IN THE CLAESSEN BOARD OF INQUIRY
(HELD IN CENTURION)

FAMILIES’ SUBMISSIONS

1. We represent the families of the 3 strikers who were killed on 13 August 2012 and the families of the 33 of the 34 strikers who were killed on 16 August 2012 at Marikana (“the Families”). The names of the deceased strikers are attached in the list marked “A”.

2. The killings at Marikana shocked our nation and the world. South Africans were left with a great deal of soul-searching about where we are as a nation 20 years after democracy. Even then, the Families are the most deeply affected. In most cases, each family lost their only breadwinner as a result of the incident. In the few cases where they did not lose their only breadwinner they nevertheless lost an essential breadwinner.

3. On 26 August 2012, the Marikana Commission of Inquiry (“Marikana Commission”) was established by the President of the Republic to enquire investigate matters of public, national and international concern arising from the events at Marikana.

4. The Families, who were devastated by the loss of their husbands, sons, brothers, fathers, uncles and cousins in horrifying and violent circumstances were party to the proceedings of the Marikana Commission. They attended the Marikana Commission to try and discover the truth of what happened to their loved ones. They attended in an attempt to understand how it was that their loved ones were shot and killed by members of the South African Police Service (“SAPS”). And to ascertain why Lonmin simply refused to engage with them, when it had done precisely that a few weeks earlier, and called for an increased police presence instead.
5. They, therefore, were looking to the Marikana Commission for the answers to their questions in the hope of achieving some measure of restoration and justice. The Families made substantial sacrifices in doing so. They left behind their children and put off looking for jobs which would have helped to make up for the support that they have lost.

6. As a result of the recommendations made by the Marikana Commission in its report ("Marikana Commission Report"), the President of the Republic established this Board of Inquiry ("the Board") in terms of section 9 of the South African Police Service Act\(^1\). The Board is mandated to inquire into allegations of misconduct by Ms Riah Phiyega ("the National Commissioner") and / or into her fitness to hold such office and /or into her capacity to execute her official duties efficiently and according to law.

7. In conducting this inquiry, the Board is guided by its terms of reference which provide that the Board shall inquire into whether:

7.1. The National Commissioner acting together with other leadership of the South African Police Service or alone, misled the Commission by concealing the fact that they had made the decision to implement a "tactical option", taken at the National Management Forum (NMF) meeting on or about 15 August 2012;

7.2. The National Commissioner, in taking the decision to implement the ‘tactical option’, ought reasonably to have foreseen the tragic and catastrophic consequences which ensued;

7.3. The remarks by the National Commissioner at the SAPS Parade on 17 August 2012 would have been understood as an unqualified endorsement of the police action and thereby having the consequence of undermining, frustrating or otherwise impeding the work of the Commission;

\(^1\) No. 68 of 1995.
7.4. The report prepared by the National Commissioner for the President of the Republic on the 16 August 2012 and the media statement subsequently issued on 17 August 2012, was deliberately amended to conceal the fact that there were two shooting incidents (Scene 1 and Scene 2), resulting in the public being misled and made to believe that all the deaths occurred at Scene 1 when members of SAPS had to defend themselves from an advancing mass; and

7.5. The overall testimony by the National Commissioner at the Commission was in keeping with the office which she holds and the discharge of her duties commensurate therewith.

8. We will make submissions under each term of reference in turn below.

A. WHETHER THE NATIONAL COMMISSIONER ACTING TOGETHER WITH OTHER LEADERSHIP OF THE SOUTH AFRICAN POLICE SERVICE OR ALONE, MISLED THE COMMISSION BY CONCEALING THE FACT THAT THEY HAD MADE THE DECISION TO IMPLEMENT A “TACTICAL OPTION”, TAKEN AT THE NATIONAL MANAGEMENT FORUM (NMF) MEETING ON OR ABOUT 15 AUGUST 2012:

9. The Evidence Leaders, in their Statement of Case, conclude their submission on the above Term of Reference by stating that:

“In all the circumstances, the evidence leaders submit that the Board of Inquiry should find that the National Commissioner, whether acting alone or in concert with others in the SAPS, attempted to mislead the Farlam Commission by concealing the fact that a decision had been made at the extraordinary meeting on 15 August 2012 that the tactical option would be implemented the following day, should the striking workers not lay
down their arms by 09h30, as Mr Mathunjwa had indicated they would.”

(Emphasis added.)

10. Subject to the caveat that Mr Joseph Mathunjwa (“Mr Mathunjwa”), the President of the Association of Mineworkers and Construction Union (“AMCU”), did not give the police an unequivocal undertaking, we align ourselves with the Evidence Leaders’ submission above.

11. Given the fact that the Evidence Leaders have extensively covered this particular term of reference, we make brief submissions in respect of the following points:

11.1. The undue economic and political factors that influenced the National Commissioner and the Provincial Commissioner in the decision to implement the tactical option;

11.2. The concealment of the minutes of the extraordinary NMF session;

11.3. The testimony of both the National Commissioner and of Major General Mbombo (“Provincial Commissioner”) at the Marikana Commission;

11.4. The Provincial Commissioner’s telephone calls and media briefing following the decision to implement the tactical option; and

11.5. The impact of the decision to implement the tactical option on the Families.

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3 Marikana Commission Report, page 180 para C1:

“At the AMCU debriefing (on the 15 August) Mr Mathunjwa came across as confident that the strikers would lay down their weapons the next day. Indeed it is correct to say that he was overconfident. But he did not give the police an unequivocal undertaking in this regard, as Major General Annandale conceded. He said expressly that he did not have a specific answer as to what would happen the next day but he added that he believed that the next day would be the day of joy for everyone. Major General Annandale also said that Mr Mathunjwa had asked the police for an undertaking that they would not take action against the strikers that night as the strikers wished to spend the last night on the koppie before discussions would resume at 09h00 the next morning.” (Emphasis added.)

See also, Marikana Commission Transcript, Day 91 page 9710.
Undue Economic and Political Influence

12. In a meeting with Lonmin Management on 14 August 2012, the Provincial Commissioner expressed an intention to end the strike and to “act such that we kill this thing”:⁴ Some of the main points she raised related in that regard to the following:

12.1. She expressed discomfort that the mine workers feel as if they are in control;⁵

12.2. She also expressed discomfort that from a “political point of view” the mining sector wants to replace the National Union of Mineworkers (“NUM”) and that mine management is “colluding with AMCU”;⁶

12.3. She stated that the Minister of Police had mentioned to her that Mr Cyril Ramaphosa (“Mr Ramaphosa”) was putting pressure on him;

12.4. She also stated that the National Commissioner had asked her who the shareholders of Lonmin are and that the National Commissioner “got it” when the Provincial Commissioner said she did not know the shareholders but the Minister had mentioned the name of Mr Ramaphosa;⁷

12.5. She also stated that the National Commissioner wanted to defuse the strike before Mr Julius Malema went to Marikana as he had done previously at the Impala mine because if he could go and defuse the situation, it would create the impression that he had taken charge of the mines;⁸ and

⁴ Marikana Commission Exhibit JJJ192 page 11.
⁵ Marikana Commission Exhibit JJJ192 page 5.
⁶ Marikana Commission Exhibit JJJ192 page 30.
⁷ Marikana Commission Exhibit JJJ192 page 9 and 10.
⁸ Marikana Commission Exhibit JJJ192, page 10 and 11.
12.6. She was also concerned about resources as a result of the deployment of other SAPS members to her province.⁹

13. Then in the press conference on the morning of 16 August 2012, the Provincial Commissioner said:-

“we will still be responsible to ensure that there is stability, there is peace, but also there is continuity of business, taking into account that despite this having a negative influence in terms of our resources that are here, depleting our resources from the other various centres, it has got an economic negativity in the country, but also I suppose that we need to clear and say that it also has got a negative effect in and around the lives of the people that would like to continue working and supporting their families...”¹⁰ [Emphasis added]

14. We submit that the above does not only show that undue economic and political considerations by the Provincial Commissioner and the National Commissioner influenced their decision / endorsement of the tactical option at the extraordinary NMF session on 15 August 2012, but also that a decision to implement the tactical phase had indeed been taken on 15 August 2012 at the extraordinary NMF session. And, as we will demonstrate below, the National Commissioner attempted to conceal this information from the Marikana Commission (and the South African public).

The Concealment of the Minutes of the Extraordinary NMF Session

15. The recording of the extraordinary NMF session disappeared after not being handled in accordance with usual procedures.¹¹

16. Major Lethoko of the Section: Executive Secretariat and Information Management in the office of the National Commissioner attended the NMF meeting on 15 August

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⁹ Marikana Commission Exhibit JJJ192, page 15.
¹⁰ Marikana Commission Exhibit HHH 40, page 5 at lines 2-11.
¹¹ Marikana Commission of Inquiry Report, page 450; Marikana Commission Transcript Day, 270.
2012. She left the meeting before the extraordinary session started. When typing the minutes of the NMF on 17 August 2012, she emailed Brigadier Malahlela requesting the audio recording of the meeting which had been saved on a memory stick. She was only provided with the memory stick on 21 August 2012 and the minutes of the extraordinary NMF session were not part of the audio recording.

The Marikana Commission requested the memory stick from the SAPS and was informed that the memory stick was “missing”. The memory stick was not handled and filed according to the ordinary procedures. Instead of being filed in a locked cabinet in Major Lethoko’s office, the memory stick was given to Brigadier Malahlela. To date, the memory stick remains “missing”.

We submit that until the SAPS can give a reasonable explanation on the whereabouts of the memory stick and why normal and proper procedures were not followed, this Board of Inquiry is entitled to draw a negative inference against SAPS and, in particular, the National Commissioner who convened that meeting.

That we submit is even more so in that, the minutes are stored in the office of the National Commissioner. The Families’ legal team is not aware of any disciplinary action taken against those involved in the mishandling of the minutes of the NMF.

**The Provincial Commissioner’s Telephone Calls and Media Briefing following the Decision to Implement the Tactical Option**

The Provincial Commissioner’s telephone records show that she had contact with senior police officials including General Naidoo, Captain Adrio, Major General Mpembe and Major General Annandale immediately after the extraordinary NMF session. She also spoke to Lonmin Security Manager, Mr Sinclair. It is our

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12 Marikana Commission Exhibit HHHH 1.
13 Marikana Commission Exhibit HHHH 1.1.
15 Marikana Commission Transcript, Day 270, page 34384 at lines 2-8.
16 Marikana Commission Transcript, Day 270 page 34359 (line 10) to page 34372 (line 18); Marikana Commission Exhibit HHHH 1 and Exhibit HHHH 1.
18 Marikana Commission Exhibit ZZZZ11.
submission that a reasonable or in fact the most plausible inference to be drawn – as was done by the Marikana Commission – is that these late telephone conversations were conveying the important decision taken at the extraordinary NMF session and the steps to be taken the following day.19

21. Captain Adrio made contact with Brigadier Mashego, as he then was, three times between 22h00 and 23h00 on 15 August 2015.20 The inference to be drawn here, we submit, is that as members of the SAPS’s communication team, Captain Adrio and Brigadier Mashego, assisted the Provincial Commissioner in organising a press conference for the morning of 16 August 2012.

22. In the morning of 16 August 2012 the Provincial Commissioner announced that the police would end the strike on that day.21

23. In an interview with eNCA after the press conference, the Provincial Commissioner said:

“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.”22

24. The Marikana Report accepts that SAPS deliberately concealed the evidence in relation to the extraordinary session of the NMF.23

25. We submit that the evidence above shows that the Provincial Commissioner, from the evening of 15 October 2012, was acting on the basis of the decision taken and endorsed at the extraordinary NMF meeting to implement the tactical option on 16 August 2012.

19Marikana Commission Report, page 189 para 8; Also, footnote 17 above; Compare Skilya Property Investments (Pty) Ltd v Lloyds of London 2002(3) SA 765 (TPD) at 780G to 781A.
20Marikana Commission Exhibit ZZZZ11 pages 35-36.
21Marikana Commission Exhibit HHH 40 and Exhibit JJJ 157.
22Marikana Commission Exhibit JJ92.
The Testimony of both the National Commissioner and the Provincial Commissioner at the Marikana Commission

26. At the Marikana Commission, the SAPS made repeated attempts to downplay the importance of the extraordinary NMF session held in the evening of 15 August 2012. The National Commissioner, in her statement to the Marikana Commission, initially concealed that the session took place and that the decision to end the strike on 16 August 2012 was taken or endorsed at that session.24

27. Further, when she testified at the Marikana Commission, the National Commissioner once again concealed the fact that the session took place and that the decision to end the strike on 16 August 2012 was taken or endorsed at that session. In response to her counsel's question about the events of 15 August 2012, the National Commissioner failed to mention the extraordinary NMF session. Instead, she said:

“On the 15th of August 2012, whilst I was attending the South African Police Services National Forum Meeting in Midrand, which General Mbombo attends as a provincial commissioner, I was informed by Lieutenant-General Mbombo of a possibility of a peaceful resolution being reached. She informed me that she had been told that Mr Mathunjwa of AMCU had promised that the protesters would lay down their weapons at the koppie at [Marikana] on the morning of the 16th August 2012, and that thereafter they will leave the koppie. Lieutenant-General Mbombo further informed me that if the above, that undertaking of putting down their weapons and leaving the koppie failed to materialise, the police would have to disperse the crowd.”25

28. It was only under cross examination, on 16 April 2013, that the National Commissioner revealed that an extraordinary session of the NMF was convened and that the main discussion focused on issues of “capacity”.26 She however, still did not mention the fact that the tactical option was proposed and ultimately endorsed.

24 Marikana Commission Exhibit FFF33.5.
25 Marikana Commission – Transcript, Day 64 page 6832 at lines4-17.
26 Marikana Commission Transcript, Day 74 page 7941 (line1) to page 7946 (line 16).
29. On 30 January 2014, when asked about the extraordinary session of the NMF, the Provincial Commissioner made it clear that the National Commissioner convened that session after the ordinary NMF meeting was concluded. In addition, she stated that after updating the attendees of the events at Marikana she made it clear that if the mine workers did not voluntarily disarm by 16 August 2012 her view was that the police would have to disperse and disarm them.27

30. The National Commissioner was subsequently recalled by the Marikana Commission and questioned extensively on the NMF meeting. She was asked to explain why she failed to mention that the decision taken to implement the tactical option and end the strike on 16 August 2012 was endorsed at the extraordinary session of the NMF. Under cross examination by the Chairperson on that issue, she said:

“I had said in the meeting I spoke about the extraordinary, in my testimony, the extraordinary meeting we referred to. The question you are asking me, in the meeting that we had General Mbombo briefed us about the situation in Marikana, shared with us their plan to disarm the protesters. We also in that meeting, because I had the other Provincial Commissioners, spoke about them giving her support. As I had indicated in some of my responses to this Commission, the issue of deployment, sharing resources for public order policing sit in my remit. Those are the issues that we focused upon in that discussion and that is why we had people such as General Mawela, General Masemola, who are people who are in charge of operations in policing.

CHAIRPERSON: I see. Now what, the minutes talk about a proposal which the Provincial Commissioner, North-West, made. What was the proposal?

GENERAL PHIYEGA: Chair, the issue I raise is that she indicated to us that their plan is to disarm the protesters.

CHAIRPERSON: Did she say when that was to be executed?

GENERAL PHIYEGA: Yes, they were planning to do that on the 16th.”28(Emphasis added.)

27 Marikana Commission Transcript, Day 178 page 21353 (line 11) to page 21355 (line 13).
28 Marikana Commission Transcript, Day, 288, page 37394 (line 8) to page 37395 (line 6).
31. In light of the above, read with the minutes of the extraordinary NMF session as well as the facts traversed in the Evidence Leaders’ Statement of Case on this term of reference, we submit that the National Commissioner was clearly coy and unwilling to provide the Marikana Commission with information about the extraordinary NMF session and the decision taken or endorsement made thereat.

32. We submit, therefore, that the National Commissioner attempted to conceal both the facts that an extraordinary session of the NMF took place and that the decision to implement the tactical phase was taken / endorsed at that meeting.

The Impact of the Decision to Implement the Tactical Option

33. The decision to implement the tactical option on 16 August 2012 was taken in the evening of 15 August 2012 at the extraordinary NMF session. It was taken without—

33.1. consultation with the operation commanders on the ground;

33.2. an operational plan of action. There was simply a desire to end the strike, without proper consideration, interrogation and planning of the impact, consequences and manner in which the police would execute the action “to end the strike and disarm” or “disperse” the strikers;

33.3. ensuring the application of Public Order Policing principles; and

33.4. taking time to respectfully and properly engage the striking mineworkers.

34. The decision to implement the tactical option resulted in the deaths of 34 people with the result that their remaining family members are left with the loss of breadwinners who were fathers, sons, brothers, community members and leaders.

35. The families of the 37 strikers who were killed by the SAPS sat through 300 days of the Marikana Commission. Throughout this period, they witnessed the SAPS deliberately keeping the Marikana Commission in the dark by being evasive and
withholding or concealing evidence as explained earlier. All of this, we submit, was a calculated effort by the SAPS under the current National Commissioner’s leadership and with her knowledge and participation, to evade accountability. It has caused additional trauma to the Families and has increased the sense of isolation and hostility from the State that the Families already feel.

36. To this day, the 320 Family members of the deceased have no explanation of why the extraordinary NMF session took the decision, or endorsed the decision to implement the tactical option.

B. WHETHER THE NATIONAL COMMISSIONER, IN TAKING THE DECISION TO IMPLEMENT THE ‘TACTICAL OPTION’, OUGHT REASONABLY TO HAVE FORESEEN THE TRAGIC AND CATASTROPHIC CONSEQUENCES WHICH ENSUED:

37. The Marikana Commission of Inquiry found that:

“It is now common cause that the decision that the strikers would be forcibly removed from the koppie by the police on 16 August 2012 if they did not voluntarily lay down their arms was not taken by the tactical commanders on the ground at Marikana on that day but rather by Lieutenant General Mbombo and “endorsed” by the SAPS leadership at an “extraordinary session” of the NMF held after its ordinary meeting was over on the evening of 15 August 2012.”

38. Even on the National Commissioner’s version, that at the extraordinary NMF meeting on 15 August 2012 she did not “take the decision” to implement the tactical phase but simply endorsed the decision that was taken by the Provincial Commissioner, the National Commissioner’s conduct is wanting and not consonant with the office that she holds and renders her unfit for it or incompetent.

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39. In any event, we agree with the Evidence Leaders that to “endorse” something means to “declare one’s public approval or support of” that thing.\textsuperscript{30} As we will demonstrate below, the National Commissioner, in terms of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), is in control of the SAPS.\textsuperscript{31} Therefore, even if one accepts the proposition that she simply endorsed the decision, it is our submission that had she refused to endorse it, the implementation of the decision would, have amounted to insubordination and rendered the SAPS members involved liable to disciplinary action and sanction.

40. We submit that there can be no contestation that the situation at Marikana was, effectively, a crowd management event that required police to act within the prescripts of public order policing.\textsuperscript{32} It is common cause that the Provincial Commissioner had no experience or expertise in public order policing.\textsuperscript{33} Therefore, the proposal by the Provincial Commissioner to implement the tactical phase would have required more interrogation, anything less we submit, is evidence of poor decision-making and incompetence on the part of the persons who endorsed the decision – including in particular the National Commissioner.

41. It is also our submission that in the circumstances the National Commissioner ought reasonably to have foreseen the tragic and catastrophic consequences which ensued following the decision to implement the tactical option. In addition, we submit that a reasonable person in the position of the National Commissioner would have taken reasonable steps to prevent the tragic and catastrophic consequences that followed as a result of the decision to implement the tactical option.

**Legal Framework**

42. We agree with the legal framework as set out by the Evidence Leaders in their statement of case. However, we set out below, the legal framework that we wish to rely on for present purposes.

\textsuperscript{30} Evidence Leaders’ Statement of Case page 48 para 77. 
\textsuperscript{31} Section 207 
\textsuperscript{32} All the experts admitted before the Marikana Commission of Inquiry were experts in public order policing –Marikana Commission Report, pages 329-330 at para 3. 
\textsuperscript{33} Marikana Commission, Transcript, Day 179, page 21437 at lines 5 – 21.
43. Of immediate importance is section 207 (1) of the Constitution which provides for the appointment of the National Commissioner by the President of the Republic.

44. Notably, section 207 (2) of the Constitution places upon the National Commissioner the obligation to—

“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.”

45. Furthermore, section 207 (4) of the Constitution deals with provincial commissioners and provides that:

“The provincial commissioners are responsible for policing in their respective provinces
a.) as prescribed by national legislation; and
b.) subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2).” (Emphasis added.)

46. We submit that these constitutional provisions place upon the National Commissioner an obligation that is far more than simply providing support to provincial commissioners. The constitutionally imposed obligation is one that requires the National Commissioner to “exercise control over” and to “manage” the police service in line with national policing policies and ministerial directions.34

47. We will demonstrate below that in light of this constitutional obligation, a reasonable National Commissioner would have scrutinized the decision to implement the tactical phase with more enthusiasm and care, than the nonchalant attitude displayed by the current incumbent.

34 Refer also to Section 207(5)
The SAPS Act

48. With respect to statutory obligations, section 17 of the South African Police Service Act\textsuperscript{35} ("SAPS Act") deals with public order policing and it reads as follows:

> “17. (1) The National Commissioner shall, subject to section 218(1) (k) of the Constitution, establish and maintain a national public order policing unit.
> (2) The National Commissioner may deploy the national public order policing unit, or any part thereof, at the request and in support of a Provincial Commissioner, taking into account-
> (a) the reason for the request;
> (b) the personnel and equipment available to the unit; and
> (c) any other circumstances anywhere in the national territory which may have an influence on the maintenance of public order and which may require the deployment of the unit or any part thereof elsewhere.”

49. We submit that section 17 of the SAPS Act must be read together with section 207 (2) and (4) of the Constitution and that any reading of section 17 of the SAPS Act that does not accord with the dictates of section 207 (2) and (4) is incorrect and must be disregarded. When read with section 207 (2) and (4) of the Constitution, section 17 (2) of the SAPS Act cannot be honoured without compliance with national policing policies and ministerial instructions.

50. In her statement to the Marikana Commission of Inquiry, the National Commissioner said—

> “I stand before you as National Commissioner of the South African Police Service to tell you that the performance, professionalism and integrity of the Service as a whole are ultimately my responsibility.
> ...
> I lead an organisation dedicated to upholding the law, serving and protecting the community and its property pursuant to the SAPS’ constitutional mandates in congruent with the bill of rights as enshrined in our constitution w[hich] guarantees rights to peaceful and unarmed demonstrations and / or protests. I

\textsuperscript{35} Footnote 1, supra.
therefore discharge this mandate through my leadership and operational command structures of men and women committed to serve with professionalism, integrity, honesty, compassion and a commitment to the excellence and placing service to others before self.\(^{36}\) (Emphasis added.)

51. We submit that a proper, objective and fair assessment of the National Commissioner’s conduct and evidence discussed above indicates that she failed to live up to and/or fulfil her mandates as captioned in the excerpt from her statement – she has misconducted herself and is neither fit nor competent to continue to hold the position and office of National Commissioner of SAPS.

Standing Order 262

52. There is no serious contention that Standing Order 262 applied to the events of Marikana. The purpose of the Standing Order is to—

“regulate crowd management during gatherings and demonstrations in accordance with the democratic principles of the Constitution and acceptable international standards”\(^{37}\)

53. Brigadier Mkhwanazi was a member of the SAPS and Provincial Head: Operational Responses Services in the Northern Cape Province when he gave evidence as a SAPS witness at the Marikana Commission of Inquiry.\(^{38}\) He has substantial expertise in public order policing\(^ {39}\) and when asked about Standing Order 262, he said the following:

“MR NGALWANA: Just very briefly, Brigadier, could you enlighten us with regards what the purpose of the standing order general 262 is?
BRIG MKHWANAZI: The standing order 262 actually it entails to how we must manage our events, activities. The crowd management issues, how we must manage them. It entails – it tells us. Remember we have national instructions,

\(^{36}\) Marikana Commission Exhibit FFF33.5 pages 1 - 3.
\(^{37}\) Marikana Commission Exhibit SS2, Standing Order 262, Clause1.
\(^{38}\) Marikana Commission Exhibit SS1, Statement of Brigadier Mkhwanazi at para 1.
\(^{39}\) Marikana Commission, Transcript, Day 27, page 2879 at lines 10 – 21.
we have policies but the standing order tells us how we must manage, how we must deal with the issues of crowd management.

MR NGALWANA: And it regulates POP conduct?

BRIG MKHWANAZI: That's correct. It regulates and it form part of our management tool.40

54. In clause 3 of Standing Order 262, entitled “Pro-active conflict resolution”, it is provided that role players and other stake-holders must be identified and that there must be a facilitation of conflict resolution processes aimed at solving the problem and preventing “any form of physical conflict or the eruption of violence”.41

55. Clause 9 of the Standing Order required pre-planning prior to the implementation of the tactical option. An information gathering system was required for the SAPS to have up-to-date information so that the plan could be based on accurate intelligence and threat assessments would have had to have been conducted.42

56. In addition, a comprehensive written plan must have been prepared and approved by the Area Commissioner43 prior to the tactical option being carried out.

57. As will be demonstrated below, it is our submission that a reasonable person in the stead of the National Commissioner would have approached the events at Marikana in line with the dictates of the Constitution, the SAPS Act, Standing Order 262 and other applicable policies and ministerial instructions. In so doing, she would have been cognisant of the fact that taking or endorsing a decision, particularly that of 15 August 2015, to implement the tactical option on 16 August 2012 would, for the reasons we will advance below, result in tragic and catastrophic consequences as has indeed happened.

**Pertinent Facts**

58. On 13 August 2012, as a result of an operation that was led by Major General Mpembe near the railway line at Marikana, three mine workers and two police

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40 Marikana Commission, Transcript, Day 28, pages 2918 (lines 24-5) to 2919 (lines 1-12).
41 Marikana Commission Exhibit SS2, Standing Order 262, Clause 3.2.
42 Marikana Commission Exhibit SS2, Standing Order 262, Clause 9.
43 Marikana Commission Exhibit SS2, Standing Order 262, Clause 9 (1).
officers lost their lives. The operation has been criticized for having been carried out with lack of planning, inadequate briefing of the members on the ground\textsuperscript{44} and clear issues of command and control by the SAPS.\textsuperscript{45}

59. Be that as it may, the Provincial Commissioner immediately went to Marikana and after having been briefed on the incident, she immediately called the National Commissioner and briefed her of the incidents.\textsuperscript{46} In his testimony, Major General Mpembe states that the National Commissioner arrived that evening and that he briefed her of the events that unfolded that day. In that regard General Mpembe says:

\begin{quote}
"After I spoke with them then there was a time where National Commissioner arrived on the 13th and the National Commissioner was briefed by myself and also Brigadier Calitz, and the National Commissioner was accompanied by Lieutenant-General Petros, Provincial Commissioner of Gauteng. I did brief the National Commissioner of what has happened since I have arrived in Marikana on the 13th until such time that I also show the mine management the photos."
\end{quote}

60. Later that evening, the National Commissioner together with operational officers of the SAPS held a meeting.\textsuperscript{48} It is clear that the SAPS perceived the situation to be so serious that by the next morning, 14 August 2012, there were over 532 SAPS members present at Marikana – a stark increase from about 209 SAPS members who were present on 13 August 2012.\textsuperscript{49}

61. The Provincial Commissioner was mindful, already in the evening of 14 August 2012 that, if the police attempted to forcibly disarm the mineworkers, there would be injury or death.\textsuperscript{50} During her conversation with Lonmin management in the evening of 14 August 2012, the Provincial Commissioner stated that she and the National Commissioner were concerned about the fact that, if once again it came

\textsuperscript{44} Marikana Commission Exhibit JJJ178, Final Statement of Gary White page 57 at para 5.4.1.
\textsuperscript{45} Marikana Commission Report, pages 142-143 at paras 43-44.
\textsuperscript{46} Marikana Commission Exhibit GGG5, Statement of the Provincial Commissioner at para 13.3.
\textsuperscript{47} Marikana Commission Transcript, Day 104 page 11171 at lines 17-25.
\textsuperscript{48} Marikana Commission Exhibit FFF18, Statement of Lieutenant Colonel Scott at para 6.
\textsuperscript{49} Marikana Commission Report, page 162 at para 4.
\textsuperscript{50} Marikana Commission, Report, page 162 at para 4. See also Marikana Commission Transcript, Day 181 pages 21661 – 21662.
across that Mr Malema had defused the situation, it would seem as if he has taken charge of the mines.\textsuperscript{51} Thereafter, she expressed a desire to end the strike quickly.\textsuperscript{52}

62. The crime intelligence that was presented at the SAPS’ Joint Operational Co-ordinating Committee (“JOCCOM”) meeting in the morning of 15 August 2016 stated clearly that:

“\textit{The situation is still tense. The mood at AMCU is still the same. Members of AMCU indicated that they will not surrender their weapons as they need to defend themselves against NUM}”.\textsuperscript{53}

63. On 15 August 2016, Mr Senzeni Zokwana of NUM and Mr Mathunjwa of AMCU, respectively, addressed the mine workers on the koppie. Afterwards, Mr Zokwana expressed a view that the mine workers should be disarmed\textsuperscript{54} whereas Mr Mathunjwa was hopeful that they would voluntarily disarm the next morning.\textsuperscript{55}

64. The Marikana Commission found that Major General Mpembe, on 15 August 2012, indeed believed that there would be “bloodshed” if the police were to disarm and disperse the mine workers.\textsuperscript{56}

65. We align ourselves, also, with the further facts as set out in the Evidence Leaders’ statement of case at paragraphs 104 – 105.

66. It is therefore now common-cause that three things were clear to the senior officials of the SAPS on 15 August 2015:

66.1. First, senior police officials were of the view that there would be “bloodshed” should the SAPS seek to forcibly disarm the mine workers. This, we argue,

\textsuperscript{51} Marikana Commission, Report, page 164 at para 6.
\textsuperscript{52} Marikana Commission Exhibit JJJ192.
\textsuperscript{53} Marikana Commission Exhibit TT3, JOCCOM Briefing Minutes of 06h00 on 15 August 2012 at para 2.1.
\textsuperscript{54} Marikana Commission Report, page 181 at para 2.
\textsuperscript{55} Marikana Commission Report, page 180 at para 1.
\textsuperscript{56} Marikana Commission Report, page 181 - 182 at paras 2-4.
was also clear to the National Commissioner as well as the provincial and divisional commissioners who were present at the extraordinary NMF session on 15 August 2012 because the Provincial Commissioner briefed them and also because they were aware of, among other things, the incident of 13 August 2012 where three mine workers and two police officers died.

66.2. Second, senior police officials on the ground and the attendees of the extraordinary NMF session of 15 August 2012 were informed that there was a reasonable possibility that the mine workers would voluntarily disarm in the morning of 16 August 2012.

66.3. Third, the mine workers still sought to engage with their employer.

67. Interestingly, while it is common cause that the strike arose from issues related to wage negotiations between the mine workers and Lonmin, at no stage, as prescribed by Clause 3 of Standing order 262, did the SAPS earnestly attempt to facilitate a conflict resolution meeting between the two parties. It was clear to the SAPS, since 13 August 2012, that in order to defuse the situation a discussion between the mine workers and Lonmin was required.

68. Despite the above facts, the extraordinary session of the NMF decided, on 15 August 2012, that the tactical option would be implemented on 16 August 2012. Then, immediately after the extraordinary session of the NMF, the Provincial Commissioner contacted Major General Mpembe, Major General Annandale and Major General Naidoo and told them of the decision that was now endorsed.57

69. The next morning, the decision had been communicated to other SAPS members.58 In this regard, we submit that there is also support in the evidence by Captain Manobese Joseph Ntlali.

70. The actual operational plan for the tactical option was devised by Lieutenant Colonel Scott at around 13h30 on 16 August 2012. Notably, Lieutenant Colonel Scott was unaware of Standing Order 262 nor did he have substantial experience in public order policing.\(^{59}\)

71. As a result, seventeen mine workers tragically lost their lives at scene 1 of the operation and a further seventeen people died tragically at scene 2.

**Reasonable Foreseeability**

72. We submit that nothing warranted the decision to implement the tactical option – or the endorsement thereof – on 15 August 2015. We further submit that this is particularly so because of the above facts and the knowledge among the officials at the extraordinary NMF session that there was still a possibility to engage with the mine workers. The probably consequences were also known when regard is had to *inter alia* the evidence of General Mpembe. We furthermore submit that the decision itself or the endorsement thereof, to implement the tactical phase, was premature. This, we submit, is so for the following reasons:

72.1. No operational commanders at Marikana were present at the meeting;

72.2. The principles of public order policing are premised on situational appropriateness\(^{60}\) and thus any plan that was endorsed on 15 August 2012 to be implemented on 16 August 2012 would not take account of the changes in the situation on the ground and it would not be based on up-to-date information;

72.3. There was not, on 15 August 2012, a plan that was presented to the extraordinary session of the NMF detailing how the tactical option would be carried out;

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\(^{59}\) Marikana Commission of Inquiry Transcript, Day 140 page 15085 at lines 16 – 24.

\(^{60}\) Marikana Commission of Inquiry Transcript, Day 27 page 2900 at lines 4-24.
72.4. Where there is no detailed plan provided, the endorsement of the tactical option by the National Commissioner sanctioned an operation contrary to the dictates of Standing Order 262; and

72.5. Taking the decision on 15 August 2012 to implement the tactical option on 16 August 2012 effectively took away agency from operational commanders on the ground at Marikana to further pursue any other public order policing measures. This, we submit, meant that they were required to forego such measures and then prematurely, recklessly and inappropriately implement the tactical option irrespective of the situation on the ground because an instruction to launch the tactical option was given after the decision was endorsed.

73. We submit that, for the National Commissioner to form part of the meeting that endorsed the Provincial Commissioner’s decision, without having had any input from operational commanders who were seized first-hand with the events at Marikana, points further to her poor decision-making qualities. It is our submission further that, it was not sufficient for the National Commissioner to agree, without adequate information, to a decision of such magnitude, which, as the Evidence Leaders rightly point out, was clearly going to result in people dying.

74. From the evidence of the National Commissioner, there is no indication that other alternative plans or options were proposed at the extraordinary NMF session to deal with the situation at Marikana should the mine workers not voluntarily disarm on 16 August 2012. The position was simply that the mine workers would voluntarily disarm or the tactical option would be implemented. This, we submit, illustrates the lack of consideration that was given to the applicable legal prescripts when the endorsement of the tactical plan was made at the extraordinary NMF session, and consequently the incompetence or lack of fitness for the office on the National Commissioner’s part.

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61 Evidence leaders’ Statement of Case at para 106.
75. We further submit that failure by the National Commissioner to state forthrightly and positively that the tactical phase option was interrogated before being endorsed and, in fact, by stating clearly that the plan itself or its details were not really discussed, the National Commissioner not only highlights her own poor decision-making qualities, but she also reinforces our submission that she did not exercise control of the SAPS in line with the applicable policies and ministerial instructions.

76. We in fact, submit that the National Commissioner took a very relaxed role. In that regard, we point out that, when she was questioned about whether the plan by which the tactical option would be implemented was interrogated at the 15 August 2015 extraordinary NMF session, the following exchange occurred:

“CHAIRPERSON: There had already been problems, serious controversy arising because of the death of one person, Mr Tatane. So if this operation had involved the death of even a dozen strikers that would have been regarded as a very serious matter, wouldn’t it?
GENERAL PHIYEKA: I agree, Chair.

CHAIRPERSON: Now surely someone of these experienced people who were there must have raised up his hand and said let’s be careful, let’s just look at it objectively and carefully to make sure that nothing doesn’t go badly wrong. Are you saying none of them did that?
GENERAL PHIYEKA: Chairperson, I have tried to give my position on that one and I want to also indicate that we should recall that as we were meeting there was a whole setup that was managing the operation there. As you’ve already indicated in your earlier question to me, General Mbombo talks about very skilled people in operations that are meeting to manage the operation in Rustenburg as we are sitting here in Midrand. You mentioned the issue of General Mpembe talking to other people. As we talk around this briefing, around this situation, around resourcing, there’s a team that is managing what is happening on the ground, Chairperson, and that backdrop is very important because we are comfortable as leaders that there are people who are managing what is taking place, who are taking feedback, who are listening, who are endorsing, because the nitty-gritty of the plan is sitting where the operation is taking place.”

(Emphasis added.)

77. It is clear from the above that the National Commissioner adopted a laid back attitude and neither appreciated her role nor the seriousness of the situation on the ground as well as the probable consequences if the SAPS adopted the approach as was done on 15 and 16 August 2012.

78. It is also our submission that anyone who endorses a blank decision, which required ordering of four mortuary vans and 4000 rounds of live ammunition, ought to foresee death occurring and reconcile themselves with that possibility. That we submit applies to the National Commissioner in this case and accordingly that the National Commissioner cannot escape this obvious inference and consequence.

79. In conclusion, we submit that all the objective facts and evidence shows that anyone in the National Commissioner’s position would reasonably have foreseen the disastrous consequences of the 15 August 2012 decision / endorsement. We submit further, that in view of the above facts and the deaths that had occurred at Marikana on 13 and 15 August 2012, necessitating a drastic increase in the number of police officials deployed to Marikana, a reasonable person in the National Commissioner’s position would have been aware of the probable consequences that would follow from the decision of 15 August 2012.

80. Thus, we submit that a reasonable National Commissioner, in the position of the current incumbent, would have declined on 15 August 2012 to endorse the decision to implement the tactical option on 16 August 2012. She would have done this in accordance with her constitutional obligations by interrogating, in line with public order principles, the proposal / decision to implement the tactical phase. This, we submit, means that, among other things:-

80.1. she should have sought more information about the situation on the ground;\(^63\)

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\(^{63}\)There were competing factors, on the one hand the workers were reported to be violent and not wanting to disarm whereas it was also clear that they were open to engagement.
80.2. She should also have demanded more clarity on the actual plan and how the tactical phase was either going to be implemented or how it would be devised and by whom it would be devised;\(^\text{64}\) and

80.3. She should have insisted on a process that conformed to the principles of public order policing.\(^\text{65}\)

81. In the end, we submit, that the National Commissioner should have reasonably foreseen the tragic and catastrophic consequences that would ensue from endorsing the decision on 15 August 2012.

82. We submit further, that the National Commissioner, by taking part in the 15 August 2012 extraordinary meeting that endorsed the decision to implement the tactical phase, failed in fulfilling her section 207 (2) constitutional obligation. On this score alone, we submit, she is unfit and should be removed from office.

C. WHETHER THE REMARKS BY THE NATIONAL COMMISSIONER AT THE SAPS PARADE ON 17 AUGUST 2012 WOULD HAVE BEEN UNDERSTOOD AS AN UNQUALIFIED ENDORSEMENT OF THE POLICE ACTION AND THEREBY HAVING THE CONSEQUENCE OF UNDERMINING, FRUSTRATING OR OTHERWISE IMPEDING THE WORK OF THE COMMISSION.

83. Whilst we agree with the submissions made by the Evidence Leaders in their Statement of Case\(^\text{66}\) under this term of reference and align ourselves with same, we make several further submissions below on behalf of the Families.

\(^\text{64}\) Because the 15 August 2012 extraordinary NMF session did not have a plan before it, the actual operational plan to be implemented on 16 August 2012 was hurriedly put together, on the day at 13h30, by Lieutenant Colonel Scott – who has no substantial public order policing experience and had no knowledge of Standing Order 262.

\(^\text{65}\) Standing Order 262 requires that threat assessments be conducted – Clause 7.

\(^\text{66}\) Evidence Leaders’ Statement of Case, page 79, paras 118 to 126 and page 107 paras 171 to 172,
84. The Families were deeply affected by the utterances made by the National Commissioner on different platforms on various dates. We highlight some of these in the paragraphs following.

85. On 17 August 2012, the National Commissioner addressed members of the SAPS who were involved in the shooting on the 16 August 2012. On that occasion she said:

“I come before you on behalf of all of us to celebrate your bravery. We are here to thank you for your selflessness. We are here to recognise the fact that indeed as South Africans you understand what it means to build a nation. Thank you very much.

For the pain you have endured, we want to say to you may that heaviness be eased. May it be eased by the appreciation of the fact that you have been out there boldly to live up to what you believe in, to live up to what you have taken oath for, to actually say to the nation and everybody that we are here to serve, we are here to make sure that citizens of this country, our mothers, father[,] our cousins[,] our nephews[,] our neighbours[,] our fellow citizens are safe and are secure.

It is not the end of the journey we probably will travel many many journeys in this county; and on behalf of the leadership team of SAPS I want to say to all of you, may you gain more and more strength to continue to be the best service people that you are. We thank you dearly and we thank you heartily.

At this point in time I also want to take the opportunity to recognise the losses that we’ve had of our fellow men in blue. It is never easy. It is one of those things that pains us, all of us. One loss of life, is one loss of life too many. And to us, it’s not just a casualty, it not just another individual, it is one of us. And it is never easy for us to accept that. I have been saying to those that I was talking to this morning, that in the 60 days of my being here, we’ve have lost 10 members. Jointly, let us go out there and say to their families, we can attest to their bravery...”67(Emphasis added.)

86. Whilst we recognise that as the National Commissioner she had to address the SAPS members on the loss of life of police officers, we submit that the manner,

67 Marikana Commission Exhibit CCCC7, Video footage at 9:42 minutes.
context and tone in which she did so seem to have further indorsed and justified the horror and tragedy that was occasioned and resulted from her imprudent and poorly considered decision to indorse the tactical option move. It, with respect, also shows clear lack of insight and sense of responsibility on her part (see further paras … , infra).

87. She thanked the SAPS members who were part of the operation and told them that the SAPS leadership recognised that the members understand what it means to build a nation. No reservation can be read into this statement that was made a day after the 34 mine workers were killed and, we submit, it was a clear endorsement of the police action by her of 16 August 2012.

88. The National Commissioner subsequently addressed another SAPS parade, on 20 August 2012, where she said:

“
We recognise as the leadership and as this country that all of you are going through very trying times, very challenging times.
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 continue 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. So for that I just want to once more thank you for having done what you did, for having endured the challenges, that we endured and as we mourn as a country let us remember that the pain that everybody is feeling is felt by all of us, but all we did was to do our job and to do it in the manner that we are trained, that we know it should be done responsibly, caringly and focussing on that which is our core responsibility.
I’m here, thinking that you know, taking the opportunity to explain one or two things.
Since the day we had the challenge that we had, a lot has been happening. I like to thank everybody who is in leadership here, ensuring that they keep you informed, they do what they supposed to do so that we continue with the job that brought us together here.

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We’ve also seen a number of visits. We’ve had our minister coming to talk to us and we appreciate the fact that when we were challenged as police he was here to also say to us be comforted, we understand, we are with you, let us help you where we can.

We had a press conference where we had to explain to the entire world, to the nation to everybody about the work that we did, to explain the facts of what evolved and what has happened. We have done so and we believe as a leadership that we represented you well because all we did was to be open, transparent and take the facts as they are to everybody. We didn’t judge, we didn’t tell anybody to think the way we do, it is up to people to assess the facts that we have put forward and judge us on the basis of that." 68 (Emphasis added.)

89. We agree with the Evidence Leaders 69 that at the time these statements were made, the leadership of the SAPS would have not had the benefit of a sufficiently detailed consultation with the commanders and members of the SAPS on the ground concerning the details of the police operation; sufficient time to study the video and photograph evidence collected by the SAPS during the operation; and proper internal reflection on how 34 people were killed by the police in less than one hour.

90. We submit that the unqualified endorsement of the police action in August 2012 through the remarks made by the National Commissioner and the Minister of Police supported a “closing of ranks and a denial that the police had any responsibility for the failure of the operation or its catastrophic consequences” 70. It set the tone and attitude that the police would henceforth adopted in relation to the Marikana incident.

91. The consequence thereof, we submit, was to be a massive embarrassment for the SAPS. Amongst other things, this could be seen from the perspective that during the Marikana Commission the police constructed evidence, fabricated documents,

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68 Marikana Commission Exhibit WW5, Video evidence (Exhibit FFF12 is an unsatisfactory transcript of Exhibit WW5. Therefore what follows is our transcription of Exhibit WW5).
69 Evidence Leaders’ Statement of Case, page 107, para 172.
70 Marikana Commission, Evidence Leaders Heads of Argument, page 503.
hid crucial facts and documents from the Commission\textsuperscript{71} and the same was effectively done by the National Commissioner as explained earlier above.

92. The deaths of the mine workers as a result of the police action and the unequivocal endorsement of the police action through the statements made by the National Commissioner resulted in the Families witnessing their deceased loved ones being presented as armed and dangerous murderers before the Marikana Commission. This, we submit, is deeply offensive, insensitive, untrue and misleading of the public and the world at large. The men who were killed were husbands, brothers, sons and fathers. They were also men engaged in a labour dispute fighting for a living wage.

93. The National Commissioner’s defence team has submitted that the Board ought to view the National Commissioner’s address at the parade in context. The context being that:

“At the time when the National Commissioner was addressing the parade, the majority of those police officers had been subjected to traumatic experiences since 9 August 2012 up to 16 August 2012 when the tragic and catastrophic incident referred to above occurred at Marikana. These officers had seen some of their colleagues who had already been killed and they themselves had been living on the knife edge with traumatic consequences.”\textsuperscript{72}

At the same time, 34 miners had been killed on the 16\textsuperscript{th} August 2012 in a single day.\textsuperscript{73}

When the National Commissioner addressed the parade she was not traversing the facts or the evidence but she was simply attempting to give strength to the police officers who were traumatized by what had happened.”\textsuperscript{74}

94. The defence team for the National Commissioner then go on to conclude as follows on this point:

\textsuperscript{71} Marikana Commission, Evidence Leaders Heads of Argument, page 512.
\textsuperscript{72} Statement of Response: page 13, para 29.
\textsuperscript{73} Statement of Response: page 13, para 30.
\textsuperscript{74} Statement of Response: page 13, para 32.
“There is nothing in the National Commissioner’s address of that day which can be attributed to insensitivity and irresponsibility.”

95. Although the National Commissioner seems to suggest, in the statement of response filed on her behalf, that she made those statements in good faith and they do not amount to insensitivity or irresponsibility, we submit that the contrary in fact appears to be the case.

96. In that respect, the Board is called upon to have regard to the fact that the statements were made in the face of 34 killings of civilians. There were families which the National Commissioner did not know who were devastated by the events of Marikana. These families lost husbands, sons, brothers, fathers, uncles and cousins in horrifying and violent circumstances. In most cases, they also lost their only breadwinner. She was blatantly ignorant and indifferent to the atmosphere and the purpose for which the victims were striking, which clearly was a genuine and legitimate one to wit, a living wage in respect of which the employer Lonmin had a reciprocal duty to negotiate and resolve in good faith.

97. The Families told the Marikana Commission harrowing and heart breaking stories about the kind of loving men they knew their slain loved ones to be and how emotionally devastated they were by their deaths.

98. Ms Notukile Songstress, the sister of the late Mr Sokanyile who was killed across the river on 13 August 2012, regularly attended the Marikana Commission. In our submission, Mr Sokanyile was targeted and shot execution style in the back of the head with an R5 bullet from over 70 metres away by the SAPS members. We further submit that he did not die as a result of an operation that represented responsible policing and should have been recognised by the National Commissioner.

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75 Statement of Response: page 13, para 33.
76 Marikana Commission, Transcript, Day 6 page 645 at lines 9-11; Day 211 page 26131; Marikana Commission Exhibit 00026 slide 16.
The late Mr Mzukisi Sompeta was shot by the SAPS during the operation at scene 1. The private pathologist’s view was that the main cause of Mr Sompeta’s death was the high-velocity gunshot wound to his abdomen. Mr Sompeta could have survived the shooting had the police not delayed in getting the paramedics on the scene. Instead, he died at the age of 37, leaving behind eight dependents.

A medico-legal report prepared by Dr Boffard for the Marikana Commission in respect of that incident stated as follows regarding Mr Sompeta:

“Although the injury, rendered him paraplegic, from a spinal-cord injury, this was at a low level (L1), so would not have affected his breathing. His only other injury from the report appears to have been a laceration of kidney. Had he had earlier access to care, although the ambulance personnel would not themselves have been able to stop the bleeding, they would have been able to manage his airway, place an IV line, and transport to level II hospital. They should have had ample time to do this, and his injuries under the circumstances are regarded as survivable had he reached a facility earlier, which was capable of performing a laparotomy and stopping the bleeding. This death is therefore regarded as potentially preventable death.”

These facts were inexplicably not presented to the public. We submit that the only facts to which the National Commissioner made reference were those that suited the police and the employer, Lonmin. We further submit that to say that there is nothing in the National Commissioner’s address of that day which can be attributed to insensitivity and irresponsibility is, with respect, nonsensical. The National Commissioner became an advocate for the SAPS members in circumstances where she did not have the full facts and had not properly reflected on the consequences of her decision of 16 August 2012 or at all.

That, we submit, is anything but statements of National Commissioner in control of a police service that is responsible to the public.

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77 Marikana Commission, Exhibit FFF20, Annexure C, number 18 (DR 582/2012).
78 Marikana Commission, Exhibit MMM10, p 21, para D4.4
103. We submit that the National Commissioner acted with the Minister of Police to undermine, frustrate and impede the work of the Marikana Commission in both her addresses to the SAPS parade on the 17th and 20th of August 2012. Moreover, we submit that the inference is irresistible that such statements were also designed to tailor a defence for the SAPS at the Marikana Commission and thus unbecoming of the National Commissioner, insensitive and irresponsible.

104. We accordingly submit that the National Commissioner failed to carry out her duties, is guilty of misconduct (on the basis explained above) and therefore unfit to hold the office of National Commissioner.

D. WHETHER THE REPORT PREPARED BY THE NATIONAL COMMISSIONER FOR THE PRESIDENT OF THE REPUBLIC ON THE 16th AUGUST 2012 AND THE MEDIA STATEMENT SUBSEQUENTLY ISSUED ON 17 AUGUST 2012, WAS DELIBERATELY AMENDED TO CONCEAL THE FACT THAT THERE WERE TWO SHOOTING INCIDENTS (SCENE 1 AND SCENE 2), RESULTING IN MISLEADING OF THE PUBLIC TO BELIEVE THAT ALL THE DEATHS HAD OCCURRED AT SCENE 1 WHICH AROSE OUT OF MEMBERS OF SAPS HAVING TO DEFEND THEMSELVES FROM AN ADVANCING MASS

105. It is our submission that any killings of civilians at the hands of the police have a pernicious impact on the community and society at large. They leave a permanently engraved pain in the hearts and minds of the families of the victims.

106. The August 2012 SAPS operation at Marikana was, since the advent of democracy, the largest police incident that resulted in a high number of civilian casualties as a direct result of police action. There can be no doubt that it has left permanent wounds in the hearts and minds of all affected – especially the families of the deceased.

107. Given the extraordinary nature of the SAPS operation on 16 August 2012, the fact that 34 people died tragically because of police action and because investigations were not yet concluded, we will submit that a public statement by the SAPS – and in particular, by the National Commissioner thereof – ought to have provided a
balance and truthful account of the available facts and should not have reached conclusions on matters that were still the subject of investigations and yet to be verified.

108. It is our submission that the media statement issued on 17 August 2012 did not meet the standard as stated in the preceding paragraph. Instead, it was deliberately amended to hide certain facts from the public and to publically create a negative impression of the mine workers and justify the killings. In particular, the media statement was deliberately amended to conceal the fact that there were two incidents, namely scenes 1 and 2. Further, the mine workers were portrayed as a single mob, with no individual identities, who were all armed with dangerous weapons and who attacked the SAPS members. Furthermore, the SAPS members were portrayed as helpless officers who were clearly in danger and sought to protect themselves by killing the mine workers.

109. That, we submit was not only designed to conceal the true facts, but also a manifestly insensitive and irresponsible act on the part of the National Commissioner.

**The Deliberate Amendment of the Media Statement**

110. On this subject, we align ourselves with the arguments of the Evidence Leaders as set out from paragraphs 118 – 143. In addition, we agree with the evidence of Mr Lindela Mashego (“Mr Mashego”) in the following respects:

110.1. the report to the President, submitted by the National Commissioner on 17 August 2012, was used as a draft for the media statement; and

110.2. the amendments to the media statement were made in the presence, and on the instruction of the National Commissioner.\(^79\)

\(^79\) Claassen Inquiry Transcript, Day 3 page 9 at lines 11-19.
111. Even if the Board does not accept the National Commissioner’s role in the specific changes that Mr Mashego says were dictated by her, we submit that there is sufficient evidence for the Board to find, as the Marikana Commission found; that the National Commissioner had read both the report prepared for the President of the Republic and the media statement, and referred to herself as “the owner and reader” of the media statement.\textsuperscript{80}

112. We submit further that the available evidence is sufficient for the Board to find, as the Marikana Commission did, that:-

“The effect of these changes in the statement issued to the public was materially \textit{misleading} because it created the impression that there had been only one shooting incident, which led to the deaths of the strikers. The public who had seen on television the shooting at scene 1 would inevitably have concluded that all the deaths had occurred while the police were defending themselves against ‘the militant group [which] stormed towards the police’. The changes were clearly \textit{not accidental} because, as has been said, the wording of the relevant parts of the statement was otherwise virtually identical\textsuperscript{81} [emphasis added]

\textbf{The Impression Created}

113. We submit that the media statement leaves out significant facts which were, at the time, already known to the National Commissioner. The purpose sought to be achieved by these omissions, we submit, was to create the impression that the SAPS members were not at fault in any way whatsoever. These include the following:

113.1. the decision to implement the tactical option had been reached on 15 August 2012 at an extraordinary NMF session; and

113.2. it is common cause that there were two scenes and not one.

\textsuperscript{80} Marikana Commission Report, page 396 at para 12, and Marikana Commission Transcript, Day 105, page 11361.
\textsuperscript{81} Marikana Commission Report, page 396 at para 11.
114. The media statement makes no mention of the extraordinary session of the NMF which took the decision to implement the tactical phase. Instead, the media statement aligned itself with the version presented to, and rejected by, the Marikana Commission, that is; the SAPS’ decision to implement the ‘tactical option’ that was taken on the day of 15 August 2012 and implemented on 16 August 2012.82

115. The media statement reads as though there was only one scene where the police were attacked by the strikers and defended themselves. It deliberately or inexplicably makes no mention of the second scene.

116. In addition, the media statement contains a number of untruths. The Families submit that the deliberate amendment of the contents of the media statement above, had the designed effect of misleading the public by creating the false impression that:-

116.1. the mine workers attacked the SAPS on 13 August 2012;

116.2. the mine workers attacked members of the SAPS on 16 August 2012;

and

116.3. the SAPS members, on 16 August 2012, were simply defending themselves against the “militant group” of strikers that “stormed” towards the police whilst at the same time “firing shots and wielding dangerous weapons”.

117. The media statement makes reference to the incident that took place on 13 August 2012 where three mine workers and two police officers were killed. The statement simply states, and without qualification, that:-

117.1. members of the SAPS were attacked by the mine workers;

117.2. the incident of 13 August 2012 was a result of poor police intervention without proper application of public order policing principles;

117.3. Mr Sokanyile was shot with one bullet to the back of his head, approximately 620m from the scene.\(^{83}\)

118. Overall, the false impression created by the media statement was that the police action was justified because the mine workers were lawless, weapon-wielding criminals who had attacked the police before (on 13 August 2012) and had done it again (on 16 August 2012). In this regard, the media statement was deliberately designed to avoid mentioning and/or to conceal the following objective and true facts:-

118.1. that the discharge of teargas by the police on 13 August 2012 led to the confrontation that resulted in the deaths of three mine workers and the two policemen; and

118.2. the SAPS members gave conflicting versions to the Marikana Commission about who issued the command to discharge the tear gas canister at the mine workers.\(^{84}\)

**Dehumanising the Mine Workers**

119. The families of mine workers employed by Lonmin and the public had probably been following the strike from news reports. Through the media reports from the SAPS media briefing, they learnt that the mine workers at Lonmin were violent men who wantonly attacked the police and repeatedly. These supposed attacks were said to have taken place on both the 13\(^{th}\) and 16\(^{th}\) of August 2012.

120. Further, the family members of the 34 mine workers killed on 16 August 2012 and the public and/or the world at large were told that there was one shooting incident

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\(^{83}\) Marikana Commission Exhibit OOO23.

\(^{84}\) Marikana Commission Report, page 139.
that occurred on the day where the mineworkers repeatedly attacked the police. They were told or rather given the impression that the mine workers had wantonly attacked the police who, in turn, defended themselves, resulting in their deaths.

121. When addressing the media on 17 August 2012, the National Commissioner ought, in the circumstances, to have been reasonably aware of the importance of the office she holds and the sensitivity required when making such an address. She ought to have been sensitive to the fact that there were families and communities grieving the deaths of their loved ones and that some families were yet to be told that their loved ones had died in the police operation.

122. The deaths of the mine workers have greatly affected the Families. At least two of the widows were so severely traumatised by the deaths of their husbands that they attempted suicide. In this regard, reference is made to the following by way of illustration. Ms Betty Gadlela, the widow of the late Mr Stelega Gadlela who died at scene 1, testified that:

“*When days went by I realised that my husband was really dead, I tried to end my life with poison. My sister rescued me.*”

123. Further, Ms Nombulelo Nqongophele testified that she:-

“*was very worried, devastated and felt severe pain on hearing about my husband’s death. When I heard the news I was so shocked and devastated that I tried to take my own life by drinking pesticide.*”

124. Furthermore, Ms Nokanele Pakati, wife to the late Mr Sokhosandile Mkhonjwa, testified that she had a miscarriage upon hearing the news of her husband’s death.

125. Based on the aforesaid, we submit that if the current National Commissioner still cannot, in the face of all these, comprehend how far-reaching her media statement

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85 Marikana Commission Transcript, Day 273, page 34961 at lines 16 -17.  
86 Marikana Commission Transcript, Day 273 page 34913 at lines 14-17.  
87 Marikana Commission Transcript, Day 273 page 34891 (line 1) to 34892 (lines 1-2).
could and had gone and the influence of her office in that regard, then most certainly she cannot be said to be fit and proper to hold the position of National Commissioner.

126. We submit further that the National Commissioner dehumanised the mine workers by deliberately presenting them as blood-thirsty violent men when that was clearly not so. In that respect the media statement makes constant reference to a “heavily armed”, “militant” groups of men carrying “dangerous weapons and firearms”. It further claims that the police decided to deploy “defensive action” “in case of aggressive actions and to confine the threat from the armed protestors”. It furthermore claims that the police “employ force to protect themselves” and “utilize maximum force to defend themselves”.

127. The families are aggrieved by the statement which deliberately used language to portray the mine workers as bloodthirsty and wantonly aggressive, violent and dangerous people. They found that to have been dehumanising, insensitive and irresponsible, particularly coming from a National Commissioner appointed in terms of Section 207(1) of the Constitution.

128. The mine workers who were killed by the police were fathers, brothers, sons, grandsons and neighbours engaged in a genuine and legitimate labour strike for a living wage. Even more so, they had already made it clear to the police on 13 August 2012 that they did not have any issues with the police and that all they wanted was for their employer, Lonmin, to meet with them.88

The Dignity of the Mine Workers

129. It is common-cause that the National Commissioner must fulfil her duties in the best interests of all South Africans and also that she could not reasonably fulfil such duties in circumstances where she amongst other things, adopts the approach and conduct herself in the manner set out in paragraphs 16 to 18 and 107 to 109 above.

88 Marikana Commission Exhibit QQ 2 is the transcript of video footage of Exhibit Z 1, Video footage. In the transcript, Worker 1, 2 and 3 state they are “not fighting”. See pages 4, 6 and 7.
In that regard, we submit that the media statement – in creating the false impression that the mine workers were solely to blame for the deaths that occurred on 16 August 2012 and that the police were acting in self-defence – was incorrect and misleading also because the following information, which could easily have been objectively established through the investigations, was later uncovered:

130.1. Mr Mgcineni Noki (killed at scene 1) and Mr Thobile Mpumza (killed at scene 2) were shot with more than 5 bullets each;\(^89\)

130.2. Mr Jackson Lehupa and Mr Cebeisle Yawa were shot from the back;\(^90\)

130.3. at least 16 mine workers were shot above the waist.\(^91\) The point being that even if the SAPS members thought they were under attack, they ought to have fired towards the ground, with less risk of causing death;

130.4. Mr Gwelani, who was not employed by the mine and who went to the kopje simply to take food and water to his cousin\(^92\) was killed at scene 1 with one R5 bullet that was fired to the back of his head from a distance of about 210 meters;

130.5. some mine workers were shot while they had their hands up;\(^93\) and

130.6. the State pathologist, Dr Boffard, found that the cause of Mr Bongani Mdze’s death was that he sustained “[g]unshot wounds to the left arm and abdomen with signs of exsanguination”. Dr Boffard further states

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\(^89\)Marikana Commission Exhibit A, see the reports of Mr Thobile Mpumza (DR 565/2012, pages 19-23a) and Mr Mgcineni Noki (PM 588, pages 568-571).

\(^90\)Marikana Commission Exhibit A, see Jackson Lehupa (DR 583/2012) and Cebesile Yawa (DR 587/2012).

\(^91\)Marikana Commission Exhibit A, see Patrick Akhona Jijase (DR 579/2012), Michael Ngweyi (DR 578/2012), Bonginkosi Yona (DR 580/2012), Andries Ntsenyeho (DR 581/2012), Mzukisi Sompeta (DR 582/2012), Jackson Lehupa (DR 583/2012), Mongezeleli Ntenya (DR 584/2012), Mphangeli Thukuza (DR 585/2012), Thobisile Zibambele (DR 586/2012), Cebisile Yawa (DR 587/2012), Mgcineni Noki (DR 588/2012), Bongani Nqongophele (DR 590/2012), John Ledingoane (DR 591/2012), Babalo Mtshazi (DR 592/2012), Thembinkosi Gwelani (DR 593/2012), Bongani Mdze (DR 585/2012).

\(^92\)Marikana Commission Transcript Day 273, page 34952 at lines 8 – 16.

\(^93\)Marikana Commission Exhibit A, see Stelega Gadlela (DR 576/2012) and Henry Mvuyisi Pato (DR 577/2012).
that Mdze’s “cause of death was failure to control bleeding in a timeous fashion due to non-availability of medical personnel”\textsuperscript{94}

131. We accordingly submit that the above facts clearly show that it was and still is disingenuous, insensitive and irresponsible for the National Commissioner to insist that the 16 August 2012 police operation was the best of responsible policing.

132. There is an indescribable trauma of losing a loved one killed by members of the police service whose duty it is to protect and defend life and limb; and whose actions are regardlessly sanctioned by the State through the person of the National Commissioner. Also, the National Commissioner’s actions of dehumanising the mine workers violated the constitutional right to life and dignity of the deceased and their families. Such actions also had a negative impact on the Families and their relations to their immediate communities and society at large.

133. The mine workers had lots of reasons to live for which included their right to be paid a living wage and to embark on a strike for same. And of course the further reasons included the following:

133.1. Mr Bongani Yona died when his son was only seven days old and he was yet to meet him;\textsuperscript{95}

133.2. the late Mr Anele Mdizeni’s wife, Ms Unathi Mdizeni, was pregnant when her husband died;\textsuperscript{96}

133.3. Ms Phumeza Mabiya\textsuperscript{97} and Ms Mathabilise Monesa,\textsuperscript{98} the wives to the late Mr Mafolisi Mabiya and Mr Khawanare Monesa, respectively, were also pregnant when their husbands were killed on 16 August 2012; and

\textsuperscript{94} Marikana Commission Exhibit MMM10, page 24.
\textsuperscript{95} Marikana Commission Transcript, Day 273 page 34973 at lines 5 – 7.
\textsuperscript{96} Marikana Commission Transcript, Day 273 page 34884 at line 21.
\textsuperscript{97} Marikana Commission Transcript, Day 273 page 34990 at lines 17 -20.
\textsuperscript{98} Marikana Commission Transcript, Day273 page 34943 at lines 3- 4.
133.4. Ms Sokhanyile immediately suffered a heart attack and died when she heard of the killing of her son, Mr Phumzile Sokhanyile, at the hands of the SAPS.99 Mr Sokhanyile was killed by members of the SAPS on 13 August 2012 with a single bullet to the back of his head. The Sokhanyile family buried both the mother and son on the same day.100

134. These, we submit, are but some of the ripple effects of a false, premature and deceitful media statement made by the National Commissioner and arising from her imprudent decision of 15 August 2012 authorising the “tactical option”. We submit that she should have, at the very least, waited to have full details of the incidents or waited for the Marikana Commission of Inquiry to make findings before pronouncing on the correctness of the police action. What is more disturbing to the families is that to date, the National Commissioner has not recanted her said media statement.

135. In conclusion, we submit that a public statement by the SAPS relating to the deaths of people – especially those killed by the SAPS – must be measured and should reflect objectivity and/or compassion in how information is presented. This, we submit, is so particularly where investigations are not yet complete like in the present case. These considerations never found a fertile ground in the heart and mind of the National Commissioner when drafting the media statement in the manner in which she did.

136. We submit, therefore, that the National Commissioner has not only misconducted herself, but cannot be the right person for the job as she lacks the necessary qualities, character or discipline and competence that a National Commissioner ought to possess and reflect towards civilians or citizens of the Republic and the world at large.

99Marikana Commission Transcript, Day 290 page 37816 at lines 22 – 25.
E. WHETHER THE OVERALL TESTIMONY BY THE NATIONAL COMMISSIONER AT THE COMMISSION WAS IN KEEPING WITH THE OFFICE WHICH SHE HOLDS AND THE DISCHARGE OF HER DUTIES COMMENSURATE THEREWITH

137. We submit that the National Commissioner, in her overall testimony and interaction with the Marikana Commission, did not exude “professionalism, integrity, honesty, compassion and a commitment to the excellence”\(^{101}\) as claimed in her statement to the Marikana Commission.

138. Her conduct, manner and the substance of her evidence at the Marikana Commission was not in keeping with the office that she holds and the discharge of her duties commensurate therewith.

139. The National Commissioner, along with other members of the SAPS, had no sense of accountability for the killings of 37 mine workers. This general lack of accountability, responsibility, sensitivity and transparency will further be demonstrated below. In this regard we shall confine our submissions to the following five topics:

a) The National Commissioner’s so called apology to the families;

b) The National Commissioner’s denial that the police killed the workers;

c) Evidence that required the National Commissioner to do further investigations and her failure to do so;

d) Roots, SAPS investigation and concealment from the Commission; and

e) General lack of accountability.

\(^{101}\) Marikana Commission Exhibit FFF 33.5, pages 1-3.
(i) The National Commissioner’s ‘apology’ to the Families of the Deceased

140. On her first day of appearance before the Marikana Commission, the National Commissioner gave evidence about her role as National Commissioner; her conduct in relation to the events at Marikana and the NMF. The National Commissioner ended her evidence by talking about the SAPS parade in which she said “let us take note of the fact that whatever happened represents the best of responsible policing.”

141. Video footage of the parade was played before the Marikana Commission and soon after that, she decided to advance some sort of apology to the Families where she did not take any responsibility for the killings.

142. Ms Songstress Sokanyile, the sister of the late Mr Sokanyile who was killed on the 13th August in 2012 with a single bullet to the back of his head, was in distress and the Marikana Commission had to afford her an opportunity to leave the auditorium for comfort and cooling down. She however was not the only family member in distress and who felt like leaving the Marikana Commission’s proceedings at that particular point.

143. In that regard we point out that Mrs Jijase, the mother of the late Patrick Akhona Jijase, also left the auditorium. Mr Jijase was killed at scene 1, and died from a bullet to his head.

144. The Families, through the Socio Economic Rights Institute of South Africa ("SERI"), issued a press statement to clarify the offence and humiliation taken and suffered by the families as a result of the National Commissioners would be apology aforementioned. The press statement noted that the families do not accept the National Commissioner’s “condolences”, and that they will continue to demand a genuine full-throated apology from her and an acknowledgement of responsibility for having killed their family members. It provided further that—

102 Marikana Commission Exhibit WW 5.
103 Recorded proceedings of Marikana Commission of Inquiry on 14 March 2013 at 5:48:40: https://www.youtube.com/watch?v=_qHZhBJ3CFw.
“We also demand an undertaking that those police officers found to have participated in the killing of our family members will be disciplined, and, where appropriate, prosecuted. In addition, the statement noted that the families were outraged and humiliated that Phiyega’s “condolences” were offered immediately after she was shown on tape thanking her officers for killing our loved-ones. On the video, Phiyega also encouraged the officers to applaud themselves.”104

145. The ‘apology’ by the National Commissioner was insensitive and insincere when regard is had to both the context and content of her testimony and the manner in which it was presented or made by her.

146. To this day, the National Commissioner is yet to offer a sincere and genuine apology to the Families in relation to her role in the decision to implement the tactical option, as well as her continuing unwillingness to take any personal or professional responsibility for the massacre and the false statements she made as discussed above.

(ii) The Denial of the Deaths having been Caused by the SAPS

147. During cross-examination by Counsel, appearing for the Families at the Commission, the National Commissioner refused to admit that 34 people were killed by the police. This was despite the matter being common cause. As an illustration of this point we refer to the fact that in three separate statements the National Commissioner stated:

“I'm not a judge. I don't know whether at this point in time I can, with my two feet stand here and say 34 people were killed by police. Those findings and the report that you are considering here are going to give us the outcome... I don't know about that and it would be very dangerous of me to dabble in saying yes to a statement like you are putting, to say we all know that 34 people were killed by the police. It is not my space and I think I am not qualified to do so. And I would like to say, Advocate, we have seen a lot of footage. You know

104 Marikana Commission Exhibit FFF26.
that this Commission is looking at a lot of reports. I’ve seen medico-legal reports submitted here, I am not in a position to say yes to such a bold, broad question and I’d like to respond to your questions but to put me in such a position to answer such a big, vague question, it’s very difficult. And through you, Judge, I really would like to respond to fair questions. I don’t want to respond to unfair questions...

I understand that 34 miners were killed. By who, I would not go that far.”

(Emphasis added.)

148. The National Commissioner was then referred to the police’s presentation known as Exhibit L, which reads “Thursday, 30 protesters were killed by the police...on the scene, four more later died in hospital.”

149. After acknowledging that she had “seen” what was written in Exhibit L, the following further exchange ensued between Counsel and the National Commissioner:

“MR NTSEBEZA SC: And Commissioner, look, this is a police presentation and I proceed on the basis that you were advised about what the police were going to put up here, it is something that you sanctioned as the highest officer in the police service.

GENERAL PHIYEGA: Mm-mm.

MR NTSEBEZA SC: So the police are not putting it in issue as to who killed those mineworkers. They say, we killed them.

GENERAL PHIYEGA: I note what is written here and I accept our report but I think what is important is the question that you had asked me earlier on.”

150. We submit that it is manifest from the excerpts above that the National Commissioner was being deliberately evasive, obstructive and/or dishonest in her answers to the Commission, and that was so even where it was common cause from the SAPs’s own information that the police killed 34 mineworkers on 16 August 2012. Needless to mention that this fact had, at all times, been undisputed by her own legal team, but she was still being evasive about it.

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105 Marikana Commission Transcript, Day 75 page 7987 (line18) to page 7997 (line 4).
106 Marikana Commission Transcript, Day 75 page 7999 at lines 5-16.
151. That we submit was and still is out of character for her as the National Commissioner in terms of Sections 198 and 207 of the Constitution and also not in keeping with her stated willingness to assist the Marikana Commission in its work. She clearly cannot be trusted by the South African public, let alone the world.

(iii) Evidence presented to the National Commissioner that required further investigations and her failure to deal with these allegations

Shooting Report

152. Photographic evidence before the Marikana Commission shows that the SAPS tampered with evidence on scene 2. Members of the SAPS planted weapons next to the bodies of Mr Nokhamba, Mr Saphendu, Mr Ngxande, Mr Pato, Mr Mkhonjwa and Mr Xalabile. The manner in which the weapons were planted was callous as it made it seem as though:

152.1. Mr Nokhamba had been carrying an axe;
152.2. Mr Saphendu had been carrying a butcher's knife with his right hand;
152.3. Mr Ngxande had been carrying a spear; and
152.4. Mr Pato was carrying a panga.

153. In addition, four weapons were also callously placed next to Mr Mkhonjwa’s body where there was, initially, no weapon. Another weapon was placed in a location different from its original position next to the body of Mr Xalabile.

154. The SAPS’ legal team stated that an immediate investigation was launched by the National Commissioner when this evidence was brought to her attention. Two information notes are available regarding the investigation into the possible tampering with a crime scene by the SAPS. The first such note was signed by the National Commissioner on 20 November 2012.

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107 Marikana Commission Exhibit K.
108 Marikana Commission Transcript Day 8 page 958 at lines 5-9.
109 Marikana Commission Exhibit FFF 15 and Exhibit FFF 23.
155. An attempted explanation for so tampering with the crime scene was provided by Warrant Officer Breedt who claimed that he moved the weapons in order to protect the paramedics who were attending to the injured persons. However, in their statements, the paramedics said they enquired if the scene is safe and Warrant Officer Breedt replied by saying it was not.\footnote{Marikana Commission Exhibit FFF 15.} That then rendered Warrant Officer Breedt’s explanation untrue, and no proper explanation was provided as to why the paramedics were unsafe, except that there were a large number of weapons found at the scene.

156. The National Commissioner was subsequently compelled to accept the outcome of the investigation into the tampering with evidence, although ambivalently or equivocally so, as she stated the following:

“I have looked into all these facts has been given to me and I am saying, given what I have made out of this fact I do think there is a rational explanation of what has happened and indeed you know it doesn’t stop anyone to judge my judgement and I would say it is your right judge my judgement but where I’m sitting I’m saying I have had some insight into what has happened and in my view it is rational and my standpoint remains.”\footnote{Marikana Commission of Inquiry Transcript, Day 73 page 7805 at lines 7-14.}

157. The Evidence Leaders of the Marikana Commission successfully demonstrated, however, that the explanations offered by Warrant Officer Breedt for the weapons placed near the bodies of Mr Pato and Mr Ngxande were unreliable and demonstrably false.\footnote{Marikana Commission, Evidence leaders Heads of Argument, pages 604 – 606.} They also argued that Captain Kidd’s explanation that Mr Mkhonjwa crawled back towards the weapon after he had been shot was implausible.\footnote{Marikana Commission, Evidence leaders Heads of Argument, page 603, and Transcript Day 234 page 29294 (line21) to page 29295 (line 1).}

158. We submit that even if the police version were accepted, no explanation is given for the callous, undignified and shameful manner in which Warrant Officer Breedt replaced the weapons at the crime scene. The tampering with the weapons, we
submit, shamelessly sought to suggest that the unarmed deceased mine workers were in fact armed so as to justify their being cold-bloodedly killed by the SAPS.

159. We submit that it is clear that despite the evidence that emerged from the Marikana Commission, the SAPS’ investigation into the tampering with the evidence at scene 2 was not comprehensive and sought only to justify the SAPS action. It is our submission further that the National Commissioner should have taken further steps to ensure that a comprehensive investigation into the tampering with evidence at scene 2 was properly and objectively undertaken and completed – she failed to do so.

**The Myburgh allegations**

160. On 1 October 2012, Lieutenant Colonel Myburgh reported to Lieutenant Colonel Vermaak that he had seen a member from the National Intervention Unit (“NIU”) kill a mine worker because the member said the mine worker “deserved to die”.\(^{115}\)

161. A meeting was thereafter set up the following day with both the National Commissioner and the Provincial Commissioner. It was decided that a statement should be taken from Lieutenant Colonel Myburgh and sent to the Independent Police Investigative Directorate (“IPID”). However, neither the National Commissioner nor the Provincial Commissioner made any attempts to follow up on the matter.\(^{116}\)

162. Under cross-examination, the National Commissioner could not provide a satisfactory answer as to why she did not personally follow up on the serious allegations made by Lieutenant Colonel Myburgh as she had done, albeit inadequately, with the allegations of SAPS tampering with the crime scene at scene 2. The exchange in that regard ran thus:

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\(^{115}\)Marikana Commission Exhibit FFF 7 and Transcript Day 206 page 25467 (line19) to page 25469 (line16).

\(^{116}\) Marikana Commission Exhibit LLL 17.
“MR MADLANGA SC: Now what I’m trying to understand, General, is this; I do not understand why you would have wanted to leave this to the decision of General Naidoo. Why is it that in respect of these allegations you did not institute investigations?

GENERAL PHIYEGA: The important thing that you’re mentioning is that a major-general was engaged to look into the scene that you allude to, and on this matter that you’re questioning me on, a major-general who is responsible for that environment, if there was more information coming out, would have assisted us in this regard.”¹¹⁷

163. It was then demonstrated to the National Commissioner that had she taken an interest, she would have known that the police could narrow the suspects to two members from the NIU.¹¹⁸

164. To date, no one has been arrested and/or charged with the murder of any of the men killed at scene 2 and no report has been made to the IPID to investigate. That we submit is further evidence of irresponsibility on the National Commissioner’s part.

(iv) **Roots and SAPS investigation and concealment from the Marikana Commission**

Roots Conference

165. The Roots conference ("Roots") took place at Potchefstroom in August and September 2012. The original purpose of Roots was for the SAPS to debrief and prepare for the Marikana Commission.¹¹⁹ However, the conference was used to generate the SAPS’ version of events that took place in August 2012 to be presented to the Marikana Commission. In particular, the SAPS’s presentation known as ‘Exhibit L’ and the accompanying narrative report known as ‘Exhibit HHH 28’ were prepared at the Roots conference.¹²⁰

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¹¹⁷ Marikana Commission Transcript, Day 65 page 6927 (line 16) to page 6928 (line 25).
¹¹⁸ Marikana Commission of Inquiry – Transcript, Day 65 page 6940 (line 11) to page 6950 (line 8)
¹¹⁹ Marikana Commission Exhibit GGG3.
¹²⁰ Marikana Commission Transcript, Days 9 – 12 of the Commission; also see Exhibit JJJ189, Exhibit JJJ156 and Exhibit JJJ40.
166. The Evidence Leaders at the Marikana Commission argued that during the Roots conference the SAPS constructed various versions of the SAPS argument; fabricated documents; and attempted to hide crucial facts and documents.\textsuperscript{121}

167. The Marikana Commission accepted that Roots became an exculpatory exercise at which the police’s version of events submitted to the Commission was constructed. The Marikana Commission accepted that evidence was amended to suit the constructed version of events and that evidence that contradicted the SAPS’s version was not disclosed to the Commission.\textsuperscript{122}

168. The Marikana Commission also accepted that the extent of the Roots exercise was only known after Lieutenant Colonel Scott handed over a hard drive in September 2013 – a year after the Marikana Commission\textsuperscript{123} had started.

169. The Marikana Commission accepted that the National and Provincial Commissioners “had seen the presentation prior to being submitted to the Commission and they would have been well aware of some of the omissions and misleading information contained therein.”\textsuperscript{124}

170. We accordingly submit that the Roots conference is an example of how the SAPS, in a deliberate and calculated fashion, misled the Marikana Commission with full knowledge and/or awareness of the National Commissioner. We thus submit she cannot be fit to continue to hold and occupy the office of National Commissioner – she cannot be trusted.

The Task Team

171. In October 2014, which was on day 136 of the Commission, evidence came to light that a Task Team which conducted its work from 29 August - 20 September 2012\textsuperscript{125} had been set up on the instruction of the National Commissioner to look at

\textsuperscript{121}Marikana Commission, Evidence Leaders Heads of Arguments, pages 510-519.
\textsuperscript{122}Marikana Commission Report, pages 402-406.
\textsuperscript{123}Marikana Commission Report, pages 404 at para 7.
\textsuperscript{124}Marikana Commission Report, page 406 at para 11.
\textsuperscript{125}Marikana Commission Exhibit JJJ 203.
the events of August 2012 at Lonmin mine.\textsuperscript{126} Pursuant thereto, questions were put during cross-examination, to Lt. Colonel Scott who then revealed that the Task Team was:-

“… 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.”\textsuperscript{127}

172. However, Brigadier Mkhwanazi,\textsuperscript{128} who was central to the task team, and General Annandale\textsuperscript{129} denied any knowledge of an internal review process. Similarly, the National Commissioner, in her testimony, also denied that an internal review into the events at Marikana was established. That part of her evidence surfaced during an exchange between her and Counsel for the Families which ran thus:

“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 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

\textsuperscript{126}Marikana Commission Transcript Day 136, page 14510 (line 13) to page 14512 (line 23).
\textsuperscript{127}Marikana Commission Transcript Day 136 page 14510 at lines 17 - 24.
\textsuperscript{128}Marikana Commission Transcript Day 33 page 3539 (line12) to page 3540 (line 22).
\textsuperscript{129}Marikana Commission Transcript Day 96 page 10224 at lines 12-20.
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.”

[emphasis added]

173. As for the Provincial Commissioner said the members of the Task team she saw at Roots “appeared to be helping each other compiling the report.”

To that end the Provincial Commissioner stated that the task team members told her that they:

“were sent by the National Commissioner to come and see if the operation was in accordance with our policies, look into what challenges were there that were faced.”

174. General Naidoo, Brigadier Calitz, Colonel Merafe, Lt Colonel Claassen, and Col Mere all appeared before the Task Team as members of SAPS involved in the operation at Marikana. General Naidoo’s evidence suggests that the task team was set up to look at the lessons from Marikana, in relation to the existing policies and procedures of SAPS.

175. The Marikana Commission made attempts to access notes and documentation produced by the task team report. The only information received from SAPS is

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130Marikana Commission Transcript Day 76 pages 8100 (line 13) to 8101 (line 22).
131Marikana Commission Transcript Day 184 page 22149 at lines 7-10.
132Marikana Commission – Transcript, Day 184 page 22146 lines at 20-23.
133Marikana Commission – Transcript, Day 189 page 22971 lines 3 – 21; Day 155 page 17510 (line 20) to 17518 (line 7), Day 217 page 26713 (line 9) to page 26712 (line 1), Day 236 page 29623 at lines 15-20, Day 238 page 29837 at lines1 - 16
134Marikana Commission Transcript Day 194 page 23696 at lines3 - 33; Day 195 page 23743 (line 14) to page 23744 (line 1).
a document titled ‘Final Interim Report’ which says the purpose of the task team was:

“To provide the National Commissioner of the South African Police Service (SAPS) with an overview on policies, SOP’s, unique challenges, weakness and lessons learned during the implementation of the SAPS operational strategy in policing the situation in Marikana. This document does not represent the debriefing of Marikana Operation as the full debriefing will be done after the commission finalized its work.”

176. The crux of the said task team report is that the mineworkers were aggressive, which meant that the SAPS had to respond to the “menace” and that the SAPS Public Order Policing Capacity needs to be increased. It is unclear why the National Commissioner and members of the SAPS lied to the Marikana Commission by not outright disclosing the existence of the Task Team.

177. We submit that the work of the Task Team could be useful in shedding light on the issues and the truth, especially contemporaneous notes and minutes of meetings held by it. It probably may be the only internal police investigation into the events at Marikana, conducted immediately after the massacre.

(v) General lack of accountability

178. It is our submission that following the massacre of the 34 mine workers on 16 August 2012, the National Commissioner and other members of the SAPS have displayed and continues to display an overall lack of remorse, accountability and responsibility for the killings on the 13th and 16th of August 2012.

Promotion of officers

179. The members of the SAPS who were present on 13 and 16 August 2012 have also continued and continue to serve in the SAPS without being held to account.

136Marikana Commission Exhibit LLL 11.
180. During the Marikana Commission, it became known that at least two police officers involved in the operations at Marikana were promoted. Lieutenant Colonel Scott of the Special Task Force (“STF”), who was responsible for devising the plan for the tactical option although he had very little experience in public order policing, was promoted to the rank of Colonel.\textsuperscript{137} Captain Govender, who was the commander of Visible Policing at Marikana, was promoted to the rank of Major.\textsuperscript{138}

181. Moreover, during 2011/12, IPID referred 545 cases to the Director of Public Prosecutions in which only five officers were charged and 13 convicted of crimes.\textsuperscript{139} In 2011, the ICD identified various challenges related to their work including co-operation from members of the SAPS, lack of post-event reports and poor command and control.\textsuperscript{140} These challenges, we submit, manifested themselves, were reflected and probably informed the SAPS and the National Commissioner’s approach and decisions which resulted in the Marikana killings on 13 and 16 August 2012 and also featured in the manner in which the reports and minutes of the NMF were handled by the SAPS under the current National Commissioner (paras 16 to 18 above).

182. We submit that it was and still is insensitive, irresponsible and unbecoming of the National Commissioner to have rewarded the aforementioned police officers with promotions, given the circumstances and state of affairs in the service as explained in the preceding paragraphs. It is our further submission that such conduct as well as the testimony of the National Commissioner as discussed above, did not only fall foul of her duties in terms of Section 207, but also violated the National Security principles set out in Section 198 of the Constitution; the basic values and principles governing public administration; and the code of conduct for public servants identified in the Evidence Leaders statement of Case.\textsuperscript{141}

\textsuperscript{137} Marikana Commission Compare Col. Scott rank in Exhibit FFF 18 and Exhibit GGG 39 to Exhibit HHH 20.
\textsuperscript{138} Marikana Commission Transcripts, Day 274 page 35014 lines 9-13.
\textsuperscript{139} Marikana Commission Exhibit FFF 21.
\textsuperscript{140} Marikana Commission Exhibit WW 3.
\textsuperscript{141} Evidence Leaders’ Statement of Case, pages 19 -28.
183. In the light of the above, we submit that the National Commissioner has misconducted herself and is neither competent nor fit to hold or continue to hold the office of National Commissioner of the SAPS and has to be relieved of same and replaced.

F. CONCLUSION

184. In the premise, we accordingly submit that the Board should find and decide the issues on the terms of reference as set out in paragraphs 6 and 7 against the National Commissioner, General Phiyega and recommend for her to be forthwith relieved of her duties as National Commissioner by the President of the Republic.

DATED at Johannesburg on this the 30th day of May 2016.

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ADV D B NTSEBEZA SC

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ADV G SHAKOANE SC

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M M LE ROUX

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T MOTLOENYA

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M D STUBBS

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T MOSIKILI

K THOBAKGALE (Attorney with Higher Appearance Rights)
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