributed materially to the tragic events at scene 2.

The circumstances of the death of Victim N

849. Mr Makhosandile Mkhonjwa died outside koppie 3. His body is commonly identified as body N. The main findings of the post-mortem report are that he died from perforating gunshot to chest and abdomen with associated haemorrhage. The gunshot that killed him was a 9mm shot. He was shot from his left hand side. The bullet passed through his left arm, entered the left side of his chest and passed through his lungs and liver before lodging in the right

¹³⁵⁰ Day 232, pp 29005/23 to 29006/3.

¹³⁵¹ See the exchange between the Chair and Capt Kidd at Day 232, pp 29006/20 to 29007/22.

¹³⁵² Capt Kidd's members can be seen still approaching the dry dam from the South West in JJJ10.4547.

side of chest.¹³⁵³ The bullet was retrieved from his body but could not be linked to any firearm.¹³⁵⁴

850. Capt Mohlaki testified that the nearest cartridges to Mr Mkhonjwa's body were cartridges AA13-24, which were 20.2 metres away from his body¹³⁵⁵ on his left hand side. However, Capt Kidd testified that Mr Mkhonjwa had crawled back up the dam wall after being wounded, and had been in a position closer to the SAPS members when he was shot.¹³⁵⁶ Capt Kidd also testified that the SAPS members apparently under attack by Mr Mkhonjwa were not in the position of cartridges AA13-24 but had been inside the dry dam and closer to him.¹³⁵⁷ So while the forensic evidence is consistent with Mr Mkhonjwa's having been shot from the position of cartridges AA13-24, it may well be that there were SAPS members considerably closer to him than the member who shot him.

851. According to SAPS, Mr Mkhonjwa was the first person to be shot at scene 2.¹³⁵⁸ The time of his shooting can be fixed before 16:09:17, because that was when Lt Col Vermaak reported seeing his prostrate body.¹³⁵⁹

¹³⁵³ Exhibit A p 91(a) paras 2-3.

¹³⁵⁴ Exhibit MMM31 Statement of Pieterse p 7 para 10.2.1 and p 15 para 29.

¹³⁵⁵ Day 6, p724/17-19: p743/3.

¹³⁵⁶ Kidd Day 234 p 29046/20 – 29047/3

¹³⁵⁷ Kidd Day 235 p 29295/2-13

¹³⁵⁸ Exhibit L, slide 231, Day 195 p 23882/5-23

¹³⁵⁹ Lt Col Vermaak reports seeing two bodies (one of whom is Mr Mkhonjwa) at CC22 11:47 which is eTV 16:09:17.

852. Exhibit L slides 236 and 237 describe the SAPS version of what happened during the incident where Mr Mkhonjwa lost his life. That version appears to have been derived from Capt Kidd whose testimony was the following:¹³⁶⁰

852.1. Mr Mkhonjwa was armed with a spear in his hand when he was shot.¹³⁶¹

852.2. A group of strikers came out of the koppie, tapping their weapons and pointing them at the police. They were chanting and singing while they moved in a crouching formation.¹³⁶²

852.3. Mr Mkhonjwa and Mr Gadavu (the man in the Arsenal shirt) then came out of the group and charged the police.¹³⁶³

852.4. The police shot at the two strikers, and Mr Mkhonjwa fell down. Mr Gadavu then retreated before running out again twenty seconds later, when he was shot and fell to the ground.¹³⁶⁴

853. While Capt Kidd's version may be true, it cannot be relied upon with complete confidence:

¹³⁶⁰ Day 223, p29140/8-10.

¹³⁶¹ Day 233, p29281/12-17; Day 235, p29402/11, p29406/2-4.

¹³⁶² Day 233, p29036/9-22.

¹³⁶³ Day 233, p29037/23-25, p29037/1-15

¹³⁶⁴ Day 233, p 29043/15-22.

- 853.1. As we have pointed out above,¹³⁶⁵ it is likely that Capt Kidd has tailored certain parts of his evidence to meet the requirements of the SAPS version. It is thus possible that his version in relation to the death of Mr Mkhonjwa may reflect not the truth, but what he thought would be expedient.
- 853.2. The evidence leaders have been unable to find corroboration of his version in its detail in relation to Mr Mkhonjwa, in any of the contemporaneous statements of FHA2 members under his command.
- 853.3. While Const Pelaelo has taken responsibility for shooting Mr Gadavu,¹³⁶⁶ no SAPS member has taken responsibility for shooting Mr Mkhonjwa. This would be anomalous if the shooting was as identifiable and justifiable as Capt Kidd suggests.
- 853.4. There is no video or photographic evidence of any weapons in the vicinity of Mr Mkhonjwa's body, or even in the vicinity of where Capt Kidd says he would have dropped his weapon when he was shot.
854. The SAPS may have been justified in shooting Mr Mkhonjwa. The evidence is insufficient to make a finding either way. If Capt Kidd's version is true, there would have been grounds for shooting at Mr Mkhonjwa - although, in the

¹³⁶⁵ See para 843 above where we point out that his evidence in relation to his briefing appears to be contrived.

¹³⁶⁶ Exhibit UUU14 and UUU15

absence of any explanation from the SAPS member who shot, it is not clear that there were grounds for shooting at chest height.

855. A final disconcerting aspect relating to Mr Mkhonjwa is the fact that SAPS clearly planted weapons on his body. This is a matter which we address below. For present purposes we point out that no explanation has been offered by SAPS for the planting of weapons on the body of Mr Mkhonjwa. W/O Breedt does not take responsibility for these weapons,¹³⁶⁷ and if the version of Capt Kidd is true, it would preclude an innocent explanation for the presence of weapons next to the body of Mr Mkhonjwa when the LCRC photographer arrived. In this regard Capt Kidd claims that when Mr Mkhonjwa was shot he dropped the weapon that he was allegedly carrying and crawled back, before dying in a position some distance from any weapons.¹³⁶⁸

The circumstances of the death of Mr Mpumza

856. Mr Thobile Mpumza was killed outside koppie 3. He is the deceased person commonly referred to as body C. The gunshots that killed Mr Mpumza are audible on Capt Rylands' video, and Capt Rylands recorded the scene in the immediate aftermath of the killing of Mr Mpumza.¹³⁶⁹ The evidence in relation to Mr Mpumza suggests that he was killed in a case of justifiable private defence.

¹³⁶⁷ See Exhibit GGG 14 at p 12 para 14

¹³⁶⁸ Kidd Day 234 p 29294/21 – 29295/1.

¹³⁶⁹ Exhibit I2 at 1:00 to 3:15.

857. On the day of his death, Mr Mpumza can be seen at the koppie brandishing the two weapons that were photographed near his body after his death. One of them is a spear.¹³⁷⁰

858. It is common cause that Mr Mpumza was killed in a hail of bullets. The post-mortem records the cause of death as multiple gunshot wounds of the chest and thighs. The post-mortem identified 12 bullet wounds which were entrance wounds. The pathologists agree that most of the bullet wounds in the body of Mr Mpumza are consistent with high velocity (ie R5) gunshots. This is significant because Constable Sebatjane, who admits to firing 9 shots at Mr Mpumza in self defence, was firing his 9mm pistol.¹³⁷¹ So it appears it may have been someone else who killed Mr Mpumza.

859. Const Sebatjane testified before the Commission. He made four written statements including a warning statement submitted to IPID which cannot be located.¹³⁷² The evidence of Const Sebatjane was the following:

859.1. He was to the west of koppie 3 when he first saw Mr Mpumza. He was walking together in a line with Cons Mabe and Buthelezi, on their left.¹³⁷³

¹³⁷⁰ Exhibit WWW 2,

¹³⁷¹ Exhibit UUU 3, par. 10 and 11, Day 237 p 29660/ 21–p 29661/9.

¹³⁷² Exhibit UUU 3, par. 3.

¹³⁷³ Day 237p 29658/1-20.

859.2. Mr Mpumza was running in the direction of Capt Kidd, but shortly thereafter he turned¹³⁷⁴ towards Const Sebatjane. As he was running towards the direction of Const Sebatjane, all three constables shouted for him to stop. He stopped and started walking slowly in their direction.¹³⁷⁵ The police officers approached Mr Mpumza and ordered him to get down.¹³⁷⁶

859.3. Mr Mpumza went down on his knees, giving an impression that he was putting down his weapons. Const Sebatjane put his pistol back in a holster and was busy taking out his handcuffs with the intention of arresting him, when Mr Mpumza stood up with a spear in his left and attempted to stab Const Sebatjane in the neck. Const Sebatjane twisted his body and the spear missed his neck. Const Sebatjane then moved two or three paces back while drawing his pistol and firing one round to the chest of Mr Mpumza.

859.4. Mr Mpumza took a few paces back before charging forward again at Const Sebatjane. Const Sebatjane fell down as he was stepping back, and then fired a total of 9 rounds into the abdomen of Mr Mpumza.¹³⁷⁷

¹³⁷⁴ Day 237, p 29653/5-10.

¹³⁷⁵ Day 237 p 29655/10-15.

¹³⁷⁶ Day 237, p 29656/5-9.

¹³⁷⁷ Exhibit UUU 3, par. 10 and 11, Day 237 p 29660/ 21–p 29661/9.

860. The evidence of Const Sebatjane is broadly corroborated by Capt Kidd¹³⁷⁸ and Lt Col McIntosh.¹³⁷⁹

861. It is also supported by the video footage of Capt Rylands:

861.1. Capt Rylands saw Mr Mpumza running towards the TRT line west of koppie 3 because he turned his cell phone video camera to film him running, at eTV 16:19:29.¹³⁸⁰

861.2. Shortly thereafter, at 16:19:29, there is the sound on Capt Rylands' video of what is probably the series of shots that killed Mr Mpumza.¹³⁸¹

861.3. Capt Rylands immediately ran to the position where Mr Mpumza was killed. His comments suggest that he witnessed an attack on Const Sebatjane by Mr Mpumza, and was concerned for the safety of Const Sebatjane:

'Ja no he is alright. He wants he wants to attack them,

...

But is he alright?

¹³⁷⁸ Day 233 p 29054/7-12, p 29057/6-23 and p 29061/15-25. Exhibit UUU2, par. 13.

¹³⁷⁹ Day 231 p 28667/19- p 28668/11 and p 28683/18-22.

¹³⁸⁰ Exhibit I2 at 0:42.

¹³⁸¹ Exhibit I2 at 0:42.

...

*(Apparently to Const Sebatjane) Ja, are you alright there? Ja, are you okay?*¹³⁸²

862. On arrival at the scene of the shooting, Col McIntosh found Const Sebatjane was unscathed. He tried unsuccessfully to resuscitate Mr Mpumza with cardio-pulmonary resuscitation.¹³⁸³ His unhurried attempts to do so were recorded on Capt Rylands' video.¹³⁸⁴

863. Const Mabe also fired two shots at Mr Mpumza in private defence of the life of Const Sebatjane.¹³⁸⁵ He states that he fired at the legs of Mr Mpumza. This evidence is corroborated by the forensic evidence - the two bullets retrieved from the thighs of Mr Mpumza¹³⁸⁶ have been linked to the R5 with serial number 322430¹³⁸⁷ which is the firearm used by Const Mabe on 16 August.¹³⁸⁸

SAPS inability to account for 15 killings

864. The fact that SAPS was unable to justify killing 15 of the 17 scene 2 victims, must have been clear to the SAPS leadership from an early stage after 16

¹³⁸² Exhibit I2 at 1:22 – 1:32.

¹³⁸³ Day 231, p 28670/9-16.

¹³⁸⁴ Exhibit I2 at 2:15 – 3:08.

¹³⁸⁵ Exhibit UUU3, par. 12.

¹³⁸⁶ Exhibit A p 20(a) paras 4.21 – 4.23.

¹³⁸⁷ Exhibit MMM31 Statement of Col Pieterse p 7 para 10.3.2 and p 15 para 32. The statement 'are inconclusive' means that the bullets are likely to have been fired in the firearm but cannot be linked to the firearm with the certainty required for independent ballistic proof in criminal proceedings.

¹³⁸⁸ Exhibit FFF8.

August. At the very least, it was clear by the time that the Roots workshop had run its course. Despite this fact, the SAPS presentation contains no frank admissions of the inability of SAPS to justify the deaths that it caused at scene 2. To the contrary, the presentation proceeds on the basis that SAPS acted perfectly reasonably at scene 2. This cannot have been an oversight in the production of Exhibit L. Instead, it appears to have been the product of a deliberate attempt to hide the degree to which SAPS was unable to account for its lethal actions at scene 2. The facilitator of the Roots process was Brig Van Graan.¹³⁸⁹ Paragraph 10 of the statement prepared for Brig Van Graan in relation to the Roots workshop reads as follows :

*'During the meeting concern arose among the members that some of the death of people at the small koppie were unexplained.'*¹³⁹⁰

In the margin against this paragraph, an SAPS officer with the reference number 'SAPS 537672' had inserted the following comment:

'Delete this sentence. It will raise questions.'

865. The SAPS legal team however made clear at the outset of the Commission, in their opening statement, that SAPS would not be able to justify all of the killings at scene 2.¹³⁹¹

¹³⁸⁹ Phiyega, p 7669/20 - 24

¹³⁹⁰ Unsigned Statement of Brig Van Graan (June 2013) Exhibit ZZZZ 1

¹³⁹¹ Exhibit FF9, SAPS Opening Statement, p 19, para 45.5

The alleged shooting at the SAPS

866. SAPS have suggested that their members at scene 2 came under fire from strikers at the koppie. This evidence must be treated with some caution. SAPS recovered only 3 firearms from strikers at scene 2.¹³⁹² One of these firearms 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. All three of these firearms were Norinco pistols.¹³⁹³ The three firearms were found in the possession of three strikers at scene 2. Gunshot residue tests were requested for all three of these strikers. There is no suggestion from SAPS that any of these tests returned positive results.¹³⁹⁴

867. It is highly unlikely that, apart from the three firearms that were recovered at scene 2, any other firearms could have been used to shoot at the police at scene 2. By the time that the fire fight broke out at scene 2, the entire koppie was surrounded by SAPS members, and no strikers were able to leave the koppie without being arrested.¹³⁹⁵ Every striker who was arrested at scene 2 was thoroughly searched. After the arrest of all of the strikers at scene 2, the entire scene was thoroughly searched by SAPS members and forensics investigators who spent days gathering evidence. None of the SAPS members searching

¹³⁹² Exh L, Slide 264

¹³⁹³ Exhibit L, Slide 264

¹³⁹⁴ Exhibit JJJ 108, Consolidated Affidavit of Maj Gen Naidoo at p 13, para 85; Naidoo, p 22951/23 – 22955/1 and 23284/2 - 19

¹³⁹⁵ Naidoo, p 23293/21 – p 23294/18

arrested strikers, or searching the koppie after the event, found any firearms other than the three that have been listed above. In the circumstances it is overwhelmingly likely that these were the only three firearms in the possession of strikers at scene 2.

868. 121 spent cartridges were found at scene 2. 119 of these cartridges can be positively linked to the firearms of SAPS members shooting at scene 2.¹³⁹⁶ The only two cartridges found at scene 2 that cannot positively be linked to SAPS firearms that were disclosed as having been shot at scene 2 are cartridges AA28 and AA29. The ballistics evidence shows that these cartridges were fired from the same firearm. That firearm was definitely not a Norinco firearm (i.e. one of the three firearms recovered from strikers at scene 2). It was a Beretta Model PX4 Storm pistol, which is standard issue to the SAPS. Although the cartridge cases could not be matched to any of the Beretta PX Storm pistols submitted for ballistics examination, one SAPS Beretta pistol used on 16 August 2012 could not be tested in that examination due to a firing pin defect. This was the firearm with Serial No. PX3499E.¹³⁹⁷ It is possible that cartridges AA28 and AA29 were fired from that pistol. It is also possible that they were fired from a pistol by a SAPS member who did not submit his pistol for ballistics investigation. It is extremely unlikely that they were fired by a striker.¹³⁹⁸

¹³⁹⁶ Exhibit FFF 8 – Discharge List Scene 2 read with Exhibit MMM 31 – Statement of Lt Col Pieterse, 21 January 2013

¹³⁹⁷ Exhibit MMM 31 at p 3 para 3

¹³⁹⁸ Exh ZZZZ 17 para 5 at page 11

869. It is therefore probable that all of the 121 cartridges recovered at scene 2 were fired from SAPS firearms. At best for SAPS, there is a faint possibility that two of the 121 may have been by strikers, but it is much more likely that they were fired by the SAPS. It is clear that not all of the cartridges fired at scene 2 were recovered by the forensics investigators. SAPS members who disclosed shooting at scene 2 can account for 295 shots. Thus there are at least 174 cartridges which have not been found for ballistics investigation. However, if there had been any sustained shooting at SAPS from strikers inside koppie 3, it would be extremely unlikely for no cartridges from this shooting to have been recovered by the forensics investigators. The Commission can therefore safely conclude that if there was any gunfire at all from strikers at scene 2, this would have been confined to a very small number of shots.

The ballistics evidence in relation to the killing zone

870. The two SAPS units whose line of fire would have had clear access into the killing zone were

870.1. the K9 members whom Maj Gen Naidoo had brought into scene 2 and whose vehicles fanned out to the South East of Koppie 3 with a line of fire into the killing zone. (In some photographs, one of these K9 members can be seen aiming his rifles in the direction of the killing zone);¹³⁹⁹ and

¹³⁹⁹ See for example JJJ6.1237-8 and 1251.

870.2. Maj Gen Naidoo and the NIU members whom he took over the rocks on the east side of koppie 2. W/O Mamabolo in Papa 11 speaks of this group coming over the rocks firing at the strikers (who would have been in the killing zone from the description of W/O Mamabolo).¹⁴⁰⁰ Some of the bullet marks in the rocks in the killing zone appear to have been fired from the rocks over which Maj Gen Naidoo and the NIU members came.¹⁴⁰¹

871. The ballistics evidence confirms that the strikers who lost their lives in the killing zone are most likely to have been killed by shots fired from the positions occupied by these two SAPS units.¹⁴⁰² This is illustrated in Fig 14 below.

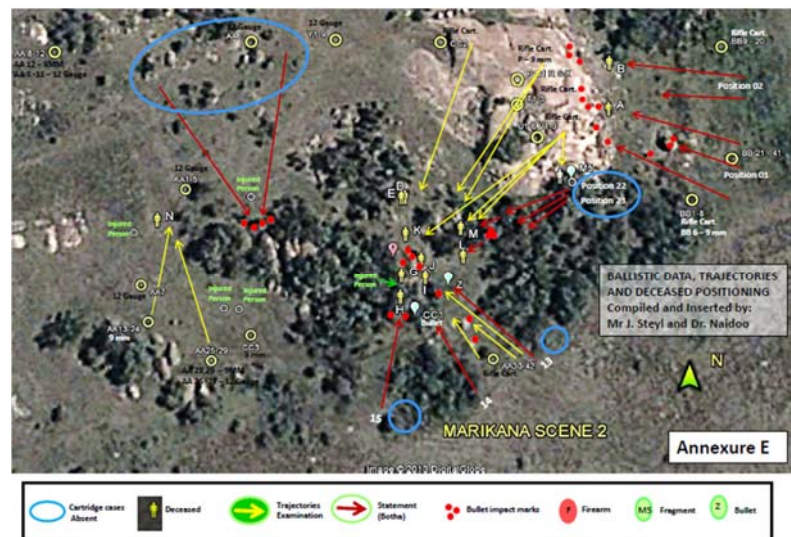


Fig 14: Line of Fire to Scene 2 Victims (Source Exh ZZZ5 Annexure E)

¹⁴⁰⁰ KKK60 Statement of W/O Mamabolo at p 6 paras 15-16. The scene he describes appears to be that photographed in KKK.16.5137 – 5142.

¹⁴⁰¹ KKK60 Statement of W/O Mamabolo at p 6 paras 15-16. The scene he describes appears to be that photographed in KKK.16.5137 – 5142.

¹⁴⁰² Exhibit ZZZ5 Integrated Report of Dr Naidoo and Mr Steyl pp 17 to 22 paras 4 to 12.

872. In relation to particular victims who died within the killing zone, the ballistic experts conclude the following:

872.1. Mr Mangcotywa (Victim D) appears to have been shot from the rocks over which the NIU came with Maj Gen Naidoo, but could also have been shot from the direction of the K9 vehicles and members.¹⁴⁰³

872.2. Mr Liao (Victim E) 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 Liao was shot from a position on top of the rocks over which Maj Gen Naidoo came with the NIU.¹⁴⁰⁴

872.3. Mr Mosepetsane (Victim G) was most likely shot from the direction of the K9 members.

872.4. Mr Mabiya (Victim H) was also most likely shot from the direction of the K9 members.

872.5. Mr Nokamba (Victim I) may have been shot from either the rocks over which Maj Gen Naidoo came with the NIU or from the position of the K9 members.¹⁴⁰⁵

¹⁴⁰³ Exhibit ZZZ 5 at p 17, para 4

¹⁴⁰⁴ Exhibit ZZZZ 5 at p 18, para 5

¹⁴⁰⁵ Exhibit ZZZ 5, p 20, para 8

872.6. Mr Saphendu (Victim J) was also probably shot either from the rocks over which Maj Gen Naidoo came with the NIU or the position of the K9 members.¹⁴⁰⁶

872.7. Mr Ngxande (Victim K) appears to have been shot from the rocks over which Maj Gen Naidoo came with the NIU members.¹⁴⁰⁷

872.8. Mr Gadlela (Victim L) may have been shot either from the rocks over which Maj Gen Naidoo came with the NIU or from the position of the K9 members.¹⁴⁰⁸

872.9. Mr Pato (Victim M) is likely to have been shot from the rocks over which Maj Gen Naidoo came with the NIU.¹⁴⁰⁹

The chaos at the scene

873. One of the striking features of the gunfire at scene 2 is that the STF did not find it necessary or appropriate to fire a single shot.¹⁴¹⁰ The STF is the most highly qualified unit of the SAPS for dealing with tactical operations. Its members were in position at scene 2 closer to the '*killing zone*' than any other unit, from very early in the scene 2 operation.¹⁴¹¹ They also appear to have had a view of the

¹⁴⁰⁶ Exhibit ZZZ 5 p 20 para 9

¹⁴⁰⁷ Exhibit ZZZ 5 p 21 para 10

¹⁴⁰⁸ Exhibit ZZZ 3 pp 21-22 para 11

¹⁴⁰⁹ Exhibit ZZZ 5 p 23 para 12

¹⁴¹⁰ Exhibit FFF 10 – Statement of Lt Col Gaffley at p 3 para 17

¹⁴¹¹ Exhibit FFF 10 – Statement of Lt Col Gaffley at p 2 para 10

'killing zone', because Col Gaffley saw strikers being hit by the gunfire coming from behind him. (To his credit, he appears to have attempted to stop this gunfire, but without success).¹⁴¹² The STF members saw no reason to fire any shots into the *'killing zone'*. It is difficult to see on what basis the members further away from the *'killing zone'* would have had reason to do so.

874. On the overwhelming probabilities, the number of shots fired by strikers at scene 2 would be in single figures, if indeed, there was any shooting at all from the strikers: it is possible that there was none at all. It appears that some SAPS members at scene 2 genuinely thought that they were being shot at. As was partially acknowledged by SAPS in its opening statement, these members were probably mistaking gunshots being fired by their colleagues on the other side of the koppie for gunshots being fired at them by strikers.¹⁴¹³ This testifies to the appalling lack of co-ordination, command and control of the SAPS operation at scene 2.

875. The evidence creates the overwhelming impression of a chaotic 'free for all' at scene 2, with SAPS members firing indiscriminately into the koppie from three sides and no-one in a position of command exercising any control over this process. When Col Gaffley and W/O Mamabolo attempted to stop apparently unjustified shooting by other units they were not successful. In the free for all 15 people were killed in circumstances which SAPS cannot even describe, still less justify. Brig Calitz, as the Operational Commander at scene 2, and Maj

¹⁴¹² Exhibit FFF 10 – Statement of Lt Col Gaffley at p 3, para 14

¹⁴¹³ Exhibit FFF 9 – SAPS Opening Statement at p 19, para 45.5

Gen Naidoo, as the senior officer on the scene, must be held responsible for these deaths.

The failure to secure the crime scene

876. After the gunfire had stopped and SAPS had arrested the strikers and taken control of the scene, scene 2 was a crime scene which had to be secured so as to protect the integrity of evidence in any prosecutions of strikers for offences they may have committed, and more obviously, for any prosecution of SAPS members for the killing of 17 people and the wounding of numerous others. It was therefore incumbent on the senior SAPS officers at the scene to take whatever steps were necessary to protect the integrity of the crime scene. This they manifestly failed to do. Instead, SAPS members were given free licence to interfere with the crime scene, planting weapons on the bodies of dead victims and moving evidence around without any apparent regard to the need to protect its integrity.

877. The planting of weapons on victims by W/O Breedt and other SAPS members is a matter which we address in some detail in a separate section below. For present purposes it is sufficient to point out that the failure of the senior officers in command at scene 2 to secure the crime scene immediately after the shootings, accordingly :

877.1. Allowed the integrity of the crime scene to be destroyed by actions like those of W/O Breedt;

- 877.2. Brought the SAPS into disrepute by facilitating the planting of weapons on dead bodies;
- 877.3. Compromised future prosecutions of persons arrested on the 16th August by providing an opportunity for their defence counsel to impugn the authenticity of any crime scene evidence.

These are all issues for which the senior commanding officers at scene 2 should be held responsible.

THE IMMEDIATE RESPONSE TO THE SHOOTINGS

The report to the President and the media statement

878. At the time of the shootings on 16 August, the President was at a SADC meeting in Mozambique with the Minister of International Relations. The Minister contacted the National Commissioner and asked for a report on the facts of the matter, in order for the President to consider whether he should continue attending the SADC meeting.¹⁴¹⁴
879. A report was prepared very late on 16 August and was sent to the Minister of International Relations in the early hours of 17 August.¹⁴¹⁵ That report is Exhibit FFF4.
880. On the morning of 17 August, the National Commissioner held a media briefing. At that briefing, she read out a statement which is Exhibit FFF5.
881. The information in this document was obtained from the commanders at Marikana.¹⁴¹⁶
882. The people who drafted the media statement (FFF5) also drafted the internal brief (FFF4).¹⁴¹⁷ The drafting was done by a communications team consisting of Brig Mashego (Head of SAPS Public Relations) and Capt Adriaio. They

¹⁴¹⁴ Day 64, p 6834/24 – 6838/4.

¹⁴¹⁵ Day 64, p 6834/23 – 6835/4.

¹⁴¹⁶ Day 64, p 6839/14-18.

¹⁴¹⁷ Day 105, p 11351/24 – 11352/2.

collated the information which was provided by the commanders, and drafted the statements.¹⁴¹⁸

883. As the Chairperson pointed out, it is clear that FFF5 was drafted after FFF4. That is so because the death toll recorded in FFF4 is 29, whereas the death toll recorded in FFF5 is 34.¹⁴¹⁹ Maj Gen Annandale confirmed that when FFF5 was prepared, the police had more information than they had had when FFF4 was prepared.¹⁴²⁰

884. Besides the updated death toll, there is a very material difference between the two statements.

885. FFF4, the report to the Minister of International Relations and the President, makes it clear that there were two separate incidents in which strikers were shot and killed. The relevant part of the report 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 repost the advance with stun grenades. The attempt was unsuccessful and the Police members had to employ force to

¹⁴¹⁸ Day 105, p 11350/20 – 11351/12.

¹⁴¹⁹ Day 105, p 1135/17 – 23; p 11357/15 – 19.

¹⁴²⁰ Day 83, p 8815/9 – 18.

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 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.'

886. From this it follows that at the time when the report was prepared for the Minister and the President, the drafters were aware that there had been two separate shooting incidents, at different places. These are what came to be known as scene 1 and scene 2.

887. However, the media statement (FFF5) which was subsequently prepared, does not disclose this. It creates the impression that there was only one shooting

incident, during which the police were acting in self-defence or private defence.

The relevant parts read 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 repost the advance with water-cannon, 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.'

888. In the later statement (FFF5), which was intended for public consumption, the statement that 13 strikers had been killed before the dispersion action commenced was thus excised from the first statement (FFF4). Similarly, the

separate death and injury toll in respect of scene 2 was excised. Instead, a total number of people killed and injured was provided.

889. The result was that the statement which was issued to the public through the media was materially misleading. It created the impression that there had been one shooting incident, at one place (which had been seen on television), and not two separate incidents at separate places. The change cannot have been accidental, because the wording of the relevant parts of the two statements was virtually identical, except in this respect. A deliberate excision was made.

890. The National Commissioner was asked, when she gave evidence, to explain this difference. She was not able to do so, except to say that in the second statement, which was being put out to the world, it was 'important for us not to be putting in detail that may not have been fully confirmed'.¹⁴²¹ That is however no explanation at all. If anything at all would have been clear to the police by late on the night of the 16th and early on the morning of the 17th, it was that there had been two shooting incidents, at what are now known as scene 1 and scene 2. The incidents were separated in space and in time. No-one could have been in any doubt about this, and no-one ever suggested that he or she was in any doubt about it.

891. The most reasonable conclusion to draw is that the report which had been prepared for the Minister and the President was deliberately amended when it was reformulated into a media statement, in order to obscure the fact that there

¹⁴²¹ Day 105, p 11360/2 – 5.

had been two shooting incidents, separate in time and in 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 at scene 1 which they had seen on television.

The media conferences on 17 August

892. On the morning of 17 August, a media conference was held. It was attended by a number of senior police officers. The National Commissioner read a statement to the conference.

893. Later that morning, Lt Col Scott presented to the media an account of what had taken place the previous day.¹⁴²² His presentation made it clear that in fact there had been two separate shooting incidents on 12 August, at scenes 1 and 2.

The address by the National Commissioner to the SAPS parade on 17 August

894. On the afternoon of 17 August, the National Commissioner addressed a parade of SAPS members.¹⁴²³ During that address, she said the following:

¹⁴²² The SABC footage of this presentation is exhibit CCCC12.

¹⁴²³ The parade is referred to in her statement FF2 at para 27. A video film of the events is exhibit WWS. A not altogether satisfactory transcript of her remarks is exhibit FFF12. The passage which we quote in these submissions is drawn directly from the video recording commencing at 3.03 minutes.

'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.'

895. In the context of what had happened the previous day, when 34 civilians had been killed by members of the SAPS, and where the President had announced that a Commission of Inquiry would be established, the statement that 'whatever happened represents the best of responsible policing', and that the police did what they did 'because you were being responsible', was unfortunate and irresponsible, to put the matter at its lowest.

896. The statement by the National Commissioner set out what was henceforth to be the police line, namely that they were not to be blamed for what had happened, because at all times they had acted responsibly and correctly. It reflected an immediate and almost reflexive 'closing of ranks', which would inevitably discourage those present from disclosing any mistakes which had been made in the operation, or any illegalities which had been committed. The statement reflected a failure by the National Commissioner to appreciate and carry out her duties under the Constitution and the SAPS Act.

The address by the Minister on 17 August

897. The National Commissioner gave her speech on 17 August in the presence of the Minister, and knowing that he was to speak immediately after her. In the circumstances, it is unlikely that she would have said what she did without discussing the approach with him in advance. It is likely, therefore, that he was party to the process of closing of ranks.

898. This is certainly the impression created by the speech that he gave after the National Commissioner. His speech was short, but it had a militaristic flavour, and communicated unconditional support for what the SAPS had done. The Minister stated:

'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, property is protected against anybody who would want to do bad things in this country.

...

There will be criticism [inaudible – of the 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 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.'

899. The Minister's remarks reflected the closing of ranks. The consistency between what he said and what the National Commissioner said is such that it is difficult to avoid the conclusion that they had discussed the matter, and agreed on the line which they would take. The line was one of unquestioning support for what the police had done the previous day.
900. Again, we accept that it was appropriate for the Minister to seek to build the morale of police officers who were engaged in important and difficult work. However, we submit that it is inexcusable that the Minister should, the day after the SAPS had killed 34 civilians, pronounce an unqualified endorsement of what they had done. One can reasonably anticipate that senior officers and those whom they command would have understood what the Minister said – following as he did upon the remarks of the National Commissioner – supported a closing of ranks and a denial that the police had any responsibility for the failure of the operation or its catastrophic consequences.

901. This was an inappropriate speech and reflected a failure on the part of the Minister to appreciate and carry out his duties under the Constitution.

The briefing by Brig Calitz on 18 August

902. This theme was picked up by Brig Calitz when he addressed a parade of POPS members before operations commenced on the following day, 18 August. He briefed the members in relation to the tasks they were to perform that day. One of the events which were anticipated was that Mr Julius Malema would visit the area on that day.

903. The briefing by Brig Calitz was recorded by the SAPS on videotape. That video recording was not initially disclosed by the SAPS. It was not on the SAPS external hard drive which was provided to the Commission, even though videos in the same sequence, before and after it, were on the hard drive. The most reasonable inference is that it was deliberately excluded and concealed. Lt Col Scott said that he saw the video recording for the first time in the Commission.¹⁴²⁴

904. Brig Calitz took steps to prevent members of the media who were in the vicinity from recording what he said. He told police officials to take the camera from a member of the media who was present in the area, to check the recording that had been made, and to record over it if necessary.¹⁴²⁵

¹⁴²⁴ Day 143, p 15753/21 – 22.

¹⁴²⁵ Exhibit JJJ82, p 3 at 9: 50 and 10: 26.

905. After giving the SAPS members their instructions as to the operation which they were going to implement, he said 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 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 theand say how many rounds'.¹⁴²⁶

906. One can readily understand that Brig Calitz felt the need to bolster the morale of his subordinates when they were preparing to go into action on 18 August. He cannot be criticised for that. However, it is truly remarkable that, in the light of what happened, he could have told the assembled police officials that

'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.'

907. Brigadier Calitz had been the Operational Commander on 16 August.

- 907.1. As to scene 1: On his version, 17 strikers were killed by the SAPS at scene 1, without his knowing that it had happened. Although he was the Operational Commander, on his version he first heard that there had been shootings at scene 1 some 54 minutes (nearly an hour) after

¹⁴²⁶ Exhibit JJJ82, p 2 at 7: 20 – 9: 15.

they had taken place: his version was that he had first heard about them at 16h47, when he was informed by Maj Gen Annandale.¹⁴²⁷

907.2. As to scene 2: A further 17 people had been killed at Scene 2, again without his knowing about it or having any control over what was happening, and without his knowing where the various police units were. Mr De Rover stated that as a matter of SAPS doctrine the operation should have been stopped after Scene 1, if the SAPS leadership had known of the shootings and had been able to communicate with the police conducting the operation. While Brig Calitz did not know on 18 August what Mr De Rover would say, he must have known that the operation should have been stopped after the shootings at Scene 1. Some of the strikers at scene 2 had been killed in cross-fire because units of the SAPS were on opposite sides of koppie 3, and each of them was firing into koppie 3, apparently under the impression that it was being fired on by strikers, when in fact the people firing in their direction were other members of the SAPS.

908. As the Operational Commander, Brig Calitz must have known how badly the operation went awry. In cross-examination, he agreed that it was not part of the plan that when the barbed wire was rolled out, some of the strikers would move forward and attack some of the Nyalas in the barbed wire line; it was not

¹⁴²⁷ Day 157, p 17801/1 – 3; p 17803/25 – 17804/6.

part of the plan that a group of the strikers would move around the kraal in an attempt to attack the police in the police-safe area; it was not part of the plan that 16 (actually 17) strikers would be shot dead at the kraal; it was not part of the plan that the police would surround the strikers at koppie 3 and shoot at them; it was not part of the plan that some strikers would be killed at koppie 3 in cross-fire by the police; it was not part of the plan that strikers would be killed at Koppie 3.¹⁴²⁸

909. He was asked how, in the light of that circumstance, he (the Operational Commander) could have said 'from the planning to the execution was 110%, exactly how we planned it'. His explanation was 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 deployed;¹⁴²⁹ the vehicles had moved in a line; and the dispersion line and basic line were correctly formed.¹⁴³⁰

910. That explanation was plainly without substance. There was a national and international uproar about the fact that 34 people had been killed by members of the SAPS. The President had appointed a Commission of Inquiry. The question which concerned everyone was whether the killings had been justified. It is fanciful to suggest that when he told his members that 'from the planning to the execution was 110%, exactly how we plan it' what he meant, and what they would have thought he was meant, was the manner in which they rolled

¹⁴²⁸ Day 157, p 17825/17 – 17827/13.

¹⁴²⁹ Day 157, p 17829/1 – 9.

¹⁴³⁰ Day 157, p 17829/21 – 17831/11.

out the barbed wire¹⁴³¹ and how they formed the dispersion line and the basic line. The question in the minds of everyone was whether the police conduct in shooting the strikers had been justified.

911. As we have stated, one can understand Brig Calitz's need to strengthen the morale of those who were under his command. However, his statement that 'from the planning to the execution was 110%. Exactly how we plan it ... I have to congratulate you' was reckless, particularly in circumstances where the police officials would shortly be undertaking a potentially difficult operation. His explanation of what he meant to communicate is plainly not the truth.

912. The statement was also entirely inappropriate at a time when a Commission of Inquiry had been established. It reflected a 'closing of ranks', and a denial that anything had been done wrongly, at a time when it was of the greatest importance that all members of the SAPS should disclose the truth to the Commission. It reflects an attitude of denialism which regrettably was carried through into his evidence before the Commission.

¹⁴³¹ Which in fact happened incorrectly, not according to the plan.

ROOTS

The Presentation and the Narrative

913. The Roots process generated two different documents, each of which went through various iterations that the evidence leaders have identified:

913.1. The first was the SAPS presentation itself which was the PowerPoint presentation that was ultimately delivered by Col Scott and Col Visser in the Commission hearings. This is now exhibit L.

913.2. Alongside the presentation, Lt Col Scott and Col Visser worked on a narrative that was the script off which they would speak when presenting the presentation. The final version of the narrative became Exh HHH28.

914. In order to assist the Commission in understanding the development of the SAPS version, the evidence leaders have included as an annexure to these heads of argument, a chronology of each of the different drafts of the presentation, and each of the different drafts of the narrative.

The change in the purpose of Roots

915. Exhibit GGG 3 is the call-up instructions for the Roots conference. The purpose for the conference set out in those instructions was framed as follows:

'The recent incident at Marikana and the subsequent judicial Commission of Inquiry necessitated that officers and members are

called to Potchefstroom for debriefing and preparation for the Commission.'

Maj Gen Naidoo, who issued the first call-up instructions, testified that initially *'my thought was maybe this was going to be some sort of debriefing session'*.¹⁴³² However that initial purpose soon changed. Facilitators were brought in, and by the time the Roots conference started it appears that debriefing was no longer on the agenda and instead, Roots had become a process of assembling the SAPS version for this Commission.

The absence of any self-criticism

916. One of the striking features of Exhibit L and the narrative that accompanies it (Exh HHH28) is the complete absence of any self-criticism on the part of SAPS. Despite the fact that Exhibit L purports to describe and to explain a police operation in which more people lost their lives than in any SAPS operation since Sharpeville, it does not suggest that there was a single thing that SAPS might have got wrong.

917. The absence of any self-criticism in Exh L hints at the true purpose of Roots and the process that followed it. What was intended to be a debriefing exercise seems to have turned into an exculpatory exercise. The evidence suggests that an exculpatory version on all of the critical incidents was decided on at Roots. Where necessary, documents were fabricated to

¹⁴³² Naidoo, p 23675/24 – p 23676/1

support this version, and documents incompatible with this version were kept undisclosed. Exhibit L was then produced to give voice to this version, scrupulously avoiding any self-criticism and/or known facts that were incompatible with the chosen version. In short, the Roots exercise involved a concerted attempt to mislead this Commission.

918. These are serious charges which need to be justified. We will do so under the following headings :

918.1. The construction of versions;

918.2. The fabrication of documents;

918.3. The attempts to hide crucial facts;

918.4. The attempts to hide crucial documents.

The construction of versions

919. SAPS always knew that it would have to justify its conduct on the 13 and 16 August at this Commission. The case that it brought to the Commission in relation to the 13th was that its actions in engaging the strikers in the field opposite the railway line were necessary because the strikers had suddenly changed direction towards the internal settlement, and SAPS had to intervene to prevent an attack on that settlement. The case in respect of the 16th was never able to provide any exculpatory version for scene 2, but attempted to explain scene 1 in the following terms :

- 919.1. The SAPS plan had been carefully worked out in consultation with POPS officers and had been in place since Tuesday, 14 August;
- 919.2. The decision to move to the tactical phase (phase 3) of the plan on 16 August had not been predetermined, but was forced on SAPS because of the escalation of the risk of violence in the morning of 16 August; and
- 919.3. The use of lethal force at scene 1 on 16 August took place only after the strikers had attacked SAPS on three different occasions (incidents 1 to 3) and POPS methods had been exhausted in repelling incidents 2 and 3.
920. Each one of these versions was produced at Roots and set out in Exhibit L. As we have shown above, each of them was demonstrably false
- 920.1. The intervention by SAPS on the 13th was not prompted by any change in direction of the strikers. The video evidence of the incident makes it clear that there was no change of direction. Rather, there was a precipitous and wholly unnecessary decision taken to fire teargas at the strikers at a time when they did not appear to pose an immediate threat to anybody. This was either a unilateral decision of W/O Kuhn or a decision implemented by him on the instruction of Maj Gen Mpembe.
- 920.2. The tactical plan ultimately implemented on the 16th had not been carefully worked out in consultation with POPS officers. Nor had it

been in place since Tuesday 14 August. It was a plan that was thought up by Col Scott in the course of the morning of 16 August and was designed and adopted without the participation of any POPS officers.

920.3. There was no material escalation of the risk of violence on the morning of 16 August and that was not the reason for the move to phase three of the plan. The true reason was that that decision had been predetermined at the meeting of the extraordinary session of the NMF the night before where it was decided, without reference to the SAPS on the ground at Marikana, that the strikers were to be disarmed and dispersed the following day.

920.4. The strikers did not attack SAPS on three separate occasions before lethal force was used at scene 1, nor had POPS methods been exhausted at that stage. Incident 1 did not take place. Incident 2 did not take place in the form described by SAPS and did not involve any apparent confrontation between SAPS and the strikers, still less the use of water cannon, stun grenades or teargas. The latter POPS methods were not used until 20 seconds before the shootings and before the strikers had already entered the channel to the east of the kraal. (As soon as they were used, they had the effect of breaking up the lead group of strikers. It is quite possible that if they had been used before the strikers entered that channel to the east of the kraal, the tragedy would have been avoided in its entirety.)

The fabrication of documents

921. In order to sustain these versions, SAPS had to fabricate some documents consistent with them. Thus, at Roots, minutes of JOCCOM meetings on 15 and 16 August were produced in a form which would not render them inconsistent with the SAPS version.¹⁴³³ This involved the omission of all content from the contemporaneous notes which did not match the new version.
922. A file was created at Roots to hold debriefing minutes of 17 August 2012. This file was never filled with information.¹⁴³⁴
923. The first version of the plan reverse engineered to match the requirements of what would be the new SAPS version in the Commission was produced at Roots on 30 August 2012.¹⁴³⁵
924. By 20 September 2012 neat versions of the reverse engineered plan had been produced for each day from 13 to 16 August for submission to IPID,¹⁴³⁶ and by 4 October 2012 an ostensible copy of the operational plan had been reverse engineered in the form required of public order policing contingency plans

¹⁴³³ See Exhs TT 3 and TT 4

¹⁴³⁴ See Exhibit JJJ 125, Debriefing Minute 17 August 2012 (file produced at 1.33 p.m. on 28 August 2012).

¹⁴³⁵ Exhibit JJJ 152, Ops Platinum, 14 August 2012 (a) – produced at 12:06 p.m. on 30 August 2012. This document should be compared with the earlier reverse engineered versions in JJJ 43b, JJJ 150 and JJJ 151, all of which were produced on 23 August 2012 and all of which disclosed that the tactical plan had been the original encirclement plan until it was revised at the 1:30 JOCCOM.

¹⁴³⁶ Exhibit JJJ 163.1 to JJJ 163.4

complete with provision for signature by Brig Calitz, Maj Gen Naidoo and Maj Gen Mpembe.¹⁴³⁷

The hiding of crucial facts

925. In order to sustain the various false elements of the SAPS version, it was necessary to hide certain facts. These included :

925.1. The absence of any change of direction by the strikers on the 13th.

925.2. The fact of the extraordinary session of the NMF on 15 August 2012;

925.3. The statement by the Provincial Commissioner in her media conference on the morning of 16 August 2012 when she made clear that SAPS were going to end the protest on that day, and the fact that up until the morning of 16 August 2012 the tactical plan had been an encirclement plan, and that it was only when it became clear that the plan had to be implemented later that day and that the encirclement plan was not feasible in that context, that a new plan was thought up and adopted at the 1:30 JOCOM - with tragic consequences a few hours later.

¹⁴³⁷ Exhibit JJJ 153 – Operational Plan, Operational Platinum (produced on 4 October 2012).

- 925.4. The manner in which political motives appeared to influence the Provincial Commissioner and National Commissioner in their decision making in relation to Marikana.
926. In at least one respect, the hiding of these facts required a deliberate removal of material that had been included in a draft of Exhibit L. Thus, as is set out more fully below, an earlier draft of Exhibit L that inadvertently included footage of the Provincial Commissioner's statement at her 9.30 press conference on 16 August that *'today we are ending this matter'* was removed from later drafts of the presentation.¹⁴³⁸
927. The National Commissioner and the Provincial Commissioner both vetted the copy of the SAPS presentation before it was finally submitted to the Commission in the form of Exhibit L. It is inconceivable that they would have failed to realise that the Commission would be misled by the failure of the presentation to refer to the extraordinary session of the NMF.

The hiding of crucial documents

928. Once SAPS had decided to put forward false versions and to hide crucial facts, it became inevitable that they would have to hide crucial documents.
- Thus :

¹⁴³⁸ See Scott Day 136 p 14391/14 to p 14405/6

- 928.1. The contemporaneous notes kept in the JOC, including contemporaneous notes of meetings in the JOC, were not disclosed to the evidence leaders until September 2013.
- 928.2. The early versions of the SAPS presentation and the early reverse engineered versions of the plans for 13 to 16 August, all of which made clear that the original tactical plan for encirclement of the koppie was abandoned only at the 1.30 JOCOM meeting of 16 August, were discovered by the evidence leaders only after Col Scott made his hard drive available to them in September 2013.
- 928.3. SAPS did not disclose the minute of the extraordinary session of the NMF until the fact of the decision taken at that session and the existence of a minute had been independently discovered by the evidence leaders, and they had addressed to SAPS a specific request for the minute.
- 928.4. SAPS did not disclose the recording of Maj Gen Mbombo's meeting with Lonmin on 14 August 2012 although they had obtained this recording from Lonmin under a s 205 subpoena early in September 2012.
929. The SAPS willingness to embrace false versions in order to avoid responsibility on the part of its senior officers continued after the production of Exhibit L, and into the Commission. Thus, although it did not form part of the version in Exhibit L, when it became clear to SAPS that its commanders at Marikana would have to explain why they failed to stop the operation after

scene one had left 17 people dead, but instead allowed it to roll forward and controlled into scene 2 where another 17 people lost their lives, they came up with the manifestly false version that neither Brig Calitz nor any of the commanders in the JOC were aware of the scene 1 shootings. They then presented a united front behind this version up to the point that it was shown to be false by the evidence of Mr Botes and Cpt Kidd on the transmission of the scene 1 shootings over the radio, and the statement of Mr Moletedi from IPID which disclosed the sms that Brig Pretorius had sent him shortly after the scene 1 shootings.

THE TASK TEAM

The SAPS failure to disclose the Task Team

930. During his cross-examination by the evidence leaders, Lt Col Scott was asked about a document which had been found on his computer hard drive, and which purported to be an operational plan compiled by a Capt Bembe on 13 August 2012.¹⁴³⁹ This was not a genuine or contemporaneous operational plan. Lt Col Scott was asked to explain how this 'operational plan' for 13 August 2012 could have found its way onto the SAPS hard drive which was the source from which it had been copied onto his hard drive.¹⁴⁴⁰ Lt Col Scott suggested that the document might have been:

*'... part of a process where the police did put together a team to try to look at the policies, etcetera, with regard to what we've done and whether this guy was not part of that make-up to see, well, you didn't create a plan, you should have created a plan, this is what it should have looked like. I am not sure if it was part of that group of people, but at best that, because as I say I have had no dealings with him regarding the planning.'*¹⁴⁴¹

931. Asked to explain what this team was, Lt Col Scott said:

¹⁴³⁹ Exhibit JJJ153.

¹⁴⁴⁰ The matter is discussed at day 136, p 14496/19 – 14513/18.

¹⁴⁴¹ Day 136, p 14510/16 – 24.

*'When the President gave the terms of reference for the Commission they needed the policies of the police to be brought together to be looked at and then obviously the operation weighed up against the policies.'*¹⁴⁴²

932. Lt Col Scott said that he had been brought from Potchefstroom, where the Roots conference was taking place, to provide the Task Team with the then existing SAPS presentation, in order to 'bring them up to speed about what we had in place so far as to what had occurred over that period'.¹⁴⁴³ He said that Brig Mkhwanazi was on the team, as were Mr Ally, Brig Hunter and Col Twala. He did not know whether the team ever furnished a report.

933. This evidence was given on 14 October 2013. That was the 136th day on which the Commission had heard evidence, and it was almost exactly a year after the Commission had commenced hearing evidence.¹⁴⁴⁴ It was the first time there was any disclosure to the Commission of the existence of such a team. In fact, Brig Mkhwanazi (who was a central member of the Task Team) had denied in his evidence that any such review had taken place. None of the documents relating to the Task Team had been disclosed.

934. It was in this almost accidental manner that the existence of the Task Team was disclosed to the Commission.

¹⁴⁴² Day 136, p 14511/3 – 7.

¹⁴⁴³ Day 136 p 14512/1 – 5.

¹⁴⁴⁴ Day 4 23 October 2012.

935. Brig Mkhwanazi had previously given extensive evidence, during December 2012 and January 2013.¹⁴⁴⁵ Counsel for the Families had asked him, in terms, whether he ever, either alone or with others, sat, met, discussed and reviewed the actions at Marikana. His answer was

‘we never have a specific meeting for the purpose of reviewing, because if you review, it will at the end, if I am part of that really, that is my understanding, we will have to give recommendation, and I have indicated as well, to say, already the Commission was appointed. To have recommendation it was not going to the correct thing.’

936. The question was repeated, at length, in a number of different forms.¹⁴⁴⁶ Some of the questions put to him related to a review of the kind contemplated in paragraph 3.5 of Standing Order 262. However, the question was put in much broader terms than that, and repeatedly so. Brig Mkhwanazi insisted that there had been no review at all.

937. The matter was raised with the National Commissioner when she gave evidence. She too denied that any such review had been carried out:¹⁴⁴⁷

MR NTSEBEZA SC: Yes. Now just to read it for all of us, ‘Every time minimum force is used, a review of the action taken must always be done by an officer holding the rank of captain and above who was not

¹⁴⁴⁵ Days 27 to 35.

¹⁴⁴⁶ Day 33 p 3534/23 – 3542/16.

¹⁴⁴⁷ Day 76 p 8100/13 – 8101/22.

part of the action and was also not on the scene.’ Now canvassed this with Brigadier Mkhwanazi when he was testifying, and amongst other things that we established and he agreed was that he is that kind of officer. He is that kind of a person holding a rank of captain and above - of course he’s a brigadier - he was not part of the action and was not also on the scene. Do you agree that he would have been the person to conduct that kind of internal review?

GENERAL PHIYEGA: He could have been.

MR NTSEBEZA SC: And I gathered from his evidence, and nothing to the contrary has been given to us, that, (1), he did not conduct that internal review; and that none was conducted.

GENERAL PHIYEGA: You are correct, but it’s going to be a matter of interpretation in terms of how we handled the matter as SAPS, and to that I want to say you would also recall that the call for the Commission came almost a day after the event and we interpreted it that our preparation for the Commission would also assist us to encapsulate all those things. So we went for the preparation. That’s how we interpreted it, and whether it is acceptable or not acceptable, it could be a matter of outcome and judgment, but we read it in a manner that our preparation would be able to assist us to achieve that.

MR NTSEBEZA SC: Are you saying there are reasons why you didn’t conduct an internal review? Are you saying there are reasons? And we’ll explore what the reasons are.

GENERAL PHIYEGA: I'm saying that and I've given you the reasons.

938. This was a group which had met and conducted what must have been an extensive review of the operation on her instructions. The call-up instructions show that it met over a period of some twenty days.¹⁴⁴⁸ There was no room for misunderstanding in the questions which she was asked and answered.

939. Maj-Gen Annandale denied any knowledge that any such review had been undertaken:¹⁴⁴⁹

MR NTSEBEZA SC: General, do you know if there was an internal review that was conducted of events that took place on the 16th of august in particular

GENERAL-MAJOOR ANNANDALE: Voorsitter, die enigste wat naby kom aan 'n nabetragting was die Potchefstroom vergadering wat ons gehad het, maar in terme van die internal reviews, soos in 'n aangestelde taakgroep of iets om dit te ondersoek, ek is nie bewus daarvan nie.

What did the Task Team do?

940. After the existence of the Task Team had accidentally come to light, a number of witnesses gave evidence about it.

¹⁴⁴⁸ Exhibit JJJ203; Day 184 p 22150/16 – 20.

¹⁴⁴⁹ Day 96 p 10224/12-20.

941. The Provincial Commissioner said that she had attended the first session of the task team. The members of the Task Team told her that they had been sent by the National Commissioner to see whether the operation had been in accordance with policies, and to look into what challenges there were that had been faced.¹⁴⁵⁰

942. Maj Gen Naidoo said that at the time when it was decided to have the session at the Roots at the end of August and the beginning of September,

'we were informed at the first day when we were at Roots that there was a task team set up by the National Commissioner to review the policy situation with regard to the incident and report to her. I think they were under the leadership of Major General Geldenhuys of our Legal Services. He was the most senior officer there and there were Brigadier Mkhwanazi and a few other officials ... who wanted to interview members of the South African Police that were involved in the incident of the 16th.'

943. He further explained the function of the Task Team as follows:

At that stage when we got to Roots we were also informed that a policy review team had been appointed and would also be requesting us to provide information to them.

¹⁴⁵⁰ Day 184 p 22146/15 – 23.

944. He agreed that it was in effect decided that the exercise of working out the lessons that the SAPS had learnt would not be undertaken at Roots.¹⁴⁵¹
945. He said that he was one of the people who were interviewed.¹⁴⁵² The Work Session or Task Team undertook a form of SWOT analysis. They were analysing what happened in terms of existing policies and procedures, including matters such as minimum force and the situation of awareness.¹⁴⁵³
946. Brig Calitz attended one of the sessions which were held at the Elgro Hotel in Potchefstroom. He was asked at that session to explain what had happened. This was done by reference to a layout map on which models were moved around to illustrate his account.¹⁴⁵⁴ He saw each of the members of the team making notes while he was speaking to them.¹⁴⁵⁵
947. Other officers who appeared before the Task Team included Col Merafe,¹⁴⁵⁶ Lt Col Classen,¹⁴⁵⁷ and Col Mere.¹⁴⁵⁸
948. The Chairperson requested the SAPS legal team to find out and inform the Commission who gave evidence before the Task Team or Work Session; whether what was said was recorded; if so, whether copies are available; if not,

¹⁴⁵¹ Day 194, p 23696/5 – 18.

¹⁴⁵² Day 189, p 22971/3 – 14.

¹⁴⁵³ Day 195, p 23743/14 – p 23744/1.

¹⁴⁵⁴ Day 155, p 17510/20 – 17518/7.

¹⁴⁵⁵ Day 155, p 17515/8 – 20.

¹⁴⁵⁶ Day 217 p 26713.

¹⁴⁵⁷ Day 236 p 29623.

¹⁴⁵⁸ Day 238, p 29837/8 – 10.

whether the individual members kept notes of what was said; and whether those notes could be made available.¹⁴⁵⁹ No recordings, notes or minutes were produced.

949. The only document produced was a two-page document somewhat inconsistently headed '*Final Interim Report*'.¹⁴⁶⁰ It would be fair to describe this report as anodyne. It is difficult to accept that this was the sole product (and sole record) of a process which had been ordered by the National Commissioner, which was headed by a Major General, which consumed at least twenty days of the time of a number of senior officers of the SAPS, and which a significant number of senior SAPS officers who had participated in the Marikana operations were required to attend in order to explain what had happened.

Concealment?

950. The circumstances are thus the following:

950.1. There was a sustained denial by Brig Mkhwanazi of the existence of such a review, when in fact he played a leading role in it;

950.2. The National Commissioner denied that there had been such a review, when in fact she had given instructions that it be undertaken;

¹⁴⁵⁹ Day 184 p 22155/2 – 13.

¹⁴⁶⁰ Exhibit LLL11.

- 950.3. Maj-Gen Annandale denied any knowledge of any such review;
- 950.4. The existence of the task team and the review which it had undertaken emerged only by accident when Lt Col Scott was being cross-examined, in an attempt to obtain an explanation of a puzzling document which the evidence-leaders had found on his computer hard drive.;
- 950.5. The SAPS failed to disclose any of the documents relating to the review, until after it had emerged during the cross-examination of Lt Col Scott;
- 950.6. Even then, and despite request by the Chairperson, no notes, recordings, minutes, or other records of the process were produced, other than a two-page 'final interim report' and the call-up instructions.
- 950.7. No explanation was proffered for these circumstances.
951. We submit that this leads to the inference that the SAPS attempted to conceal the existence and work of the Task Team from the Commission.
952. One can only conjecture as to what the reason was for this concealment. The Commission is unfortunately not in a position to make any finding in that regard – or as to whether there was a final and substantive report after the two-page 'final interim report'. But on any basis, this was a deliberate and sustained concealment which was in breach of the SAPS undertaking to make full disclosure to the Commission.

‘POLITICAL INTERFERENCE’

953. An important question is whether there was political ‘interference’, or inappropriate political involvement, in the decision on 15 August to implement the tactical option on 16 August if the strikers did not lay down their weapons and leave the koppie.

954. This requires in the first instance a proper understanding of what would be improper or inappropriate political involvement in that decision.

955. The role of the Member of the Cabinet who is responsible for policing is set out in s 206 of the Constitution, which is headed *‘political responsibility’*. Section 206(1) provides:

‘A member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial government and taking into account the policing needs and priorities of the provinces as determined by the provincial executive.’

956. The Minister therefore has two functions: he or she ‘must be responsible’ for policing and ‘must determine national policing policy’. This implies that the functions of the Minister are not limited to purely policy matters.

957. The South African Police Service Act 68 of 1995 does not provide any further guidance as to the role of the Minister.

958. The functions of the National Commissioner are set out in s 207(2) of the Constitution. She or he:

'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.'

959. This too makes clear that the Minister is not only responsible for policy, but may also issue 'directions' to the National Commissioner.

960. 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.

961. The matter has been expressed as follows by Ngcobo CJ:

'It is apparent from the provisions of the Constitution that, far from requiring insulation from the political sphere, it is a fundamental principle of our legal system that there is political oversight over the police. To this end, s 206(1) requires that a member of the Cabinet be responsible for policing and determining national policing policy. Section 206(8) requires the establishment of a committee, composed of the Cabinet member and members of the Executive Councils responsible for policing in the provinces, to 'ensure effective co-ordination of the police service and effective co-operation among the spheres of government'.¹⁴⁶¹

¹⁴⁶¹ Glenister v President of the Republic of South Africa and others 2011 (3) SA 347 (CC) para [127]

962. While the judgment of Ngcobo CJ has to be treated with caution because it was a minority judgment, we respectfully submit that this paragraph correctly states the constitutional position. We submit that it would therefore 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 or skill.

963. Mr De Rover said that he expected that there had been an order of some kind from the executive:

*'...it's simply on my expectation of having been in 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.'*¹⁴⁶²

964. That really raises two different questions: first, what is the legal arrangement of powers, and second, how are decisions about major police operations are made in practice. As to the first, Mr De Rover's understanding did not reflect the position in South African law, with its particular constitutional arrangement

¹⁴⁶² Day 286 p 37080/16–21; see also 37071/8–19.

of the functions of the branches of the state. It self-evidently does not reflect the position as far as the functions of the judiciary are concerned, and the same applies to the separation of functions between the Minister and the National Commissioner. As a legal matter it would not fall within the Minister's functions to make the decision as to whether, when and how to implement the tactical option. That is an operational decision, involving experience and skills which differ from those expected of a Minister. As to the second question (how major decisions about police operations are made as a practical matter), we deal with that below.

965. Against that background, we address the various 'political' interventions and factors in Marikana.

The role of Mr Ramaphosa¹⁴⁶³

966. Mr Ramaphosa's evidence was that in a telephone conversation with the Minister of Police at 6.38 pm on Sunday 12 August, he raised the concern that people had died and were dying, that the situation was getting worse, and that Mr Jamieson of Lonmin had requested that there should be more police presence so as to prevent further loss of life. He said that he had told the Minister that the situation that he had been told about on the ground was that Lonmin needed help; they needed more police presence on the ground. He asked the Minister whether he could do something about it. He said that the

¹⁴⁶³ Mr Ramaphosa is of course now the Deputy President of South Africa. In these submissions we refer to him as Mr Ramaphosa, as he did not hold that position at the time of the events in question.

Minister's response was that he would look into it and would talk to his people on the ground and hear for himself what was actually unfolding.¹⁴⁶⁴

967. On Wednesday 15 August, Mr Ramaphosa was to be in Cape Town for a meeting of the national planning Commission. He arranged that while he was there, he had a meeting with Minister Shabangu. Their accounts of that meeting differ. After the meeting, Mr Ramaphosa reported to Lonmin management that Minister Shabangu had agreed that:

'What we are going through is not a labour dispute but a criminal act. She will correct her characterization of what we are experiencing ... She is going into Cabinet and will brief the President as well and get the Minister of Police, Nathi Mthetwa to act in a more pointed way'.¹⁴⁶⁵

968. Minister Shabangu agreed that in an earlier television interview she had characterised the matter as a labour dispute, and that it was only after her discussion with Mr Ramaphosa that she had characterised it as having escalated into a security or policing matter. She however denied that she had been persuaded in any way by Mr Ramaphosa, and insisted that she had not changed her view in any way.¹⁴⁶⁶

¹⁴⁶⁴ Day 271, pages 34418–34419.

¹⁴⁶⁵ Exhibit BBB4. p 5.

¹⁴⁶⁶ Day 278 p 35637/7 – 35642/20

969. Mr Rampahosa's version is supported by the contemporaneous record of emails and by the Minister's interview. But in any event, not much turns on this.

970. In an e-mail sent at 12.18 pm on 15 August to Lonmin management,¹⁴⁶⁷ Mr Ramaphosa said:

'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 characterisation 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 we are essentially dealing with a criminal act. I have said as much to the Minister of safety and security.'

971. The events of that week arose from a labour dispute which had resulted in a strike. Serious criminal offences, including murder, were committed. Mr Rampahosa's reference to the 'terrible events that have unfolded' cannot reasonably be construed as a reference to the strike itself. 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.

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

¹⁴⁶⁷ Exhibit BBB4, p 3.

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 that 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 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 these 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 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, that Mr Ramaphosa’s intervention with the Ministers was not inappropriate or impermissible. 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.¹⁴⁶⁸ This is demonstrated by what

¹⁴⁶⁸ The assertion of Minister Mthethwa, that ‘any person could pick up the phone and call me’ – Day 255 page 32083/16-17 - misses the point: anyone can pick up the phone and call, but not everyone can call a Cabinet

happened in this instance. Lonmin's previous attempts to gain access to the Minister Shabangu, for example by approaching the Director-General, had met with no success.¹⁴⁶⁹ 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 that 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.¹⁴⁷⁰

980. In this instance, Mr Ramaphosa wore the 'hats' of non-executive director of Lonmin, a significant shareholder in Lonmin (through its shareholding

Minister and get through to him or her. A Cabinet Minister who accepted every call made to him or her, regardless of its origin, would have no time to do anything else. Compare the evidence of Mr Ramaphosa Day 272 page 34786/25 to 34787/1: 'I just had access to her [Minister Shabangu]'.

¹⁴⁶⁹ Day 288 37507/15-23.

¹⁴⁷⁰ Day 272, p 34714/18-25.

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.¹⁴⁷¹

The involvement of Minister Mthethwa

982. Minister Mthethwa stated that he had the following telephone conversations with the Provincial and National Commissioners during the period in question:

- 982.1. On 12 August, shortly after he had had fairly lengthy telephonic conversations with Mr Ramaphosa (282 secs) and Mr Zokwana (189 secs), he called the Provincial Commissioner at 18.47 and

¹⁴⁷¹ Day 272, p 34715/24-34716/2.

informed her about those calls. His call to her lasted for 338 secs. He says that he sought to confirm the factual correctness of the reports which he had received, and to establish what the SAPS was doing about the matter. The Provincial Commissioner confirmed the reports and informed him what the SAPS was doing and what was happening on the ground.

982.2. On 13 August, he called the Provincial Commissioner at 18.36 and spent 354 secs on the phone with her. She briefed him on the events of that day. She said that she did not consider SAPS incapable of managing the situation, and that more members had been deployed in the area.

982.3. On 14 August the National Commissioner telephoned him in response to calls he had made to each her, and they had a conversation for 159 secs. She provided him with information as to what had been happening, and assured him that the SAPS had the required capability to handle the situation.

982.4. At 06.50 on 15 August, he had a telephone conversation lasting for 175 secs with the Provincial Commissioner. During that conversation, he enquired whether there was anything that he needed to be briefed on before he commenced his duties that day. He was informed that the situation was still the same.

- 982.5. At 17.00 on 16 August, the National Commissioner called, and briefed him about the tragedy. The call lasted 65 secs. She stated that she would get a full briefing and then brief him thereafter.
- 982.6. Thereafter, he had three further telephonic conversations with the National Commissioner about the events: at 18.53 (68 secs), 21.11 (88 secs) and 21.13 (213 secs).¹⁴⁷²
983. The Minister repeatedly insisted that he had not placed any pressure on the National or Provincial Commissioners to take any form of action.
984. The National Commissioner 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.
985. She said that she continually reports to the Minister 'using a multiplicity of platforms' (a repeated refrain);¹⁴⁷³ and that 'He's a political leader. He gives us leadership in that space and support'.¹⁴⁷⁴ When she was asked what specific support the Minister gave before the killings which took place on 16 August, the National Commissioner answered '...he is our political leader. He took, gave us politic(al) support. He gave us that leadership, because I do not have the

¹⁴⁷² Exhibit CCCC1, para 85.

¹⁴⁷³ Day 65, p 6870/20 – 22.

¹⁴⁷⁴ Day 65, p 6871/15 – 16.

responsibility of communicating in that space or dealing with issues in that regard, and that is the best answer I can give you'.¹⁴⁷⁵

986. The senior evidence leader then tried for a last time, and asked 'So must I take your last answer to be that you cannot be specific on the political direction, nor can you be specific on the support that the Minister gave you?' The answer of the National Commissioner was 'I have said he has given us leadership, he has given us political support, and that enabled us to do our work'.¹⁴⁷⁶

987. The answers of the National Commissioner were not only unhelpful, they were distinctly evasive. It is not clear why she wished to be evasive.

The decision on 15 August to implement the tactical option the following day

988. The Provincial Commissioner said that on 15 August, she took the fateful decision to implement the tactical option the following day if the strikers did not surrender their weapons and leave the koppie. This decision was endorsed by the 'extraordinary NMF session' led by the National Commissioner that evening.

989. As we submit elsewhere in these heads of argument, that decision was and remains inexplicable. None of the witnesses was able to explain why it was necessary or even desirable to move to the tactical option on 16 August, and what is more during the course of the afternoon, when the number of strikers

¹⁴⁷⁵ Day 65, p 6872/16 – 22.

¹⁴⁷⁶ Day 65, p 6872/23 – 6873/4.

on the koppie was probably at its largest. That inevitably gives rise to the question why the decision was made on 15 August.

990. It may be that National Commissioner's fairly lengthy discussion with the Minister early that morning played a role in what followed that day. The Minister's closing of ranks with the National Commissioner on 17 August suggests that he might have carried some responsibility for the decision made on 15 August. The evidence of Mr De Rover is also relevant in this regard:

991. We have submitted above that Mr De Rover's understanding of the arrangement of powers and functions with regards to policing does not reflect the position in South Africa. However, that does not address the question of how decisions are made in practice, and to what extent the Executive is likely to have been involved in discussions about major decisions. Mr De Rover's evidence in that regard was forthright and unequivocal. He said, referring to the 'extraordinary session' of the NMF on 15 August:

*'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'*¹⁴⁷⁷

¹⁴⁷⁷ Day 286, p 37075/17 – 20.

*You cannot have a police force essentially deciding on issues that have such ramifications attached to it and consequences as Marikana, on its own ...*¹⁴⁷⁸

*But 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 importance 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.*¹⁴⁷⁹

¹⁴⁷⁸ Day 286, p 37076/2 – 5.

¹⁴⁷⁹ Day 286, p 37079/22 – 37080/21.

992. He said that when he asked Lt Gen Mbombo how this decision came about, she said 'there happened to be that meeting [of the NMF] and a few of the members remained behind and they had that discussion'. He said that on the basis of his personal experience and exposure of 22 years in 70 countries where he has seen this done differently, he has a problem accepting this as 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 a reality that that was given a go ahead or left to go ahead without the government having its say in 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.'*¹⁴⁸⁰

993. The Chairperson asked him whether he had put that problem to the SAPS officers who were instructing him. He said that he had had lengthy discussions on it with Maj Gen Mpembe and Maj Gen Annandale, and 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 they could say was that they shared that view.

994. He put this view to Gen Phiyega:

'Chairperson: and what was her answer?'

¹⁴⁸⁰ Day 286, p 37082/4 –20.

Mr De Rover: a diplomatic answer ...

Mr De Rover ...I asked that question and that a hot one if, you know, to even enter into, to divulge to me what your working relationships are with the executive. So I got a diplomatic answer –

Chairperson: by diplomatic do you mean evasive?

*Mr De Rover: Ja.*¹⁴⁸¹

995. It is probable that the discussion between the Minister and the National Commissioner was not limited to an update by the National Commissioner on what the current situation was on the ground. There must at the very least have been some discussion on what was likely to take place. This would have been the natural and proper concern of the Minister. There is however no evidence before the Commission to show that (for example) he urged that action be taken without delay, to have the strikers removed from the koppie.
996. So the question remains: why is it that the precipitate decision was taken that day, and endorsed by a special meeting of key National Management Forum members convened by the National Commissioner, to implement the tactical option the following day if the strikers did not lay down their weapons and leave the koppie.

¹⁴⁸¹ Day 286, p 37083/17 – 37084/22.

997. We submit that a very material factor emerges from what the Provincial Commissioner said at her meeting with Lonmin management on 14 August. She made those statements at a time when she was unaware that her remarks were being recorded and would one day be closely examined, with the result that she was probably speaking freely.

998. At the Provincial Commissioner's meeting with Lonmin management on 14 August, she said the following:

'Because I think even when we were trying to talk about it last night, she [the National Commissioner] asked me a question that says you know – well, this one I am not sure, because the Lonmin shareholders I do not know much about them ... but when I was speaking to Minister [Mthethwa] he mentioned a name to me that is also calling him, that is pressurising him, unfortunately it is a political high ... Cyril Ramaphosa, yes. Now remember when I was talking to the National Commissioner last night she says to me, look General who are the shareholders here, so I said I do not know the shareholders but I know that when I spoke to the Minister he mentioned Cyril. And then she says, now I got it. You know why she says she got it? Remember Cyril was in the appeal committee of Malema, remember? ... And he was very strong in terms of the decision that was made And remember that in Impala Malema came with our Premier and spoke to those people about that they should make their demands but in a way that – and after that we ourselves as the police we managed to, you know, manage the situation after Malema came. Now our discussion with the National Commissioner was around

*this thing that say is this thing now happening such that again Malema come and de-fuse this thing, so that it becomes as if Malema has taken charge of the mining – the mine ... Once again remember Malema's view that the mines should be ... nationalised and all of that. So it has got a serious political connotation that we need to take into account, but which we need to find a way of de-fusing. Hence I just told these guys that we need to act such that we kill this thing.... When tomorrow we have to move in, if today we do not find cooperation in these people we need to move in such that we kill it.*¹⁴⁸²

999. Mr Mokoena of Lonmin shortly afterwards said the following:

*'So I agree with you Commissioner, if we can arrest these people, because the longer it goes it is giving all the other opportunists to comment and seize the opportunity and then it gets out of control.'*¹⁴⁸³

1000. The response of the Provincial Commissioner was:

*'That is it.'*¹⁴⁸⁴

1001. What emerges from this is the following:

1001.1. The Provincial Commissioner was under the impression that the Minister of Police felt under political pressure as a result of the call

¹⁴⁸² Exhibit JJJ 192, p 9/24 – p 11/6.

¹⁴⁸³ Exhibit JJJ 192, p 12/18-21.

¹⁴⁸⁴ Exhibit JJJ 192, p 12/22.

from Mr Ramaphosa. In her evidence, the Provincial Commissioner said that the Minister did not use the word 'pressure'. Whether he did or not do so, it was clearly her impression that he was feeling pressurised.

1001.2. The National Commissioner was interested in knowing who the shareholders were. When she was told that Mr Ramaphosa was one of them, she said 'now I got it' – because Mr Ramaphosa had chaired the appeal committee that expelled Mr Malema from the African National Congress.

1001.3. The Provincial Commissioner and the National Commissioner both regarded this fact as significant.

1001.4. The Provincial Commissioner and the National Commissioner were both concerned to avoid a situation in which Mr Malema arrived on the scene, was seen to play a role in defusing the matter, and received credit for that.

1002. We submit that what this shows is that political considerations weighed with the Provincial Commissioner and the National Commissioner in relation to their view as to whether it was necessary to act in order to end to the situation at the koppie.

1003. The following day, on Wednesday 15 August, the decision was made to move to the tactical option if the strikers did not lay down their weapons and leave the koppie.

1004. The objective evidence shows that Mr Ramaphosa was not aware of this decision, and did not anticipate it, when he spoke to the Minister Shabangu on Wednesday 15 August and reported back to Lonmin. He planned a meeting with Mr Zokwana and Mr Motlatsi on Friday 17 August. That confirms his evidence that he did not anticipate police action of the kind that took place on Thursday 16 August.¹⁴⁸⁵

1005. 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 SAS would act 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.¹⁴⁸⁶ His evidence was that his concern was to prevent a situation where 'more and more people would be killed'.¹⁴⁸⁷ There is nothing which he said or did, which suggests the

¹⁴⁸⁵ Day 271 page 34601/15 to 34603/4.

¹⁴⁸⁶ Day 271 page 34598/7 to 35600/12.

¹⁴⁸⁷ Day 271 page 34600/12-17.

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.¹⁴⁸⁸ That did not result in events of the kind which took place at Marikana.

The attitude of the SAPS and Minister Shabangu to AMCU

1006. As we submit elsewhere, there is room for debate as to the precise role which AMCU played in the strike. However, there can be no doubt that at the time of the strike there was intense competition between AMCU and the NUM for membership at the Lonmin mine, that the strikers in general were hostile towards the NUM, and that they were in general more sympathetically inclined towards AMCU. It is also clear that the strike was seen as in part the manifestation of the competition between the NUM and AMCU.

1007. This was plainly the perception of the National and Provincial Commissioners. At the meeting which the Provincial Commissioner had with Lonmin management on 14 August, Mr Mokwena said:

*'It is very clear AMCU is behind it, very clear, in actual fact we have a recording that we are going to play for you.'*¹⁴⁸⁹

He said further:

¹⁴⁸⁸ Day 272 page 34728/11-17.

¹⁴⁸⁹ Exhibit JJJ192, p 2, lines 13 - 14.

*'now the media are going to say, but management then you must talk to AMCU.'*¹⁴⁹⁰

1008. The Provincial Commissioner said the following:

'....you remember last night Abie I raised this thing that when we were dealing with Impala we had a lot of allegations and rumours and some of these allegations they were pointing to the management that the management is colluding with AMCU and so on and so forth. And at some point – at some point ourselves we were asking ourselves questions to say but these rumours that we are getting, these issues that are being said, they might find truth somehow because we are looking at how the management was moving forward in terms of taking action ... So at the end of the day when we were dealing with these issues we ended up ourselves not being comfortable in terms of understanding whether the Impala mine management really is colluding with the mine. But also remember from a political point of view there was even this feeling that you know, the mining sector wants to replace NUM, you know, with a new face and maybe that is why things are erupting. So I think yesterday, Abie will recall – you will recall when this discussions with the National Commissioner came, she also from the discussion that she raised with you and, you know, and some of these questions that she raised, you remember I raised them in the morning in our meeting

¹⁴⁹⁰ Exhibit JJJ192, p 3, lines 29 - 30.

*and she also felt that you know, it is difficult to separate management from giving these people a leeway, and if management gave these people this type of a leeway how do we separate them now from an allegation that can come and say but they are supporting them. So I want us to, when you said people must be arrested, I want us to be very clear that any information that we get we should get so that we arrest people. That is our interest, because yourselves here as management you will clear yourselves from this ... [Mr Mokwena: Perception] Perception, you know ... You will clear yourself by ensuring that you de-fuse, you give out information that is related to this thing and we are able to actually act on that information.*¹⁴⁹¹

1009. From this it is clear that both the National Commissioner and the Provincial Commissioner were concerned that mining companies were ‘colluding’ with AMCU to replace NUM, and pressed the mine management to act to remove this perception.

1010. It should go without saying that it was no business at all of the National Commissioner or the Provincial Commissioner to have any preference as to which union should represent the employees of Lonmin. This was an entirely improper and illegitimate consideration.

1011. This attitude of the two most senior police officers involved in the matter reflects the attitude which was expressed by Minister Shabangu. During May 2013,

¹⁴⁹¹ Exhibit JJJ192, p 8, line 15 – p 9, line 24.

Minister Shabangu, who was then the Minister of Mineral Resources, addressed a meeting of NUM Shop Stewards at a meeting of their Central Committee. She said the following:

*'You are under siege by forces determined to use every trick in the book to remove you from the face of the earth. (They want to make sure) that no progressive trade union will be permitted in the mining sector. It is only those who are wilfully blind who cannot see that the agenda is to defeat and drive the African National Congress from power and reverse the gains of the national democratic revolution.'*¹⁴⁹²

1012. In her oral evidence,¹⁴⁹³ the Minister suggested that the 'forces' to which she was referring were the mining industry, and in particular Lonmin, which she said was seeking to divide and rule workers. She could not explain why Lonmin would have wanted to 'remove NUM from the face of the earth', when Lonmin had been opposed to the violent strike, and in fact was encouraging its members to go to work. She agreed that she saw a synergy of interest between the ANC and the NUM. She saw an attack on workers as an attack on the ANC.

1013. Even if the evidence of the Minister is given the meaning which she said she intended, it would be a remarkable and unfortunate statement, particularly coming from the Minister who at the time was responsible for regulating the

¹⁴⁹² Exhibit QQQQ1.8, para 5 of the text of the report.

¹⁴⁹³ Day 278 page 35621/6 – page 35625/17.

mining industry. In effect, it was a statement that mining companies (not only Lonmin) were the enemy of the ANC, attempting to undermine it.

1014. But we submit that it is clear from the context that the 'force' to which the Minister was referring was not the mining industry, but AMCU. At the time when she made this speech, the NUM was engaged in a contest with AMCU for membership of mine workers. It had suffered a number of reversals particularly in the platinum industry, and it was on the back foot. At that time the 'sinister force' with which the NUM conference would have been concerned, was not the mining industry at large, but the newcomer in the industry, AMCU, which threatened to undermine its membership and its power base. We submit that the plain meaning of the words, taken in their context, is what the Minister was saying was that AMCU was a threat not only to the NUM, but also to the ANC, and should be resisted.

1015. This was an entirely improper approach for the Minister of Mineral Resources to take. As Mr Ramaphosa agreed in his oral evidence, independent trade unions are necessary, and the state should keep its hands off and not favour one union over another.¹⁴⁹⁴

1016. All of this illuminates the meaning of the statement by the Provincial Commissioner to a television interviewer on the morning 16 August, namely:

¹⁴⁹⁴ Day 271 page 34455/24 to 34456/3.

*'Today we intend to end this strike.'*¹⁴⁹⁵

1017. The Provincial Commissioner attempted to explain this by saying that when she referred to 'strike', she meant the violence that was going together with the strike, and this was a slip of the tongue. On its own terms, that explanation is difficult to accept. It is further undermined by the fact that when the National Commissioner was recalled to give evidence, she too referred to the ending of the strike (not the ending of the violence).¹⁴⁹⁶ It is not possible to accept that coincidentally, the two of them made this identical slip of the tongue. This leads to the conclusion that one of the purposes of the SAPS action on 16 August was to end the strike. That was an entirely impermissible and illegitimate purpose. The SAPS should not be used to break strikes, whether protected or unprotected.

1018. These attitudes of Minister Shabangu, the National Commissioner and the Provincial Commissioner were not only inappropriate. They also go to illuminate why the SAPS leadership acted as they did in the days leading up to the events of 16 August, and why they ordered the precipitate action which they did. The overwhelming probability is that one of the motivating factors was a desire to support the NUM and undermine AMCU in its attempt to mobilise and recruit support amongst miners in the platinum industry. The questions of which union had support amongst strikers, and which of the contending unions (if any) supported the ANC, were entirely impermissible and illegitimate considerations

¹⁴⁹⁵ Exhibit JJJ92: see also Day 181 p 21702/9 – 21703/18

¹⁴⁹⁶ Day 288 pages 37493/14-17, 37495/7-9.

in the decision as to how the police should conduct themselves and what action they should take. Another consideration was a desire to end the strike. That too was an illegitimate consideration.

1019. We submit that the following conclusions may be drawn from this analysis:

1019.1. It was not improper or inappropriate for the Minister of Police to discuss with the National Commissioner, the need to intervene and deal with the violence at Marikana;

1019.2. It was not improper or inappropriate for Mr Ramaphosa to attempt to persuade the Minister of Police and the Minister of Mineral Resources to perceive the matter as having a substantial criminal element, which required the involvement of the police, having regard to the fact that there had been multiple murders, assaults, and damage to property;

1019.3. It is likely that Mr Ramaphosa's engagement with the Ministers, and the engagement of the Minister of Police with the National Commissioner, were factors which induced the National and Provincial Commissioner to feel that they needed to act;

1019.4. There is no evidence that Mr Ramaphosa attempted to persuade or to encourage the SAPS to kill any of the strikers. There was no reason for him to think that the consequence of his call for the SAPS to deal with the murders and violence would be that they would kill 34 people. There is no basis for a finding that he should have anticipated that this would be the consequence of police action.

1019.5. The National Commissioner and Provincial Commissioner were motivated at least in part by illegitimate and improper political motives in deciding that the SAPS should act as they did, and in this precipitate manner. The political motives – whether they were a desire to please people who had political influence (Mr Ramaphosa and Mr Zokwana), a desire to protect the NUM against AMCU, or a desire to prevent Mr Malema gaining political credit - are the consequence of an improper politicisation of the SAPS at very senior level.

1020. South Africa has a history of the politicisation of policing. We have experience of its consequences. We submit that it is of the greatest importance that this should not be repeated in the democratic era.

EXPERT POLICING ISSUES

1021. The Commission received the evidence of three external expert witnesses on policing matters: Mr Cees De Rover (who was called on behalf of the SAPS), Mr Eddie Hendrickx (called on behalf of the Families), and Mr Gary White (called on behalf of the SAHRC). All three of them have considerable domestic and international experience of and expertise in policing matters. Mr Hendrickx has considerable “hands-on” experience in South Africa. From 1996 to 2000 he worked in South Africa as the manager of the first phase of a technical co-operation agreement between the governments of South Africa and Belgium. His key area of responsibility was to work with the Police Development Services on the restructuring of the Internal Stabilities Units into the Public Order Policing Services. From 1996 – 2000, and again between 2004 and 2008, he was also the head of a team of international experts responsible for monitoring and evaluating the management of the changes in the SAPS.¹⁴⁹⁷

1022. The opinions expressed by Mr White and Mr Hendrickx in their written statements were broadly consistent with each other. An attempt was made to resolve differences between their views and those of Mr De Rover before any of them gave oral evidence. This attempt was unsuccessful. However, when they gave oral evidence and were cross-examined, it became clear that there were substantial areas of agreement and more limited areas of disagreement.

¹⁴⁹⁷ Exhibit GGG2, paras 6 and 8.

1023. Where their evidence relates to particular incidents or events, we deal with it in our analysis of those events.¹⁴⁹⁸ In this section of our submissions, we deal principally with their evidence with regard to systemic issues rather than particular events. Towards the end of the hearings, the evidence-leaders invited each of the three experts to make such recommendations as he thought fit. Each of them did so. Those recommendations are addressed here and in the final section of these submissions.

1024. Mr De Rover was not specifically asked, when he was instructed by the SAPS, to look at intelligence, planning, briefing, command and control, and accountability.¹⁴⁹⁹ He said however that the benchmarks that were used by Mr White and Mr Hendrickx are by and large accepted international benchmarks, and he likely would have come to similar findings.¹⁵⁰⁰ But he noted that 100% achievement on these matters is impossible in South Africa.¹⁵⁰¹ He suggested, in effect, that it is necessary to have regard to the context and general nature of policing in South Africa in order not to set a standard which is so high that it is incapable of achievement. We accept that there is some force in this contention. However, the conclusion to which it leads is that to the extent that policing skills and experience are limited, it is all the more important that SAPS members be given clear prescriptions and guidance as to how they are to perform their functions. The less reliance that can be placed on the judgment

¹⁴⁹⁸ Mr White undertook a very detailed analysis of the events, by reference to statements, video material and photographic material, and the oral evidence of witnesses before the Commission.

¹⁴⁹⁹ Day 285 p 36992/18 – 24.

¹⁵⁰⁰ Day 285 p 36993/19 – 24.

¹⁵⁰¹ Day 285 p 36995/20 – 36996/21.

of individual members, the greater the need for clarity as to what is required of them in order that they may regulate their conduct accordingly.

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 “provention” or conflict resolution – for example by meeting with and establishing relationships with the relevant stakeholders, setting up contact and negotiation channels between the different parties and the SAPS, patrolling the area, etc.¹⁵⁰² 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”.¹⁵⁰³ Similarly, Mr Hendrickx stated that:

¹⁵⁰² Exhibit GGG2, para 21.2, pp 13 – 14.

¹⁵⁰³ Day 286, p 37094/21 – 37096/22.

“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”.¹⁵⁰⁴

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. Now, the SAPS shifted the operation away from a crowd management 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 262.¹⁵⁰⁵

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

¹⁵⁰⁴ Exhibit GGG2, para 28.4, p 18.

¹⁵⁰⁵ Exhibit LLL12, paras 25, 46 and 47.

to manage situations such as that at Marikana.¹⁵⁰⁶ He disputed the contention that the situation was unprecedented.¹⁵⁰⁷

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”.¹⁵⁰⁸ 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 reported 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

¹⁵⁰⁶ Exhibit LLL12, paras 49, 55 – 65, and 66 – 70.

¹⁵⁰⁷ Exhibit LLL12, paras 53 – 54.

¹⁵⁰⁸ Day 285 p 36918/21 – 36191/3.

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.”¹⁵⁰⁹

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.¹⁵¹⁰ 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

¹⁵⁰⁹ Exhibit TT1, pp 37 – 38.

¹⁵¹⁰ Day 134 p 14164/23 – 14165/23

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 262¹⁵¹¹ 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,¹⁵¹² and whether the use of sharp ammunition is prohibited in all

¹⁵¹¹ Exhibit SS2.

¹⁵¹² This was discussed in the evidence of Lt Col Merafe, and is referred to elsewhere in these submissions.

circumstances.¹⁵¹³ 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 not 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

¹⁵¹³ Exhibit SS2, para xxx.

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.¹⁵¹⁴

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 2013.¹⁵¹⁵ 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.¹⁵¹⁶ 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,

¹⁵¹⁴ Day 285, p 36985/4 – 36987/7.

¹⁵¹⁵ Day 285 p 36948/23 – 36949/4.

¹⁵¹⁶ Day 288 p 37435/21 – 37441/17.

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 the carry is that R5, so then it ends up being used”.¹⁵¹⁷

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.¹⁵¹⁸ 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.¹⁵¹⁹

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

¹⁵¹⁷ Day 285, p 36947/21 – 36948/1.

¹⁵¹⁸ Day 286, p 37135/5 – 10.

¹⁵¹⁹ Day 286, p 37134/20 – 25.

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, including through cell phones or in person, if necessary via a third party.¹⁵²⁰

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

¹⁵²⁰ Exhibit JJJ178, para 7.4.

than lethal options. We endorse what is said by Mr White in this regard: the tragedy did not occur because the SAPS were not issued with the correct equipment. It occurred because of poor planning, poor briefing and poor decision-making.¹⁵²¹

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.¹⁵²²

1046. Mr Hendrickx contended that the SAPS should have prioritised information gathering in the operation.¹⁵²³ During cross-examination, he was questioned intensively on this issue. The practical difficulties involved in obtaining information were pointed out. Mr White and Mr Hendricks both accepted that there were difficulties in gathering intelligence.¹⁵²⁴ They both suggested however that there were opportunities for better intelligence to be gathered.¹⁵²⁵

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

¹⁵²¹ Exhibit JJJ178, para 4.2.23.

¹⁵²² See for example Exhibit JJJ178, para 6.2.

¹⁵²³ Exhibit LLL12, paras 76 – 83.

¹⁵²⁴ Day 284, p 36701/7 – 36705/6; day 284, p 36861/13 – 36862/22.

¹⁵²⁵ Day 284, p 36704/13 – 23; p 36862/2 – 8.

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 thin. 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 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.¹⁵²⁶

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.

¹⁵²⁶ Day 285, p 37015/11 – 21.

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 of 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”.¹⁵²⁷ 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.

¹⁵²⁷ Exhibit JJJ178, para 8.1.4.

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”.¹⁵²⁸

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”.¹⁵²⁹

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.¹⁵³⁰

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

¹⁵²⁸ Day 14, p 1603/1.

¹⁵²⁹ Day 98, p 10471/9 – 12.

¹⁵³⁰ Day 193, p 23570/17 – 23571/3, 23572/2 – 4.

incident where first aid is called for, should administer first aid.¹⁵³¹ 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.¹⁵³²

1056. He said however that the police member would potentially be conflicted, on the one hand carrying arms and possibly using force, and at the same time having to render assistance to a person who was injured.¹⁵³³ 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 management¹⁵³⁴ 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”.¹⁵³⁵

¹⁵³¹ Day 193, p 23574/18 – 22.

¹⁵³² Day 193, p 23577/25 – 23578/25.

¹⁵³³ Day 193, p 23576/18 – 24.

¹⁵³⁴ Exhibit MMM49.1.

¹⁵³⁵ Para 12.2(a).

1058. In his final statement,¹⁵³⁶ 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.¹⁵³⁷ In the Recommendations which were invited by the evidence leaders, he recommended that firearms officers should be provided with the basic first aid skills needed to deal with gunshot wounds.¹⁵³⁸

¹⁵³⁶ Exhibit JJJ178.

¹⁵³⁷ Paras 8.1.2 – 8.1.5.

¹⁵³⁸ Exhibit ZZZZ31.3, para 42.

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.¹⁵³⁹

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.¹⁵⁴⁰

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

¹⁵³⁹ De Rover FFF11, para 77; day 229, p 28409/4 – 28410/3; day 286, p 37138/16 – 37144/2.

¹⁵⁴⁰ Day 286, p 37138/18 – 22, 37142/4 – 14.

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 in 1980.¹⁵⁴¹ 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 as Provincial Commissioner in the Northern Cape.¹⁵⁴² 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.¹⁵⁴³
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

¹⁵⁴¹ Her Curriculum Vitae is summarised in para 8 of her amplified statement LLL1, and in fuller version in LLL4.

¹⁵⁴² Day 179, p 21429/19 – 21432/24.

¹⁵⁴³ Day 179, p 21437/1 – 21438/2.

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.¹⁵⁴⁴ 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,¹⁵⁴⁵ 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

¹⁵⁴⁴ We submit elsewhere that her decision was motivated by improper political considerations.

¹⁵⁴⁵ Exhibit ZZZZ31.3.

*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."*¹⁵⁴⁶

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 for 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

¹⁵⁴⁶ ExhibitZZZZ31.3, para 18.

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,¹⁵⁴⁷ 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

¹⁵⁴⁷ Exhibit ZZZZ31.1 para 7.

*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.”*¹⁵⁴⁸

1076. We endorse that approach.

Militarisation and demilitarisation

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”.¹⁵⁴⁹

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 militarisation, in a report which he submitted to the Commission titled “Notes on Militarisation and De-militarisation of the Police”.¹⁵⁵⁰ 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

¹⁵⁴⁸ Exhibit FFF11, para 81, p 19.

¹⁵⁴⁹ Exhibit FFF13.

¹⁵⁵⁰ Exhibit TTT1.

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 militarisation 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.”¹⁵⁵¹

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 remilitarisation 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

¹⁵⁵¹ Exhibit TTT1, p 2.

culture of the police should be reviewed to instil the best possible discipline and ethos associated with a professional police service.”¹⁵⁵²

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."¹⁵⁵³

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."*¹⁵⁵⁴

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 2.¹⁵⁵⁵ At the very most, 14 rounds of live ammunition were fired at the police at Scene 2.¹⁵⁵⁶

¹⁵⁵³ Page 392.

¹⁵⁵⁴ Page 393.

¹⁵⁵⁵ Exhibit FFF8, FFF35 – Discharge 16 August 2012.

¹⁵⁵⁶ Exhibit L, slide 264.

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.¹⁵⁵⁷

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

¹⁵⁵⁷ Day 286, p 37158/6 – 11.

training in judgement, discretion and professional conduct,¹⁵⁵⁸ these crises have had a detrimental effect on police culture and sub-cultures...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 organisational culture and subcultures of the police should be reviewed to assess the effects of militarisation, demilitarisation, remilitarisation and the serial crises of top management.”¹⁵⁵⁹

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.¹⁵⁶⁰ 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.”¹⁵⁶¹

¹⁵⁵⁸ Page 387.

¹⁵⁵⁹ Page 393.

¹⁵⁶⁰ Exhibit ZZZZ xx.

¹⁵⁶¹ Page 5.

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.¹⁵⁶² 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.”*¹⁵⁶³

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.¹⁵⁶⁴ 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.”*¹⁵⁶⁵

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.¹⁵⁶⁶ It is of course correct that the reintroduction of military ranks into the SAPS is only one manifestation of the remilitarisation which took place after 2000. However, it is an important signifier and symbol.

¹⁵⁶² Day 67, p 7162/17 – 19.

¹⁵⁶³ Day 67, p 7162/20 – 7164/18.

¹⁵⁶⁴ Day 67, p 7165/1 – 7173/23.

¹⁵⁶⁵ Day 67, p 7173/21 – 23.

¹⁵⁶⁶ Day 67, p 7157/5 – 6.

It is a matter which can be readily addressed, through regulations made in terms of the SA Police Service Act.¹⁵⁶⁷ 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.¹⁵⁶⁸ 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 professionalization 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”.¹⁵⁶⁹

¹⁵⁶⁷ Section 24(1)(i) of the South African Police Service Act 69 of 1995.

¹⁵⁶⁸ Exhibit FFF13, p 392.

¹⁵⁶⁹ Exhibit FFF13, p 389.

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.”¹⁵⁷⁰

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

¹⁵⁷⁰ Exhibit ZZZZ31.1.

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.¹⁵⁷¹ 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.¹⁵⁷² 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”.¹⁵⁷³ 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.¹⁵⁷⁴ The evidence of the senior police officers who were involved in the operation revealed a distinct

¹⁵⁷¹ Day 286, p 3028; day 31, pp 3395 – 3396; day 107, pp 11504 – 11505.

¹⁵⁷² Exhibit JJJ178, para 4.2.12.

¹⁵⁷³ Exhibit JJJ178, para 4.2.13.

¹⁵⁷⁴ Exhibit JJJ178, para 4.2.14.

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.¹⁵⁷⁵ 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.¹⁵⁷⁶

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,

¹⁵⁷⁵ Exhibit JJJ178, 4.2.18.

¹⁵⁷⁶ Exhibit JJJ178, para 4.2.22.

because such things could happen again while attempts were being made to establish what had gone wrong and how it went wrong.¹⁵⁷⁷

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”.¹⁵⁷⁸

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.¹⁵⁷⁹ 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 technician 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

¹⁵⁷⁷ Day 285 p 36929/5 – 16.

¹⁵⁷⁸ Day 173 p 20442/11

¹⁵⁷⁹ Day 285 p 36927/23 – 36932/1.

operation which had been prepared by Mr White.¹⁵⁸⁰ 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:

¹⁵⁸⁰ In its provisional form, Exhibit WW2; in its final form, Exhibit JJJ178

*"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 organisation experience so that you retain what was good and that you seek to remedy what went wrong."*¹⁵⁸¹

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."*¹⁵⁸²

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

¹⁵⁸¹ Day 285 p 36929/22 – 36932/7 – 14.

¹⁵⁸² Exhibit FFF11, para 81, p 19.

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 non-disclosure 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.*¹⁵⁸³

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.”*¹⁵⁸⁴

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. This is a matter which we address further in our recommendations.

¹⁵⁸³ Day 286 p 37122/22 – 37123/15.

¹⁵⁸⁴ Day 286 p 37130/4 – 8.

MISCELLANEOUS ISSUES

The Myburgh allegations (CW)

1107. Warrant Officer Henrich Wouter Myburgh was a member of the K9 Unit at koppie 3 on 16 August.¹⁵⁸⁵ He stated:

'On 16 August I was officially on duty and at Marikana where there was a strike taking place.

We were briefed by Major-General Naidoo for our duties at the Koppies searching for firearms and weapons and as we approached the scene at the Koppies from the southern side, there were miners shooting at us. I emerged from the vehicle and took cover behind the driver and passenger doors as I moved to see clearly who is shooting at us.

After most of the shooting has stopped I entered into Koppies searching for suspects to arrest. I found about 3 injured people lying down and turned away from them searching for other suspects. I suddenly heard a gunshot behind me as I turned I saw a NIU Constable who is unknown to me putting his side firearm in his leg holster while he was standing next to the injured I first met was having a jersey wrapped around his arm. I asked him the NIU Constable what is going on he replied by saying

¹⁵⁸⁵ See exhibit FFF7.

they deserve to die and he moved away. I cannot identify him facially and I could not read his surname on his nametag.

On the 1st October 2012 after one white male Lt Colonel who is a helicopter pilot showed us video footages taken from helicopter, I then narrated the story to him as to what happened on the hill (NIU shooting at an injured minor). Since the 16/08/2012 shooting incident, he was the first officer I reported this matter to.

On the same date (1st October 2012) I once again narrated the same story to Major General Naidoo. Major General Naidoo was the second person I reported this shooting incident to ever since it happened, where after Lt General Mbombo and National Commissioner were informed by myself as per an arrangement on the 02nd October 2012.

I did not inform anybody immediately after the shooting incident as I did not regard this shooting incident as that serious; I only became aware that it is serious after we were briefed that all bodies found on the hill were to be accounted to by all responsible. I then decided to report all that I witnessed on that day.'

1108. The Lt Colonel to whom W/O Myburgh first made his report was Lt Col Vermaak. Lt Col Vermaak confirmed that W/O Myburgh had made the report to

him, and testified that because this was a very serious matter he immediately brought it to the attention of Brig Calitz with a view to him taking it further.¹⁵⁸⁶

1109. Gen Phiyega stated in cross examination that W/O Myburgh advised her of the allegations on 2 October 2012.¹⁵⁸⁷ She said that as W/O Myburgh could not identify the NIU member, 'SAPS was completely stunted and could not do anything.'¹⁵⁸⁸ Gen Phiyega testified that it fell to Maj Gen Naidoo, the appropriate commander, to pursue the matter further.¹⁵⁸⁹ In further cross examination it was demonstrated to Gen Phiyega that the identity of the alleged shooter could, with relative ease, be narrowed down to two suspects.¹⁵⁹⁰

1110. Lt Gen Mbombo stated that Maj Gen Naidoo brought W/O Myburgh to her and Gen Phiyega on 1 October 2012, that he made his report to them, that they found the report immensely distressing, and that she and Gen Phiyega decided there and then that a written statement had to be taken from W/O Myburgh and given to IPID for investigation. According to Lt Gen Mbombo, Maj Gen Tsumane was instructed to obtain the statement from W/O Myburgh, after which it was handed over to IPID.¹⁵⁹¹ As at 30 January 2014, when Lt Gen Mbombo testified about these events, she did not know what the outcome of the matter was.¹⁵⁹² In cross examination Lt Gen Mbombo testified that the statement that was

¹⁵⁸⁶ Day 206, pp 25467/19 to 25469/16.

¹⁵⁸⁷ Day 65, p 6926/2 to /13.

¹⁵⁸⁸ Day 65, p 6926/16 to /21.

¹⁵⁸⁹ Day 65, p 6927/1 to /6.

¹⁵⁹⁰ Day 65, pp 6940/11 to 6950/8

¹⁵⁹¹ See Exhibit LLL1, paragraphs 50 to 52.

¹⁵⁹² Day 178, p 21396/2 to /19.

obtained from W/O Myburgh was not sent to IPID by SAPS, but by the SAPS legal team, and that she had not followed the matter up with IPID because it was IPID's job to investigate it, and IPID was independent.¹⁵⁹³

1111. Maj Gen Naidoo testified that he was present when W/O Myburgh made his report to Gen Phiyega and Lt Gen Mbombo, that Lt Gen Mbombo instructed Maj Gen Tsumani to obtain a statement from W/O Myburgh, that he could not be involved in the matter because he had been at the scene himself on the day, and that he thought that the statement was then given to the Commission and to IPID.¹⁵⁹⁴

1112. Warrant Officer Jan Jacobus Swarts was at the scene at koppie 3 on the afternoon of 16 August 2012.¹⁵⁹⁵ He stated that W/O Myburgh (whose rank he gives as Sergeant) had told him that he had shot a protester who was lying in some bushes.

1113. What is immediately noticeable as odd about W/O Myburgh's allegations is that he did not initially think that a SAPS member shooting an injured protester who was lying on the ground was a serious matter, and that he waited until 1 October 2012 before he reported this incident to a senior officer. He did so only 'after we were briefed that all bodies found on the hill were to be accounted to by all responsible'. This casts doubt on the veracity of his allegations. There are no

¹⁵⁹³ Day 181, pp 21761/13 to 21765/11.

¹⁵⁹⁴ Day 189, p 22967/16 to 22970/13.

¹⁵⁹⁵ See Exhibit LLL14.

witnesses to this incident other than W/O Myburgh, despite the fact that many SAPS members would have been in the area.

1114. The possibility cannot be discounted that W/O Myburgh may have fabricated his allegations after realising that he could possibly be held to account for the striker whom he had shot.

1115. On the other hand, the manner in which SAPS has dealt with the allegations of W/O Myburgh does not suggest that it had any great enthusiasm for establishing the truth of the matter.

The planting of weapons on victims

1116. The planting of weapons on dead bodies demands particular comment. It is a plainly unacceptable practice, and has brought the SAPS into disrepute now that it has been exposed through the proceedings of the Commission. Exhibit K shows that the SAPS planted weapons on the bodies of the following victims after their deaths :

1116.1. Mr Nokamba (Victim I);

1116.2. Mr Saphendu (Victim J);

1116.3. Mr Ngxande (Victim K);

1116.4. Mr Pato (Victim M);

1116.5. Mr Mkhonjwa (Victim N); and

1116.6. Mr Xalabile (Victim O).

1117. This was a totally unacceptable process. In the case of Mr Pato, for example, a SAPS member would have had to lift up the arm of his dead body in order to slip the yellow handled panga underneath that arm.¹⁵⁹⁶ In the case of Mr Mkhonjwa it involved adorning his body with four different weapons, none of which were anywhere in the vicinity of his body in the many earlier photographs that we have of his body.¹⁵⁹⁷

1118. It also appears not to be an isolated incident that can be confined to scene 2 on 16 August 2012. Thus the photographic evidence of Mr Sokonyile shows that a panga was placed in his hand after he had been killed by the SAPS on 13 August 2012.¹⁵⁹⁸

1119. SAPS has not produced a satisfactory explanation for the planting of weapons on the dead bodies for victims at scene 2 on 16 August. The explanation that was offered, comes in the form of the statement of W/O Breedt.¹⁵⁹⁹ This is plainly inadequate to justify what took place :

¹⁵⁹⁶ See Exhibit K, Slides 14 & 15

¹⁵⁹⁷ See Exhibit K, Slides 8 & 9

¹⁵⁹⁸ Vermaak, p 25264/3 – 22. Cf Exhibit L, Slide 56 with Exhibit OOO 14

¹⁵⁹⁹ Exhibit GGG 14

1119.1. On its own terms, the statement of W/O Breedt does not account for the planting of bodies on the bodies of Mr Mkhonjwa (Victim N) and Mr Xalabile (Victim O).¹⁶⁰⁰

1119.2. In relation to Mr Mkhonjwa, the version of Capt Kidd would preclude an innocent explanation for the planting of weapons next to his body, because Capt Kidd claims that when Mr Mkhonjwa was shot he dropped the weapon that he was carrying and crawled back, before dying in a position some distance from any weapons.¹⁶⁰¹

1119.3. It is also, on its own terms, utterly implausible. W/O Breedt explains his conduct in placing weapons on dead bodies in the following terms:

'Later, ek weet nie presies watter tyd nie, maar dit was ongeveer 18:15 en dit was als sterk skemer, het 'n swart man wie in privaat kleure gekleur was my op die toneel genader. Ek ken nie die persoon nie en twyfel of ek hom sal herken. Ek het aangeneem dat hy 'n lid van polisie se fotografe by the Plaaslike Rekord Sentrum (PKRS) is of 'n lid van die speurdiens, want hy het my gevra of ek wapens vanaf of op die toneel geskryf of verwyder het. Ek het ja gesê en die persoon het my versoek om die wapens

¹⁶⁰⁰ See Exhibit GGG 14 at p 12 para 14

¹⁶⁰¹ Kidd Day 234 p 29294/21 – 29295/1.

*terug te plaas min or meer waar ek dit gevind vanaf verskyf of
verwyder het.*¹⁶⁰²

1119.4. Even if it can be accepted in W/O Breedt's favour that he was ignorant enough about proper crime scene procedures to respond to the request that he claims he received, it is difficult to accept that SAPS have been unable to locate the '*swart man wie in privaat kleure gekleur was*' to confirm or deny that he gave this instruction. There were very few people in plain clothes on the scene around 6.15 p.m. on 16 August. It would not be difficult to identify all of them and to establish from them whether any of them gave the instruction that W/O Breedt claims he received. In the absence of a corroborating statement from a member of the LCRC or the detectives confirming the version of W/O Breedt and taking responsibility for the instruction to rearrange the crime scene, it is difficult to credit his version with much reliability.

1119.5. Moreover there are material parts of his statement that can be shown to be false :

1119.5.1. W/O Breedt claims that he did not move weapons far from the place where he had removed them alongside bodies. He estimates that he only moved them approximately 2

¹⁶⁰² Exhibit GGG 14 : Statement of W/O Breedt, p 7, para 9

metres away.¹⁶⁰³ In this context his explanation of his alleged removal of a spear from the body of Mr Ngxande (Victim K) is not sustainable.¹⁶⁰⁴ The area around the body of Mr Ngxande was filmed extensively by Const Molefe. The distinctive homemade spear that was ultimately placed on the body of Mr Ngxande is nowhere to be seen in the immediate vicinity of his body. Instead, it appears to have been taken from some distance away on the other side of the bodies of Mr Nokamba (Victim I) and Mr Saphendu (Victim J), to be planted on the body of Mr Ngxande.¹⁶⁰⁵ It later appears to have resurfaced on the body of Mr Mkhonjwa (Victim N) approximately 50 metres away.¹⁶⁰⁶

1119.5.2. W/O Breedts's account of the body planted on Mr Pato (Victim M) is also demonstrably false. He claims that the yellow panga slipped under the arm of Mr Pato after his death was in that position when he found him, and that he removed the weapon and placed it on the rock against which Mr Pato's body lay.¹⁶⁰⁷ He earlier states that he neither placed any of the weapons that he moved in piles

¹⁶⁰³ Exhibit GGG 14, p 8, para 9

¹⁶⁰⁴ Exhibit GGG 14, pp 10 – 11, para 13

¹⁶⁰⁵ **Get detailed references**

¹⁶⁰⁶ **Get detailed references**

¹⁶⁰⁷ Exhibit GGG 14, Statement of W/O Breedts, p 10, para 14

nor removed weapons from piles to replace them on bodies.¹⁶⁰⁸ The panga that was placed on the body of Mr Pato did not come from the rock above his body. It was removed from a pile of weapons some distance away from his body, where it was photographed several times before W/O Breedt planted it on his body. It is positively identifiable in both the before and after positions by the particular fraying of the yellow tape around its handle.¹⁶⁰⁹

1120. We submit that in the light of the unreliability of the version given by W/O Breedt, the Commission cannot accept that any of the victims on whose bodies weapons were subsequently planted did, in fact, carry those weapons at the time that they were shot. We recommend that disciplinary proceedings be instituted against W/O Breedt for interfering with the crime scene in the manner that he did.¹⁶¹⁰

1121. The firearm that was ostensibly found under the body of an injured striker at scene 2 was repeatedly moved around before being staged photographed in positions that purported to be its original position.¹⁶¹¹

¹⁶⁰⁸ Exhibit GGG 14, p 8, para 10

¹⁶⁰⁹ See Fig ????

¹⁶¹⁰ See Phiyega, 6960/9 to 14

¹⁶¹¹ See Exhibit MMM 27

Failure to Record Communications on 16th

1122. Maj Gen Annandale explained that SAPS used two radio systems, an analogue system called Orca and a digital system called Tetra; that the Tetra system was only fully deployed in the Gauteng Province; that the two radio systems were not compatible with each other; that the radio system that was used in the North west Province was the analogue system; that some members who were deployed from the Gauteng Province had brought their Tetra radios with them which they used to communicate amongst themselves; and that members had been issued with between 83 and 85 analogue radios.¹⁶¹²

1123. Lt Col Sepale, the North West Provincial System Manager of Information Communication Technology Units, stated that 85 hand radios were issued to SAPS members on 16 August, more especially to those members from outside of the North West Province who used the Tetra system.¹⁶¹³

1124. None of the radio communications that occurred between SAPS members on 16 August 2012 on the analogue system were recorded. Lt Col Sepale stated that the reason for this was because the voice logger was not installed on the sites or the radio control room.¹⁶¹⁴

1125. Lt Gen Mbombo was asked whether it was not important that recordings be made of the radio communications between the various participants in the

¹⁶¹² Day 80 pp 8488/19 to 8489/23.

¹⁶¹³ See Exhibit LLL7, paragraphs 5 and 6.

¹⁶¹⁴ Exhibit LLL7 paragraph 7.

operation. She stated that it was always important.¹⁶¹⁵ She also testified that it was a big embarrassment to SAPS that no such recordings were made.¹⁶¹⁶ She testified further this had been brought to her attention, but that she was unable to remember the reason that was given as to why recordings had not been made and the voice logger had not been installed.¹⁶¹⁷

1126. SAPS did not explain why a voice logger was not installed on 16 August 2012.

Obstructing the Commission's Access to Video evidence

1127. It is quite clear that certain members of SAPS attempted to hide video evidence from the Commission. Unsuccessful attempts were made to prevent the Commission seeing the following videos :

1127.1. Cpt Nel's videos of Sgt Venter throwing stun grenades at strikers fleeing the scene far to the west of koppie 3.¹⁶¹⁸ The footage in these videos is inconsistent with the explanation offered by Sgt Venter for throwing stun grenades during the operation, and also raises questions about why Brig Fritz allowed his helicopter to be used for this purpose far away from koppie 3 when he was supposed to be the aerial commander at scene 2.¹⁶¹⁹

¹⁶¹⁵ Day 182, pp 21963/21 to 21964/11.

¹⁶¹⁶ Day 182, p 21965/3 to /7.

¹⁶¹⁷ Day 182, p 21965/8 to /24.

¹⁶¹⁸ **Get reference**

¹⁶¹⁹ **Get reference**

1127.2. The POPS video of Brig Calitz's briefing to SAPS members on the morning of 18 August 2012.¹⁶²⁰

1127.3. The JJJ 26 series of videos from 13 to 16 August 2012, which were deleted from the SAPS hard drive before it was circulated to the parties.¹⁶²¹

1127.4. The videos taken by POPS operatives of speeches at the koppie at midday on 16 August 2012 which showed that the sequencing of the videos of this event in Exhibit L was incorrect, misleading and possibly deliberately contrived to prejudice AMCU.¹⁶²²

1127.5. Certain videos taken by Sgt Mahlatsi, including one which the Commission was never able to retrieve.¹⁶²³

1128. In two of these cases, the attempts to hide videos from the Commission involved the falsification of electronic evidence. Thus -

1128.1. When the evidence leaders noticed that video 350 was missing from the sequence of Sgt Mahlatsi's videos that had been provided to them and asked for it, someone within SAPS renamed a copy of video 353 as video 350, changed the file size of video 353 and the thumbnail image attached to that video so that the two videos would

¹⁶²⁰ **Get reference**

¹⁶²¹ **Get Reference.**

¹⁶²² **Get Reference.**

¹⁶²³ **Get Reference.**

appear to be different files when they were viewed in the same directory, and then passed off the copy of the real video 353 as the missing video 350.¹⁶²⁴

1128.2. In order to conceal from the evidence leaders, the video of Brig Calitz's briefing on 18 August 2012, which was video 00021.MTS in the directory \videos\16th\camera407POP directory on SAPS master copy of their Marikana hard drive, someone within SAPS performed the following exercise :

1128.2.1. s/he copied all of the video files in the '*camera 407 POP directory*' after the video of Brig Calitz' briefing of 18 August into a new directory,

1128.2.2. the new directory now contained files 00022.MTS to 00041.MTS,

1128.2.3. in order to make the new directory look like a complete directory, s/he copied into it files 000.MTS to 00021.MTS from a different directory, the '*camera 457 POP directory*',

1128.2.4. s/he now had a new directory of 42 files that did not include the video of Brig Calitz's briefing of 18 August and had been artificially created to hold an apparently

¹⁶²⁴ **Get Reference.**

complete sequence of files from 00000.MTS to
00041.MTS, and

1128.2.5. after three other files in this directory had been replaced
with their appropriate numerical counterparts from a
directory called \videos\16th\CI directory, the new
artificially created directory was handed over to the
evidence leaders on 7 November 2012.

This process of artificially creating a new directory to hide Brig
Calitz's video is illustrated in Exhibit JJJ 80.

1129. These could not have been accidents: they were deliberate attempts by
persons within SAPS to conceal evidence. It is, of course, possible that
there are other cases which the evidence leaders did not discover, and that
material video evidence has successfully been hidden from the Commission.

1130. The circumstances surrounding the video footage from the Johannesburg
water cannon are also suspicious. The North West water cannon had a lens
on its camera that was so dirty that the footage taken by that camera is barely
intelligible. The Johannesburg water cannon, on the other hand, had a clean
lens and the footage from that camera is clear. The Johannesburg water
cannon was in a position where it ought to have provided video footage of the
scene 1 shootings and the incidents immediately preceding and following
those shootings. However, there is no video footage from the Johannesburg
water cannon of scene 1. The only video footage recovered from the
Johannesburg water cannon starts at eTV time 16:00:05 when the

Johannesburg water cannon had already reached the dispersion line at the standoff at koppie 2.

1131. No satisfactory explanation has been offered by SAPS for the absence of video footage from the Johannesburg water cannon at scene 1. The only explanation that has been offered is inconsistent with the objective evidence.

1131.1. W/O Dicks provided a statement saying the following :

*'Ek het die water kanon aangedreuer geopereer. Ek het die video kamera aangesit maar nie die opnameskakelaar aangesit nie. Weens die feit met my indiensopleiding was daar vir my gesê dat jy hom nie op opname moet sit die heelyd nie om spasio te spaar op die hardeskyf. Weens die omstandighede hê ek vergeet om die opname skakelaar om aan te selekteer.'*¹⁶²⁵

1131.2. W/O Kruger, who commanded the water cannon, gave a slightly different version. He stated the following :

'W/O Dicks was the operator and W/O Parsons was the driver. The operation started on our arrival and the system with water cannon had to be operated manually by W/O Dicks. The video recording system was not switched on due to the action that the

¹⁶²⁵ Exhibit UUUU 8.1 – Handwritten Statement of W/O Dicks.

*participants took. We only realised after the incident that nothing was recorded.*¹⁶²⁶

1131.3. Neither of these versions can account for the fact that the Johannesburg water cannon did record some video footage of the events on the 16th. It has a continuous record of the video footage from the standoff at koppie 2 through to the end of the operation. For this state of affairs to be innocently explained, someone would have had to switch on the record function in the middle of the operation. That, however, is not the version of either W/O Dicks or W/O Kruger.

1132. We recommend below that these very serious matters be further investigated with a view to disciplinary action and/or criminal prosecution.

The Need for a More Efficient Utilisation of Resources

Helicopter video recording

1133. The two SAPS helicopters that were deployed to Marikana were a Squirrel helicopter and a Robinson R44. Both of them had camera equipment that would ordinarily have enabled them to record the events that occurred that day (and previous days). However, the camera equipment on both of the helicopters was out of service and had been out of service for some time.¹⁶²⁷ The Squirrel helicopter was not equipped with a camera, whilst the recording facility on the

¹⁶²⁶ Exhibit UUUU 9.1 – Handwritten Statement of W/O Kruger.

¹⁶²⁷ Day 207, pp 25561 to 25565/25. And see exhibit HHH5.

FLIR camera that was fitted to the Robinson R44 helicopter had not worked since 9 November 2009. The remaining helicopter from the North West Air Wing was a B 105 helicopter, which did have a recording facility but had been out of service since 22 February 2012.¹⁶²⁸

1134. Lt Col Vermaak, the Commander of the North West Air Wing, confirmed in his testimony on 26 March 2014 that the problems with the B105 helicopter and the recording facility on the FLIR camera of the Squirrel helicopter had still not been resolved.¹⁶²⁹

1135. This state of affairs is inexcusable. It is not just a matter of the absence of what might have been potentially valuable video footage of the operation that this Commission has investigated. It also reflects a wasteful failure properly to maintain and utilise specialised equipment that has been procured at considerable public expense. At a time when resources are limited, SAPS ought to be putting its resources to better use.

Water Cannon Cameras

1136. The water cannons used by SAPS are equipped with a video camera that is fixed to the barrel of the water cannon and can rotate through 360°. The video camera is operated from a control panel that is situated in the cab of the vehicle by the operator and includes a display screen that shows what is being viewed

¹⁶²⁸ Day 207, pp 25561/15 to 25572/2. And see exhibit HHH5.

¹⁶²⁹ Day 207, p 25565/23 to /25.

through the video camera. Thus the video camera can be used to give the water cannon crew a 360° view of their situation.

1137. The water cannon camera does not operate independently from the barrel of the water cannon. It is always oriented along the line of sight and elevation of the barrel. The result is that the camera records the images that appear directly where the barrel is pointing, so that if the barrel is elevated in order to get distance on the spray of water, the camera records the elevated view and not where the water is landing. A second result is that when water is sprayed from the barrel the spray often obscures the view of the camera, so that what is recorded is the spray itself. Thus the footage of the water cannon video camera is of limited value in relation to the period when the water cannon is actually spraying water. However, it could and should be of significant value in relation to all other times because, if properly used, it should capture the 360° view that the crew has of the incident that prompts them to spray water.

1138. Maj Gen Annandale testified that on 16 August the SAPS operation was to be recorded by three means, namely (i) by the two SAPS video operators from POP who were on the ground, (ii) by Lt Col Botha who was in a helicopter, and (iii) by the two water cannon.¹⁶³⁰ He said that he had been under the impression that the video cameras on the two water cannon were in working order.¹⁶³¹ Maj Gen Mpembe testified that when he requested the deployment of the two water

¹⁶³⁰ Day 78 p 8311/5 to /20.

¹⁶³¹ Day 8442, pp 8441/22 to 8442/5.

cannon to Marikana, he assumed that the SAPS members who were to crew them were adequately trained to operate them.¹⁶³²

1139. The assumptions of Maj Gens Annandale and Mpembe turned out to be incorrect:

1139.1. The NW Water Cannon camera was not in proper working order because, as has been pointed out above, its lens was so dirty as to make the footage it produced almost unintelligible, and

1139.2. The crews of both water cannons had not received any meaningful training in the use of the water cannon cameras.¹⁶³³

1140. As a result, the footage produced by the water cannon cameras was of much less value than should have been the case.

1141. The failure to train the water cannon crews in the use of the water cannon camera is inexcusable. Again, the absence of what might have been potentially valuable video footage is the consequence of a wasteful approach to expensive specialised equipment.

AVL

1142. Exhibit JJJ106 is video footage that was recorded at 15h23 on 16 August and shows an aerial view of koppies 1 and 2 and surrounds at that time. The video

¹⁶³² Day 123, pp 12728/22 to 12729/3; pp 12732/20 to 12733/7.

¹⁶³³ See Exhibits HHH37 and TTTT4.

footage was recorded by a remotely controlled unmanned aerial vehicle (UAV) which carried two cameras, one of which was directed forward and the other of which was directed down. The resultant footage is displayed side by side on a split screen with the footage from the two cameras running simultaneously. It has the advantage of being displayed live.

1143. Brig Fritz, who was the Overall Commander of the Special Task Force members who were deployed at Marikana,¹⁶³⁴ arranged for the flight by the UAV.¹⁶³⁵ He stated:¹⁶³⁶

'At 14:10 I attended a demonstration by a private company of a drone aeroplane close to the Wonderkop hostel. The functionality of the drone was evaluated as it flew over the koppie area for approximately 4 to 5 minutes. I had a specific interest in the possible application thereof in the STF environment, more specifically during counter rhino poaching deployments and possibly for monitoring crowds during unrest situations like we experienced at the mines in the Rustenburg area.'

1144. The UAV has multiple advantages. It can be pre-programmed to fly a specific route, the footage from the UAV can be viewed in real time (i.e. live) on a monitor, it is cheaper to run than a helicopter, it is quiet and thus clandestine, being unmanned it poses no danger to a flight crew when flying in dangerous

¹⁶³⁴ See Exhibit GGG8, paragraph 1.

¹⁶³⁵ Day 133, p 14101/3 to /21.

¹⁶³⁶ See Exhibit JJJ172, paragraph 3.3

areas, and (in the words of Lt Col Scott) it offers a holistic view of the scene that it flies over.¹⁶³⁷

1145. The advantages of a UAV with video camera capabilities are obvious and manifest. If such a system been in place on that day, the commanders of the SAPS operation would have had the benefit of having a real-time aerial view of the area. This would have greatly assisted them in both the planning and the execution of the operation. Further, there would have been a video recording of the events that occurred that day which would have served as an objective record for future purposes.

1146. We recommend that the SAPS should urgently consider the use of UAV's in the monitoring and recording of gatherings and public order.

Protocols for Video and Photo evidence

1147. One of the matters revealed by the evidence leaders' investigation of the video and photographic evidence of the events of 16 August is the absence of simple protocols which would facilitate the investigatory power of that evidence for SAPS.

1148. The proceedings of the Commission have shown the power of an integrated timeline of electronic evidence for investigatory purposes. In order to create that integrated timeline, the evidence leaders had to pore over different

¹⁶³⁷ Day 133, p 14102/1 to 14104/13.

sources of electronic evidence to find exact images of identical scenes so that the time differences between the different camera clocks could be determined.¹⁶³⁸ That laborious process could be avoided if SAPS synchronised its camera clocks before sending videographers and photographers out into the field. A standing order to that effect should be put in place.

1149. An even simpler protocol that would be of value to SAPS is a protocol that a master copy of all photographic and video evidence taken during an operation or an investigation should be housed in a single location as soon as possible after that evidence is taken. Photographs and videos taken at Marikana were not centrally collected at the time. As a result, the process of gathering them became much more complicated and the scope was increased for evidence to be lost, hidden or destroyed.

IPID and the investigation of SAPS misconduct

1150. IPID has opened or taken over various case dockets in relation to the Marikana incidents of 13 and 16 August 2012. In the immediate aftermath of the events they embarked on a massive process evidence collection. They took down around 160 statements from victims, witnesses and police suspects (warning statements). They collected firearms of the police officers involved in the shooting. They attended to post mortem reports. Most of the investigation was

¹⁶³⁸ This is an extremely laborious process as is illustrated by Exhibit ZZZZ9 which is the presentation prepared by the evidence leaders to persuade the parties that their set of time differences was accurate.

done in a few weeks after the shootings whereafter the investigation appears to have stalled. Although IPID has not made a formal presentation to the Commission it appears that they have halted their investigations pending the findings of the Commission.

1151. The IPID investigations though cannot be regarded as adequate. The factors that may have contributed to the inadequacy of investigations by IPID are the following:

1151.1. Lack of personnel,

1151.2. Lack of specialised skills personnel or experts like the crime scene experts,

1151.3. Dependency on SAPS for support on the performance of their duties,

1151.4. The legal framework that make police officers suspects, and therefore entitle them to the rights of accused persons which include the right to remain silent.

1152. Gen Naidoo testified that he was the one facilitating the taking over of the scene by IPID¹⁶³⁹. Various members of IPID arrived at the JOC and they needed police escort to go to the scene. IPID took over the scene and the killings are investigated under case no; Marikana CAS 138/08/2012. Although Gen Naidoo states that IPID was to take over the crime scene, in reality it was the members

¹⁶³⁹ Day 189 p 22956/2-3; 8-10

of SAPS who were in charge of the crime scene. Mr Motaung of IPID had to rely on the members of SAPS to walk him through the crime scene.¹⁶⁴⁰

1153. IPID team that attended the scene consists only of ordinary investigators and not experts. They relied on the crime scene experts of SAPS (*“the LCRC”*) to collect, record and preserve the evidence. The crime scene experts of SAPS who attended the scene are; Captain Mohlaki, W/O Thamae; W/O Molefe; and W/O Henderson.

1154. Marikana crime scene exposed the shortcomings in the operations of IPID. In the first place the crime scene of the 16th August 2012 was too vast and big for IPID to handle. They simply did not have enough personnel to deal with a crime scene of that magnitude. In fact Capt. Mohlaki started working on the crime scene long before IPID arrived on the scene. By the time that he first saw Mr Molatedi of IPID around 20H00 at scene 2, Capt Mohlaki had been processing the crime scene for almost two hours.¹⁶⁴¹

1155. The IPID’s lack of specialised expert skills and personnel does not end during the gathering and preserving of evidence. After the evidence and exhibits have been collected and stored, IPID will once again rely on the ballistics experts of SAPS to do a ballistics report. It is not a satisfactory arrangement for SAPS ballistics experts to be working with their colleagues in some cases and investigating them in others.

¹⁶⁴⁰ Day 189 p22958/4 - 8

¹⁶⁴¹ Day 78 p775/15 to p776/15

1156. In the Marikana cases, almost all of the ballistics investigations were conducted by Col Pieterse. We cannot fault Col Pieterse's work in any way, and the independent ballistics experts have confirmed his findings in all material respects.¹⁶⁴² Nevertheless, absent the corroboration of the independent ballistics experts, it is likely that the victim parties would have lacked confidence in his findings because of his structural position in relation to the SAPS. Moreover, he was expected to perform his massive task singlehandedly, so there were significant delays before IPID (and the Commission) were able to receive his findings. All this points to the unsatisfactory nature of the existing arrangements where IPID is not in control of the ballistics investigations in its cases, but the responsibility to produce and act on the report still lies with them.¹⁶⁴³

1157. An IPID investigation is a criminal investigation. A police officer requested to make a statement by IPID is approached either as a suspect or as a witness against a colleague in a criminal investigation. This immediately put a police officer on the defensive. Instead of assisting to find the truth the police officer will frequently keep quiet for fear of incriminating him/herself or a colleague. This is reflected in the lack of detail in almost all of the warning statements taken by IPID in the Marikana investigation. The policing expert Mr De Rover made the following observations in this regard:

¹⁶⁴² See Exhibit ZZZZ17

¹⁶⁴³ Day 14 p1576/22 to p1577/3; Day 16 p1766/18 - 21

"I have a professional problem with the situation that very early on SAPS members have been given warning statements by IPID. So there was a general reticence to be specific with me on detail.

...

*Now I've seen many statements that fall far short from that and 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 the consequences of speaking with that warning being given, 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."*¹⁶⁴⁴

1158. David Bruce *et al*,¹⁶⁴⁵ argue that because of the particular public interest in establishing the truth in relation to alleged criminal conduct of police officers there should be legislation that compels police officers to answer questions in

¹⁶⁴⁴ De Rover Day 286 p 31722/2 to p 31723/10

¹⁶⁴⁵ Bruce, D., Savage, K. and De Waal, J. (2000) A Duty to Answer Questions? The Police, The Independent Complaints Directorate and the Right to Remain Silent. *South African Journal on Human Rights*, Vol. 16, Part 1.

an IPID investigation but gives them immunity against the use of their answers in any prosecution.

THE UNACCEPTABLE NATURE OF THE SAPS RESPONSE TO THE SHOOTINGS AND THE COMMISSION

1159. The nature of the SAPS response to the shootings and to the Commission is a cause for considerable concern. There has been a complete failure of any serious self-criticism from SAPS. In the light of what happened on 16 August 2012, one would have expected SAPS to conduct some serious introspection and to have approached the Commission candidly with its own assessment of the mistakes that were made in relation to the operation on 16 August 2012 so that ways of avoiding such mistakes in the future could be addressed. Instead, there has been an almost complete failure on the part of SAPS to acknowledge that they made any serious mistakes. Apart from the technical issues like the failure of radio systems and the unavailability of teargas masks, SAPS acknowledged almost no mistakes on its part, and managed to avoid tabling its '*lessons learned*' document¹⁶⁴⁶ until the oral evidence at the Commission had been completed.

1160. This defensive response was coupled with a lack of candour on the part of all senior SAPS officers who testified at the Commission. As is clear from our discussion of the important substantive topics above, on issues central to the investigation of the Commission, untruthful evidence has been given by –

1160.1. The National Commissioner,

¹⁶⁴⁶ Exhibit YYYY1

1160.2. The Provincial Commissioner,

1160.3. Maj Gen Annandale,

1160.4. Maj Gen Naidoo,

1160.5. Maj Gen Mpembe, and

1160.6. Brig Calitz.

1161. This lack of candour appears to be part of a process that began almost immediately after the killings. For example -

1161.1. The press statement issued from the office of the National Commissioner in the immediate aftermath of the killings was altered from the report to the President so that it did not make clear that there had been two separate sites of killing, and that 17 of the 34 victims had been killed at scene 2, rather than in the televised footage that everybody knew about.

1161.2. Brig Van Zyl claimed on oath in the bail proceedings that the scene 1 shootings and the conduct of the strikers that immediately preceded them had been viewed live on CCTV footage in the JOC.¹⁶⁴⁷

¹⁶⁴⁷ Insert reference.

1162. We point out, too, that Brig Calitz claimed on oath in the bail application to have witnessed events which emphatically in his evidence before the Commission he denied witnessing in his evidence in the Commission. However, for reasons which we have given above, his evidence in the bail hearing is more likely to have been the truth than his evidence in this regard before the Commission.

1163. As we have pointed out above, some very important real evidence in this inquiry is evidence that was originally withheld, or at the very least not disclosed, by SAPS. this includes:

1163.1. The minute of the extraordinary session of the MNF meeting,

1163.2. The original notes taken in the JOC in the period 13 to 18 August 2012,

1163.3. The audio recording of the Provincial Commissioner's meeting with Lonmin on the 14th August,

1163.4. The early versions of reverse engineered plans for 13 to 16 August, which cast better light on what the true plans were when the versions ultimately put forth at the Commission, and

1163.5. The video footage of the Provincial Commissioner's press conference of the morning of 16 August.

1164. Other evidence that cast SAPS in a bad light and had to be discovered by the evidence leaders when it ought to have been disclosed by SAPS itself, included –

1164.1. The ordering of mortuary vehicles on the morning of 16 August 2012,

1164.2. The requisitioning of an additional 4 000 R5 rounds for the operation on 16 August 2012,

1164.3. The fact of the task team investigation,

1164.4. The various videos that SAPS attempted to conceal from the Commission, and

1164.5. The evidence relating to the planting of weapons on the bodies of dead strikers at scene 2.

1165. All of this points to a practice of not being candid with the Commission, and of deliberately attempting to suppress the disclosure of evidence that may be embarrassing to SAPS. This practice is well illustrated by the annotated marginal note on the statement of Brig Van Graan which suggests that a sentence pointing to the inability of SAPS to account for deaths at scene 2, should be deleted because *‘it will raise questions’*.

1166. The suppression of evidence appears to have been linked to a deliberate attempt to advance false versions before this Commission and, in some cases, to fabricate *‘real’* evidence in support of these versions. We have

addressed these topics above in relation to the Roots conference, but they bear repetition. They include:

- 1166.1. The SAPS case in relation to the 13th was that its actions in engaging the strikers in the field were necessary because the strikers had suddenly changed direction towards the internal settlement and SAPS needed to protect that settlement. That version was manifestly false and must have been known by Maj Gen Mpembe to be false. It must also have been known to be false by any SAPS member with knowledge of the events of the 13th.
- 1166.2. The version that the SAPS plan ultimately implemented on the 16th with disastrous effects was a tactical plan that had been carefully worked out in consultation with POPS officers and had been in place since Tuesday, 14 August was manifestly false and must have been known by all members of the JOC to have been false.
- 1166.3. The version that the decision to move to the tactical phase of the plan on 16 August had not been predetermined but was forced on SAPS because of the escalation of risk of violence in the morning of 16 August was manifestly false and must have been known to be false by the National Commissioner, the Provincial Commissioner, Maj Gen Annandale and Maj Gen Mpembe.
- 1166.4. The versions that the officers in the JOC and Brig Calitz in the field were all ignorant of the shootings at scene 1 was manifestly false and known by them all to be false.

1166.5. The SAPS version in relation to incidents 1 and 2 was not as transparently false as the matters described above but must have been known by Brig Calitz not to be the truth.

1167. As pointed out above, SAPS did not content itself merely to advance false versions in the Commission. It also fabricated or deployed false evidence in support of these versions. Thus :

1167.1. Minutes of the 6 a.m. JOCCOM on 16 August were created at Roots in a form which carefully avoided all evidence in the original notes taken on that morning that would show that a decision had already been taken that the miners would be forced off the koppie that day.

1167.2. Reverse engineered copies of plans of the week were produced at Roots and later to support the version that the plan ultimately implemented on 16 August had been in place since Tuesday 14 and to obscure the fact that the tactical plan ultimately implemented with disastrous consequences was one that was thought up by Col Scott alone under pressure in the morning of 16 August.

1167.3. Bullet damage on Nyala Papa 5 that had been present when it arrived at Marikana on 15 August was presented as proof of damage sustained as a result of shooting by strikers at incident 2 of scene 1.

1167.4. Weapons were planted on the bodies of dead strikers in a process that may well not have been the innocent, if unacceptable, process

described by W/O Breedts, but rather an attempt to justify the killing of those persons.

1168. All of these processes have to be related to the broader problem of a '*closing the ranks*' within SAPS in the face of criticism. We have commented on this in the context of the address by the National Commissioner at Marikana on 17 August 2012. It is also reflected in the otherwise inexplicable failure of SAPS, in relation to the events of 13 to 16 August 2012, to investigate a range of actions of its members, or allegations against its members, which cry out for investigation. We would include in this regard :

1168.1. The failure of SAPS to investigate allegations of mutiny against Maj Gen Mpembe on 13 August,

1168.2. The failure of SAPS to investigate the conflicting allegations in relation to the order to fire teargas on the 13th. In this context,

1168.2.1. either Maj Gen Mpembe took an extremely inappropriate step which resulted in the deaths of two SAPS members and three strikers, or

1168.2.2. other members within SAPS have falsely accused him of doing so.

Either way, investigation was required and action should have been taken against the guilty party.

- 1168.3. The failure of SAPS to investigate any of its members in relation to reckless shooting on 13 August 2012.
- 1168.4. The failure of SAPS to investigate any of its members in relation to reckless shooting on 16 August 2012.
- 1168.5. The failure of SAPS properly to investigate the allegations of W/O Myburgh.
- 1168.6. The failure of SAPS properly to investigate the planting of weapons on dead bodies at scene 2 on 16 August.
1169. While it could be argued that some of these matters should await the outcome of the commission, that cannot apply to all of them.
1170. A corollary of this process of closing ranks has been a process of turning on anybody who breaks ranks. Thus when Col Vermaak threatened not to toe the SAPS line in the Commission, SAPS turned on him and seems to have encouraged a process by which allegations were fabricated against him.
1171. The SAPS response to W/O Myburgh has hallmarks of a similar process.

RESPONSIBILITY FOR THE EVENTS OF THE WEEK: SAPS

Confrontation at NUM and murders on the 12th

1172. We have elsewhere in these submissions dealt with the intelligence reports which were made available by Brig Engelbrecht to Maj Gen Mpembe on 10 and 11 November. These reports made it clear that the strikers were intend on intimidating workers into supporting the strike. They were also targeting NUM members who did not support the strike. Notwithstanding these reports, SAPS failed to ensure that it stepped up visible policing in the area.
1173. On the contrary, SAPS allowed the strikers to embark on a pattern of violent behaviour from 10 August to 13 August. The only time that SAPS appeared to treat the situation with the gravity it deserved was after two of its members were killed on 13 August. Prior to that there was a glaring absence of proper planning, proper briefing and visible deployment by SAPS notwithstanding the crime intelligence reports available.
1174. What is particularly problematic about the SAPS response over 10 to 13 August is that it failed to implement its own contingency plan for this period, a plan which it claims to have drawn up on 10 August. The plan was one which identified strong visible policing as its first operational focus area. It also provided for the deployment of POPS resources and the establishment of a JOC. The failure of implementation was absolute – no JOC was established and the plan was not even brought to the attention of Capt Govender who was designated as the VISPOL Commander.

1175. The events of 11 and 12 August which started the spiral of violence in Marikana are events which may well have been prevented by strong visible policing backed up with POPS resources co-ordinated at a JOC. For this reason, SAPS must carry some responsibility for failing to prevent those events.

Deaths on 13 August

1176. The intervention by SAPS on 13 August was done contrary to crowd control prescripts. There was a lack of proper planning and briefing. The result was that members were deployed without fully understanding what they were dealing with and what it is that they were meant to do. Maj Gen Mpembe's explanation that the gathering was a spontaneous one and that there was no time for a proper planning and briefing exercise does not hold water. SAPS have put forward no basis for treating the march as a spontaneous gathering when they were well aware that the marchers were part of the bigger group on the koppie.

1177. Furthermore even if it was proper to treat the march as a spontaneous gathering, in light of the intelligence reports available (and the knowledge that the strikers had brutally killed two security guards the day before) SAPS ought to have known that any attempt to forcibly disarm and disperse the group would have been met with resistance.

Unjustified use of teargas provoked the confrontation

1178. The objective evidence shows that at the time that teargas and stun grenades were fired, there was no change in the behaviour of the strikers to merit this.

The strikers were steadily marching in the direction of the koppie. Any suggestion that there was a change in direction is false. Importantly, even if there was such a change, there is absolutely no evidence before this Commission that the strikers posed a risk to people living in surrounding informal settlements. On the contrary, the strikers themselves come from these communities. They moved in and out of these settlements every day without one report of an attack on the settlements.

Unjustified killing of Mr Sokanyile

1179. On the version of SAPS witnesses, Const Sekgweleya and Sgt Mguye, there was no basis for shooting at Mr Sokanyile. At the time Mr Sokanyile was part of the strikers who were moving away from the scene where two policemen were killed. The SAPS members involved all indicate that Mr Sokanyile did not pose a threat at the time that he was killed. On this basis this Commission should find that SAPS was responsible for the unlawful killing of Mr Sokanyile.

1180. Similarly, in relation to Mr Mati, SAPS have not made out a case that his killing was justified. We submit that a finding should similarly be made that SAPS is responsible for the unlawful killing of Mr Mati.

Events of the 16th - Interference in operational decisions by SAPS leadership

1181. At a general level, the National Commissioner and her fellow SAPS leaders who attended the extraordinary session of the National Management Forum must be held partially responsible for the 34 deaths on 16 August.

1182. The situation in Marikana was a difficult one. It was pregnant with the risk of further loss of life. This was appreciated by all of the SAPS leaders on the ground in Marikana. It accordingly called for careful planning and cautious operational decision-making.

1183. At the extraordinary session of the National Management Forum, a far-reaching operational decision (or 'endorsement of a decision') was taken by people with no knowledge of the conditions on the ground. Those present effectively placed a time limit on the operation without knowing whether there was a plan in place that was capable of being executed within this arbitrarily imposed time limit. In fact, there was no such plan, and it was left to Lt Col Scott to scramble together a new plan without sufficient time to think it through, debate it with other qualified SAPS planners (including officers with POPS experience), or even to brief the members in the field adequately in relation to this plan. As a result, SAPS went into the tactical phase on 16 August with a plan that was materially defective and which appears not to have been fully understood by the members who had to implement it.

1184. These fundamental problems led directly to the deaths at both scene 1 and scene 2. They can be traced back to the precipitate decision at the National Management Forum extraordinary session.

Events of the 16th - Scene 1

1185. Moving from the general to the more specific, the deaths at scene 1 on the 16th August are deaths for which SAPS must be held responsible because

they are causally linked to several negligent acts or omissions on the part of SAPS.

1186. The scene 1 deaths flowed directly from two obvious deficiencies in the plan. The first was Col Scott's design of a plan that depended on a simultaneous roll-out of barbed wire Nyalas when this was not operationally possible. The second was the quantum leap in the plan from non-lethal POP methods to what amounted to a firing squad of TRT members armed with military assault rifles and formed in a line. These deficiencies of the plan were linked to the failure to involve any members with POP experience in the development of the plan. They were also linked to a wholly deficient briefing in relation to the plan. In this regard, at the very least, if an adequate briefing had been given, the importance of the simultaneous roll-out to the plan would have been communicated by Col Scott to the POP commanders who would have to implement this roll-out and they, in turn, would have alerted him to the fact that a simultaneous roll-out was not possible. This would then have led to a revised planning process that may well have pre-empted the problem that ultimately arose as armed strikers attempted to enter the 'SAPS zone' during the 10 minute barbed wire roll-out period and before the barbed wire cordon had been put in place. These problems were, themselves, clearly linked to the precipitate decision taken at the extraordinary session of the NMF, which had placed an artificial time limit on the operation.

1187. Apart from defects in the plan itself and in its briefing, there were failures of command in the implementation of the plan.

- 1187.1. First, the evidence suggests strongly that Brig Calitz failed to respond quickly enough to the movement of the strikers in the direction of the 'SAPS zone' and in particular, after 'incident 2' he did not issue a clear command to block the gap at passage A which was the only entry to the 'SAPS zone' and the imminent destination of the lead group of strikers. Had Brig Calitz responded quickly and decisively to order that passage A be blocked, it is likely that the POPS armoured vehicles in the field would have been able to effect this block and the tragedy at scene 1 would not have taken place.
- 1187.2. As an alternative to executing a block at passage A, Brig Calitz could have instructed his armoured vehicles to block passage B, or could even have instructed one of the barbed wire Nyalas to be on standby to block passage B with barbed wire if the need arose. Both of these options were capable of implementation and both would have averted the tragedy at scene 1.
- 1187.3. Another failure on the part of Brig Calitz was to delay in deploying non-lethal POPS resources. No teargas, stun grenades or water cannons were used until 20 second before the scene 1 shootings. When the teargas and stun grenades were belatedly used by SAPS, they had the intended effect – they broke up the group of strikers that was advancing from the koppie to the kraal. However, by the time that teargas and stun grenades were used, this lead group of strikers was already in the channel running down the east side of the kraal. So breaking up that group by shooting teargas and stun

grenades into the heart of the group merely pushed the strikers at the head of that group further down the channel and closer towards the TRT line. Had teargas, stun grenades and water cannons been used before the strikers entered the channel at passage A, it is quite possible that they would have been dispersed in a manner that would have prevented the scene 1 tragedy. At the very least, such use of non-lethal POPS methods would have reduced the number of strikers that ultimately came down the channel towards the TRT line and would have limited the need for lethal force and the potential numbers of casualties if it was used commensurately.

1187.4. Then there is the extraordinary arrangement of the armoured vehicles around the eastern side of the kraal. Whatever the intention of Brig Calitz, the SAPS armoured vehicles arranged themselves around the eastern side of the kraal in a manner that did not block access to the 'SAPS zone', but effectively channelled the strikers down towards that zone and straight into the TRT line armed with R5 assault rifles.

1187.5. The position of the TRT line itself can be questioned. It was set up practically on the edge of the path to Nkaneng. As a result, the members in the TRT line never had the opportunity to wait to see whether the strikers were going to turn left along that path to Nkaneng and instead, found themselves in a position where they believed they were facing an imminent attack which had to be repelled before the strikers reached the path to Nkaneng.

1187.6. The collective shooting of the TRT line was the product of a flaw in the plan which provided for the TRT to move in a line and which did not provide for designated shooters to be identified in that line. This flaw, however, was one which might readily have been remedied by the TRT commanders in the field. They could have had designated shooters within the line and thereby prevented the fusillade that was fired at scene 1. However, they did not take the step. As a result, more than 300 shots were fired in 8 seconds at scene 1.

1188. Following the scene 1 shootings, there was a culpable failure on the part of SAPS to ensure that the strikers whom they had shot were given medical attention as quickly as possible. Primary culpability in this regard rests with Maj Gen Naidoo, who appears deliberately to have abandoned his responsibilities in relation to medical assistance at scene 1 and to have chosen instead to join the action at scene 2. However, there were many medically trained NIU members present at the scene 1 shootings, and they ought to have given paramedical assistance to the scene 1 victims who were left lying on the ground in great pain and, in at least one case, bleeding to death in circumstances where basic paramedical assistance would have prevented that outcome.

Events of the 16th - Scene 2

1189. SAPS is plainly responsible for all the deaths at scene 2. The first level of responsibility lies with Brig Calitz and the commanders in the JOC who failed to stop the operation after the scene 1 killings. This was an inexcusable

omission. Had they done what common sense, SAPS doctrine and basic decency demanded of them, and stopped the operation once it became clear that people had been shot with R5s at scene 1, none of the deaths at scene 2 would have taken place.

1190. The scene 2 deaths can also be causally linked to deficiencies in Lt Col Scott's plan which were, themselves, the product of the artificial time limit imposed on him by the decision of the extraordinary session of the NMF. Although it was clearly predictable that strikers dispersed west from koppies 1 and 2 would end up in koppie 3, Lt Col Scott's plan had no plan for dealing with the difficulties that were created by the terrain of koppie 3 when the predictable happened and strikers fled from koppies 1 and 2 to hide in koppie 3. This left the entire tactical operation to be coordinated on the ground by the Operational Commander without any plan.

1191. Brig Calitz's difficulties in this regard were compounded, first by the absence of Brig Fritz, who had abandoned his post as aerial commander to facilitate Cpt Venter's wish to throw stun grenades at strikers fleeing the scene a long way west of koppie 3, and second, by his own inexplicable decision to take himself 150 metres away from koppie 3 where he would have no way of seeing what was taking place inside the koppie and coordinating the operation accordingly.

1192. The problems at koppie 3 were compounded by the unsolicited and unannounced intervention at the scene of Maj Gen Naidoo with the K9 members coming up from the south-east, Cpt Kidd with the TRT members

coming up on the south-west and Col Modiba with the NIU line moving in from the east. These three unplanned interventions created a situation where the koppie was entirely surrounded by SAPS and the strikers could not be dispersed into the open areas where the arrest and disarming would have been much easier. Furthermore, all three of these units were without the protection of armoured vehicles. So if there was to be a confrontation between them and the strikers, they would have limited defensive options and the risk of lethal force was significantly increased.

1193. That these particular difficulties were created by circumstances beyond his control, does not excuse Brig Calitz from a grossly negligent, and possibly wilful, failure to exercise command and control at scene 2. As Operational Commander, it was incumbent upon him to stop the firefight that broke out at scene 2 as soon as it began. He failed to do this, and as a result, SAPS ended up killing 17 people whose lives should not have been lost. SAPS cannot even describe the circumstances in which 15 of these 17 people were killed.

1194. Alongside Brig Calitz, Maj Gen Naidoo must be held responsible for the deaths at scene 2. He created a large part of the problem at scene 2 by electing to intervene in the operation, contrary to the plan and without announcing his presence. Having done so, he became the senior officer in the operation, and when the firefight broke out at scene 2, it was incumbent upon him to take immediate steps to stop it. Far from doing this, he allowed the indiscriminate shooting into the koppie to continue in his presence, and then appears to have compounded the situation by leading the group of NIU

members over the rocks on the eastern side of the koppie and taking them into the position from which they appear to have killed several of the people in the killing zone.

RESPONSIBILITY FOR THE EVENTS OF THE WEEK: THE STRIKE ORGANISERS AND INDIVIDUAL STRIKERS

1195. The evidence shows that the strikers, or more precisely certain of them, decided to enforce the strike with violence, and did so.
1196. We have submitted elsewhere that strikers were directly responsible for the murders of Mr Mabebe, Mr Langa, Mr Mabelane, Mr Fundi and Mr Twala. No attempt was made to suggest that anyone else was responsible or might have been responsible for those deaths.
1197. We have also submitted that although the confrontation on 13 August was triggered by reckless and unjustified police action, that cannot justify the killing of W/O Monene and W/O Lepaaku. No attempt was made to justify those killings.
1198. One cannot realistically expect that those who have carried out murders will appear before a Commission of Inquiry and give evidence that they have done so. (In this respect, the position of the strikers who were responsible is different from that of the SAPS, who admit having killed certain people and seek to justify this.) No attempt was made to justify the killing of the persons whom we have mentioned above. As a consequence, no-one came forward to say that he had done this. As we have noted, this is hardly surprising.
1199. However, the question is whether the leaders of the strike should be held accountable for the killings which were committed by some of the strikers. Whether or not there is legal culpability, we submit that there can be no doubt

that the strike leaders were morally responsible for the conduct of the strikers in carrying out these killings. We say so for the following reasons:

1199.1. It is clear that the killings were carried out in an organised fashion, except for those of the afternoon of 13 August.

1199.2. The leaders of the strike must have known that their followers intended to enforce the strike with violence and, if deemed necessary, through murder; and they must have known, after each of the murders, that a murder had been committed.

1199.3. There is no evidence, or even a suggestion, that the leaders of the strike did anything to dissuade their followers from carrying out the murders and violence, or that they condemned or criticised the murders and violence after they had taken place.

1199.4. To the contrary, the strike leaders must be found to have encouraged and supported the culture of violence through the week, through the assertion of a right to armed assembly (including the carrying of weapons other than traditional weapons), through the logic of the violence used in enforcing the strike, and through making speeches which threatened and incited violence.

1200. At a late stage in the proceedings, counsel for the injured and arrested persons stated as follows, presumably on behalf of his clients:

*"I do not excuse the conduct of the people who killed those people. Those people, if they are properly identified, they must be charged and if they are found guilty they must go to gaol."*¹⁶⁴⁸

1201. Mr Xolani Nzuza agreed that he was "second in charge of the strikers' committee ... a senior leader, you were the second in command".¹⁶⁴⁹ He agreed that he was "the most senior survivor of the leadership of the strikers".¹⁶⁵⁰ Later in his evidence, apparently because he had come to appreciate the implications of this, he attempted to retreat from this position, saying that this was something that he had heard in the Commission.¹⁶⁵¹

1202. Mr Nzuza denied any knowledge of who had killed Mr Fundi and Mr Mabelane.¹⁶⁵² He said that it was the fault of Lonmin and Mr Ramaphosa that Mr Mabebe, Mr Fundi, Mr Mabelane and Mr Langa had lost their lives.¹⁶⁵³ His evidence was that the deaths of the ten people before 16 August were caused by Lonmin's refusal to talk to the strikers, but he was unable to explain why the death of (for example) Mr Langa, who was killed when he on the way to work, was caused by Lonmin's refusal to talk to the strikers. But he agreed that if Lonmin had spoken to the strikers, then the strike might have been

¹⁶⁴⁸ Day 266, p 33677/23.

¹⁶⁴⁹ Day 279, p 35815/9–13, 22–24. See also Day 279, p 35850/12–13.

¹⁶⁵⁰ Day 279, p 35850/25 – 35851/2.

¹⁶⁵¹ Day 279, p 3880/14, notwithstanding that it appears in his statement Exhibit PPPP1.1, para 2.

¹⁶⁵² Day 279, p 35828/14 – 35829/1.

¹⁶⁵³ Day 279, p 35847/3 – 8.

called off, and the people concerned would not have lost their lives because no-one would have enforced the strike.¹⁶⁵⁴

1203. Despite this, he steadfastly insisted that there was no reason why he should apologise to the families of Mr Mabelane, Mr Fundi, Mr Langa, Mr Mabebe and Mr Twala for the loss of their loved ones.¹⁶⁵⁵

1204. He claimed to be of the view that the people who carried out the killings of the security guards, the Lonmin workers and the police should be prosecuted, and if they were convicted they must go to gaol. He said that he felt strongly about this, and that people who did things like that were criminals. However, he was not willing to speak to his co-strikers and urge them that if they had any information about who killed these people, they should give it to the police: "That is not my duty". It was put to him that he claimed to want them to be arrested and prosecuted, but he did not want to do anything to ensure that they were arrested and prosecuted. His only answer was that this was not his duty.¹⁶⁵⁶

1205. We repeat the submission that the strike leadership, including Mr Nzuza, have at least a moral responsibility if not a legal responsibility for the deaths of persons who were apparently killed by some of the strikers. Mr Nzuza's statement that he would be happy if the people responsible for the deaths

¹⁶⁵⁴ Day 279, p 35845/18 – 35846/2 – although he then attempted to retreat from that answer by saying that he did not know who the people were who were enforcing the strike: p 35846/3 – 9.

¹⁶⁵⁵ Day 279, p 35851/3 – 35855/4.

¹⁶⁵⁶ Day 279, p 35855/6 – 35860/2.

were arrested and prosecuted, has to be rejected as self-serving and dishonest. The murders were the direct consequence of the manner in which strike was organised and enforced, and the leaders of the strike must be found to have been complicit in this.

RESPONSIBILITY FOR THE EVENTS OF THE WEEK: LONMIN

Lonmin's inconsistency in its attitude to negotiating with RDOs outside of recognised collective bargaining structures

1206. When the RDO's demanded an increase in wages in June 2012, Mr Da Costa received the demand and took it to Lonmin's Exco for decision. Exco considered the demand carefully and decided to approve an allowance of R750 for RDO's. This decision was conveyed to RDO's in the last few days of July 2012 and the first few days of August 2012.

1207. Mr Da Costa summarised the process as follows:¹⁶⁵⁷ He said

*'I didn't negotiate wages with them. They tabled a concern with me which did relate to their basic wage but at not stage did I engage in negotiations with them. I escalated the issue to the executive committee, the executive committee took a decision to implement an allowance to close the gap that had opened up in, you know, us relative to the rest of the industry. I communicated that decision back to them and that was the end of the process. We never negotiated around the amount or anything else around that.'*¹⁶⁵⁸

1208. This process of receiving a demand, considering it and then reverting with a decision that in effect amounted to an increase in the remuneration of RDO's

¹⁶⁵⁷ See Day 239, p 30029/8-30032/18

¹⁶⁵⁸ See Day 239, pp 30032/22-30033/6

bears all the characteristics of a negotiation. Importantly from the perspective of the RDO's, what had transpired was the following:

1208.1. They had taken a demand to management;

1208.2. Management had considered the demand;

1208.3. Management had reverted with a decision that amounted to more money in their hands each month.

1209. We submit that whether or not Lonmin intended to engage in wage negotiations with RDO's or not, the perception of the strikers (and other roleplayers) was that this was a negotiation. This is evident from the following:

1209.1. The entry in the Lonmin Karee OB (exhibit EEEE19.1) at 21 July 2012 at 10H00 where it is recorded that *"The RDO's first illegal march to the general office, Karee. The first demand made for an increase from R5,400 to R12,500. Negotiations between VP Mike da Costa and Semelo Mkhise and two reps from the RDOs, demand rejected at Exco level, threat, strike action."* (emphasis added)

1209.2. The entry in EEEE19.1 on 23 July 2012 at 10H00 where it states that: "Exco approved allowances of R750 per month. ..NUM, UASA, AMCU informed and NUM not happy that they were not involved in the negotiation". (emphasis added)

1209.3. Mr Mtshamba's testimony that the RDO's initially demanded R12500 with a view to settling on a different amount through the negotiations;¹⁶⁵⁹

1209.4. Mr Sipiwe Booi's supplementary statement¹⁶⁶⁰. Mr Booi who was part of the delegation who met with Mr Da Costa describes the interaction with Mr Da Costa. Mr Booi then states the following: "*At the third such meeting, management offered us an increase of R750-00. This small victory was achieved without the involvement of any union. Management had agreed to negotiate directly with the RDO's.*"¹⁶⁶¹ (emphasis added)

1210. Lonmin's claim that there is no evidence to support the assertion that the workers perceived that the process amounted to a negotiation is unfounded.

1211. Its also appears that there was a dichotomy of approaches within Lonmin to the issue of engaging with workers. Mr Da Costa testified that at line management level supervisors were encourage to speak to workers to understand their work related issues and, where necessary, to escalate issues to management. At the same time however, the collective bargaining structures were firmly in place with wage increases being negotiated centrally.¹⁶⁶²

¹⁶⁵⁹ Day 277 p 35398/12-17

¹⁶⁶⁰ Exhibit BBB3

¹⁶⁶¹ Exhibit BBB3 para 6

¹⁶⁶² Day 239 p 30030/17 – p 30032/3

1212. We submit that:

1212.1. Given the dichotomy in approach by Lonmin to the issue of engaging with workers on work related issues;

1212.2. Given that Lonmin had entertained the RDO's demand in the way that it did;

1212.3. Given that Lonmin was well aware that the RDO's had lost confidence in NUM;¹⁶⁶³

it was not inappropriate for Lonmin to adopt an intransigent approach after 9 August by refusing to talk to the workers outside established bargaining structures. A predictable result of Lonmin's intransigent refusal to engage with workers outside established collective bargaining structures was that workers resorted to increasingly desperate and violent measures in order to force Lonmin to once again engage with them.

1213. To make matters worse, Lonmin was well aware of the consequences of its refusal to engage with workers. In his memorandum to Exco,¹⁶⁶⁴ Mr Da Costa specifically pointed out that Lonmin's default position was unlikely to resolve the situation. Mr Da Costa proposed that Lonmin engage with the unions (at national level) on how to address the issue.

¹⁶⁶³ This issue is dealt with earlier in these submissions and is patently clear from the scenario planning process which Lonmin was conducting at the time.

¹⁶⁶⁴ Exhibit XXX3 p448

1214. Mr Gcilitshana testified that NUM may well have been open to agreeing that Lonmin engage in negotiations with the RDO's directly (outside formal bargaining structures) in order to resolve the dispute amicably. Therefore had Lonmin followed Mr Da Costa's suggested approach, there is a possibility that the tragedy of 16 August could have been averted because the parties could have engaged in negotiations around the RDO's demand.

1215. In cross-examination¹⁶⁶⁵ it was put to Mr Da Costa that Eric Gcilitshana, the National Secretary for Health and Safety of NUM and its chief negotiator at Lonmin, had testified that NUM would have agreed to an attempt being made to resolve the dispute with the RDOs outside of the normal bargaining processes in mid-August 2012. Mr Da Costa was asked why Lonmin did not take the initiative and say that they were willing to speak to the representatives of the strikers, in a controlled environment.¹⁶⁶⁶ He did not seek to justify the course of action adopted by Lonmin and conceded an attempt to resolve the dispute with the RDOs outside the normal bargaining processes would probably have been the sensible thing to do.¹⁶⁶⁷

1216. He said that Lonmin had been aware of the fact that NUM opposed the differential between RDOs and other employees on the same grade.¹⁶⁶⁸ He agreed that if the Lonmin RDOs had asked NUM to negotiate higher wages for

¹⁶⁶⁵ See Day 239, pp 30047/12-30048/23

¹⁶⁶⁶ See Day 239, pp 30049/21-30050/2

¹⁶⁶⁷ See Day 239, pp 30050/3-7 and 30051/1-6

¹⁶⁶⁸ See Day 240/13-17

them, NUM would have refused.¹⁶⁶⁹ He also conceded that Lonmin had told the RDOs that they had to speak to management through the NUM even though Lonmin knew that the RDOs had no confidence in NUM.¹⁶⁷⁰ He said that it was difficult for him to disagree that it was cynical for Lonmin to say they would only negotiate with the RDOs through NUM, which in effect was a statement that Lonmin would not negotiate with the RDOs at all.¹⁶⁷¹

Shooting at RDOs on the 10th and the Escalation of Violence

1217. The shootings that occurred on the evening of the 10th by Lonmin security personnel (which are addressed elsewhere in these submissions) were not adequately explained by Lonmin. We submit that Lonmin has failed to place any facts before this Commission (except the bland allegation that the strikers were intimidating workers) to show that the shooting incidents on the evening of 10 August were justified. On this basis, and in light of Maj Govender's evidence that in his view there was no basis for SAPS to act against the strikers, we submit that the Commission should find that the shootings were unjustified.

¹⁶⁶⁹ See Day 240, p 30130/18-30131/22

¹⁶⁷⁰ See Day 240, p 30134/13-22

¹⁶⁷¹ See Day 240, p 30142/23-30143/12

Tampering with evidence

1218. A logbook was kept in the Lonmin JOC, called Karee RDO OB 993. A hard copy of this logbook was made available by Lonmin to the Commission and was entered as exhibit XX2.10.

1219. During the course of the hearings, a different version of the logbook found its way into evidence. This version of the logbook¹⁶⁷² was furnished to SAPS in response to the section 205 subpoena (and hence found its way in to Col Scott's hard drive). This version was also an annexure to the ICAM report.

1220. In Exhibit EEE19.2, against the date 10 August 2012, the following inscriptions appear :

At 18h35 'PW reported that they fired about 10 rounds to the commuters at 4 (shaft) that are aggressive and busy intimidate the people.'

At 18h50 'GK reported that commuters intimidate workers to go to work, they are using pangas and knobkerrie, PW shot 15 rounds of rubber bullets at them'

And at 20h10 'GK reported that they shot 10-15 rounds of rubber bullets to commuters'.

¹⁶⁷² Exhibit EEEE19.1

1221. These inscriptions appear in red in Exhibit EEE19.2, whereas the remainder of the print in the document is blue. They do not appear in Exhibit XX2.10. In his testimony, Mr Dirk Botes said that the person who should explain this was Mr Sinclair. Mr Sinclair took responsibility for the deletions that were made from Exhibit EEE19.2.¹⁶⁷³ He put the deletions down to an editing process, but could not explain how in this process the references to the shootings were deleted.

1222. Mr Sinclair's explanation that the deletions were made only when there was other evidence of a particular entry is clearly false. He was unable to point to other evidence of some of the incidents which he had deleted. An example of this is the insertion that Lonmin security had shot at strikers with rubber bullets on 11 August 2012. There is no other evidence of this shooting apart from the insertion in the OB book. The effect of Mr Sinclair's deletion would have been that this Commission would not have known about this incident at all.

1223. We submit that the only inference to be drawn from Mr Sinclair's efforts in tampering with the OB book is that he sought to keep those deleted entries from the Commission. This raises the question of whether the shooting incidents to which these entries related were indeed justified. In the case of the shootings on 10 Aug, we submit that it was not.

¹⁶⁷³ See Day 267, pp 33843/5-33887/1

The Failure to Prevent the Shooting at the NUM Offices on 11 August 2012

1224. The shooting that occurred in the vicinity of the NUM office on 11 August 2012 is dealt with extensively elsewhere in these heads of argument.

1225. Upon receiving reports that the strikers were going to the NUM office, Lonmin security personnel warned the NUM members at the office of this and asked them to vacate the building. The subsequent confrontation occurred as a result of the actions of the strikers and the NUM members.

1226. Lonmin security clearly did not have a plan to deal with the proposed march. Furthermore the security personnel deployed (which consisted only of Mr Motlogelwa and Mr Dibakoane) were incapable of dealing with the large crowd of marchers. Had security been more effective, then the chances are that it would not have been necessary for the NUM members to resort to self-help to protect themselves and their offices.

Failure Adequately to Protect Lonmin Employees and Employees of Contractors

Mr Mabelane and Mr Fundi

1227. Lonmin must carry some responsibility for the deaths of Mr Mabelane and Mr Fundi.

1228. If Lonmin security had had the use of hard skinned vehicles, this could have contributed to their greater safety. Mr Blou and Mr Kent had repeatedly requested this, without success. Not only did Lonmin fail to procure armoured

vehicles for their personnel, they also failed to ensure that the armoured vehicles of Protea Coin were in proper working condition.

1229. It has been suggested that when the confrontation took place, Mr Mabelane and Mr Fundi should have withdrawn but Mr Mabelane (who was Mr Fundi's supervisor) chose not to do so. We submit that the Commission should make no finding in this regard because there is insufficient evidence to support such a finding.

The deaths of Mr Langa and Mr Mabebe

1230. The occurrence book is replete with reports that the strikers were intent on targeting Saffy shaft and K4 shaft immediately before the attacks on Mr Langa and Mr Mabebe.

1231. Furthermore, the intelligence reports available to Lonmin showed the serious threat posed by the strikers to the safety of workers reporting for duty. Notwithstanding these reports, Lonmin continued to actively encourage workers to come to work. It did these even though Mr Sinclair acknowledged that at the time Lonmin security was simply unable to protect all Lonmin's workers. Mr Jamieson also conceded that the situation at the time was out of control. Mr Mokwena testified that Lonmin considered closing down its operations until it was able to get the situation under control but that it took a business decision not to do so because of the cost (and difficulties involved) in identifying and paying workers who did not want to go on strike)

1232. Lonmin must bear responsibility for failing adequately to secure K4 shaft and at a time when it was aware of the risk of violent confrontation but was expecting

of workers and contractors that they should present themselves for duty at K4 shaft. It must also bear responsibility for failing to ensure the safe passage of workers on popular routes to work in these circumstances.

RESPONSIBILITY FOR THE EVENTS OF THE WEEK – NUM

NUM's conduct as a catalyst for violence

1233. NUM has been criticised for their violent conduct on 11 August. The evidence before the Commission suggests that NUM pre-empted an attack by 3000 marchers by chasing towards the marchers and firing at them with live ammunition. Two marchers were wounded as a result of this shooting.

1234. We submit that while the incident of 11 August can be seen as a turning point in the sequence of events, NUM's conduct may be excusable in view of the large number of armed strikers marching towards them. The situation was made worse by the fact that the NUM members had earlier been informed by Lonmin security that they had received reports that the strikers intended to burn down the offices.

1235. In these circumstances NUM's conduct was justified.

NUM's handling of the RDO demand

1236. One of the key criticisms of NUM's conduct in the run-up to the shootings on 16 August relates to NUM's handling of the RDO demand. Mr Setelele confirmed that at all times NUM was aware that RDO's at Lonmin were being underpaid. They therefore were aware that the RDO's complaints were legitimate.¹⁶⁷⁴ Mr Setelele confirmed that NUM tried to address the plight of the RDO's within the

¹⁶⁷⁴ Day 38 p 4123/12-22

bargain system but was unsuccessful in securing for the RDO's the kind of increases they demanded.¹⁶⁷⁵

1237. Given that increases for RDO's were one of the demands which NUM brought to the bargaining table, in terms of clause 12.3 of the wage agreement¹⁶⁷⁶, NUM was not entitled to initiate strike action on any demand made but which was not successful. This clause 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."

1238. This meant that, in terms of the wage agreement, NUM could not call on its members to go on strike even if, arguably, it was inclined to support the strike. There was however a course of action open to NUM if it wished to re-open negotiations on RDO increases. NUM could have approached Lonmin in a bid to open up talks on amending the wage agreement. This was however never done.

1239. Mr Setelele was cross examined on this point and maintained 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. Mr Setelele testified that the RDO's refused to talk to NUM about their demands.

¹⁶⁷⁵ Day 38 p 4124/1-5

¹⁶⁷⁶ Exhibit XX2 p19

They were therefore not in a position to obtain a mandate from the workers.¹⁶⁷⁷

Mr Setelele emphasised in his evidence that NUM had no access to the workers and therefore could neither discuss the demand with them nor obtain a mandate to take the demand up on their behalf.¹⁶⁷⁸ Furthermore, the workers themselves were adamant that they wanted to raise the demand with the employer themselves.¹⁶⁷⁹

1240. Mr Setelele's explanation does reveal the difficult position in which NUM found itself during the strike. The evidence does support Mr Setelele's explanation that the workers rejected NUM's involvement in the raising of the demand. In these circumstances NUM had no mandate to take the demand up. This must mean that NUM was entitled to remain uninvolved in the RDO demand for increased wages.

1241. Where NUM does fall short is in its report to workers that they could not raise the demand for R12500 because of the two year wage agreement. Mr Setelele testified that this was conveyed to workers on 8 August. This is an incorrect portrayal of the situation because the wage agreement could have always have been amended.

1242. It is however important to refer to the evidence of Mr Gcilitshana who testified that, had Lonmin approached NUM before 16 August and asked that they agree to have the RDO demand negotiated outside the established bargaining

¹⁶⁷⁷ Day 38 p 4134/16-25

¹⁶⁷⁸ Day 38 p 4135/6-13

¹⁶⁷⁹ Day 38 p 4140/1-3

structures, NUM would in all probability have agreed if it meant that this approach would restore peace at Karee.

NUM's attitude to the strike

1243. NUM was resolutely opposed to the strike. Mr Setelele, chairperson of NUM branch at WPL, explained that NUM's position was that the RDO's should go to work and raise their grievances within the normal structures.¹⁶⁸⁰ NUM's position, according to Mr Setelele, was that if there was a problem, workers should bring it to NUM to deal with it.¹⁶⁸¹

1244. On this basis NUM not only encouraged its members to go to work, it actively assisted members to get to work safely by providing transport for workers.

1245. We submit that in circumstances where there was widespread violence and intimidation directed at workers who reported for duty, it was not unreasonable for NUM to want to ensure the safe passage of its members travelling to work. This was made worse by the fact that Lonmin security was not able to protect all workers reporting for duty. Furthermore there was a lack of visible policing in the area.

Relationship between NUM and Lonmin

¹⁶⁸⁰ Day 38 p 4114/5-16

¹⁶⁸¹ Day 38 p 4114/15-16

1246. One of the criticisms raised against NUM was the closeness of NUM's relationship with Lonmin and the perception that existed that NUM was a sweetheart union.

1247. This is a complex analysis since which requires an in-depth investigation into the relationship between Lonmin and NUM in order to understand whether or not NUM is able and/or willing to passionately pursue the best interests of its members. This topic would have been properly dealt with in phase 2.

However, in view of the fact that phase 2 has been considerably truncated, there is insufficient evidence available to make any submissions on whether NUM effectively represents its members.

RESPONSIBILITY FOR THE EVENTS OF THE WEEK – AMCU

AMCU's involvement in the RDO demand

1248. One of the key criticisms directed against AMCU was that it was behind the RDO demand and the strike and that it promised its members an increase to R12 500.¹⁶⁸²

1249. However, the evidence before the Commission is that the RDO's did not want to involve the unions in raising their demands. This is evident from the following:

1249.1. Prior to the August strike, the branch leaders of AMCU heard of the intended march by RDOs to present a memorandum to the management, and they asked to be invited to the processes but management engaged directly with the employees.¹⁶⁸³ In an AMCU meeting held on the 19 July 2012 and addressed by Stephen Khululekile, he told his members that whenever they have a problem they must first go to AMCU offices before they go to Human resources.¹⁶⁸⁴

1249.2. In a memo dated 26 June 2012 addressed by Lonmin Human Resources to the Lonmin EXCO, it was stated that there was no proof

¹⁶⁸² See for example the statement of exhibit 004 p4 Line 2-5

¹⁶⁸³ Exhibit LL p7/3-15

¹⁶⁸⁴ Exhibit CCC3

of AMCU's involvement in the RDO demand for R12 500. That the RDOs were led by one member from AMCU and another affiliated to NUM, suggested to Lonmin that the RDO issue had assumed a life of its own, independent of trade unions.¹⁶⁸⁵

1249.3. Mr Mabuyakhulu, who was an RDO involved in the strike, testified that during a meeting on 9 August which was called by RDOs to discuss their salaries, it was stated that no trade union should be engaged in respect of that wage demand for R12 500.¹⁶⁸⁶

1249.4. Mr Da Costa testified that at the initial meeting on 21 June 2012, the RDO's who met with him specifically informed him that they did not want unions involved in the matter.¹⁶⁸⁷

1249.5. In a letter dated 10 August 2012, Mr Mathunjwa advised Mr Mokoena not to talk to the strikers as most of them were members of unions and should therefore be addressing their grievances with their respective unions, and for non-unionised employees, there are management structures that deal with such grievances. He referred to the strikers as sinister forces that should not be engaged.¹⁶⁸⁸ There is no concrete evidence to suggest that Mr Mathunjwa was being duplicitous when he sent this email.

¹⁶⁸⁵ Exhibit VVVV11 170.

¹⁶⁸⁶ Transcript Day 48 5260/20-25. 5261/5-9

¹⁶⁸⁷ Exhibit OO17, para 3.18

¹⁶⁸⁸ Transcript Day 290/10-14. Day291 37962/1-10

1250. Furthermore, apart from allegations from NUM and Lonmin, there is no concrete evidence before this Commission which points to AMCU being behind the strike and the violence which ensued.

1251. Mr Da Costa stated that he had been advised by Lonmin management that when the branch secretaries of AMCU and NUM were advised of the RDOs' approach to him for a wage increase, they were both non-committal and said that the RDOs were Lonmin's problem and Lonmin should address the issue.¹⁶⁸⁹ When he met with AMCU representatives on 29 July regarding a proposed RDO allowance emanating from that approach, AMCU's position was that if Lonmin wished to give RDOs an allowance, it should do so, and that AMCU had nothing to do with that issue.¹⁶⁹⁰

1252. This is also consistent with Mr Mathunjwa's evidence that his organisation was not involved in the strike. He said that the workers themselves called the strike.¹⁶⁹¹

1253. In a meeting held on 13 August between AMCU officials and Lonmin management, AMCU said that the employees at the koppie were demanding that the company increase the pay of all employees to R12 500. When Mr Munro asked the AMCU representatives whether they were formally tabling a

¹⁶⁸⁹ Exhibit XXX Para 3.32-3.34. Transcript Day 37 3979/17-23

¹⁶⁹⁰ Exhibit 0017 Para 4.10

¹⁶⁹¹ Transcript Day 21 2253/21-25. 2254/1-6. Day 241 30430/15-22. 30432/21-25. 30434/3-22. 30435/4-7

demand on behalf of the striking workers, their response was that they were not.¹⁶⁹²

1254. We submit accordingly that there is no evidence on which it can be concluded that AMCU was behind the strike and the violence which followed.

Is there anything that AMCU should have done?

1255. The demand of the RDOs was a wage demand. NUM was the bargaining agent for all Lonmin operations. Although AMCU enjoyed a majority in membership at Karee, it did not have a place at the bargaining table. It therefore could not play a role in any negotiations regarding the wage demand.

1256. Mr Mathunjwa received a phone call from Mr Mokwena regarding the march on the 10th. He asked Mr Mokwena to call a meeting of stakeholders. He then made enquiries from his Karee branch structures, and was informed that the march had been organised by the RDO's and that they did not want union involvement.¹⁶⁹³ He sent an email to Lonmin management proposing that any issues of concern that the strikers had should be communicated through recognised structures, that any memorandum received from the structures be communicated to unions, and a meeting be held to discuss the contents¹⁶⁹⁴.

¹⁶⁹² Exhibit XXX9. Transcript Day 241 30434/19-22. 30435/4-10.

¹⁶⁹³ Exhibit NN Para 15-20

¹⁶⁹⁴ Exhibit OO1

1257. Mr Mathunjwa responded positively to Xolani Gwala's invitation to participate in the debate in which a solution was sought. He made good on his promise to address the strikers on 15 August. On 16 August he did everything he could to persuade Lonmin to engage with the strikers, and to persuade the strikers to lay down their weapons and go back to work.

1258. It is difficult to see what else could have been expected of AMCU under the circumstances. Whatever Mr Mathunjwa's motives may have been (a matter we address elsewhere in these submissions), we submit that he made a genuine effort to persuade Lonmin to talk to the strikers, and to persuade the strikers to lay down their weapons and leave the koppie, in order to avoid bloodshed.

Mr Mathunjwa's optimism that he could get the strikers off the koppie and back to work

1259. The case advanced by SAPS is that on 15 August Mr Mathunjwa gave them an undertaking that by 9H00 the next morning the strikers would lay down their weapons and leave the koppie.

1260. The evidence however suggests that while Mr Mathunjwa appeared to be very confident that the strikers would agree to disarm and disperse, he stopped short of giving an unequivocal undertaking that they would do so. Maj Gen Annandale testified that he did not understand Mr Mathunjwa to have made a promise that the strikers would disarm and disperse. However he testified that Mr Mathunjwa appeared to be optimistic that the next day the strikers would agree to disarm and disperse.

1261. We submit that there are no facts to support the assertion by SAPS that Mr Mathunjwa gave an undertaking that the strikers would voluntarily disarm and disperse by 9H00 the next day.

Did Mr Mathunjwa demand a place at the bargaining table?

1262. The evidence suggests that at the meeting in the morning of 16 August Mr Mathunjwa indicated to Lonmin management that if he ended the strike he wanted AMCU to be involved in the ensuing negotiations around the RDO's demand.

1263. Initially Mr Mathunjwa denied having said this and gave a very different and truncated account of what transpired at the meeting. However, once he was shown the transcript of the meeting, Mr Mathunjwa conceded that he did convey to Lonmin that AMCU wanted to be part of a central forum which would negotiate on the RDO's demand. Mr Mathunjwa gave no explanation for his changed version.

1264. While Mr Mathunjwa may appear to have tried to exploit the situation for the benefit of AMCU, he can hardly be faulted in relation to his attempts to avoid the catastrophe that ultimately unfolded. On two occasions on 16 August he pleaded with the strikers to disarm and disperse. On both occasions his plea fell on deaf ears.

1265. We submit that neither Mr Mathunjwa nor AMCU can be found to be responsible for any of the events from 9 to 16 August.

RECOMMENDATIONS - POLICING

1266. As we have noted above, the evidence-leaders invited each of the external policing experts to make recommendations which could be considered by the commission. Each of them has done so. We do not propose to repeat here the recommendations made by the experts, but we urge the Commission to give careful consideration to all of them. They are contained in exhibits ZZZZ31.1, ZZZZ31.2 and ZZZZ31.3.

1267. The recommendations which we make below, flow for the most part from the analysis in these submissions, particular in the section dealing with the evidence of the experts.

Professionalism and depoliticisation

1268. Senior police appointments should be depoliticised.

1269. Only persons with expert knowledge should be appointed to senior policing positions in which they may have any role at all in operational decisions.

1270. The government should commit publicly to the professionalisation of the police through appointing highly trained and skilled personnel, establishing a body to set and regulate standards, and enforcing the code of conduct and a police code of ethics.

1271. The code of conduct/ethical code should explicitly prohibit the application of political or sectional or sectarian considerations in decision-making with regard to policing.

1272. The code of conduct/ethical code should emphasise the fundamental duty of the SAPS to be accountable for the use of force, and to account honestly to the public. The SAPS should demonstrate by word and deed that failure to comply with this duty has materially negative career consequences.

Demilitarisation

1273. The demilitarisation of the SAPS should be undertaken as a matter of priority. This should not be confined to police insignia, military ranks and force orders but should also address the training and development curricula with a view to effecting the mental change required for policing today and in the future.

1274. The Minister of Police and the National Commissioner of Police should be required to state publicly, within a specified time:

1274.1. When the police ranks will be demilitarised.

1274.2. What further steps will be taken to demilitarise the police.

1274.3. When each such step should be taken.

1275. The Minister of Police and the National Commissioner of Police should be required to report publicly, at defined intervals, on what has been done to give effect to such statement – and if they have not complied with the statement, why this is so, and when compliance will take place.

1276. The organisational culture and subcultures of the SAPS should be critically reviewed to assess the effects of militarisation, demilitarisation, remilitarisation and the serial crises of top management.

Control over operational decisions

1277. It should be recognised and accepted that in large and special operations, there is a role for consultation with the executive (the Minister of Police), subject to the following:

1277.1. The executive should give only policy guidance, and never make any operational decisions.

1277.2. The policy guidance should be appropriately and securely recorded, preferably through real time audio and visual recording.

1277.3. Subject to security and other operational requirements, the policy guidance should be made public.

1278. 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.

Standing Orders and other prescripts

1279. The policing prescripts should state explicitly that contingency plans must identify and address a range of scenarios, from those thought to be highly probable through to those considered possible, but unlikely.

1280. Standing Order 262 should be revised or replaced in order to address explicitly gatherings and demonstrations at which the participants are armed and actually or potentially violent, including:

1280.1. When tactical units may be involved in dealing with gatherings and demonstrations;

1280.2. Who should be in charge of SAPS operations in which a number of units, including tactical units, are engaged;

1280.3. The need for written plans (including contingency plans) to be prepared;

1280.4. Who should be responsible for preparing such plans;

1280.5. In what circumstances, if any, the use of sharp ammunition is permitted;

1281. If there is a new Standing Order dealing with such situations, it should be made clear that the usual prescripts relating to planning, briefing and debriefing are applicable to all such operations.

1282. Where shooting may be necessary in violent crowd situations, the prescripts should require the designation of particular members of a unit or line as having responsibility for identifying particular members of a crowd who are a threat to life, and dealing with them in a manner consistent with the Criminal Procedure Act.

1283. The prescripts should address the circumstances and manner in which a crime scene may be interfered with, in order to ensure that evidence is not falsely introduced or changed.

Police equipment

1284. All radio communications during operations should be recorded, and the recordings should be preserved.

1285. R5 rifles should immediately be withdrawn from use in public order events.

1286. Any replacement weapons should not be capable of automatic fire.

1287. Plans for public order policing operations should identify the means of communication which SAPS members will use to communicate with each other.

1288. 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.

1289. 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.

1290. All SAPS helicopters should be equipped with functional video cameras.

1291. 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.

First aid

1292. 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.

1293. 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.

1294. All police officers should be trained in basic first aid.

1295. Specialist firearm officers should receive additional training in the basic first aid skills needed to deal with gunshot wounds.

Accountability

1296. Where a police operation and its consequences have been controversial, requiring further investigation, neither the Minister nor the National Commission should ever pronounce publicly (or to members of the SAPS) on the appropriateness of the police conduct, unless and until the matter has been fully investigated.

1297. The standing orders should more clearly require a full audit trail and adequate recording of police operations.

1298. 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.
1299. The SAPS should implement mechanisms for the protection of “whistle-blowers” and other methods to ensure that SAPS members who criticise police operations in good faith, do not suffer negative consequences.
1300. The staffing and resourcing of IPID should be reviewed to ensure that it is able to carry out its functions effectively.
1301. The IPID system should be reviewed and revised to ensure that it does not create a perverse incentive for SAPS members to conceal errors and mistakes which were made, because they fear that their careers may be at risk. This is particularly so in relation to operations where a substantial public interest is involved, as was the case with regard to Marikana

RECOMMENDATIONS – PUNITIVE ACTIONS

Proceedings to Inquire in terms of section 8(1) of the SAPS Act into the Fitness of the National Commissioner for Office

1302. We submit that the Commission should recommend that the President establish a board of inquiry under s 8(1) of the SAPS Act to consider the fitness of the National Commissioner to hold her office. In this regard, we draw attention to the following:

1302.1. The SAPS response to this Commission of Inquiry has been characterised by concerted attempts to mislead the Commission on several central issues, including the role played in relation to the events of 16 August 2012 by the National Commissioner herself and the other Generals in attendance at the extraordinary session of the NMF on 15 August 2012.

1302.2. The National Commissioner herself must have been aware of this attempt to mislead the Commission but has done nothing to prevent it.

1302.3. In at least one respect, the concerted attempt to mislead the Commission appears to have been designed to protect the National Commissioner and the generals in attendance at the meeting of the extraordinary session of the NMF on 15 August 2012. In the circumstances, it is unlikely that this would have taken place without

the instruction (or at least clear support) of the National Commissioner.

1302.4. Her own evidence in relation to the meeting of 15 August 2012 was not candid. She also gave false evidence to the Commission in relation to the Task Team. Her evidence before the Commission was generally characterised by a lack of candour.

1302.5. Her office appears to have been responsible for the misleading press statement that was issued in the immediate aftermath of the shootings and which appears to have been designed to conceal the facts of scene 2.

1302.6. Her immediate response to the shootings was incompatible with the office of the Head of a police service in a constitutional state. Her refusal in evidence to repudiate her statement that on 17 August 2012 that '*whatever happened represents the best of responsible policing*' suggests that she is not fit to hold the office of National Commissioner. So too does her dogged refusal to criticise any aspect of the conduct of SAPS in relation to the tragedy of 16 August 2012.

Criminal charges for the deaths of victims of Mr Fundi and Mr Mabelane

1303. The Commission has heard no evidence that may be relied upon to identify the individual strikers who were responsible for the deaths of Mr Fundi and Mr Mabelane.

1304. There is an ongoing SAPS investigation and, pending finalisation of the Commission proceedings, the NDPP has suspended any decision on whether or not to pursue charges against particular suspects. These processes of the criminal justice system will, we hope, lead to the arrest, prosecution and conviction of those responsible. We would submit that the only recommendation that the Commission should make in this context is that the NDPP should have regard, in making such decisions, to the findings of the Commission on the reliability of the evidence of Mr X.

1305. Apart from the individual strikers who were responsible for the deaths of Mr Fundi and Mr Mabelane, we submit that no other party can be held criminally liable for these deaths.

Criminal charges for the deaths of Mr Langa and Mr Mabebe

Criminal liability of individual strikers

1306. It can safely be accepted that Mr Mabebe and Mr Langa were killed by strikers. The concerns expressed in paragraphs 1303 and 1304 above apply equally to the deaths of Mr Langa and Mr Mabebe.

Potential criminal liability of Lonmin

1307. The evidence of Mr Mokwena on 16 September 2014 (the last day scheduled for the hearing of oral evidence) suggests that Lonmin was aware that if it did not close the mine after the murder of Mr Fundi and Mr Mabelane, there was a real risk that one or more of its employees (or employees of contractors)

would be murdered for coming to work. It appears from this evidence that a business decision was taken to expose non-striking employees and employees of contractors to the risk of death because of the cost of closing the mine.

1308. The fact of the discussion and decision admitted by Mr Mokwena was not previously disclosed by Lonmin. Because of the late stage of proceedings at which this evidence emerged, there was no opportunity for it to be investigated. It is possible that the decision about which Mr Mokwena testified may have fallen within the category of business decisions that are not regarded as unlawful for the purposes of the criminal justice system. It is also possible that it fell on the wrong side of criminal liability. The evidence leaders submit that this is a matter that demands further investigation and should be referred to the SAPS and the NDPP for that purpose.

Criminal Charges for the Deaths of W/O Lepaaku and W/O Monene

1309. It can safely be accepted that W/O Lepaaku and W/O Monene were killed by strikers. The concerns expressed in paragraphs 1303 and 1304 above apply equally to these deaths.

Criminal Charges for the Deaths of Mr Mati and Mr Jokanisi

1310. It is now clear that both Mr Mati and Mr Jokanisi were killed by SAPS members. There is no ballistics evidence that links their deaths to any individual SAPS member. We see no basis to recommend the prosecution of any individuals in relation to these deaths.

Criminal Charges for the Death of Mr Sokanyile

1311. Mr Sokanyile was killed by a shot from a R5 rifle in circumstances which do not appear to be consistent with a claim of private defence or self-defence. There is conflicting evidence from Lt Col Vermaak and Const Mguye and Const Sekgweleya in relation to the death of Mr Sokanyile. IPID should investigate these conflicting versions with a view to deciding whether there is evidence to institute criminal proceedings in relation to the death of Mr Sokanyile.

1312. In the context of this investigation, IPID should also consider whether there is evidence to institute proceedings against any SAPS members (including Const Mguye and Const Sekgweleya) for interference with the administration of justice in relation to the statements that have been made regarding the shooting at fleeing strikers across the river on 13 August 2012.

Criminal Charges for the Death of Mr Twala

1313. It can safely be accepted that Mr Twala was killed by strikers at the koppie on 14 August 2012. The evidence before the Commission is not sufficient to hold Mr Nzuza responsible for the death of Mr Twala. The concerns expressed in paragraphs 1303 and 1304 above apply equally to the death of Mr Nzuza.

The Deaths at Scene 1 on 16 August 2012

The participants at the extraordinary session of the NMF

1314. As we have indicated above, we are of the view that the precipitate decision taken at the extraordinary session of the NMF led to the tragic events on 16 August 2012.

1315. However, we submit that it is unlikely that this decision would be held to be a legal cause of the deaths of 16 August 2012.

Lt Col Scott

1316. As we have indicated above, we submit that flaws in the plan of Lt Col Scott are causally linked to the deaths at both scene 1 and scene 2. However, he was placed in an impossible position by the order to produce in a few hours a tactical plan of the complexity required for the operation in the afternoon of 16 August 2012. Under the untenable circumstances in which he was constrained to act, we submit that he cannot be held to have acted negligently.

Lt Gen Mbombo

1317. The order to implement the tactical operation on the afternoon of 16 August 2012 was issued by Lt Gen Mbombo. There was no need for this order to be issued and because of the serious risk of loss of life inherent in the implementation of Col Scott's plan, no reasonable SAPS commander would have issued such an order.

1318. As has been set out above, the loss of life at scenes 1 and 2 was causally linked to the deficiencies in Col Scott's plan. These are deficiencies which ought to have been obvious to Lt Gen Mbombo and ought to have alerted her to the need to postpone the operation until SAPS were better prepared.

1319. We submit that, in the circumstances, IPID should be invited to investigate whether Lt Gen Mbombo should be held criminally liable for the deaths at scene 1 and scene 2.

Maj Gen Annandale and Maj Gen Mpembe

1320. We submit that the order of Lt Gen Mbombo was not a manifestly illegal order. There is accordingly no basis upon which Maj Gen Annandale or Maj Gen Mpembe can be held criminally liable for implementing that order.

Brig Calitz

1321. We have submitted above that a reasonable operational commander in the position of Brig Calitz could have acted in a manner that prevented the scene 1 tragedy. We submit that IPID should be invited to investigate whether the omissions of Brig Calitz were of such an order as to render him criminally liable for the deaths at scene 1.

Individual Shooters

1322. We have indicated above that the individual SAPS members who started shooting at scene 1 would have had a reasonable basis upon which to fear that they were coming under imminent attack.

1323. We do not submit that it would be appropriate to prosecute any individual SAPS members who shot at scene 1 for the deaths at scene 1.

Maj Gen Naidoo

1324. Mr Mdze would probably be alive but for Maj Gen Naidoo's egregious failure to bring paramedics to scene 1. The report of Prof Boffard considers all victims at scene 1 and does not focus on the case of Mr Mdze in any detail. We submit that IPID must investigate the death of Mr Mdze specifically to establish whether the medical evidence is sufficiently clear to justify the institution of criminal proceedings against Maj Gen Naidoo.

The Arrested Strikers

1325. In the immediate aftermath of the tragedy, the survivors of the tragedy were charged with the murder of their colleagues on the basis of the common purpose doctrine. These charges were subsequently withdrawn.

1326. We submit that the NDPP should not be requested to reinstitute any of these charges. Aside from the undesirability of holding the victims of the massacre responsible for the death of other victims, for the reasons set out above, we are of the view that there is no clear evidence of a common purpose, still less of one that involved foresight of the deaths of colleagues. We point out that the only common purpose alleged is that alleged by SAPS, and this common purpose, on the SAPS case, was one which was premised on the belief in the invulnerability of the strikers because of mutu. It accordingly could never be a common purpose that was predicated on the foresight of deaths of strikers.

Criminal Liability for the deaths at Scene 2

Lt Gen Mbombo

1327. We have indicated above that the shortcomings of the plan were also causally linked deaths at Koppie 3. In particular, the plan failed to prevent a retreat by strikers to Koppie 3 and failed to provide any measures to deal with the situation that would result if strikers retreating from Koppie 1 and Koppie 2 entrenched themselves at Koppie 3. It was therefore foreseeable that the decision to implement the plan would lead to deaths at Koppie 2.

1328. For this reason, we repeat that IPID should be invited to investigate whether Lt Gen Mbombo should be held criminally liable in relation to the deaths at scene 2 for her order at the 1:30 JOCCOM that phase 3 of the plan should be implemented.

Maj Gen Annandale and Maj Gen Mpembe

1329. We have submitted above that Maj Gen Annandale and Maj Gen Mpembe cannot be held criminally liable in respect of the deaths at scene 1 because they were ordered by Lt Gen Mbombo to implement the plan and that order was not a manifestly unlawful order.

1330. In relation to scene 2, however the situation is materially different. After the scene 1 shootings had taken place, Maj Gen Mpembe and Maj Gen Annandale were no longer bound to implement Lt Gen Mbombo's order. As overall commander and de facto overall commander respectively, they were

under a duty to consider whether the operation should be stopped in the light of the scene 1 shootings and to act accordingly. In making this assessment, they had to consider whether there was a risk of further loss of life if implementation of the plan continued.

1331. Because both Maj Gen Mpembe and Maj Gen Annandale gave false evidence to the effect that they were ignorant of the scene 1 shootings, one does not know what attempts, if any, they made to stop the operation after scene 1.

1332. We accordingly submit that IPID should be invited to investigate this issue and to decide whether Maj Gen Mpembe and Maj Gen Annandale should be held criminally liable for the deaths at scene 2.

Maj Gen Naidoo

1333. We have set out above how Maj Gen Naidoo placed himself in a position of command and control at scene 2 and then did not exercise command and control to bring the shooting at scene 2 under control. We submit that IPID should be invited to investigate whether he should be held criminally liable for the deaths at scene 2, other than the death of Mr Mkhonjwa (victim N) which appears to have occurred before he would have been in a position to prevent it by exercising proper control.

Brig Calitz

1334. We have set out above how Brig Calitz abdicated his responsibilities as operational commander at scene 2 and failed to exercise command and

control to bring the shooting at scene 2 under control. We submit that IPID should be invited to investigate whether he should be held criminally liable for the deaths of strikers at scene 2.

Brig Fritz and Sgt Venter

1335. While Brig Fritz was supposed to be performing the function of aerial commander at scene 2, his helicopter was away from the scene so that Sgt Venter could throw stun grenades at strikers fleeing far away from the scene. The justifications advanced for the throwing of these stun grenades in the statements of Brig Fritz and Sgt Venter and in the pocket book of Sgt Venter are contradictory and inconsistent with the known facts. IPID should be invited to investigate whether there was any justification for this conduct on the part of Brig Fritz and Sgt Venter, or whether it was gratuitous conduct for which they should be charged with assault.

Offences under the Regulation of Gatherings Act

1336. Armed assemblies are not lawful. The tragic events in the week of 9 to 16 August 2012 would never have taken place if the laws relating to the display of dangerous weapons at public gatherings had been respected. It is important that these laws are enforced rigidly with an eye to the future. We accordingly would invite the Commission to recommend the prosecution of all strikers who can be identified displaying dangerous weapons at the gatherings of the strikers or marches of strikers during the week of 9 to 16 August 2012.

Offences / Punitive Action in Relation to Proceedings of the Commission

False evidence before the Commission

1337. The unfortunate truth is that, with some honourable exceptions, many witnesses before the Commission gave false evidence. In the circumstances, we submit that it would not be an appropriate use of the resources of the criminal justice system to seek the prosecution of all witnesses who contravened section 6(2) of the Commissions Act.

1338. In our submission, however, SAPS members who gave false evidence before this Commission should be the subject of disciplinary proceedings and we would invite the Commission to make a recommendation to that effect in relation to all SAPS witnesses whom it finds to have given false evidence.

Hindering or Obstructing the Commission

1339. There are two serious cases which, we submit, warrant investigation with a view to prosecution under section 5 of the Commissions Act.

1339.1. The first relates to the attempts, by unknown SAPS members, to falsify evidence in an attempt to hide videos from the Commission.

1339.2. The second is even more serious, and relates to what we have described as the concerted attempt by SAPS, at Roots and thereafter, to mislead the Commission as to the true facts.

1340. We submit that IPID should be invited to investigate both of these cases with a view to prosecution under section 5 of the Commissions Act.

RECOMMENDATIONS: REPARATIVE MEASURES

Compensation for Victims of the Week of 9 to 16 August

1341. A number of the dependants of strikers who were killed, and a number of those who were injured, have instituted civil claims against the police for compensation.
1342. The Commission has sat for two years hearing evidence and argument. The process has been painful and exhausting. If the matter now had to be re-investigated in civil trials, this would re-open the wounds and cause further pain.
1343. The Commission's motto is "Truth, Restoration and Justice". Compensation is not simply about legal liability: it is also about how to repair some of the terrible damage that has been done, and to restore community. Endless litigation will undermine this.
1344. We therefore submit that the Commission should recommend that, having regard to all of the circumstances which it will no doubt address in its report, the SAPS should pay compensation to the dependants of those who were killed in the police action, and to those who were injured.
1345. This raises an important question, namely the treatment of those who died apparently at the hands of certain of the strikers. It would be a travesty of justice if compensation were to be paid in respect of those who were killed by the SAPS, but not in respect of those who were killed by the strikers. The

public attention focus on the plight of the dependants of those who were killed by the SAPS in understandable – because the SAPS acts on behalf of all of us, and its conduct is the responsibility of all of us. However, the result is that the dependants and families of the other victims of the events of August 2012 have received inadequate care and attention. For the most part, they were killed because they were doing their job or attempting to do so.

1346. If the achievement of reconciliation and restoration is the goal, as we submit it must be, this will be fundamentally undermined if a one-sided compensation process takes place. We therefore submit that the Commission should recommend that the State should compensate the dependants of all of those who lost their lives and all those who were injured in the events of 9 to 16 August 2012.

A heritage project

1347. Consistently with this, we submit that the Commission should recommend that consideration be given to some form of heritage project which will have a healing effect. The essence of any such project must be that it is more than some kind of formal memorial: it must be the result of a process which brings people together to decide, jointly, what heritage project should be undertaken, and how this should be done. If the parties affected are able to come together to reach agreement on a project aimed at memorialising what has happened, that would be a very important step in achieving the goals of truth, restoration and justice.

GEOFF BUDLENDER SC

MATTHEW CHASKALSON SC

KAMESHNI PILLAY SC

CHARLES WESLEY

TANTASWA LUPUWANA

MATTHEWS MOJAPELO

**Chambers
Cape Town, Johannesburg and Pretoria
27 October 2014**