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Part A – Introduction

General introduction to these 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").

2 Whilst our nation and the world were shocked by the killings at Marikana, and left with a great deal of soul-searching about where we are as a nation 20 years after democracy, it goes without saying that the Families are the most deeply affected.

3 They were devastated by the events that form the subject of this Commission’s enquiry. They lost husbands, sons, brothers, fathers, uncles and cousins in horrifying and violent circumstances. In most cases, they also lost their only breadwinner. In the few cases where they did not lose their only breadwinner they nevertheless lost an essential breadwinner.
They have attended the Commission to try and discover the truth of what happened to their loved ones. They have attended to try to understand how it was that their loved ones were shot and killed by the 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. They are looking to the Commission for the answers to their question in the hope of achieving some measure of restoration and justice. The Families have made substantial sacrifices in doing so. They left behind children and have put off looking for jobs which would have helped to make up for the support that they have lost.

In our opening statement, we made the following allegations:

5.1 SAPS’ version of self-defence and private defence was entirely at odds with the post-mortem reports for the Families’ loved ones, which showed that many had been shot in the head, their upper bodies, or from behind.
5.2 It could not be contended that SAPS could not have acted differently. It could and should have brought the day and the gathering to an end without the loss of life.

5.3 While disarming and dispersing the miners may not have been an illegitimate objective, the manner and timing of SAPS’ attempts to do so inevitably invited death and injury.

5.4 It did not negotiate sufficiently with the strikers.

5.5 The strikers were not given any warning before the tactical plan was implemented.

5.6 Instead, SAPS sought to encircle and entrap the strikers. A barbed-wire fence was rolled out, blocking the strikers’ most likely dispersal route to Nkaneng. It was this event, and this event alone, which precipitated the movement of the strikers off the Koppie.

5.7 In these circumstances, death and injury were depressingly predictable. Less predictable was the fact that many of the
miners would be shot in the back, much less the back of the head. The use of automatic weapons was in itself astonishing.

5.8 Lonmin’s steadfast refusal to engage with the strikers and instead to instigate and escalate an excessive security response was one of the causes of the killings that occurred.

6 We submit that these allegations, made at the very outset of the proceedings, have been borne out by the evidence led.

7 In what follows, we address the following in turn:

7.1 The events of 13 August 2012.

7.1.1 We will submit that the confrontation that occurred between the strikers and the police and the ensuing killings was the result of an unprovoked attack by SAPS on the strikers. We will set out the evidence which clearly establishes this.

7.1.2 Accordingly, we will submit that SAPS is liable for the killings that occurred.
7.1.3 We will submit further that there is clear evidence that the three strikers who were killed; Mr Mati, Mr Sokanyile and Mr Jokanisi were killed unlawfully by SAPS.

7.2 The killings at Scene 1 on 16 August 2012.

7.2.1 We will submit that the strikers were channelled towards the TRT line in circumstances where it was foreseen and reasonably foreseeable that doing so would lead to at least some strikers being killed.

7.2.2 We will submit further that the evidence is wholly inconsistent with the allegation that the TRT shot in self-defence, private defence or putative self-defence.

7.2.3 We will consequently submit that the Commission should find that the killings at Scene 1 were unlawful.

7.3 The killings at Scene 2.
7.3.1 We will submit that SAPS had more than ample time to halt the operation after Scene 1. We will submit that it should be held liable for the deaths at Scene 2 on this basis alone.

7.3.2 We will submit further that the evidence is wholly inconsistent with any suggestion that SAPS acted in self-defence, private defence or putative self-defence at Scene 2.

7.3.3 We will submit that the Commission must find that the killings at Scene 2 were unlawful.

The deceased and their family members

8 In what follows, we provide a description of the men who were killed on 13 and 16 August 2012 at Marikana, of their families and the impact that their deaths have had on their families.

9 The victims who were killed on 13 August 2012 were:
9.1 Mr Phumzile Sokanyile (“Mr Sokanyile”) was shot and killed across the river. The following information is from the statement that was given by Ms Notukile Songstress, who was Mr Sokanyile’s sister, on behalf of Mr Sokanyile’s family and which was presented to the Commission on 12 September 2014:¹

9.1.1 He was 48 years of age when he was shot and killed. Mr Sokanyile came from Mdumazulu Location, Ngqeleni in the Eastern Cape.

9.1.2 Mr Sokanyile had nine dependants. They were his wife (Philiswa Sokanyile), his five children (Fezeka (20), Ziyanda (21), Lindikhaya (26), Yolanda (12), Snikeziwe (7) and Sibulele (18)), his two brothers (Luvuyo and Mzubanzi), his sister (Notukile Songstress) and his nephew (Songezo).

¹ See Exhibit KKKK 35, Day 290, T. 37812 lines 16 - 37818 Line 1
9.1.3 Mr Sokanyile was the breadwinner in his family. He built his own home and paid for his children’s school fees.

9.1.4 Mr Sokanyile played a big role at his home since 2001. He built his own home and paid his children’s school fees. After his father’s death in 2010 the whole family had to rely on him. He was everything to the family. His sister is also a widow and so she was staying at home with him.

9.1.5 Mr Sokanyile’s death had a big impact on his family. Their feeling is that no one can really know what they as a family are feeling. They cannot begin to describe the pain that they feel inside. When Mr Sokanyile’s mother heard about his death she had a heart attack and died. They lost their brother and mother at the same time and they buried both of them on the same day.
9.1.6 Miss Songstress Notukile is now the elder in the family and the responsibility for caring for the family now falls to her. She is over the age of 50 years but her wish is to get a job, any job, so that she can put food on her family’s table at the end of the day. She said that she was not looking for any luxuries but simply to be able to put bread and butter on the table. All she wants for her family is for them to survive.

9.2 Mr Thembalakhe Mati (“Mr Mati”), was shot and killed outside the shack in the informal settlement. The following information is from the statement that was given by Mr Lanford Gcotyelwa, who was Mr Mati’s cousin, on behalf of Mr Mati’s family and which was presented to the Commission on 13 August 2014:\(^2\)

9.2.1 Mr Mati was 50 years old when he shot and killed on the 13\(^{th}\) of August 2012. He was from Ntabankulu in the Eastern Cape.

\(^2\) See Exhibit KKKK23; Day 273, T. 34954, line 1 - 34958, line 23
9.2.2 Mr Mati had eleven dependants. They were his wife (Florence Mati), his six children (Mandisa (28), Nomfundiso (21), Vuyisani (20), Yolokazi (17), Asisipho (13), Siziphiwe (8)) his mother and his three sisters.

9.2.3 Mr Mati was the only one who was employed in the family. He provided for his family’s need, including sending his children to school. Some of them were at high school. He rented a room near the school as there was no boarding house.

9.2.4 The impact of Mr Mati’s death on his family is grave. Mr Mati’s family feels severe pain. They never thought Mr Mati would die in a strike. They thought the strike would end like any other strike.

9.2.5 In addition, Mr Mati was the only one in the family who was employed and the entire family depended on him. There is no one left to support the family
now. His wife and children have no money to pay rent. They now have to borrow money for rent.

9.3 Mr Semi Jokanisi (“Mr Jokanisi”) was killed in the field next to the railway line. The following information is from the statement that was made by Mrs Joyce Jokanisi, who was Mr Jokanisi’s mother, on behalf of Mr Jokanisi’s family and which was presented to the Commission on 13 August 2014:\(^3\)

9.3.1 Mr Jokanisi was 29 years old when he was shot and killed by the SAPS on 13\(^{th}\) August 2012. He was from Lusikisiki in the Eastern Cape.

9.3.2 Mr Jokanisi had fourteen dependents. His five minor children (Ndikho Bomela, Ayabonga Qekeka, Enami Skhwehle, Okonwaba Skhwehle, Thabiso Molefe), his mother (Joyce Jokanisi), his nephew and seven siblings. Mr Jokanisi was not married.

\(^3\) See Exhibit KKKK5; Day 273, T. 34879, line 8 - 34883, line 17
Mr Jokanisi assisted his father, Mr Goodman Jokanisi, who is employed by Lonmin PLC, with the maintenance of the family. He supported and maintained his five minor children. In addition, he assisted his father to support his seven siblings, his nephew and his mother. Mr Jokanisi bought the groceries for the family. He also assisted with other household needs. Prior to his death, he built a house for his children.

When Semi’s mother heard about his death she collapsed and fainted. She had to see doctors after his death. They diagnosed her as suffering from depression and prescribed medication, which she is taking. She is still not well but she can now eat on her own. She also suffers from chest pains.

The victims who were killed at Scene 1 on 16 August 2012 were:

Khanare Elias Monesa (“Mr Monesa”) was shot and killed at Scene 1. He was Body A. The following information was
provided in a statement by Mr Motlalepula Monesa, who was Mr Monesa’s brother, on behalf of his family and which was presented to the Commission on 13 August 2014.

10.1.1 Mr Monesa was 36 years old when he was shot and killed by the members of the SAPS on 16 August 2012. He was from Butha Buthe in Lesotho.

10.1.2 Mr Monesa had two dependents. His wife Mathabisile Monesa and his brother. It should be noted that his widow was pregnant at the time of his death and she was so distressed that she was hospitalised, she later gave birth however the child died three days after birth.

10.1.3 Mr Monesa’s family told the Commission that his widow did not take the news of his death very well. She was hospitalized after Mr Monesa’s funeral.4

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Mgcineni Noki ("Mr Noki") was shot and killed at scene 1. He was Body B. The following information is from the statement that was made by Mr S’novuyo Noki, who was Mr Noki’s cousin, on behalf of Mr Noki’s family and which was presented to the Commission on 13 August 2014:5

10.2.1 Mr Noki was 30 years old when he was shot and killed by the police on 16 August 2012. He was from Twalikulu in the Eastern Cape.

10.2.2 Mr Noki had eight dependents. They were his wife (Noluvuyo Mathaphelo Lekoetje), his five children (Khanya Ndleleni (8), Ayabonga Zukhanya Zwem (8), Manyano Mbekeni (6), Sandiso Khohlombe (9), and Asive Lekoetje (3)), his sister (Nolufefe Noki) and his niece (Sinoyolo Noki (16)).

10.2.3 It was extremely painful for Mr Noki’s sister to hear about his death. She has since seen a doctor at the

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5 See Exhibit KKKK11, Day 273, T. 34905, line 1 -34910, line 12
very least three times since his death. She was in a state of shock and was stressed.

10.2.4 There is no one to look after them now that her brother is dead. Her other two sisters are married and live in their homes. She lives with her orphaned niece and they both depended on Mr Noki.

10.3 Mr Thobisile Zibambele (“Mr Zibambele”) was shot and killed at Scene 1. He was Body C. The following information was provided in a statement by Ms Nokuthula Zibambele, who was Mr Zibambele’s wife, on behalf of his family and which was presented to the Commission on 13 August 2014:  

10.3.1 Mr Zibambele was 39 years old when he was shot and killed by the SAPS on 16 August 2012. He came from Lusikisiki in the Eastern Cape.

10.3.2 Mr Zibambele had 11 dependants. They were his wife (Nokuthula Zibambele) and his ten children

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6 See Exhibit KKKK10, Day 273, T. 34899, line 24 - 34904, line 4
(Balisa Zibambele (12), Melikhaya Zibambele (11), Unathi Zibambele (6), Sibonelo Zibambele (3), Anele Zibambele (15), Sikho Mandara (19), Asiphe Mandara (14), Nandipha Mandara (12), Nokubonga Maqhuzu (13), and Nonkanyiso Molwana (18)).

10.3.3 Mr Zibambele was the sole breadwinner of the family. He supported his family and the extended family.

10.3.4 As the sole breadwinner of the family, he bought groceries, clothes, and school uniforms for the school-going children. He used to send them monthly allowances and now they have no one to do so.

10.3.5 He also supported his wife’s elder child who was not his biological child and whom she had before she married Thobisile. In 2012 he was completing Grade 12 and he was going to assist him with his tertiary education. She said that she didn’t know what was going to happen to him now. Without Mr
Zibambele’s support, she does not have the means for her child to continue with his studies.

10.3.6 Mr Zibambele’s widow also described the impact her husband’s death had on their family. She says she does not know what she is going to do. Her husband has left behind ten children. She does not work. Nor does she know how she will afford to take them to school or feed them.

10.3.7 The grant money was not enough for the upkeep of the household. She had started begging from her neighbours for help.

10.4 Mphangeli Tukuza ("Mr Tukuza") was shot and killed at Scene 1. He was Body D. The following information was provided in a statement by Mr Jamela Tukuza, who was Mr Tukuza’s brother, on behalf of his family and which was presented to the Commission on 14 August 2014.

10.4.1 Mr Tukuza was from Ngqeleni in the Eastern Cape.
10.4.2 Mr Tukuza had eleven dependents. His two wives, (Nokwandisa Tukuza) and (Nolundi Tukuza). Their seven minor children, (Nomiselo Nopiki (16)), (Phumeza Nopiki (4)), (Fikile Tukuza (11)), (Phumzile Tukuza (9)), (Inaminkosi Tukuza (6)), (Aluncedo Tukuza (4)) and (Lamla Tukuza (3 months)) including his mother, (Matshikana Tukuza) and father (Tshotshotsho Tukuza).

10.4.3 Mr Tukuza supported his entire family including his parents.

10.4.4 The entire family was very devastated and hurt. Mr Tukuza’s parents are still not taking it well.

10.5 Jackson Lehupa (“Mr Lehupa”) was shot and killed at Scene 1. He was Body E. The following information was provided in a statement by Ms Zameka Nungu, who was Mr Lehupa’s wife, on behalf of his family and which was presented to the Commission on 14 August 2014.
10.5.1 Mr Lehupa was 48 years old when he was shot and killed by the members of the SAPS on 16 August 2012. He was from Mount Fletcher in the Eastern Cape.

10.5.2 Mr Lehupa had seven dependents. His wife (Zameka Nungu) and their six children (Olwethu), (Tshepiso), (Nowili), (Sizwe), (Xolile) and (Noxolo).

10.5.3 Mr Lehupa was the breadwinner of his family. He supported his six children and his wife. He also supported extended family members. In particular, he supported three of his brother’s children and three of his sister’s children although they did not stay with him.

10.5.4 His family relied on him for everything, including school fees, clothes, groceries and many other household needs.
10.5.5 Mr Lehupa’s widow says she was very hurt by her husband’s death and what she heard about the manner in which he was killed. Even now she is not well. Her children have been badly affected. The three year old keeps asking where his father is. She has received counselling from social workers who have been to her home several times, but she is still very hurt. She still does not believe that it is true.

10.6 Mongezeleli Ntenetya (“Mr Ntenetya”) was shot and killed at Scene 1. He was Body F. The following information was provided in a statement by Mr Kolose Fundakubi, who was Mr Ntenetya’s uncle, on behalf of his family and which was presented to the Commission on 14 August 2014.  

10.6.1 Mr Ntenetya was from Idutywa in the Eastern Cape.

10.6.2 Mr Ntenetya had six dependents. His wife: Nosipho Ntenetya. Their children: Endinalo Mtanda (5), Inganathi Mtanda (2), Athekosi Mtanda (14), Thuleka

7 See Exhibit KKKK31. Day 274, T. 34994, line 20 – 34997, line 16
Fundakubi (8) and his two nephews: Bolekwa Fundakubi (17) and Orlando Fundakubi (22)

10.6.3 Mr Ntenetya supported his entire family and they were weakened when they heard the news of his death. They all thought of the support that he gave to the family.

10.6.4 His younger brother also works in the mines but there is no one supporting the family, because even his brother supports his own family.”

10.7 Mr Mzukisi Sompeta (“Mr Sompeta”) was shot and killed at Scene 1. He was Body G. The following information was provided by Ms Nomawabo Mabhengu Sompeta, who was Mr Sompeta’s mother, on behalf of his family and presented to the Commission on 13 August 2014:

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8 See Exhibit KKKK9, Day 237 T. 34896, line 11 - 34899, line 21
10.7.1 Mr Sompeta was 39 years old when he was shot and killed by the SAPS on 16 August 2012. He was from Lusikisiki in the Eastern Cape.

10.7.2 Mr Sompeta had eight dependents. They were his daughter (Sinawo Ngetu (12)), his mother (Nomawabo Mabhengu Sompeta), his sister (Nomkhitha Sompeta), his two brothers (Mnikelo and Thando (who is mentally ill)), his nieces (Kamva (8), Yolatha (2) and his nephew Lelethu (6)).

10.7.3 Mr Sompeta was the only breadwinner in the family. He supported his father, sister, his two brother, his two nieces, nephew and me. Every month they received money for groceries and clothes from him. He was in the process of building us a house, which he would have continued working on when he came home for his annual leave.
10.7.4 Mr Sompeta’s family are deeply hurt about his death. They do not know where to turn. He was the one that provided for them.

10.8 Michael Ngweyi (“Mr Ngweyi”) was shot and killed at Scene 1. He was Body H. The following information was provided in a statement by Ms Nosihle Ngweyi, who was Mr Ngweyi’s widow, on behalf of his family and which was presented to the Commission on 12 September 2014:

10.8.1 He was 39 years of age when he was shot and killed by SAPS on 16 August 2012. He was from Umtata in the Eastern Cape.

10.8.2 Mr Ngweyi had seven dependants. They were his wife, two sons (Wanda (4) and Minenhle Olothando (1)) and four of his sister’s children (Anita (17), Nthabiseng (5), Ovayo (3), and Sange (6)).

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\(^9\) See KKKK42, Day 290, T. 37850 line 7 - 37857, line 21
10.8.3 Mr Ngweyi was the only person who was employed in their family. He thus played a very big role in their family. He was responsible for everything in the household, from groceries, school fees, medical care and all other household needs. This included the needs of his sister’s children.

10.9 Bonginkosi Yona (“Mr Yona”) was shot and killed at Scene 1. He was Body I. The following information was provided in a statement by Ms Nandipha Gunuza, who was Mr Yona’s wife, on behalf of his family and which was presented to the Commission on 13 August 2014.

10.9.1 Mr Yona was 32 years old when he was shot and killed by members of the SAPS on 16 August 2012. He was from MaQhashu, LadyFrere in the Eastern Cape.

10.9.2 Mr Yona had four dependents. His wife (Nandipha Gunuza), their two children (Babalo (5)), (Mihle (3 months)) and his brother-in-law (Zibongile (29)).
His family stated that Mr Yona worked very hard to support them. He supported his two children Babalo (5 years), Mihle (3 months), and his brother-in-law Zibongile (29 years) and his wife.

The family also said that his death has had a big impact on them. On hearing the news of Mr Yona’s death they did not believe those who told them. His wife switched off not knowing how she was going to live her life without her husband and how she was going to look after their young children on her own. His wife said that it hurts her a lot. She thinks about her baby boy, Mihle. He did not get the chance to meet his father. His father was killed when he was just 7 days old. It is a pain that no one can take away.”

Even now that she is attending the Commission each day it seems as if she’ll wake up tomorrow and they will tell her that it was just a dream. She gave an

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10 See Exhibit KKKK26; Day 273, T. 34970 line 10 - 34973, line 21
example that their house is incomplete and it was her plan to complete the house. The house has three rooms and is therefore too small for them. In addition, after Mr Yona’s funeral the kitchen burned down.

10.9.6 She is still suffering financial loss as result and, without Mr Yona’s support, she is struggling to find the means to fix the kitchen. This in itself is causing her and her children untold hardship. It made her realise how hard it is going to be for them to survive without her husband’s support.”

10.10 Mr Andries Motlalepula Ntsenyeho (“Mr Ntsenyeho”) was shot and killed at Scene 1. He was Body J. The following information was provided in a statement by Ms Lebohang Ntsenyeho, who was Mr Ntsenyeho’s sister, on behalf of his

11 See Exhibit KKKK26, Day 274, T. 34970 line 14 – 34973, line 21
family and which was presented to the Commission on 12 September 2014.¹²

10.10.1 Mr Ntsenyeho was 42 years old when was shot and killed on 16 August 2012. He was from Sasolburg in the Free State.

10.10.2 Mr Ntsenyeho had eight dependents. His wife (Agnes Mathabang Ntsenyeho), their 5 children (Thabang Ntsenyeho(21)), (Ntabiseng Ntsenyeho(19)), (Mamokete Ntsenyeho(18)), (Moeke Ntsenyeho(10)), (Rehilwe Ntsenyeho(7)), his mother and sister (Lebohang Ntsenyeho).

10.10.3 Mr Ntsenyeho was the sole breadwinner for his family. His wife Mathabang has not been well for a while, so she had not been working and after Mr Ntsenyeho was killed her condition worsened.

¹² See Exhibit KKKK44, Day 290, T. 37862 line 16 - 37870 line 6
10.10.4 Mr Ntsenyeho was responsible for everything. He bought the groceries, paid for school fees for his children, clothes and anything else that was needed in the house.

10.10.5 The Ntsenyeho family told the Commission that they are not sure what is going to happen to his children as Mr Maruping from Lonmin said the mine would pay for the children’s school fees as long as they passed, however if they failed they would not. Mr Ntsenyeho would not have placed conditions on the education of his children, so they do not know what they will do in that regard.

10.10.6 They further said that Mr Ntsenyeho’s deepest desire was for his children to go to University. Now his oldest son, Thabang, will have to put his studies on hold to find a job in order to provide for his family.

10.10.7 The family never expected the strike to result in his death. They have always heard of people going on
strikes but they never thought people would get killed like this. They are devastated by his death, he was holding all of them together.

10.11 Patrick Akhona Jijase (“Mr Jijase”) was shot and killed at Scene 1. He was Body K. The following information was provided in a statement by Ms Mavalithuba Jijase, who was Mr Jijase’s mother, on behalf of his family and which was presented to the Commission on 12 September 2014.13

10.11.5 Mr Jijase was 26 years old when he was shot and killed by the members of the SAPS on 16 August 2012. He was from Ntabankulu in the Eastern Cape.

10.11.6 Mr Jijase supported his mother (Mavalithuba Jijase) and father (Mhliselwa Jijase). He also looked after his brother and two sisters and his nephew. Mr Jijase did not have any children

13 See Exhibit KKKK40; Day 290, T. 37840 line 1 - 37842, line 16
10.11.7 Mr Jijase supported his family financially. He put food on the table, catered for all their needs such as medical care and other household essentials.

10.11.8 Mr Jijase had an older brother who has his own family and he cannot support Mr Jijase’s dependents.

10.11.9 His family was heartbroken and felt severe pain on hearing that he died and they are still not well emotionally.

10.11.10 In addition, Mr Jijase was their only breadwinner. They are now left with no support or financial assistance. The family does not know what they are going to do to survive.

10.12 Mr Cebisile Yawa (“Mr Yawa”) was shot at Scene 1 and later died in hospital. He was Body L. The following information was provided in a statement by Mr Andile Yawa, who was Mr Yawa’s father, on behalf of his family and which was presented to the Commission on 13 August 2014.
10.12.1 Cebisile Yawa ("Mr Yawa") was 24 years old when he was shot and killed by the members of the SAPS on 16 August 2012. He was from Cala in the Eastern Cape.

10.12.2 Mr Yawa had eight dependents one child (Sisipho Komanisi (1)), his father, his mother, his four brothers (Mandla Yawa (At Fort Hare University)), (Thobani Yawa), (Siphelele Yawa), (Mkhuseli Yawa) and a sister (Khuselwa Yawa).

10.12.3 His father, Mr Andile Yawa told the Commission that his son took over position after he fell ill. He was their only breadwinner.

10.12.4 The family feel devastated by Mr Yawa’s death. Mr Yawa’s father says he has a constant sound in his ears of his child’s cries. He said he is pained by the fact that Lonmin sold his child.
10.12.5 The family never thought that their son would be killed over a wage dispute. The death of Mr Yawa means that they are left without a breadwinner. They do not know how they are going to survive.\textsuperscript{14}

10.13 Bongani Nqongophele (“Mr Nqongophele”) was shot and killed at Scene 1. He was Body M.

10.13.1 The following information is from the statement that was made by Ms Nombulelo Ntonga, who was Mr Nqongophele’s wife, on behalf of Mr Nqongophele’s family and which was presented to the Commission on 13 August 2014:15

10.13.2 Bongani Nqongophele (“Mr Nqongophele”) was 31 years old when he was shot and killed by members of the SAPS on 16 August 2012. He came from Elliotdale in the Eastern Cape.

\textsuperscript{14} See Exhibit KKKK 25, Day 273, T. 34965 line 14 - 34970 line 9

\textsuperscript{15} See Exhibit KKKK12, Day 273, T. 34910 line 13 - 34914, line 22.
10.13.3 Mr Nqongophele had 12 dependents. They were his wife (Nombulelo Ntonga Nqongophele), his daughter (Anga Ntonga (aged 4)), his mother, his sister, his 8 nieces and nephews.

10.13.4 Mr Nqongophele’s income was vital to the sustenance of the entire family, especially since he was the only member of the family with a job. He gave them a thousand rand per month for groceries.

10.13.5 Mr Nqongophele was responsible for paying school fees two children in the family (Abongile Nqandeka and Vusiwe Nqandeka). He had also just started building them their own home.

10.13.6 Mr Nqongophele’s wife was very worried, devastated and felt severe pain on hearing about her husband’s death. When she heard the news she was so shocked and devastated that she tried to take her own life by drinking pesticide.
10.13.7 His mother and sister were also devastated. His mother had to consult a doctor afterwards. His mother is still not well emotionally and physically. She cried a lot and lost her voice. She has developed chest pains. The entire family will now have to survive on her mother-in-law’s pension. His wife does not know how they’re going to survive without him.

10.14 Babalo Mtshazi (“Mr Mtshazi”) was shot and killed at Scene 1. He was Body O. The following information was provided in a statement by Ms Noziphiwo Mtshazi, who was Mr Mtshazi’s mother, on behalf of his family and which was presented to the Commission on 12 September 2014.

10.14.3 Mr Mtshazi was 26 years old when he was shot and killed by the members of the SAPS on 16 August 2012. Mr Mtshazi was from Ntshale Location, Libode in the Eastern Cape.
10.14.4 Mr Mtshazi had six dependents. His mother, (Noziphiwo Mtshazi), his two children, (Lisakhanya Mtshazi), (Masethole Mtshazi) and his three siblings, (Zameka Mtshazi), (Yonela Mtshazi) and (Boniswa Komana).

10.14.5 Mr Mtshazi supported the family and bought food and other household necessities. He also bought cattle. He had recently bought a stand and had built a house for us.

10.14.6 The Mtshazi family said that Mr Mtshazi was the person they solely depended on. His father passed away a long time ago. He had to carry the family. He would always say that he does not want the other children to grow up in the same manner in which he grew up. He would give them money, R500 a month for each. They have both passed they are presently attending school. They were all hurting. His mother
suffers from sugar diabetes and high blood pressure as a result of the stress and pain.16

10.15 Thembinkosi Gwelani (“Mr Gwelani”) was shot and killed approximately 210 metres away from Scene 1. He was Body P. The following information was provided in a statement by Ms Ntombekhaya Gwelani, who was Mr Gwelani’s sister, on behalf of his family and which was presented to the Commission on 13 August 2014.

10.15.1 Mr Gwelani was 27 years old when he was shot and killed by the members of the SAPS on 16 August 2012. Mr Gwelani was from Makwaleni, Lusikisiki in the Eastern Cape. Mr Gwelani was not part of the strike and had gone to the koppie to deliver food for his cousin.

10.15.2 Mr Gwelani had six dependents. His two brothers (Mlungisi (24)) and (Andile (14)). His two sisters (Zikhona (18)) and (Ntombekhaya). His niece (Asiphe (2)) and nephew (Eza (8))

16 See Exhibit KKKK39. Day 290 T. 37834, line 1-37837, line 18
10.15.3 Mr Gwelani was his family’s only hope as they do not receive social grants.\textsuperscript{17}

10.16 Bongani Mdze (“Mr Mdze) was shot at Scene 1 and later died in hospital. The following information was provided in a statement by Miss Matshepo Letsaba, who was Mr Mdze’s sister, on behalf of his family and which was presented to the Commission on 13 August 2014.\textsuperscript{18}

10.16.1 Mr Mdze was 28 years old when he was shot and killed by the members of the SAPS on 16 August 2012. He was from Jabavu, Matatiele in the Eastern Cape.

10.16.2 Mr Mdze had 3 dependents. They were his wife Nomisile Annacletta Mdze, his child (Lusanda (2)) and his sister (Matshepo Letsaba).

10.16.3 Mr Mdze’s family told the Commission that it was devastating to learn of his death. Mr Mdze was very

\textsuperscript{17} See Exhibit KKKK 17, Day 273, T. 34951, line 11 - 34953 line 23

\textsuperscript{18} See Exhibit KKKK21; Day 231, T. 34974, line 5 - 34977, line 20
close to them. He loved his wife and his daughter. The family feel a pain that no one can take away. The family is struggling to make ends meet. Mr Mdze’s brother had to take Mr Mdze’s wife and his child under his roof.

11 The victims who were killed at Scene 2 on 16 August 2012 were:

11.1 Anele Mdizeni (“Mr Mdizeni”) was shot and killed at Scene 2. He was Body A. The following information is from the statement of Unathi Mdizeni, who was Mr Mdizeni’s wife, on behalf of Mr Mdizeni’s family and which was presented to the Commission on 13 August 2014:

11.1.1 Mr Mdizeni was from Elliotdale in Eastern Cape. He had five dependents at the time of his death. They were his pregnant wife (Unathi Mdizeni), his two children (Asisipho Ndoysisile (6) and Ababalwa Jaji (2)), his mother and his sister.
11.1.2 Mr Mdizeni assisted with the general upkeep of the household. He sent the family R2000 per month for these purposes.

11.1.3 In addition, Mr Mdizeni’s family are extremely saddened by Anele’s death. It has caused them a lot of pain. They are also fearful about how they are going to survive without his support.

11.1.4 They want the government to take responsibility for the children’s education and complete the house which Anele had begun to build. 19

11.2 Johannes Thelejane (“Mr Thelejane”) was shot and killed at Scene 2. He was Body B. The following information was provided in a statement by Ms Makopano Thelejane, who was Mr Thelejane’s wife, on behalf of his family and which was presented to the Commission on 13 August 2014.

19 See Exhibit KKKK6, Day 273, T. 34882, line 17 - 34887, line 12
11.2.1 Mr Thelejane was shot and killed by the SAPS at the age of 55. Mr Thelejane was from Pabellong, Matatiele in the Eastern Cape. Mr Thelejane worked for a labour broker at Lonmin.

11.2.2 Mr Thelejane had four dependants. His wife, 2 children: (Liketso Thelejane (31)) and (Kopano Thelejane (29)). Neither of them were employed. He also supported his grandchild: (Atlehang Johnson Phori (7)).

11.2.3 He was the only person who was supporting the family. He paid the school fees for his grandchild. He also provided for the families other needs.

11.2.4 When the family spoke about the impact the death of Mr Thelejane had on his family they said husband was the breadwinner. He provided for all needs. The family is suffering emotionally and financially. Their lives will never be the same. They complained about the fact that Lonmin denied that Mr Thelejane
worked at Lonmin even though he wore a Lonmin overall and went underground for Lonmin every day. Mr Thelejane’s widow does not get any pay. His children also don’t get any pay. The grandchild is the only one who receives a grant, which does not help us. 20

11.3 Mr Thobile Mpumza (“Mr Mpumza”) was shot and killed at Scene 2. He was Body C. The following information was provided in a statement by Miss Xolelwa Mpumza, who was Mr Mpumza’s sister, on behalf of his family and which was presented to the Commission on 13 August 2014:21

11.3.3 He was 26 years old when he was shot and killed by SAPS on 16 August 2012. He was from Mount Ayliff in the Eastern Cape. Mr Mpumza was not employed at Lonmin at the time of his death.

20 See exhibit KKKK18. Day 273, T.34929, line 1 - 34932, line 22
21 See Exhibit KKKK13; Day 273 T. 34914, Line 23 - 34917, line 8
11.3.4 He had seven dependents. They were his child (Inga Mpumza (7)), his sister, his niece (Esona Njomboni (10)) and his 4 nephews (Lihle Njomboni (9), Olwethu Mpumza (10), Wanda Mpumza (13), Asangile Njomboni (12)).

11.3.5 Mr Mpumza’s family said that no-one would ever replace and carry out his responsibilities in the family. He raised them well, sent the children to school and maintained them. He looked after them as best he could with the meagre means, which he had. He saw to all of their needs. The death of Mr Mpumza has left them not knowing what they are going to do now.

11.4 Julius Tokoti Mangcotywa (“Mr Mangcotywa) was shot and killed at Scene 2. He was Body D. The following information was provided in a statement by Miss Vuyiswa Mangcotywa, who was
Mr Mangcotywa’s daughter, on behalf of his family and which was presented to the Commission on 12 September 2014.22

11.4.3 Mr Mangcotywa 61 years old when he was shot and killed by members of the SAPS on 16 August 2012. He was from Sterkspruit in the Eastern Cape.

11.4.4 Mr Mangcotywa had thirteen dependents. His wife (Nowellington Mangcotywa). His eight children, 5 of whom are adults but are all dependent and three minor children: (Fezile), (Sandi), (Anele). The minor children all attend school. He also supported his three grandchildren and his niece.

11.4.5 Mr Mangcotywa was the sole breadwinner in the family and as such played a very critical role in providing food, clothes and all of the important needs of the family. He supported his all his dependents.

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22 See KKKK 38, Day 290, T. 3783,1 line 13 - 37833 line 16
11.4.6 His death remains a painful and sad moment in their family. They are all devastated and hurting. The pain is unbearable.

11.5 Janaveke Raphael Liau (“Mr Liau”), was shot and killed at Scene 2. He was Body E. The following information was provided in a statement by Ms Masebolai Liau, who was Mr Liau’s wife, on behalf of his family and which was presented to the Commission on 13 August 2014.

11.5.1 Mr Liau was shot and killed by the members of the SAPS when he was 47 years old. He was from Dikolobeng Hamonyane in Maseru, Lesotho.

11.5.2 Mr Liau had seven dependents. His wife: Masebolai Liau and their four children: (Sebolai Liau(14)), (Mahloma Liau(10)), (Motsilisi Liau(7)) and (Jane Liau(4)). He also supported his late elder brother’s wife and children.
11.5.3 His family said that Mr Liau was their only source of financial support in the family. Mrs Liau is not working and with the money he would send home every month she would buy whatever they needed in the house. She further said they were dependent on him for their every need. She does not know how they will manage to pay for the children’s education or buy them food and clothes because the money Mr Liau used to send would cover all of those things.

11.5.4 They were also in the process of completing rooms which we would lease to tenants so as to generate an income. The rooms are incomplete. She does not know how she will complete them on her own. She is not working and their entire family looked to him for support. There is no one else who can help them. 23

11.6 Thabiso Mosebetsane ("Mr Mosebetsane") was shot and killed at Scene 2. He was Body G. The following information was provided in a statement by Miss Nomakhephu Mosebetsane,

23 See Exhibit KKKK 19, Day 273, T. 34933, line 15 - 34936, line 2
who was Mr Mosebetsane’s sister, on behalf of his family and which was presented to the Commission on 13 August 2014.

11.6.3 He was 49 years old when he was shot and killed by SAPS on 16 August 2012. He was from Matatiele in the Eastern Cape.

11.6.4 Mr Mosebetsane had 5 dependents. They were his wife, his four children (Kabelo (25), Katiso (22), Tshepo (18) and Chantel (2)) and his mother (Nomakheba).

11.6.5 Mr Mosebetsane was a breadwinner. He provided the family with all the things that they needed, including school fees for the children.

11.6.6 The family told the Commission in a statement that they felt severe pain when they heard about Mr Mosebetsane’s death. His widow’s mother was even admitted to hospital. Mr Mosebetsane was the only
one that was working. They have lost their only breadwinner.  

11.7 Mafolisi Mabiya (“Mr Mabiya”) was shot and killed at Scene 2. He was Body H. The following information was provided in a statement by Ms Phumeza Mabiya, who was Mr Mabiya’s wife, on behalf of his family and which was presented to the Commission on 14 August 2014.

11.7.1 Mr Mabiya was from Idutywa in the Eastern Cape.

11.7.2 At the time of his death Mr Mabiya had four dependents, his eighteen year old pregnant wife, child, (Buhle Swelindwao (2)), his mother (Nosajini Mabiya) and his niece (Mthandazo Mabiya (8)). His widow gave birth to their second child Siwakhe Precious on 26 March 2013.

11.7.3 Mr Mabiya supported his entire family. He was the only breadwinner. He played a big role in the family.

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24 See Exhibit KKKK14, Day 273, T. 34917 line 10 - 34919, line 25
His father passed away and his mom does not get a pension. He was the only one in the family who was employed and he therefore supported all of them. It is not easy to survive without him.  

11.8 Mr Ntandazo Nokamba (“Mr Nokamba”) was shot and killed at Scene 2. He was body I. The following information is from the statement that was provided by Ms Nosakhe Nokamba, who was Mr Nokamba’s wife, on behalf of his family and which was presented to the Commission on 13 August 2014:

11.8.1 Mr Nokamba was 36 years old when he was shot and killed by SAPS on 16 August 2012. He was from Libode in the Eastern Cape.

11.8.2 Mr Nokamba had seven dependants. They were his wife (Nosakhe Nokamba), their five children (Khuselwa (13), Siziphiwo (15), Liyabona (8),

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25 See Exhibit KKKK29, Day 274, T. 34987, line 1 – 34991, line 5
26 See Exhibit KKKK8, Day 273, T. 34892 line 12 – 34896, line 9
Zozibini (2) and Elam (1)) and his mother (Gecani Magaba Mandla).

11.8.3 Mr Nokamba’s family told the Commission that Mr Nokamba was their breadwinner. He bought them groceries, clothes and all other household essentials. He also paid school fees and bought clothes for the children.

11.8.4 Mr Nokamba’s death had an impact on the family. The family has said that they do not know who is going to support them and raise the children like Ntandazo would. The only income that they now have is Ntandazo’s mother’s pension money.

11.9 Fezile Saphendu (“Mr Saphendu”) was shot and killed at Scene 2. He was Body J. The following information was provided in a statement by Mr Thembinkosi Saphendu, who was Mr Saphendu’s brother.\(^\text{27}\)

\(^{27}\) See Exhibit KKKK15, DAY 273
11.9.1 He was 24 years old when he was shot and killed by the SAPS on 16 August 2012. He was from Mqanduli in the Eastern Cape.

11.9.2 Mr Saphendu was not married and he did not have children. He supported his mother (Nolindile Saphendu), his brother (Thembinkosi Saphendu), his sister (Ntombivelile Saphendu) and his niece (Siza Saphendu (6)).

11.9.3 Mr Saphendu provided for his family financially. He bought them food, clothes and built them houses. They do not know what they were going to do without him.

11.9.4 His family are very hurt that Fezile (Mr Saphendu) was killed.

11.10 Mphumzeni Ngxande (“Mr Ngxande) was shot and killed at Scene 2. He was Body G. The following information was provided in a statement by Ms Nonkululeko Ngxande, who was Mr
Ngxande’s wife, on behalf of his family and which was presented to the Commission on 13 August 2014.28

11.10.3 Mphumzeni Ngxande (‘Mr Ngxande) was 38 years old when he was shot and killed by the police on 16 August 2012. He was from Lujizweni, Ngqeleni in the Eastern Cape.

11.10.4 Mr Ngxande had three dependants, wife. They were his wife (Nonkululeko Ngxande) and their 2 children (Athandile Thwazi (18) and Aviwe Ngxande (9)).

11.10.5 Mr Ngxande played a big role in his family. He was the only one working at home, he provided for his family with everything. Mr Ngxande paid for the children’s education and built a home for his family.

11.10.6 Mr Ngxande’s wife and family are suffering. They are deeply hurt. Life is also very difficult without his financial support.

28 See Exhibit KKKK16; Day 273, T. 34923, line 16 - 34926, line 10
11.11 Sitelega Meric Gadlela ("Mr Gadlela") was shot and killed at Scene 2. He was Body L. The following information was provided in a statement by Ms Betty Gadlela, who was Mr Gadlela’s sister, on behalf of his family and which was presented to the Commission on 13 August 2014.

11.11.3 Mr Gadlela was 50 years old when he was shot and killed by the members of the SAPS on 16 August 2012. He was from Dvokolwako, in Swaziland.

11.11.4 Mr Gadlela had thirteen dependents. His wife (Betty Gadlela) His mother (Maria Gadlela) and his eleven children, (Hlengiwe(28)), (Nelisiwe(27)), (Bhekithemba(26)), (Samukelisiwe(24)), (Ishmael(20)), (Mthunzi (18)), (Mayenziwe (16)), (Sindiso (13)), (Simiselo (11)), (Seluliwe (8)), (Sihlelelo (4)).

11.11.5 Mr Gadlela’s family told the Commission that he came from a big family. He supported his wife, his eleven children and his elderly mother. He was
paying his mother’s medical bills and paying school fees for the 5 children that are still at school.

11.11.6 His family says they cannot get Mr Gadlela’s death out of their minds. His death changed their lives. With Mr Gadlela alive, they had the comfort to know they could always rely on him for everything. But he is no more.

11.11.7 When they received the news that Mr Gadlela was killed in the strike by the police it felt like a dream. When days went by and his wife realised that Mr Gadlela was really dead she tried to end her life with poison. Her sister rescued her.29

11.12 Henry Mvuyisi Pato (“Mr Pato”) was shot and killed at Scene 2. He was Body M. The following information was provided in a statement by Mr Mongezi Pato, who was Mr Pato’s father, on

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29 See Exhibit KKKK24; Day 273, T. 34959, line 1- 34965, line 11
behalf of his family and which was presented to the Commission on 14 August 2014.\footnote{See Exhibit KKKK30, Day 274, T. 34991, line 6 – 34993, Line 20}

11.12.3 Mr Pato was from Bizana in the Eastern Cape.

11.12.4 Mr Pato had eight dependents. His two minor children, (Cebo Chagi (4)) and (S’nawo Chagi (2)). His mother, (Manquphaza Nomanzi Pato) and father (Mongezi Pato). The mother of his children, (Nobungcwele Chagi) and his 3 siblings (Thuba Pato (15)), (Mfana Pato (21)) and (Fundiswa Pato).

11.12.5 Mr Pato played a pivotal role in supporting his family by buying food and providing school fees for the children of the family, which included fees for his sister at Fort Hare University.

11.12.6 The family was extremely sad and shocked when they heard that Mr Pato had been killed. They stated that they have lost their only breadwinner. The
family does not know what is going to become of them.

11.13 Mr Makhosandile Mkhonjwa (“Mr Mkhonjwa”), was shot and killed at Scene 2. He was Body N. The following information is from the statement that was provided by Ms Nokwanele Phakati, who was Mr Mkhonjwa’s wife, on behalf of his family and which was presented to the Commission on 13 August 2014:

11.13.3 Mr Mkhonjwa was 28 years old. He came from Mbizana in Eastern Cape.

11.13.4 Mr Mkhonjwa had four dependents. They were his wife (Nokwanele Phakati), his two children (As’nalo (2) and Onke (6)), and his mother.

11.13.5 Mr Mkhonjwa was the sole breadwinner in the family. He was in the process of building a house for his family he was killed. He paid for the school fees and uniforms for the elder child. He also paid for the family’s medical care.
11.13.6 Mr Mkhonjwa’s wife was devastated by the news of his death. She was hurting. Mr Mkhonjwa’s mother was still mourning the death of his father who died four months before August 2012.

11.13.7 She said she was lost without her husband. She does not know what she will eat tomorrow and in the future. She was asking herself questions such as: “How am I going to build a house, send the children to school and support his siblings? I do not know where help will come from.”

11.13.8 At the time when Mr Mkhonjwa was killed, his wife was pregnant and had a miscarriage as a result of the shock and the stress that she was under. 31

11.14 Nkosiyabo Xalabile (“Mr Xalabile”) was shot and killed at Scene 2. He was Body O. The following information was provided in a statement by Ms Nonezile Xalabile, who was Mr

31 See Exhibit KKKK7, Day 273, T. 34887 line 13 - 34892 line 10
Xalabiles mother, on behalf of his family and which was presented to the Commission on 12 September 2014.  

11.14.1 Mr Xalabile was 30 years old when he was shot and killed by the members of the SAPS on 16 August 2012. He was from Elliotdale in the Eastern Cape.

11.14.2 Mr Xalabile had five dependents. His wife: Lilita (whom he had married a month before he was killed). His mother (Nonezile), his sister (Pamela) and his two nieces (Milisa Xalabile (11)) and (Silindi (6)).

11.14.3 His family said that Mr Xalabile was the first born child and the sole breadwinner in the family. He supported everyone in the family, including his wife and sister and his sister’s children. He bought them food, clothes and paid for their medical care and most importantly he provided schools fees for his two sister’s children. He helped the family to keep their heads above the water at all costs. Like many

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32 See Exhibit KKKK 41, Day 290, T. 37842 line 20- 37849, line 13.
workers, he would come home during Easter and Christmas holidays.

11.14.4 His death brought not only unbearable pain but life in itself has become unbearable. The family benefitted from his employment at the mine. He supported them and sent them money on monthly basis.

11.14.5 She does not know how they are going to survive without him.

11.14.6 The other impact of Mr Xalabile’s death on his family is that his family is in deep trouble as he had left behind unfulfilled obligations or debts and sadly, there is no money in his bank account to settle these outstanding debts. He had incurred debts in preparation for his the wedding.

11.15 Motiso Otsile van Wyk Sagalala (“Mr Sagalagala”) was shot at scene 2 and died later in hospital. The following information
was provided in a statement by Mr David Sagalala, who was Mr Sagalala’s son, on behalf of his family and which was presented to the Commission on 13 August 2014.

11.15.1 Mr Sagalala was from Bophirima Setlagole in the North West.

11.15.2 Mr Sagalala had three dependents. His wife, child (David Sagalala) and his grandmother.

11.15.3 His family says Mr Sagalala was the breadwinner and he supported all of his dependents. He had started building his dream home in preparation for his retirement. His son relied on him for everything as he is not working. His family said it was really difficult for them to deal with this great loss.”

11.16 Telang Mohai (“Mr Mohai”) was shot at Scene 2, he later died in hospital. The following information was provided in a statement by Ms Matumelo Mohai, who was Mr Mohai’s wife,

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33 See Exhibit KKKK22, Day 273, T. 34945 line 7 - 34948 line 21.
on behalf of his family and which was presented to the Commission on 12 September 2014

11.16.1 Mr Mohai was shot and killed at the age of 37. He came from Lithabeng in Maseru, Lesotho.

11.16.2 Mr Mohai had four dependents his wife, (Matumelo Mohai) and their 3 children (Relebohile Mohai (13)), (Paballo Mohai (8)), (Mamolefi Mohai (2)).

11.16.3 “Mr Mohai was the only person working in the family. He provided his family with everything. He paid for the children’s school fees and maintained the family. He also looked after his cousin who was orphaned, he would pay for his school fees and help him with whatever he needed.”

11.16.4 The children still haven’t recovered from the shock. After hearing of his death they were inconsolable. They talk about the days that he was meant to come
home on leave and how they were looking forward to spending time with him. Now he is gone.

11.16.5 They also talk about the gifts their father had promised them. Relebohile was expecting a computer from her father as she wanted to learn how to use a computer.\textsuperscript{34}

11.17 Molefi Osiel Ntsoele ("Mr Ntsoele") was shot at Scene 2, he later died in hospital. The following information was provided in a statement by Ms Matshepang Ntsoele, who was Mr Ntsoele’s wife, on behalf of his family and which was presented to the Commission on 13 August 2014

11.17.1 Mr Ntsoele was shot and killed at the age of 40. He came from Ha Tebese Semonkong in Maseru, Lesotho.

11.17.2 Mr Ntsoele had four dependents his wife, (Matshepang Ntsoele) and their 4 children (Tse pang

\textsuperscript{34} See Exhibit KKKK20, Day 290, T. 37858, line 2 - 37862, line 12
Ntsoele (19)), (Moramokoma Ntsoele (13)), (Tokelo Ntsoele (10)) and (Maphothe Ntsoele (6))

11.17.3 Mr Ntsoele was the breadwinner. He supported his wife, his children, as well as his 86 year old mother and his mother-in-law. He was responsible for everything in his family; school fees for the children, groceries, clothes and building their home.

11.17.4 Every single thing they had, he provided for them. He wanted his children to have the best education, so he made sure he took them to the best schools that he could afford

11.17.5 His wife has said that she cannot even explain the pain she is going through. She would not wish it to befall anyone. There is a hole that has been left her my life. Even if this was God’s will she cannot find a way to understand how and why this came to happen. She has lost interest in everything. She says
that she is always thinking about him and what happened to him and the pain is unbearable.

11.17.6 Mr Ntsoele’s mother still doesn’t understand what happened. His mother-in-law has also been badly affected by his death.

11.17.7 Mr Ntsoele’s family says that they are in trouble now. They do not know how they will go on. They are really at a loss for words. They cannot even think of a way to make ends meet. Mr Ntsoele used to provide everything for them, they depended on his income for everything. Now that he is gone it falls on his wife to make a way to support the family. She does not know how she will be able to do this.

11.17.8 She stated that she was stressed. She wonders how she will provide for the children and how she will put food on the table or finish the buildings that are incomplete. She cannot even pay the shepherds and
she cannot take my children out of school to take care of the livestock

11.17.9 She is willing to work to put food on the table and to make sure the children are taken care of. She sometimes thinks if she had something else to occupy her mind she would be better because all she thinks about is all that needs to be done and what happened to her husband.

11.17.10 They were in the process of building rooms to rent out to tenants in order to generate an income in preparation for Mr Ntsoele’s retirement or in case he got injured at work. All those plans have been stopped now because they do not know where the money to continue will come from.

11.17.11 His wife is even more worried because Christmas is around the corner. He would come home to buy the
children food and clothes. The family does not know what they are going to do.  

11.17.12 Mrs Ntsoele told the Commission that she is surprised why Lonmin did what they did. Why they let their employees get killed over wages.

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35 See Exhibit KKKK20, Day 273, T.34937, line 4 – 34942, line 8
Part B – The events of 13 August 2012

Introduction

12 We submit that the confrontation that occurred on 13 August 2012 and the ensuing killings were the result of an unprovoked attack by SAPS on the strikers.

13 In addition, we submit that it is clear that the killings of Mr Mati, Mr Jokanisi and Mr Sokanyile were unlawful.

14 In what follows, we deal with the following issues in turn:

14.1 The behaviour of the strikers at the railway line;

14.2 Major-General Mpembe’s decision to escort the strikers;

14.3 Major-General Mpembe’s decision to block the strikers;

14.4 The fact that the strikers did not change direction; and

14.5 Conclusion.
The behaviour of the strikers at the railway line

15 We submit that the strikers at the railway line treated Major-General Mpembe with the utmost respect and were entirely reasonable in their engagement with him. Major-General Mpembe started off by treating the strikers with respect but as the negotiation progressed he became confrontational. The strikers were clearly taken aback by the change in his demeanour.

16 We submit that the strikers said five things to Major-General Mpembe, which demonstrated their respectful demeanour and the reasonableness of their approach:

16.1 Firstly, the strikers repeatedly said to him that they were not fighting with anybody.\(^{36}\)

16.2 Secondly, they said that they were carrying their weapons to protect themselves because they had been shot at by Lonmin security and by NUM.\(^{37}\)

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\(^{36}\) Exhibit QQ2, at p.6, 7, 8, 9, 11 and 12; Day 145, T.16024, lines 2 - 5.
16.3 Thirdly, they repeatedly asked the police to escort them to the koppie; in other words, that they did not want to go alone but wanted to be escorted by the police.\textsuperscript{38}

16.4 Fourthly, they said that they would hand over their weapons if SAPS escorted them to the koppie and called their employer to come and respond to their request.\textsuperscript{39}

16.5 Fifthly, the strikers also said that it did not have to be the koppie. It could be a location of Major-General Mpembe’s choice, for example the stadium, as long as he escorted them and called their employer to speak to them.\textsuperscript{40}

17 In addition to what the strikers said, we submit that the manner in which they spoke was also extremely respectful. We point out that

\textsuperscript{37} Exhibit QQ2, at p.6, line 4, p.7, line 4, p.7, line 4, p.7, line 20; Day 145, T.16029, lines 3 - 9.

\textsuperscript{38} Exhibit QQ2, at p.6, 9, 11; Day 145, T.16029, lines 14 - 19.

\textsuperscript{39} Exhibit QQ2, p.8, p.9, p.10; Day 145, T.16031, lines 17 – 23.

\textsuperscript{40} Exhibit QQ2, p.10; Day 146, T.16134, line 15 - 16137, line 25.
they did not raise their voices and they addressed Major-General Mpembe as “tata”.41

18 Ultimately, Major-General Mpembe conceded that the strikers addressed him with the utmost respect.42

19 At the time that the strikers’ made their plea to be escorted to the koppie, Major-General appeared to be considering it. At this stage, Major-General Mpembe displayed a respectful and conciliatory attitude towards the strikers. Major-General conceded this in the following terms:43

“Mr Ntsebeza SC:...Would you agree that up to that point there seems to be a more engaging attitude from you because it appears you were understanding what they were putting to you? Would you agree with that?

Major-General Mpembe: Yes Chairperson, with the following explanation. Firstly, before one takes a decision it should be based on the conduct and on the understanding of, between the two people...So yes, I appeared on the video to have agreed with them – to have not agreed, to have

41 Day 145, T.16020, line 16 - 16021, line 3.
42 Day 145, T.16020, line 16 - 16021, line 3.
listened to them attentively, and that listening made me to take a decision of situational appropriateness, but not necessarily that I agreed with them, and I wanted that they should know that they are committing an offence, but I am obliged to protect them.”

20 However, Major-General Mpembe then left to make a phone-call. On Exhibit Q1 at 20:57 - 21:12, Major-General Mpembe can be seen speaking on his cell-phone. He testified that he phoned General Mbombo and the JOC.44

21 Major-General Mpembe testified as follows regarding the content of the phone-call:

21.1 He informed General Mbombo and the JOC that he was going to deal with the situation by applying the principle of “situational appropriateness.” In terms of this approach, he wanted the strikers to disarm voluntarily but if they did not do

44 Day 146, T.16032, line 10 - 16033, line 3.
so he was going to escort them back to the koppie without insisting that they hand over their weapons.45

21.2 General Mbombo agreed with his suggested approach and said that since he was on the grounds he was the best person to make the decision. 46

22 However, when Major-General Mpembe came back from making the phone call there was a drastic change in his demeanour. He did not engage further with the strikers regarding their plea that they be escorted to the koppie. Instead, he gave the strikers an ultimatum to hand over their weapons by the count of 10 and started counting.47

23 The fact that the strikers were taken aback by this change in demeanour and in fact thought that Major-General Mpembe had agreed to their plea is apparent from the video footage. Thus, when he

45 Day 146, T.16034, lines 9 - 16; 16038, line 13 - 16039, line 2.
46 Day 146, T.16034, lines 17 – 22; Day 103, T.111127, lines 9 - 15.
47 Exhibit QQ2, p.11, lines 14 - 16.
returned from making the phone call and announced the ultimatum they responded by saying “we agreed, we agreed.”^{48}

24 Major-General Mpembe conceded that it was possible that the strikers thought that he had agreed to their plea to escort them to the koppie.\textsuperscript{49} As is evident from the video footage, Major-General Mpembe went to make his phone-call after Mr Noki made his plea for the Major-General Mpembe to escort the strikers to the koppie. He left without expressly rejecting or responding to the strikers’ plea. Thus, we submit that it is possible that Major-General Mpembe’s conciliatory attitude towards the strikers (before he left to make the phone call) together with the fact that he did not expressly reject their plea led the strikers to believe that Major-General Mpembe had in fact agreed to their plea.\textsuperscript{50}

**Major-General Mpembe’s decision to escort the strikers**

25 As noted above, Major-General Mpembe testified that he made the decision to escort the strikers to the koppie. However, he did not

\textsuperscript{48} Exhibit QQ2, p.11, line 15; Day 1466, T.16040, lines 6 - 16041, lines 15.
\textsuperscript{49} Day 146, T.16045, line 15 - 16046, line 11.
\textsuperscript{50} Day 145, T.16050, lines 3 - 13.
inform the strikers that this is what he intended to do. Nor did he tell
the strikers which route to follow. Nor, in our submission did Major
General Mpembe brief his members properly.

26 We submit that this violated the most fundamental principles of crowd
management. The policy on crowd management requires SAPS to
clarify the roles and responsibilities of the role players. In addition,
in a march, SAPS is required to negotiate with all parties to reach
mutual agreement on, amongst others factors, the route. Thus,
applying the policy on crowd management, Major-General Mpembe
was required to explain to the strikers that he had adopted a decision
to escort them and the route that he expected them to follow.

27 Major-General Mpembe also failed to brief his members properly. He
conceded that he that he only briefed the commanders. He said that he
expected them to brief the members but he did not get confirmation of
whether this in fact took place.

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51 Exhibit FFF1, at paras.4.4.2.
52 Exhibit FFF1, at paras.4.4.2.4.
53 Exhibit FFF1, at paras.4.4.2.3.
54 Day 109, T.11736, line 22 - 11737, line 7.
In addition, his briefing to the commanders was extremely brief. It was between two and four minutes.\textsuperscript{55} It did not include how the strikers were to be kept away from the informal settlements.\textsuperscript{56} This was despite the fact that Major-General Mpembe conceded that such a briefing was in fact required in terms of the “prescripts”.\textsuperscript{57} Thus, the briefing only dealt with the following:\textsuperscript{58}

28.1 Mpembe’s members were going to escort the strikers; and

28.2 They needed to check flashpoints and informal settlements and a mineshaft on their left.

We submit that, having made the decision to escort the strikers to the koppie, Major General Mpembe was grossly negligent in failing to:

29.1.1 Inform the strikers of this decision;

29.1.2 Inform the strikers of the route that he wanted them to follow; and

\textsuperscript{55} Day 109, T.11731, lines 12 - 21.

\textsuperscript{56} Day 109, T.11729, lines 1- 5; T.11733, lines 2 - 16.

\textsuperscript{57} Day 109, T.11733, line 17 - 11734, line 4.

\textsuperscript{58} Day 109, T.11734, lines 11 - 20.
29.1.3 Brief his members adequately.

30 We submit that the Commission ought to find that Major-General Mpembe was grossly negligent in these respects.

**Major-General Mpembe’s decision to block the strikers**

31 As noted above, Major-General Mpembe testified that he made the decision to escort the strikers. However, we submit that the evidence shows that he then changed his mind and gave an order to block/disperse and disarm the strikers.

32 We set out the relevant evidence below:

32.1 In his statement, Constable Plaatjie stated that Major-General Mpembe gave the instruction to stop the miners: “while General Mpembe was addressing the crowd (miners) they stand up and walk away. General Mpembe instructs us to stop
them. One nyala of POP drove after and ended up in front of the walking miners trying to stop them.”

32.2 Constable Zondi stated similarly as follows: “General instruct us to let them (the group) pass, we moved the group passed to the shacks direction and said we must escort them...Then the consents of once the group get in the shacks it will be a big problem because police are not familiar with the shacks, General Mpembe issued a command of blocking the group from going to the shacks. The first nyala from the far left of the group drove in front to block and the others followed on the right and other police officers on foot.”

32.3 In his statement Warrant Officer Mkhabele of POP said “they then start to move from where they were gathered (sitting) to the direction of the shacks. The General gave the instruction to escort the strikers. As the strikers were moving in their

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59 Exhibit HHH58, at para.5; Day 146, T.16150, lines 10 - 21.
60 Exhibit HHH57, at paras.5-6; Day 146, T.16148, line 23 - 16149, line 19.
formation, the General gave another instruction to block (stop) them as they were on their way to attack non-strikers.”

32.4 In his statement, Warrant-Officer Kuhn stated the following: “the General again told them that they have 10 seconds to put their weapons and they refused and walked forward, we let them...When they were a distance away, General Mpembe gave the command that we must keep them out of the informal settlement...”

32.5 In his statement, Constable Sekgweleya stated that “[t]he instruction was given to dispersed them with CS, and with rubber bullets.”

32.6 In his statement, Constable Mguye stated that “[w]hile they were escorting instruction was given that they must be

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61 Exhibit HHH33, para.7
62 Exhibit RRR9, paras.3-4.
63 Exhibit HHH29, Day 121, T.12496, lines 1 - 6.
dispersed and disarmed and one CS to be used. One CS was thrown to them and they started attacking the police.”

32.7 In his statement, Constable Benjamin stated that “[t]hen General Mpembe gave order/instruction to escort them. As they were walking some police official went back to the cars. I was walking close to the General and he gave instruction to disarm the mineworkers who were on strike. He (General) instructed to use one CS and two rubber per person who was walking on the field or open space. Then one member fired a CS. It landed inside the group. Then they run towards the police official. Two of the participants came straight to me with pangas on their hands.”

33 We therefore submit that the evidence overwhelmingly shows that after taking the decision to escort the strikers Major-General Mpembe changed his mind and gave a command for them to be blocked/dispersed or disarmed.

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64 Exhibit HHH30, Day 121, T.12496, lines 12 - 22.
65 Exhibit HHH31; Day 121, T.12496, line 22 - 12497, line 10.
We submit further that the evidence also overwhelmingly shows that Major-General Mpembe gave the order to Kuhn to fire the teargas for the following reasons:

34.1 Warrant-Officer Kuhn states that he heard an order to fire tear and engaged with the person who gave the order but did not know who the person was. This is highly improbable. It is far more probable that he does not want to identify the person who gave him the order.66

34.2 The fact that Warrant-Officer Kuhn does not appear to have been disciplined for firing the tear gas.

34.2.1 Paragraph 11(5) of Standing Order 262 provides as follows: “Force may only be used on the command or instruction of the CJOC or operational commander, if appointed. Members may never act individually without receiving a command from their commander.” Major-General Mpembe testified that he was exercising the functions of the operational

66 Exhibit RRR4, paras.3 - 4.
commander on 13 August 2012. He was therefore the only person who was authorised to give the order to Kuhn to fire the tear gas and denies doing so.\textsuperscript{67}

34.2.2 On Kuhn’s version, he discharged the tear gas without knowing who gave the command. He therefore acted in contravention of the Standing Order.\textsuperscript{68} If Kuhn’s version were true, Major-General Mpembe would have wasted no time in disciplining him. Under re-examination, Major-General Mpembe gave a belated and vague undertaking to do so. However, we submit that due to its late and vague nature, this undertaking was insufficient to detract from our argument in this regard. This is particularly so in view of the fact that no report has been provided to the Commission as to whether such a report was in fact carried out and what the results of

\textsuperscript{67} Day 110, T.11805, line 23 - 11809, line 6.

\textsuperscript{68} Day 110, T.11805, line 23 - 11809, line 6.
it were. 69 We submit that an adverse inference should be drawn in this regard.

34.2.3 On the other hand, we submit that Kuhn stating that he did not know who gave the order is consistent with Major-General Mpembe having given him the order to fire the tear-gas and Kuhn covering for him.

34.3 Constable Benjamin identified Major-General Mpembe as the person who gave the order.70

34.4 The evidence that Major-General Mpembe was accused at Roots of having given the instruction to fire tear-gas.

34.4.1 Thus, Major-General Mpembe testified that at Potchefstroom, Captain Thupe stated that he heard that it was Major-General Mpembe who gave the order.71

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69 Day 127, T.13220, line 17 - 13221, line 10.
70 See para.31.7 above.
71 Day 104, T.11166, line 22 - 11167, line 11.
34.4.2 Colonel Vermaak testified that Captain Thupe alleged that Major-General Mpembe gave the order for the firing of the tear-gas and the stun grenades. He stated that he knew this for a fact because Major-General Mpembe had been next to him when he did so.\(^72\)

34.5 Captain Thupe’s evidence that he heard Major-General Mpembe give the order for the firing of the tear gas and stun grenades.\(^73\)

34.6 We submit that the Commission ought to make findings to this effect.

34.7 We submit further that even if the Commission does not make findings to this effect it must still find that SAPS’ conduct was unlawful. If the Commission finds that General-Mpembe did not give the order to block the strikers, it must find that there was a mutiny amongst his members who took matters into

\(^72\) Day 206, T.25487, line 16 - 25488, line 5.

\(^73\) Exhibit QQQ9, para.6.3, Day 227, T.27938, lines 13 - 15, T.27954, lines 4 - 16.
their own hands and fired the tear-gas and stun grenades in contravention of Standing Order 262, which required an order from the Operational Commander.

The strikers did not change direction

Introduction

SAPS’ alleges that whilst Major-General Mpembe’s members were escorting the strikers they suddenly changed direction towards the informal settlement. SAPS’ members consequently discharged tear gas and stun grenades to prevent the strikers from entering the informal settlement. A group of strikers turned around and charged at the members behind them, which resulted in the death of two SAPS’ members.74

This version must be rejected. It is entirely inconsistent with the objective evidence and the evidence of SAPS witnesses. Furthermore, as we will demonstrate below it is nothing more than an ex post facto attempt to justify SAPS’ attack on the strikers.

74 Exhibit L, slides 46 - 47, Exhibit GGG12, para.19, Day, T.11705, line 11 - 11706, line 1.
In what follows, we deal with the following in turn:

37.1 The objective evidence;

37.2 The evidence of Colonel Vermaak and Captain Loest; and

37.3 The evidence of Major-General Mpembe.

**The objective evidence**

38 The objective evidence shows that SAPS’ version is manifestly false.

39 On the basis of the objective evidence, the following is clear:

39.1 Before the firing of stun grenades and tear gas, the strikers did not change direction. They walked in a straight line in the direction of the koppie.75

39.2 Despite the fact that the strikers did not change direction, SAPS members’ fired tear gas canisters at them. On the video footage, tear gas canisters can be seen being fired before the

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75 Exhibit HHH59, slides 3 – 8.
pandemonium starts. Despite this teargas the strikers continued to walk in the same direction. They did not change direction.\textsuperscript{76}

A stun grenade was then fired. The flash and distinctive double flash are clearly visible on the video footage.\textsuperscript{77} The strikers began to run in all directions. In short; there was general pandemonium. It was only at that stage that the strikers ran back towards the police. It is clear from the video footage that the tear gas in effect drove the strikers back towards the police. This is because the cannisters were thrown over the strikers and the wind blew the smoke from the tear gas back towards them, which effectively pushed the strikers back towards the SAPS members behind them.\textsuperscript{78}

Thus, the objective evidence makes the following clear:

\textsuperscript{76} Exhibit Z2 from 14:27:35 – 14:27:58; Exhibit HHH59, slide 8. See also, Exhibit OOO20, slides 4 – 8.

\textsuperscript{77} Exhibit Z2 at 14:27:56.

\textsuperscript{78} Exhibit Z2, from 14:27:35 – 14:27:58; Exhibit OOO20, slides 4 – 14; and Exhibit HHH59, slide 8;
40.1 The strikers did not change direction before SAPS fired the stun grenade at them;

40.2 The SAPS firing of tear gas and stun grenades at the strikers was unprovoked; and

40.3 It was this unprovoked attack against the strikers, which caused the confrontation between the strikers and the SAPS’ members.

41 We submit that the evidence of the relevant SAPS witnesses confirms this. We deal with this below.

The evidence of Colonel Vermaak and Captain Loest

42 Colonel Vermaak and Captain Loest were in the helicopter above the strikers. Their evidence confirms the conclusions set out above on the basis of the objective evidence.

43 Colonel Vermaak testified as follows:
43.1 With reference to Exhibit B, slide 3, the strikers were in the vicinity of the letter “W” and were walking in a straight line in the direction of where the CAS 115/08/2012 is indicated.79

43.2 The strikers did not change direction at all before the use of the tear gas or stun grenades; they all walked in the same direction.80

43.3 Colonel Vermaak’s testimony of the direction in which the strikers walked is indicated on Exhibit OOO13. This confirms the analysis in Exhibit HHH59 regarding the direction in which the strikers walked.

43.4 Colonel Vermaak was surprised when he saw SAPS members firing tear gas and stun grenades. 81

43.5 From Colonel Vermaak’s vantage point in the helicopter, he could not see any reason for SAPS to discharge tear gas and stun grenades. 82

79 Day 205, T.25227, lines 5 - 14.
80 Day 109, T.25231, lines 21 - 25.
81 Day 109, T.25232, lines 11 - 25.
43.6 It was only after the firing of the tear gas and the stun grenades that the confrontation between SAPS and the strikers occurred.\textsuperscript{83}

44 Captain Loest testified as follows:

44.1 He confirmed Vermaak’s testimony regarding the direction in which the strikers were walking. He thus confirmed the correctness of Exhibit OOO13.\textsuperscript{84}

44.2 He testified that at the time that the teargas was thrown he could not see the ground.\textsuperscript{85}

44.3 He testified that, while in the helicopter, Colonel Vermaak asked him if he could see any reason why the tear gas was thrown.\textsuperscript{86}

\textsuperscript{82} Day 109, T.25232, lines 11 - 25.
\textsuperscript{83} Day 109, T.25233, lines 1 – 5.
\textsuperscript{84} Day 229, T.28326, lines 1 - 10.
\textsuperscript{85} Day 229, T.29298, lines 11 - 15.
\textsuperscript{86} Day 229, T.28298, line 17 - 28299, line 2.
Thus, the evidence of Colonel Vermaak and Captain Loest, who were in the helicopter above the scene, confirms the correctness of the objective analysis of the strikers’ movement and the fact that it was SAPS’ discharge of the tear gas and stun grenades which caused the confrontation between the strikers and the police.

**The evidence of Major-General Mpembe**

Major-General Mpembe’s evidence is also consistent with the objective evidence in a number of material respects.

Under cross-examination, Major-General Mpembe conceded the following:

47.1 Even after the tear gas was thrown, the strikers continued to walk forward in the same direction. They had not begun to run or turned back towards the police.87

47.2 It was only after the stun grenades were fired that the strikers began to run in different directions.88

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87 Day 111, T.11847, lines 16-21, T.11848, lines 7-11.
Major-General Mpembe conceded further that it was the discharge of the stun grenades that caused the confrontation between the strikers and the police:\textsuperscript{89}

“Mr Mpofu: Yes. When you said to the Commission that the firing of the tear gas which goes together with the stun grenades, was the spark, what did you seek to convey, was the spark of the incident?

Major-General Mpembe: I need to convey, what I needed to convey is that that’s what made the protestors to attack the police.”

Notably, in his statement made on 13 August 2012 Major-General made no mention of the strikers changing direction towards the informal settlement or of that being the reason that for SAPS members discharge of tear gas or stun grenades.\textsuperscript{90} Indeed, we point out that the evidence has established that not a single SAPS statement made prior to Roots alleges that the strikers changed direction and started veering towards the informal settlement on 13 August 2012.

\textsuperscript{88} Day 111, T.11851, lines 3 - 8, T.11860, line 2 - 11861, line 8.

\textsuperscript{89} Day 147, T.16313, lines 2 - 8.

\textsuperscript{90} Exhibit HHH13, at para 4
We submit that this proves that the SAPS’ version in this regard is nothing more than an *ex post facto* attempt to justify SAPS’ unprovoked attack on the strikers.

**Conclusion**

The strikers did not change direction towards the informal settlement. They also did not do anything else that provoked or justified SAPS’ discharge of the teargas and stun grenades. Thus, SAPS’ conduct in this regard amounted to an unprovoked attack on the strikers. It was this attack that caused the confrontation between the police and the strikers and the deaths that ensued.

**Conclusion**

We accordingly submit that on the basis of the objective evidence and the evidence of the relevant SAPS witnesses, the Commission must make the following findings:

52.1 Before the tear gas and stun grenades were thrown, the strikers were walking in a straight line towards the koppie;
52.2 Before SAPS’ members discharged tear gas and stun grenades the strikers did not change direction;

52.3 SAPS’ discharge of tear gas and stun grenades amounted to an provoked attack by SAPS against the strikers; and

52.4 It was SAPS’ discharge of tear gas and stun grenades that caused the confrontation between the strikers and the police and the deaths that ensued.

52.5 The SAPS is thus responsible for the deaths of the three strikers who died on 13 August 2012; Mr Mati, Mr Jokanisi and Mr Sokanyile.

52.6 We will now deal with the deaths of the strikers, Mr Mati, Mr Jokanisi and Mr Sokanyile and submit that their deaths were plainly unlawful.
Mr Mati, Mr Jokanisi and Mr Sokanyile

Introduction

The three protestors who were killed on 13 August 2012 were Mr Mati, Mr Jokanisi and Mr Sokanyile. We submit that they were killed unlawfully by members of SAPS.

In what follows below we will address the killing of each of them in turn.

Mr Mati

Mr Mati was shot and killed unlawfully by members of SAPS.

Mr Mati was killed approximately 200 metres from the scene of the main confrontation. His body was found in the adjacent field outside a hut.\(^91\)

Mr Mati was one of the group of strikers at the railway line. This is clear from Exhibit HHH53, which is an affidavit by Mr Lanford

\(^91\) Exhibit B, slides 1 - 3.
Gcotelwa who was Mr Mati’s cousin. In the affidavit, Mr Gcotelwa confirmed, on the basis of screenshots taken from the video footage of the strikers at the railway line on 13 August 2012, that Mr Mati was one of the group. On the basis of the affidavit, Major-General Mpembe accepted that Mr Mati was one of the strikers.

Mr Mati sustained the following wounds:

58.1 A wound to the front of his thigh;

58.2 A wound to the right lower buttock;

58.3 Two superficial wounds to his face (left cheek and left eyebrow); and

58.4 An abrasion on the right elbow.

The initial pathology report concluded that the wound to Mr Mati’s thigh and buttock was a stab wound. This was clearly incorrect.

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92 Exhibit HHH53, paras.4 - 6,
93 Day 145, T.16066, lines 12 - 20.
94 Exhibit RRRR5, para.3; Exhibit A (1.1), para.4.
95 Exhibit A (1.1), p.1.
subsequent report from Dr Naidoo made this clear. He concluded as follows:96

“The features are, in my opinion confidently that of a gunshot wound through the thigh, and not a stab wound.”

This is also clear from the Lonmin security casebook regarding Mr Mati. It is clear that the casebook related to Mr Mati because the CAS No for the case that was opened in relation to his death, CAS116/08/2012 is at the bottom of the first page.97

The person who compiled the report and who made the statement attached to it was Mr Obed Meku, who was an investigating officer in the Lonmin Security division.98 In the statement, he stated that he reported to Mr Henry Blou.99 Mr Blou confirmed this during his cross-examination.100 Mr Blou also confirmed that a Lonmin Security

96 Exhibit RRRR5, at para 9(a).
97 Exhibit RRRR4, p.1; Day 283, T.36461, lines 5 - 9.
98 Exhibit RRRR4, paras.3.1 - 3.5; Day 283, T.36462, lines 7 - 10.
99 Exhibit RRRR4, p.2.
100 Day 283, T.36462, lines 2 - 6.
casebook is opened whenever a Lonmin employee dies of unnatural causes, for example murder.\textsuperscript{101}

Mr Blou conceded the following generally about the manner in which a Lonmin security officer would conduct an investigation:\textsuperscript{102}

62.1 They would inspect the scene;

62.2 They would interview relevant witnesses;

62.3 They would interview the complainant if there was one;

62.4 They would always act subordinate to SAPS. Thus, where it is a SAPS case they would seek permission to go to the crime scene; and

62.5 They would collect exhibits.

The Lonmin Security casebook for Mr Mati indicated as follows:

63.1 The charge that was being investigated was murder;\textsuperscript{103}

\textsuperscript{101} Day 283, T.36460, lines 16 - 22.

\textsuperscript{102} Day 283, T.36462, lines 16 - 22.
63.2 Mr Mati died as a result of gunshots.\textsuperscript{104}

64 Mr Meko’s statement recorded the following:\textsuperscript{105}

“The unknown black male ran towards group 5 house and fell down and he was bleeding. The deceased was one of the people who are on strike it is believed that the deceased is one of the suspect who killed the SAPS policemen that’s why he was shot and he tried to run away with R5 rifle…”

65 Thus, from the casebook it is clear that Mr Mati was shot by SAPS officers. Mr Blou conceded this.\textsuperscript{106} He also conceded that the information in Mr Meko’s statement, which is set out above, would have come from the police.\textsuperscript{107}

66 Therefore, the only reasonable inference is that Mr Mati was shot and killed by SAPS members. SAPS has provided no version as to how Mr

\textsuperscript{103} Exhibit RRRR4, para.2.1.
\textsuperscript{104} Exhibit RRRR4, para.2.5.
\textsuperscript{105} Exhibit RRRR4, p.2 (para.4 of statement).
\textsuperscript{106} Day 283, T.36464, line 18 - 36465, line 1.
\textsuperscript{107} Day 283, T.36464, line 23 - 36465, line 1.
Mati was shot and killed. We submit that the Commission must therefore find that his death was unlawful.

Mr Jokanisi

We submit that Mr Jokanisi was shot and killed unlawfully by SAPS.

The relevant objective evidence is the following:

68.1 Exhibit B, slide 3 indicates the position were Mr Jokanisi was shot and killed relative to the scene of the main confrontation:

68.2 Mr Jokanisi's body was found at position "E".\(^{108}\)

68.3 Warrant Officer Monene and Warrant Officer Lepaaku's bodies were found namely, position "C" and position "D" respectively.\(^{109}\)

68.4 The distance between position of Warrant-Officer Monene's body and Mr Jokanisi's body was 150 metres.\(^{110}\)

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\(^{108}\) Exhibit B, slides 1 - 3.

\(^{109}\) Exhibit B, slides 1 - 3.
68.5 No distance has been provided for the distance between the body of Mr Jokanisi and the body of Warrant-Officer Lepaaku. However, it is estimated to be 80 - 100 metres.

69 Mr Jokanisi sustained the following wounds:

69.1 An entrance wound to the left upper axilla, which is the left armpit;\textsuperscript{111}

69.2 An entrance wound to the right iliac fossa, which is the right hip;\textsuperscript{112}

69.3 An exit wound to the left posterior shoulder, which is the back of the left shoulder;\textsuperscript{113}

69.4 A laceration on the left axilla (50 mm x 20 mm);\textsuperscript{114}

69.5 A fracture of the left humerus;\textsuperscript{115}

\textsuperscript{110} Day 4, T.285, 289.
\textsuperscript{111} Exhibit A, p.13 - 18, para.4(a)(i).
\textsuperscript{112} Exhibit A, p.13 - 18, para.4(a)(ii).
\textsuperscript{113} Exhibit A, p.13 – 18, para.4(a)(b).
\textsuperscript{114} Exhibit A, p.13 – 18, para.4(a)(c).
69.6 The bullet was lodged in the lumbar on the region and retrieved;\textsuperscript{116} and

69.7 In addition, the spinal column and spinal cord were examined; both the lumbar spine and the lumbar spinal cord had gunshot injuries.\textsuperscript{117}

70 The probabilities are that the injury to Mr Jokanisi’s spinal column would have incapacitated him immediately. Mr Jokanisi was shot and killed 80 and 150 metres away from where Warrant-Officer Lepaaku and Warrant-Officer Monene, respectively, were killed. We submit that he was therefore clearly not shot and killed during this confrontation.

71 We submit that the only reasonable inference is that Mr Jokanisi was shot and killed unlawfully.

\textsuperscript{115} Exhibit A (1.3), p.13 – 18, para.4(a)(d).
\textsuperscript{116} Exhibit A (1.3), p.13 – 18, para.4(a)(e).
\textsuperscript{117} Exhibit A (1.3), p.13 – 18, p.15.
Mr Sokanyile

72 Mr Sokanyile was the striker in the white overalls who was killed across the river approximately 620 metres from the scene of the main confrontation.118

73 We submit that Mr Sokanyile was shot and killed unlawfully. This is clear from the following:

73.1 Lieutenant-Colonel Vermaak’s evidence about the killing of Mr Sokanyile;

73.2 The position where Mr Sokanyile’s was shot and killed;

73.3 The injuries that he sustained;

73.4 The position from where Mr Sokanyile was shot; and

73.5 The SAPS members who shot at the scene where Mr Sokanyile was killed; and

118 See Exhibit OOO23, slide 2.
73.6 The statements of the SAPS members who shot at the scene where Mr Sokanyile was killed.

74 In what follows below, we address each of these aspects of the evidence in turn.

*Lieutenant-Colonel Vermaak’s evidence regarding the killing of Mr Sokanyile*

75 Lieutenant-Colonel Vermaak’s (“Vermaak”) evidence was that while the helicopter was circling to land he saw a protestor in a white overall being carried.119 After the helicopter landed, he asked Captain Loest to gather together a group of members in order to pursue the strikers.120

76 They pursued the strikers to where they crossed a stream. The strikers then fired at his members with a shotgun and an R5.121 On the basis of an instruction from Lieutenant-Colonel Vermaak, one of his

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119 Day 205, T. 25242, Lines 10 - 17
120 Day 205, T. 25243, Lines 4 - 16
121 Day 205, T.25245, lines 4 - 8.
members fired a single shot back at the striker who was shooting at them.122

Vermaak used Exhibit “OOO6” to indicate where this occurred. He testified that the striker who was shooting at the SAPS members was where the end of the point of the arrow is.123 The SAPS members shot in the direction of the arrow.124 Lieutenant-Colonel Vermaak testified that neither he nor any of his members shot in any other direction in that area.125

The position of Mr Sokanyile’s body

We submit that Vermaak’s evidence regarding the position of Mr Sokanyile’s body was clearly incorrect. The true position of Mr Sokanyile’s body is indicated on Exhibit OOO23, slides 6 - 7.

If regard is had to Exhibit OOO23, slide 6, certain landmarks are visible. To the left of Mr Sokanyile’s body are tree stumps and a ridge

122 Day 205, T.25248, lines 4 – 10.
123 Day 205, T.25248, line 21 - 25249, line 9.
124 Day 205, T.25249, lines 13 - 16.
125 Day 205, T.25249, line 24 - 25250, line 1.
(Point A). To the right is a tree (Point B). Point C indicates the position of the photographer. Towards the centre of the photograph, a pathway can be seen, which crosses the stream and curves to the right.

Using these landmarks, the position of Mr Sokanyile’s body has been indicated on Exhibit OOO23, slide 7. It was between points A, B and C and approximately 60 - 65 metres away from where Vermaak testified it was.

The injuries that Mr Sokanyile sustained

We submit that Colonel Vermaak’s version is entirely inconsistent with the injuries that Mr Sokanyile sustained.

Mr Sokanyile was shot once. The entrance wound was in his left cheek. The exit wound was in the nape of the spine of his neck. His lumbar spinal column and cord were injured. Mr Sokanyile would therefore

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126 Day 211, T.26122, line 12 - 26123, line 3.
127 Day 211, T.26123, lines 4 - 10.
128 Day 211, T.26123, line 14 - 26124, line 12.
have died immediately or almost immediately. He would have been immediately incapacitated.

When regard is had to the weapons that were underneath Mr Sokanyile’s body it becomes clear that Vermaak’s version was incorrect:129

83.1 Mr Sokanyile was lying face down when the LCRC personnel arrived on the scene.130

83.2 There was a stick and a panga underneath Mr Sokanyile’s body.

83.3 The stick and the handle of the panga were protruding from the right side of his body near his right hand.

83.4 However, his left hand was holding the handle of the panga; the fingers of his left hand can be seen around it.

129 Exhibit OOO23, slides 11 - 12.
130 Exhibit OOO23, slide 10; Day 211, T.26127, lines 4 - 23.
Vermaak’s version was therefore clearly incorrect. It is highly improbable that the strikers would have carried a dead man for approximately 620 metres, including across a stream, while fleeing from the police. It is even more improbable that they would/could have carried him while fleeing and hold his left hand around the handle of the panga.

Colonel Vermaak ultimately conceded that:

85.1 Mr Sokanyile could not have been the striker that he saw being carried from the helicopter.\(^{131}\)

85.2 It was highly improbable that the strikers would have carried Mr Sokanyile for 620 metres holding his hand around the handle of the panga.\(^{132}\)

85.3 Mr Sokanyile must have been shot and killed at the position where his body was found.\(^{133}\)

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\(^{131}\) Day 211, T.26131, line 18 - 26132, line 3.

\(^{132}\) Day 211, T.26132, lines 4 - 12.

\(^{133}\) Day 211, T.26131, line 18 – 26132, line 3.
Thus, we submit that the only reasonable inference is that Mr Sokanyile was shot and killed at the position where he fell.

*The position from where Mr Sokanyile was shot*

We submit that contrary to Vermaak’s version, Mr Sokanyile was killed from a position on the other side of the river to where he was and directly in line with his body.

Captain Mushwane who processed the scene, produced a sketch of where the cartridges were found relative to Mr Sokanyile’s body. The majority of cartridges were found on the western side of the river directly in line with Mr Sokanyile’s body, which was on the eastern side of the river.134

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134 Exhibit OOO26, Exhibit OOO23, slide 16, Day 211, T.26133, line 14 - 26134, line 12.
The photograph of the scene makes this clearer. It plots where the some of the cartridges cases were found relative to where Mr Sokanyile’s body was.135

Exhibit OOO23, slide 2, thus depicts the position of the cartridge cases relative to where Mr Sokanyile’s body was. His body was in the red circle. This is confirmed by Exhibit B, slide 10.136

Vermaak conceded that Exhibit, slide 10, was not necessarily accurate because the scene was not marked. Colonel Botha compiled the slide simply by flying over the scene and indicating to members on the ground where to stand. Thus, it was an estimate of where Mr Sokanyile’s body was found and not an objective verification.137

Thus, to the extent that there are discrepancies between Exhibit B, slide 10 and Exhibit OOO23, slide 2, we submit that the latter must be accepted because it is based on an objective analysis based on landmarks.

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135 Exhibit OOO25, photograph 17, Exhibit OOO23, slide 21; Day 211, T.26135, lines 9 - 20.
Vermaak’s also confirmed that they saw Mr Sokanyile’s body testimony once they crossed the stream and were again on level ground. On the basis of that testimony Vermaak could not be correct about where they crossed the stream. He must have crossed the stream at approximately the position where the cartridge cases were.

Behind his body, in a line, there is a bigger red circle, which is the approximate area where the cartridges were found. The position of the cartridge cases is also confirmed by Exhibit B, slide 10.

Vermaak accepted, based on the measurements between the cartridge cases on Captain Mushwane’s sketch plan, that the approximate diameter of the area where the cartridge cases were found was approximately 12.5 - 13 metres.

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139 Day 205, T.25245, lines 5 - 13, Day 213, T.26218, line 15 - 26220, line 1.
140 Day 211, T.26135, line 21 - 26136, line 6.
142 Exhibit OOO25, p.6; Day 211, T.26150, line 16 – 26154, line 6.
Therefore, as Vermaak conceded, the cartridge cases were all found in one location. Vermaak conceded further that this would apply even if the depiction of the area in which the cartridge cases were found was 2 - 3 metres too small or big or to the left or right or up or down.

Captain Mushwane testified that the cartridge cases were 74.4 metres away from Mr Sokanyile’s body.

No cartridges were found at the position from which Vermaak testified his members fired. Thus, we submit that Vermaak’s evidence in this regard was clearly incorrect.

We submit that on the probabilities the members who were under Vermaak’s command must have fired from the position where the

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143 Day 211, T.26156, line 24 - 26157, line 3.
144 Day 213, T.26213, lines 7 - 14.
145 Day 6, T.645, lines 9 - 11.
146 Day 211, T.26158, line 3 – 26160, line 4.
cartridge cases were found. Vermaak’s insistence otherwise impacts negatively on his credibility.147

100 This position was directly in line with Mr Sokanyile’s body and 74.4 metres away. In addition, as noted above, he was shot once in the head. We submit that he was shot execution-style from the other side of the river.

The SAPS members who shot at the scene where Mr Sokanyile was killed

101 The SAPS members who shot at the scene where Mr Sokanyile was killed were Constable Yende, Constable Mogale or Constable Mguye. We submit that the only reasonable conclusion is that one of these members shot and killed Mr Sokanyile.

102 The affidavit of De Caires related to the death of Mr Sokanyile. This is indicated by the CAS number, CAS 115/08/2012, was on the first page. The LAB number for the case is indicated on the right-hand corner of the affidavit as 268994/2012.148

147 Day 211, T.26158, line 3 – 26160, line 4.

148 Exhibit OOO27, Day 212, T.26173, line 3 - 26175, line 1.
The affidavit listed 17 cartridge cases as having been found at the scene. These were cartridges cases B - O and Q - S. Except for cartridge case H, all of the cartridge cases were from 9mm pistols. Cartridge case H was from a 5.56 mm rifle.

De Caires concluded that cartridge cases B - E, G, J - M and O and R and S were fired from the same firearm. She concluded further that cartridge cases F, I, N and Q were fired from the same firearm. The remaining cartridge case H, which was from a rifle, must have been fired from a separate firearm. Thus, the 17 cartridge cases that were found at the scene were fired from three firearms.

From Lieutenant-Colonel Pieterse’s affidavit read together with the discharge sheet, it is clear which members fired these firearms. From this affidavit the following is clear:

105.1 Cartridge case H was fired from the rifle with serial number 336969.

Exhibit OOO27, paras.3.1 - 3.2, 4.1 - 4.3, Day 212, T.26175, lines 13 - 19.
Exhibit OOO27, paras.6.1, 3.1 and 4.1, Day 212, T.26176, lines 3 - 11.
Exhibit OOO27, paras.3.2, 4.2 and 6.2, Day 212, T.26176, lines 18 - 21.
Day 212, T.26176, line 21 - 26177, line 9.
Exhibit OOO28, para.10, Day 212, T.26177, line 23 – 26178, line 2.
Mguye was issued with the relevant rifle on the particular day and thus fired the particular cartridge.\textsuperscript{155}

105.2 Cartridge cases B - E, G, J - M, O, R and S were fired from the firearm with serial number Q049587.\textsuperscript{156} From the discharge sheet it is clear that Constable Yende was issued with the relevant firearm on the particular day and thus fired those cartridges.\textsuperscript{157}

105.3 Cartridge cases F, I, N and Q were fired from the firearm with serial number Q036933.\textsuperscript{158} From the discharge sheet it is clear that Constable Mogale was issued with the relevant firearm on the particular day and thus fired those cartridges.\textsuperscript{159}

106 We point out that Colonel Vermaak conceded that he did not see another group firing from the position where the cartridges were found. As far as he was aware, there was no other SAPS group in the

\textsuperscript{154} Exhibit OOO28, paras.13.2.

\textsuperscript{155} Exhibit HHH23, number 15, Day 212, T.26178, lines 12 - 26179, line 20.

\textsuperscript{156} Exhibit OOO28, para.13.4, Day 212, T.26182, lines 6 - 13.

\textsuperscript{157} Exhibit HHH23, number 6, Day 212, T.26182, lines 19 - 25.

\textsuperscript{158} Exhibit , para.13.5, Day 212, T.26186, lines 6 - 11.

\textsuperscript{159} Exhibit HHH23, number 13, Day 212, T.26186, lines 13 - 23.
vicinity other than his. We submit that it is highly improbable that another group could have gone to the river and fired at strikers without Colonel Vermaak being aware of it.

For all of the above reasons, we submit that the Commission must therefore find the following:

107.1 The strikers did not fire at the SAPS members.

107.2 Colonel Vermaak must have been incorrect about where he said his members fired from because no cartridge cases were found there. His members must have fired from the position where the cartridge cases were found.

107.3 One of the three police officers whose firearm is linked to the scene, Constable Yende, Constable Mguye or Warrant-Officer Mogale, must have shot and killed Mr Sokanyile.

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161 Day 212, T.26188, lines 6 - 12.
162 Day 212, T.26189, lines 1 - 21.
163 Day 212, T.26187, line 20 - 26188, line 1.
The statements of the SAPS members who shot at the scene where Mr Sokanyile was killed

108 The supplementary statements of Sergeant Mguye and Constable Sekgweleya confirm that the SAPS members who shot at Mr Sokanyile were under Vermaak’s command.

109 As noted above, Sergeant Mguye was one of the members whose cartridge cases were found at the scene. In his supplementary statement, he states that he was one of the members under Vermaak’s command who pursued the strikers down to the river. He and other members fired at Mr Sokanyile from the position of the red circle on Exhibit OOO23, slide 23 indicating where the cartridge cases were found. They did so on the basis of an instruction from Vermaak. As the result of the shooting, Mr Sokanyile was killed. Constable Sekgweleya’s statement provides similarly.

164 Exhibit QQQ8, paras.6 -7.
165 Exhibit QQQ8, paras.9 -10.
166 Exhibit QQQ8, para.11.
167 Exhibit QQQ7, paras.8 - 13
Conclusion

110 We therefore submit that Mr Mati, Mr Jokanisi and Mr Sokanyile were killed unlawfully by the police.

Conclusion

111 We submit that the Commission must therefore make the following findings:

111.1 The strikers did not change direction towards the informal settlement;

111.2 The firing of tear gas and stun grenades thus amounted to an unprovoked attack by SAPS against the strikers;

111.3 It was this attack that caused the confrontation between the police and the strikers;

111.4 Mr Mati, Mr Jokanisi and Mr Sokanyile were killed unlawfully; and
111.5 Mr Sokanyile was shot execution-style from the other side of the river.

112 The Commission must make the following recommendations:

112.1 Vermaak must be investigated and prosecuted for the murder of Mr Sokanyile;

112.2 Sergeant Mguye must be investigated and prosecuted for the murder of Mr Sokanyile;

112.3 Constable Yende must be investigated and prosecuted for the murder of Mr Sokanyile;

112.4 Constable Sekgweleya must be investigated and prosecuted for the murder of Mr Sokanyile;

112.5 Constable Mogale must be investigated and prosecuted for the murder of Mr Sokanyile; and

112.6 Constable Rhekotso (identified in the statements of Mguye and Sekgweleya as being a member of their group that shot and
killed Mr Sokanyile) must be investigated and prosecuted for
the murder of Mr Sokanyile).
Part C – SAPS’ failure to negotiate

Introduction

113 At the time that SAPS implemented the tactical plan, negotiations had not been exhausted. In fact, there were reasonable prospects that the strike could be resolved by negotiation. There had also not been an increase in the threat level.

114 We will therefore submit that there was no operational need for SAPS to implement the tactical plan when it did. It was consequently grossly negligent for it to have done so.

Negotiations had not been exhausted

115 At the time that SAPS took the decision to implement the tactical plan, negotiations had not been exhausted.

116 During the evening of 15 August 2012, on the basis of a challenge issued by Mr Xolani Gwala of SAFM, Mr Mathunjwa, the President of
AMCU and Mr Zokwana, the President of NUM, went to address the strikers on the Koppie.

Mr Zokwana was not well received by the strikers. Mr Mathunjwa on the other hand was favourably received. He communicated to the strikers Lonmin’s undertaking that it was willing to engage with the strikers’ demands through the appropriate structures if they laid down their weapons and returned to work.

The strikers indicated that they were willing to consider this. SAPS’ negotiators had previously communicated the same undertaking to the strikers.

At the subsequent SAPS’ debriefing, the SAPS’ leadership was positive that the situation would be able to be resolved through negotiation the following day. The mood was one of jubilation and celebration.

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169 Day 22, T.2323, line 10 – 2324, line 2.
170 Day 22, T.2322, lines 11 – 18.
171 Day 77, T.8222, line 15; Day 80, T.8487, line 8; Day 94, T.10043, lines 1 - 18; T.10045, lines 12 - 24.
172 Day 95, T.10077, lines 3 – 11.
overall commander, Major-General Mbembe even told Mr Mathunjwa that he was very impressed.\textsuperscript{173}

Yet, the following day, Lonmin reneged on its commitment to engage with the strikers through the structures if they returned to work. Mr Mathunjwa was thus not able to report to the Koppie at 9:00 as he had arranged with the strikers he would do. When Mr Mathunjwa reported this to the Provincial Commissioner her response was to berate him for not upholding his commitment and insist that he did so.

This was a shocking and grossly negligent approach for SAPS to adopt. Thus, Major-General Annandale conceded the following in this regard:

121.1 The news that Lonmin was reneging on its commitment to engage with the strikers if they returned to work should have been of grave concern to SAPS.\textsuperscript{174}

121.2 SAPS should, as a matter of urgency, contacted Lonmin and insisted that they honour their undertaking to the strikers.

\textsuperscript{173} Day 107, T.11520, lines 13 – 19.

\textsuperscript{174} Day 94, T.10051, line 7 - 10052, line 7.
SAPS should therefore have done something to get the negotiations back on track.\(^ {175}\)

121.3 There was therefore a lot more that SAPS could have done to act as the intermediary between Mr Mathunjwa and Lonmin in order to get the parties together to talk further and SAPS should have done so.\(^ {176}\)

Thus, instead of SAPS contacting Lonmin to insist that it honour its commitment, it allowed Mr Mathunjwa to go back to the Koppie and deliver bad news to the strikers. Thus, SAPS left Mr Mathunjwa to attempt to carry out “mission impossible”; to go back to the Koppie and attempt to get the strikers to lay down their arms in circumstances where Lonmin had reneged on its commitment to engage with the strikers if they returned to work.\(^ {177}\)

123 When Mr Mathunjwa left the Koppie after addressing the strikers, which was at approximately 13:25, he told Brigadier Calitz that he was going to try and persuade management to come and address the

\(^{175}\) Day 94, T.10051, line 7 - 10052, line 7, T.10052, line 21 - 10053, line 9.

\(^{176}\) Day 94, T.10056, line 14 - 10057, line 23.

\(^{177}\) Day 94, T.10056, line 19 - 10057, line 8.
strikers at the Koppie because they were not happy.\textsuperscript{178} Brigadier Calitz reported this to the JOC.\textsuperscript{179}

It was at that time that the 13:30 JOCCOM meeting was being held to discuss the implementation of the tactical phase of the plan. Thus SAPS went ahead with the tactical phase of the plan without getting feedback from Mr Mathunjwa and without giving him an opportunity to see if he could get management to address the strikers or to continue in his efforts to persuade the strikers to leave the Koppie.\textsuperscript{180}

Thus, the Provincial Commissioner conceded the following in this regard:

125.1 The Provincial Commissioner had not been told of this information.\textsuperscript{181}

125.2 Major-General Mpembe instead told her that negotiations had failed before the 13:30 JOCCOM meeting.\textsuperscript{182}

\textsuperscript{178} Exhibit KKK55.

\textsuperscript{179} Exhibit FFF25, entry 1010.

\textsuperscript{180} Day 94, T.10056, line 19 - 10057, line 8.

\textsuperscript{181} Day 183, T. 22066, Lines 14 - 25
125.3 If she had been told this information before the 13:30 JOCCOM meeting started it would have made a difference to her decision to go to the tactical phase of the operation. She might have decided that the tactical part of the operation could wait.\textsuperscript{183}

126 Therefore, Major-General Annandale’s evidence that negotiations had deadlocked and that Mr Mathunjwa had been unable to persuade the strikers to lay down their weapons must be rejected:\textsuperscript{184}

126.1 Negotiations between the parties had not deadlocked. All that had happened was that Lonmin had reneged on its commitment to engage with the strikers if they returned to work and SAPS should have immediately contacted Lonmin and insisted that it honour its commitment.

126.2 SAPS implemented the tactical plan without getting feedback from Mr Mathunjwa regarding his first address and without allowing him to continue to negotiate with the strikers.

\textsuperscript{182} Day 183, T. 22066, lines 14 - 25
\textsuperscript{183} Day 183, T. 22067, lines 1 - 25
\textsuperscript{184} Day 183, T.10042, lines 6 – 14.
The only reasonable conclusion is that rather than negotiations being deadlocked, SAPS abandoned its efforts to negotiate because it had already taken the decision to implement the tactical plan.

This is supported by the fact that the decision to implement the tactical plan was taken the evening before by Major-General Mbombo and endorsed by the extraordinary sessions of the NMF. This decision was taken regardless of whether the situation escalated the following day or not.\footnote{Day 180, T.21593, lines 1 – 7; 21600, line 10.}

**Conclusion**

The Commission should make the following findings:

129.1 At the time that the tactical plan was implemented negotiations were not deadlocked and they had not been exhausted.

129.2 At most, Lonmin had reneged on its commitment to engage with the strikers. SAPS should, as a matter of urgency, negotiated further with Lonmin in this regard.
129.3 Mr Mathunjwa was also still in the process of negotiating with the strikers when the tactical plan was implemented. SAPS should have made full use of the opportunity presented by Mr Mathunjwa’s willingness to negotiate with the strikers and exhausted this avenue for negotiating an end to the strike.

129.4 It was grossly negligent of SAPS to implement the tactical plan in circumstances where negotiations had not been implemented.

The threat level did not increase before the tactical plan was implemented on 16 August 2012

130 Three SAPS witnesses gave evidence regarding the alleged escalation of the threat level during the morning of 16 August 2012.

131 These witnesses were Major-General Annandale, Brigadier Calitz and Lieutenant-Colonel McIntosh. In what follows, we will deal with the evidence of each witness in turn. We will submit that the Commission should reject their evidence in this regard.
We will submit that the threat level did not increase before the implementation of the tactical plan.

**Major-General Annandale**

Major-General Annandale alleged two further reasons for SAPS’ decision to implement the tactical plan, namely an increase in the threat level and the fact that the mood of the strikers had changed.\(^{186}\) This evidence must also be rejected.

Exhibit L, slide 118 alleges that on 15 August 2012, at about 10:15 the representatives of the strikers said that they wanted the telephone number of the commander and they would provide him with the telephone number of Advocate Shapiro. It states further that one of the representatives became aggressive and said that the police should not be there and the people in the hippos would die there and not one Nyala would leave that ground.

There is no objective evidence that supports this. The SAPS occurrence book records that the exchange in which the strikers mentioned

\(^{186}\) Day 183, T.10042, lines 6 – 14.
Advocate Shapiro happened at 10:20 on 15 August 2012. The next entry states that the representatives went back to their group and said that they wanted mine management to come and talk to them. It does not record anything that remotely resembles a threat.

In addition, Brigadier Calitz’s statement also referred to the exchange where the strikers’ representatives referred to their lawyer. However, he also did not record anything along the lines of the threat that is alleged in Exhibit L, slide 118. Brigadier Calitz conceded that he could not confirm the correctness of Exhibit L, slide 118 with regards to the alleged threat and that it was not accurate.

Exhibit L, slide 192 alleges that Mr Noki made two threats against the police. The first one was allegedly made at 13:40; and the second one was allegedly made at 15:40. Yet, by time these threats were allegedly made, SAPS had made already the decision to implement the tactical phase. Thus, even if Mr Noki did make these threats, they in no way

187 Exhibit FFF25, entry 178.
188 Exhibit FFF25, entry 179.
189 Exhibit JJJ107, para.58.
190 Day 174, T.20732, lines 2 - 8; T.20732, line 20 - 20733, line 5.
influenced SAPS’ decision to implement the tactical phase of the plan. Major-General Annandale conceded this.191

Similarly, Exhibit L, slide 189 alleges that the mood of the strikers changed and the media withdrew because they were in fear of their safety. Yet, this is alleged to have occurred at 15:35, which was also after the decision to go to the tactical phase had been made and therefore could not have influenced the decision. Major-General Annandale conceded this too.192

Major-General Annandale conceded further that, on the basis of Exhibit L, slide 170, the withdrawal of the video operators was also alleged to have taken place at 13:25, which was after the decision to go tactical had already been made.193

Major-General Annandale’s evidence that there was an escalation of the threat level before the tactical plan was implemented must therefore be rejected.

191 Day 95, T.10068, line 3 - 10069, line 23.
192 Day 95, T.10069, line 24 - 10070, line 12.
193 Day 95, T. 10070, lines 1-25
Brigadier Calitz

Introduction

141 Brigadier Calitz alleged that six threats were made against SAPS on 16 August 2012 before the tactical plan was implemented. However, at least half of what Brigadier Calitz identified as threats were not threats at all, even on the most expansive interpretation of the word. There are also a number of inconsistencies in his evidence in this regard.

142 In what follows, we address each alleged threat in turn. We will submit that the Commission should reject Brig Calitz’s evidence in this regard.

The first alleged threat

143 The first alleged threat was alleged to have occurred at approximately 14:00 on 15 August 2012 when Mr Noki went to Brigadier Calitz’s Nyala and stated that he did not want the police there anymore.\textsuperscript{194}

\textsuperscript{194} Day 153, T.17187, line 19.
However, as Brigadier Calitz, conceded a statement that the strikers did not want the police there clearly did not constitute a threat.\footnote{Day 174, T.207336, lines 7 – 13.} This was particularly so in view of the context of the discussions between the strikers and the police, which was that the strikers repeatedly told the police they did not want to speak to the police. They wanted to speak to management.\footnote{Day 174, T.20722, line 13 - 20723, line 9.}

In any event, Brig Calitz’s evidence in this regard was inconsistent with the objective evidence:

\footnote{Exibit FFF25, entry 196; Day 174, T.20733, line 16 - 20734, line 11.} The SAPS’ occurrence book does not record any threat a having been made at 14:00 on 15 August 2012 but records entirely different information about information reported to the JOC by amongst others Brig Calitz’s Nyala.\footnote{Day 174, T.20735, lines 2 - 16.} Brigadier Calitz conceded this.
145.2 If a threat had been made against the police it would have been recorded in the occurrence book. This was particularly so in relation to 15 August 2012 when only that event was occurring.

146 The Commission should therefore reject Brig Calitz’s evidence regarding the first alleged threat.

*The second alleged threat*

147 The second alleged threat allegedly occurred shortly after the arrival of barbed-wire Nyalas when Mr Noki and one of the five representatives approached the Nyala and told the police that they did not want the police there and went back to the hill singing and displaying aggression.199

148 As noted above, Brig Calitz conceded that a statement that the strikers did not want the police present did not constitute a threat. Brig Calitz conceded further that singing and displaying aggression did not constitute a threat.200

199 Exhibit JJJ107, paras.80 - 81; Day 174, T.20736, lines 19 - 25.

The evidence regarding the second alleged “threat” is also inconsistent with the objective evidence:

149.1 The threat is alleged to have occurred shortly after 10:00. However, it is also alleged to have occurred after the arrival of the barbed wire Nyalas.\textsuperscript{201}

149.2 Yet, the barbed wire Nyalas only arrived on the scene approximately 40 minutes later and were prepositioned approximately 50 minutes later at 10:44.\textsuperscript{202}

149.3 In addition, the occurrence book records that this incident was reported at 11:20.\textsuperscript{203} Brigadier Calitz conceded that the entries were made contemporaneously and that the times recorded in the occurrence book should be the correct times.\textsuperscript{204}

149.4 Thus, the time indicated by Brigadier Calitz in relation to the alleged threat (and the arrival and preposition of the barbed

\textsuperscript{201} Exhibit JJJ107, paras.80 – 81; Day 174, T.20738, lines 17 – 25.

\textsuperscript{202} See para.191 below; Day 174, T.20739, lines 10 – 19.

\textsuperscript{203} Exhibit FFF25, entry 998.

\textsuperscript{204} Day 174, T.20742, line 23 - 20743, line 4.
wire Nyalas) was completely incorrect; the alleged threat could not have occurred at 10:00 because the barbed wire Nyalas only arrived 45 minutes later.205

Brig Calitz’s evidence regarding the second alleged threat should therefore be rejected.

The third alleged threat

The third alleged threat allegedly occurred when Mr Noki approached Nyala 6 and the commander of Nyala 6 and told him that he did not want the police there anymore.206

The third alleged “threat” was based on hearsay evidence. Brigadier Calitz did not himself hear the alleged threat against Nyala 6. He alleged that the driver or commander of Nyala 6 reported it to him.

In addition, there are also a number of material inconsistencies in Brigadier Calitz’s version of the third alleged threat:

205 Day 174, T.20742, lines 1 - 4.

206 Day 152, T.17216, line 9; Day 174, T.20751, line 7 – 20752, line 12.
153.1 In his statement, Brigadier Calitz stated that it was the commander of Nyala 6 who reported the threat to him. In his evidence-in-chief, Brigadier Calitz testified that it was the driver who reported the threat. In cross-examination, he again alleged that it was the commander.\(^{207}\)

153.2 Yet, the driver and the commander were two different people. Lieutenant Mhlongo was the commander of Nyala 6. Constable Malatsi was the driver.\(^{208}\)

153.3 When these inconsistencies were put to Brigadier Calitz in cross-examination, he then changed his version yet again and testified that it was first reported to him by the driver and then discussed with the commander.\(^{209}\)

154 The alleged third “threat” is also inconsistent with the objective evidence:

\(^{207}\) Exhibit JJJ135, p.3; Day 174, T.20752, line 22 – 20753, line 4.

\(^{208}\) Exhibit JJJ135, p.3; Day 174, T.20752, line 22 – 20753, line 4.

\(^{209}\) Day 174, T.20755, lines 1 – 7.
154.1 Exhibit L, slide 160, states that Nyala 6 was moved back to avoid it being isolated. It did not say anything about it having been moved because it was threatened.

154.2 The SAPS occurrence book also makes no mention of Nyala 6 having been threatened.\textsuperscript{210}

155 The evidence regarding the third alleged threat should therefore be rejected.

\textit{The fourth alleged threat}

156 Brig Calitz alleged that the following constituted the fourth threat:\textsuperscript{211}

“Captain Adriao informed me that the media people had begun to withdraw from the koppie as they felt unsafe amongst the strikers and felt that something was about to happen. He also said that media people said that the strikers showed them a firearm wrapped in a blanket.”

\textsuperscript{210} Exhibit FFF25, entry 998.

\textsuperscript{211} Exhibit JJJ107, para.90; Day 175, T.20862, lines 13 - 24.
Yet, this was clearly based on hearsay evidence. The media allegedly reported it to Captain Adriaao who allegedly reported it to Brigadier Calitz. 212

The Commission should therefore attach no weight to this evidence.

The fifth alleged threat

The fifth alleged threat related to a period after Mr Mathunjwa’s first address, which he gave at approximately 13:40. Mr Noki and the group of five representatives allegedly again approached the Nyala and demanded to know the purpose of the barbed wire. Mr Noki allegedly stated that they “must sign a piece of paper so that the world would see how they kill each other.” He threatened the police saying they would die and that their vehicles would be burned. 213

The fifth alleged threat is inconsistent with the objective evidence:

160.1 Again, this threat is not recorded in the occurrence book.

212 Day 175, T.20863, lines 7 - 20.
213 Exhibit JJJ107, para.92.
160.2 In addition, at the relevant time there are two entries, which record inconsequential matters. The first was that: “Papa 1 reported that there is a white sedan standing by the people and the driver is addressing the people, registration number CDX826L.” The second was that “Papa 1 reported that water cannons arrived and will be water 1 and water 2.”

160.3 Yet, there is no report of the serious threat that Brigadier Calitz alleged Mr Noki made at around the same time. The only reasonable inference is that the relevant threat did not occur. If such a serious threat had occurred it would have been reported and recorded.215

160.4 In addition, Brigadier Calitz’s evidence is inconsistent with earlier versions of Exhibit L. Thus, JJJ34 presents a very different rendition of the threat. “At 15:37 the leader of the militant group approached the police armoured vehicle line, telling Brigadier Calitz the protestors have made a contract that they would

214 Exhibit FFF25, entries 1010 - 1014.
215 Day 175, T.20832, line 19 - 20835, line 19.
not lay down their arms and were willing to die there that day – there’s no turning back.”

160.5 There is no other threat that is recorded in the document. In addition, Colonel Scott testified that this information would probably have come from Brigadier Calitz. The context in which this would have been said is also relevant. It was immediately after Mr Mathunjwa told the strikers that they should leave the Koppie because they were going to be killed.

161 Brig Calitz’s evidence in this regard should therefore be rejected.

The sixth alleged threat

162 The sixth threat allegedly occurred when the barbed wire was being deployed. Brigadier Calitz alleged the following in this regard: “As the first wire was deploying Mr Noki approached my Nyala. He was

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216 Day 137, T.14596, lines 7 - 14.
217 Day 137, T.14597, lines 6 - 9.
218 Day 137, T.14598, lines 10 - 18.
219 Day 137, T.14599, lines 2 - 17.
very aggressive and said again that we will die...Mr Noki said that he will not return to us and he went back to the strikers.”

163 The alleged sixth threat is inconsistent with the objective evidence:  

163.1 Exhibit KKK55 contains footage that was taken after Mr Noki’s second address.

163.2 The mood of the crowd is one of dejection or defeat and certainly not aggression.

163.3 Mr Noki can then be seen standing on the front bumper of Papa 1 and speaking through the porthole to the SAPS members inside it. There is no evidence of aggression on Mr Noki’s part.

164 Brig Calitz’s evidence in this regard should therefore be rejected.

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220 Exhibit JJJ107, para.108; 17260 - 17261.
221 Day 175, T.20858, line 9 - 20859, line 11.
Conclusion

165 We submit that the Commission should reject Brig Calitz’s evidence regarding the alleged threats.

Lieutenant-Colonel McIntosh

Introduction

166 Colonel McIntosh gave evidence about four threats; one that was allegedly made on 15 August 2012 and three that were allegedly made on 16 August 2012.

167 We will submit that Colonel McIntosh’s evidence in this regard should be rejected for three reasons:

167.1 It is inconsistent and contradictory;

167.2 It is inconsistent with the objective evidence; and

167.3 It is inconsistent with Brigadier Calitz’s evidence.
In what follows we will address each of the alleged threats in turn.

**The first alleged threat**

Colonel McIntosh alleged that Mr Noki made a threat on 15 August 2012. Colonel McIntosh’s supplementary statement provided as follows:

“On the 15th of August 2012 after we gave feedback to the delegation of strikers led by the person who I now know as the deceased Mr Noki, that Lonmin management was not prepared to come to the koppie to address the strikers, he went back to the group of strikers. He later returned to our Nyala and said to us that they did not want the police there and we must go. I then said that we did not want any trouble with them and merely wanted a peaceful resolution to their unlawfully carrying weapons. He left and later returned again and said that they were going to burn the Hippos and that we would run out of there. I considered this a threat, which I took seriously. I’m aware that Brigadier Calitz reported this threat to the JOC.”

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222 Exhibit TTI, para.6
In Colonel McIntosh’s original statement, Exhibit HHH14, there was no mention of any threat by Mr Noki on 15 August 2012, in those terms or any other terms. Colonel McIntosh conceded this.\textsuperscript{223} In addition, Brigadier Calitz’s evidence also makes no mention of any threat being made on 15 August 2012.\textsuperscript{224}

Before Colonel McIntosh’s supplementary statement, Exhibit L, slide 118 contained the only allegation of a threat being made on 15 August 2012. It provided as follows:

“At this point one of the representatives became aggressive and stated that the police should not be there and that the people in the Hippos, referring to the armoured vehicles, would die there and not one Nyala would leave that ground.”

As noted above, Brigadier Calitz testified that he could not confirm the accuracy of this allegation and that to his knowledge no such threat was made on 15 August 2012.\textsuperscript{225} He therefore also did not confirm

\textsuperscript{223} Day 231, T.28714, lines 8 - 14.
\textsuperscript{224} Exhibit JJJ107, para.58. Day 231, T.28714, line 21 - 28715, line 2.
\textsuperscript{225} Day 174, T.20730, line 17.
Colonel McIntosh’s evidence that he reported the incident to the JOC. The alleged threat was also not recorded in the occurrence book. Colonel McIntosh had no explanation for the inconsistencies between his evidence and that of Brigadier Calitz and the objective evidence.226

173 We submit that the Commission should therefore find that the alleged threat did not occur.

*The second alleged threat*

174 Colonel McIntosh alleged that Mr Noki made a threat during the morning of 16 August 2012 at approximately 10:00.

175 He alleged as follows in this regard: “Mr Noki came to our Nyala and said they were going to burn the Hippos and that we were going to die in our Hippos.”227

176 Again, Colonel McIntosh’s original statement did not contain any mention of this threat. With reference to the same time period (9:45)

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226 Day 175, T.28715, line 15 – 28717, line 8.
227 Exhibit TTT1, para.7; Day 231, T.28717, lines 6 - 14.
his original statement provided as follows: “The person with the green blanket was one of the two who came to us. He then informed us that they do not want the police there and he was very aggressive towards us.” He did not say anything about a threat being made along the lines of the one described in his supplementary statement. Colonel McIntosh conceded this.228

As noted above, a statement to the effect that the strikers did not want the police there clearly did not constitute a threat. Thus, Colonel McIntosh’s original statement does not allege any threat at all. Colonel McIntosh conceded this too.229

In addition, Colonel McIntosh’s original statement is consistent with Brigadier Calitz’s statement, which provides that “Mr Noki and one of the five men approached our Nyala and told us that they did not want us there and went back to the Koppie singing and displaying aggression.” Colonel McIntosh conceded this.230

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228 Exhibit HHH14, Day 231, T.28719, lines 4 - 13.
229 Exhibit HHH14, Day 231, T.28719, lines 14 - 18.
The alleged threat was also omitted from the IPID statement that Colonel McIntosh made on 19 August 2012:\textsuperscript{231}

179.1 This statement was thus made the week after the incident.

179.2 Colonel McIntosh conceded that at that stage the events were fresh in his mind and the statement was the product of a lengthy interview. He conceded further that the threats would have been very important.

179.3 The statement was made under oath.

179.4 In addition, it was not simply a matter of Colonel McIntosh not mentioning the particular threat. He gave an entirely different account. He said the following: “We requested them to stop their behaviour but they ignored us. We stopped negotiations and just observed the group.” Thus, there was no mention of any threats at all or any approach to the police.

The alleged threat was also not recorded in the occurrence book.\textsuperscript{232}

Colonel McIntosh conceded this.\textsuperscript{233}

\textsuperscript{231} Day 231, T.28270, line 12 - 28723, line 7.
We submit that if the alleged threat had occurred it would have been made it would have been referred to in Colonel McIntosh’s earlier statements and Brigadier Calitz’s statement. It would also have been reported to the JOC and recorded in the occurrence book.

We therefore submit that the Commission must find that this threat did not occur.

The third and fourth alleged threats

The third and fourth alleged threats were alleged to have occurred after Mr Mathunjwa’s first address.

The third alleged threat was as follows:

“Mr Noki said to us that he can see that we are preparing for war and that we are going to die that day.”

The fourth alleged threat was as follows:

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232 Exhibit FFF25.
233 Day 231, T.28723, lines 18 - 23.
234 Exhibit TTT1, para.8.
“Mr Noki again returned to our nyala when the barbwire nyalas began deploying barbwire. This time he said that we must sign a piece of paper to show the people that we are going to kill each other today.”

In addition, neither of these alleged threats appear in the occurrence book. This is despite the fact that there is detailed reporting in the occurrence book on 16 August 2012, including of relatively minor matters.236 Thus, if serious threats of the nature alleged by Colonel McIntosh were in fact made they would have been reported and recorded.237

In addition, as noted above, the fourth alleged threat is inconsistent with earlier versions of Exhibit L.

We therefore submit that the Commission must find that these alleged threats did not occur.

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235 Exhibit TTT1, para.9.
236 Exhibit FFF25, entries 1011 - 1012; Day 231, T.28725, line 22 - 28726, line 10.
237 Exhibit FFF25, entries 1011 - 1012.
Conclusion

189 We submit that the Commission must reject Colonel McIntosh’s evidence regarding the threats allegedly made by Mr Noki.
Part D – Scene 1

Introduction

190 This section of the heads deals with the deaths of 17 of the families loved ones at what has become known as “Scene 1”.

191 We submit that the evidence led in the Commission proves, on a balance of probabilities, that Scene 1 was a “trap”, which was sprung when approximately 38 of the strikers were successfully channelled towards the TRT line by the POP members under the control of Brigadier Calitz. The relevant evidence is set out in detail below. It is, inter alia, that:

191.1 The SAPS plan was changed in a significant respect when Nyala 6 was moved, after 12:00, on 16 August 2012;

191.2 Brigadier Calitz, allegedly without consulting Lt Col Scott, made a decision to deploy the razor wire Nyala such that the wire was rolled out sequentially, rather than simultaneously;

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238 To use the wording of Exhibit KKK49, slide 6.
191.3 The consequence of the above was that the point at which the razor wire ended, namely the small kraal, became a positive attraction point for many of the strikers. This was already a point to which, to the knowledge of the SAPS, strikers were likely to move because it lay along the road to Nkaneng. Key SAPS witnesses all conceded this point;

191.4 Once they had reached the small kraal, and after Nyala 4 had blocked their path, the most likely route of the strikers was to attempt to reach the road to Nkaneng by moving around the Northern edge of the small kraal. At the time they headed in that direction, there were no Nyalas in that vicinity;

191.5 The Nyalas under the control of Brig Calitz were called up into a formation, and tear gas and stun grenades were used in a manner, which effectively channelled the strikers towards the TRT line;

191.6 The TRT members were also instructed to move up into their position under the control of Brig Calitz;
191.7 At the critical moment, Brig Calitz gave the instruction to “engage, engage, engage”, which in the context could only have meant that the TRT line should act. It did so, with fatal consequences.

192 In an attempt to avoid the inexorable conclusion that SAPS members acted with at least *dolus eventualis*, which resulted in the tragic deaths of 17 people at Scene 1, the SAPS has sought to suggest that its members acted in self or private defence of life, when confronted by an attacking crowd of 3000 strikers.

193 A significant amount of evidence points to the fact that the strikers were not attacking the police, contrary to the claim made by the SAPS. If, for example, the strikers were intent on attacking any SAPS members, they had more than sufficient time and opportunity to do so before the razor wire had been rolled out. While the SAPS has alleged that there were two incidents prior to Scene 1 in which “attacking strikers” had to be repelled, the evidence does not support these claims. The first incident, the so-called incident 1, did not occur and all. Incident 2 did not occur in the manner that the SAPS has alleged; the evidence points strongly to the conclusion that the strikers were
merely attempting to get onto the road to Nkaneng, when that route was blocked by the razor wire. However, when strikers took the alternative path around the kraal, POPS did not block it. Rather, the POPS Nyalas were called into a formation that channelled a number of strikers, including 13 of the deceased that we represent, towards the basic line of waiting TRT members. Forty-five TRT members opened fire simultaneously. Many of the TRT members were firing lethal R5 rifles. The strikers were given no verbal warning and no warning shots were fired prior to the TRT volley.

All of the key SAPS witnesses conceded that they knew, as events unfolded, that a confrontation was likely to occur in the vicinity of Scene 1. By contrast, it is not at all clear that any of the strikers knew that the TRT line was there. A single shot was fired, into the ground, by one of the strikers, but he was not one of the 17 who was killed and this event occurred 10 seconds before the TRT opened fire. The TRT members did not respond to this shot. The objective evidence shows that many of the strikers were moving towards the TRT bent over and with blankets over their heads, to protect themselves from the rubber
balls being fired by POPS members to their left. The SAPS has also conceded that the strikers would, at the time, have been suffering from the effects of tear gas. It would have been difficult for them to see what was in front of them. This submission is confirmed by the direct testimony of the strikers who gave evidence.

Quite apart from the issue of whether the strikers did indeed attack the TRT line, the objective evidence shows that the response of many of the members in the line was disproportionate to the alleged threat. Moreover, the SAPS’ brutal treatment of the dead and injured strikers after the incident reveals a mindset which is wholly inconsistent with the proposition that the TRT members acted in self or private defence.

The evidence relating to these issues is dealt with in detail below.

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239 Exhibit RRR15, page 3.
241 Mr Phasha’s witness statement, Exhibit DDD1, para 13.
243 Day 230, T.28507, lines 1 - 18 (Loest’s evidence).
Setting up – changes to the SAPS plan and the moving of Nyala 6

The road to Nkaneng

197 The SAPS’ plan was changed, in a significant respect, on the morning of 16 August 2012. In order to appreciate the significance of this change, it is necessary to deal, in a little detail, with one aspect of the geography of the area.

198 For the period of the strike, many of the strikers used the road to Nkaneng to travel between their homes in Nkaneng and the Koppie.

199 This was confirmed by the evidence of Mr Magidiwana and Mr Phasha.

199.1 Mr Magidiwana testified as follows:\(^{244}\)

“Mr Mpfou: Okay. Now going again to what I call geography around those areas when you come to the mountain or to the koppie in the morning and then you went to lunch and then you came back which road you use?

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\(^{244}\) Day 55, T.5908, lines 1 - 11.
Mr Magidiwana: The one that is, the path from Marikana and leading to the informal settlement.

Mr Mpofu: And is that the road that passes directly opposite the kraal, the entrance of the kraal?

Mr Magidiwana: Yes.”

199.2 Mr Phasha testified as follows:\textsuperscript{245}

“Mr Mpofu: Now which road or path did you use on the 16\textsuperscript{th} on your way to the koppie?

Mr Phasha: We used the path that we usually take even when we go to Marikana.

Mr Mpofu: Yes, and which one is that?

Mr Phasha: It leads and moves in front of the kraal.

Mr Mpofu: Yes, is it the same one that you showed to the Commission yesterday?

Mr Phasha: Yes.

Mr Mpofu: And on the other days when you were, you said you had been going to the koppie, which path did you use? And sorry, when I say “you”, I mean you as in singular.

Mr Phasha: I was walking on that same path on the road on

\textsuperscript{245} Day 51, T.5463, lines 6 - 21.
which we usually travel.”

SAPS was, of course, very well aware that the strikers generally used the road to Nkaneng to travel between their homes and the Koppie.

Thus, photographs taken by SAPS members on 14 and 15 August 2012, show the strikers using the road to Nkaneng to travel between the Koppie and Nkaneng.

Photographs taken by SAPS members on 16 August 2012 show the same thing. Indeed, they show strikers on the road to Nkaneng shortly after Mr Mathunjwa gave his second address and SAPS began deploying the barbed wire.

Exhibit JJJ10.1514, which is one of Colonel Vermaak’s blackberry photographs and which was taken at 15:42:35, shows strikers dispersing on either side of Nyala 6 in order to get to the road to Nkaneng. Nyala 1 can be seen deploying its barbed wire.

Exhibit JJJ10.4540, which is also one of Colonel Vermaak’s blackberry photographs and which was
taken at 15:43:56, shows strikers dispersing on the road to Nkaneng. Nyala 6 has been moved off the road, seemingly to allow strikers to disperse using the road to Nkaneng.\textsuperscript{246}

200.3 This was also confirmed by SAPS witnesses.

200.3.1 Colonel Scott testified as follows:\textsuperscript{247}

“Mr Mpofu: The point really that I am driving at is this; that it was known to you and to the police who were there that throughout the day, from the video evidence, the protestors were moving towards the koppie and away from it, utilising that road or path in front of the kraal, correct?

Colonel Scott: It is so, but to state, to my knowledge they were coming from many directions, but like you say, on that path, it seems to be quite a –

Mr Mpofu: Popular place.

Colonel Scott: Popular, yes.”

\textsuperscript{246} This is dealt with in further detail below, inter alia at paras 234 and 235.

\textsuperscript{247} Day 143, T.15642, line 15 - 15643, line 1.
200.3.2 Captain Loest testified as follows:248

“Mr Gotz: The road that you see there is the road to Nkaneng, correct?

Captain Loest: That’s correct, Mr Chair.

Mr Gotz: That was the road along which the strikers would move back and forth from the koppie to their homes, correct?

Captain Loest: That’s correct, Mr Chair.”

200.3.3 Captain Thupe also conceded, with reference to Exhibits JJJ10.1514 and JJJ10.4540, that the strikers depicted on these photographs using the road to Nkaneng to disperse on 16 August 2012 were not stopped or challenged.249

The time that Nyala 6 was moved

The original SAPS plan was for the barbed-wire Nyalas to be deployed in a crescent or half-moon formation.

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248 Day 230, T.28466, lines 15 – 21 (with reference to Exhibit JJJ10.4541).
249 Day 227, T.28058, lines 6 - 8.
Exhibit L, slides 148 – 150, shows the formation of the barbed-wire Nyalas and the barbed-wire as per the plan. This was also the formation in which the barbed-wire Nyalas were originally deployed. This can be seen from some of Vermaak’s pentax photographs.  

In terms of the planned formation, the barbed-wire would have cut off the striker’s access to the road to Nkaneng. As Brig Calitz conceded, if the Nyalas had remained deployed in their crescent formation, the strikers would have had to break the police line between Nyalas 5 and 6 in order to access the road to Nkaneng.  

The SAPS’ version is that at 10:56 am, Major-General Annandale made the decision to move Nyala 6 because it was isolated.  

Yet this is inconsistent with the objective evidence:

Exhibit JJJ10.4498 shows that the razor-wire Nyalas were driving to the scene at e TV time 10:34:08;  

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250 Exhibits JJJ10.4501 and JJJ10.4524.  
251 Day 175, T.20813, lines 1 – 6.  
252 L160, Day T.8282, lines 2 - 25.
205.2 Exhibit JJJ10.4499 shows that the razor-wire Nyalas were in position at 10:43:46;

205.3 Exhibits JJ10.1498 and JJJ10.1499 show that all of the razor-wire Nyalas with the exception of Nyala 1 were in position by 10:44:00;

205.4 Exhibit JJJ10.4501 shows that Nyala 6 was still in its original formation at 10:44:16;

205.5 Exhibit JJJ10.4524 shows Nyala 6 in its original position at 11:20:42;

206 Thus, by 11:20 am, Nyala 6 had not yet been moved backwards to its position at the kraal. Exhibit JJJ10.4525 is the first photograph that Vermaak took in the afternoon. It was taken at 15:32:22. Nyala 6 was therefore moved to its position at the kraal at sometime between 11:20 am and 15:32:22.

253 All times given are eTV time, unless otherwise indicated.
Brig Calitz testified that Nyala 6 was moved following a telephone
conversation that he had with Lieutenant-Colonel Scott. Exhibit
KKK4, which is the schedule of telephone calls that was made between
various SAPS members, shows that Lieutenant-Colonel Scott made a
phone call to Brig Calitz at 11:56:00. The call lasted 12 seconds. Brig
Calitz phoned him back almost immediately at 11:56:45 am. They then
had a conversation that lasted 3 minutes and 42 seconds, which would
therefore have ended at approximately 12:00:00.

There is no telephone call between Brig Calitz and Lieutenant-Colonel
Scott after the arrival of the barbed-wire Nyalas at the Koppie and
before this phone-call. Therefore, Nyala 6 could not have been moved
before 12:00:00 on 16 August 2012.

Exhibit L, slide 160, which states that Nyala 6 was moved at 10:56 am
is therefore incorrect. The earliest that it could have been moved was
an hour later at approximately 12:00:00.

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254 Day 175, T.20788, line 22 – 20791, line 21.
255 Exhibit KKK4, p.5.
256 Day 175, T.20788, line 22 – 20791, line 21.
The effect of moving Nyala 6

A comparison of Exhibit JJJ10.4501 and Exhibit JJJ10.4525 shows the effect of the movement of Nyala 6. The shape of the deployment of the razor-wire Nyalas has changed from a crescent or half-moon shape to an L-shape.

The effect of this is that in their original formation the barbed-wire Nyalas formed a barrier between the strikers and the road to Nkaneng. Indeed, Brigadier Calitz conceded in this regard that when Nyala 6 was deployed in the crescent position, the road to Nkaneng ran between Nyala 5 and Nyala 6. Thus, with Nyala 6 in this position, the strikers would have had to pass between Nyalas 5 and 6 and break the police line in order to access the road to Nkaneng.257

Thus, as Lt Col Scott conceded, before Nyala 6 was moved, access to the road to Nkaneng was entirely screened. The plan was designed to funnel the strikers to the west away from Nkaneng.258

257 Day 175, T.20813, lines 1 – 8.
However, once Nyala 6 was moved to its position at the kraal, the road to Nkaneng was open. The effect of the changed L-shape formation of the razor-wire vehicles was thus to effectively funnel the protestors towards Nkaneng. This is demonstrated by Exhibit KKK57.1, which shows that the formation of the barbed wire, together with the wire fencing on the Northern side of the kraal, created a funnel towards Nkaneng.259

Captain Thupe’s evidence confirmed this. In his statement, dated 19 August 2012, he stated as follows: “The public order police members laid barbed wire to channel them, the protestors, towards the informal settlement.”260 His warning statement, dated September 2012, said materially the same thing.261

Captain Thupe conceded the following in this regard:262

259 Day 176, T.20965, lines 7 - 22; See also Day 214, T.26449, lines 8 – 16 where Lieutenant Colonel Vermaak conceded that there was a fence from points C - D and D - E on Exhibit OOO36 and Day 215, T.26459, line 17 - 26460, line 2, where SAPS’ counsel conceded that there was a fence from points A – B on Exhibit OOO36.

260 Exhibit RRR1, para.3.

261 Exhibit RRR2, para.4.

262 Day 227, T.28037, line 23 – 28038, line 2; 28042, lines 5 - 9.
215.1 These allegations were based on his own understanding;

215.2 From where he was standing in the neutral area he could see the shape that the razor wire was going to take; and

215.3 It was on this basis that he came to the conclusion that it was channelling the protestors towards Nkaneng.

216 Thus, as Colonel Scott conceded, moving Nyala 6 had extremely serious implications for the plan.263

The reason for moving Nyala 6

217 Major-General Annandale testified that Nyala 6 was moved at approximately 11:00 because threats had been made against it.264 This is inconsistent with the objective evidence.

218 Brig Calitz testified that he gave the order for Nyala 6 to be moved after a telephone discussion between him and Lieutenant-Colonel Scott. During the telephone call, according to Brig Calitz, Lt Col Scott

264 Day 78, T.8282, lines 5 – 25.
told him that it had been decided that if Nyala 6 remained in that position it would be isolated. It therefore had to be moved back.265

Yet, the overwhelming impression from Lt Col Scott’s testimony was that he had no knowledge about the movement of Nyala 6 before it was moved. This led the Chairperson to ask him a direct question on this point to which Lt Col Scott responded as follows:266

“I was aware, I saw a photograph Chairperson. I didn’t take the decision because I’d seen a photograph of the deployment on the ground.”

Thus, Lt Col Scott’s evidence was that he only became aware of the movement of Nyala 6 after seeing a photograph of its changed position. He claimed that he did not take the decision and does not appear to be aware of who did so. He also made no mention of the telephone conversation with Brigadier Calitz.

When this was put to Brigadier Calitz, his response was that Lt Col Scott would not have been at liberty to have made such a decision

265 Day 153, T.17220, lines.
266 Day 140, T.15190, lines 10 - 12.
himself. He suggested that the decision would have been made by the overall commander or the JOCCOM as a whole. 267

Yet, this response did not explain the inconsistency between Lt Col Scott’s and Brig Calitz’s evidence. Lt Col Scott did not testify that the matter was discussed in the JOC and that he was involved in those discussions. He also did not testify that after the discussion he communicated his decision or the decision of the JOCCOM to Brig Calitz. 268

It is also improbable that Nyala 6 was moved to prevent it from being isolated. At 11:45, Brig Calitz called for additional Nyalas to be deployed to the Koppie for reinforcement. If he felt that Nyala 6 was isolated he could have used one or two of these Nyalas to protect Nyala 6. 269

In addition, Brig Calitz testified that it was agreed at the 6:00 am JOCCOM meeting that a contingency plan would have to be prepared to cater for the possibility that the intelligence reports were correct and

268 Day 175, T.20804, line 21 – 20805, line 6.
269 Day 175, T.20807, line 13 – 20808, line 22.
the strikers would not lay down their weapons voluntarily. Thus, at the time that Brig Calitz and Lt Col Scott engaged in their telephonic discussion, Lt Col Scott would have been in the process of drafting his plan. Brig Calitz confirmed this as follows:\textsuperscript{270}

“Chairperson: So if it was agreed at the JOCCOM meeting six o’clock in the morning on Thursday, that a contingency plan would be drawn up for the contingency that arms weren’t going to be laid down, the strikers were going to fight to stay there and keep their arms, the logical person to draw up the contingency plan would have been Colonel Scott I take it, that must be right, is that not so?

Brigadier Calitz: Dit is korrek, mnr die Voorsitter.

Chairperson: And did you expect him to be working on the plan which had been agreed would be drawn up while you were out there in the field in the course of the morning on the 16th?

Calitz: Ja, nee, dit sal wees, mnr die Voorsitter...

Chairperson: Ja, he was supposed to be drawing up a contingency plan according to you, is that right?

Brigadier Calitz: Dit is korrek …”

\textsuperscript{270} Day 175, T.20814, line 8 – 20815, line 23.
Thus, the most reasonable conclusion from the facts as a whole is that Nyala 6 was moved as part of the plan that Lt Col Scott was in the process of drafting on the morning of 16 August 2012.

The sequential roll-out of the barbed-wire

Lt Col Scott’s plan was for the barbed-wire to be rolled out simultaneously by the six barbed-wire Nyalas. Despite this, the barbed-wire was rolled out sequentially.

Lt Col Scott confirmed that in terms of his plan the barbed wire was to be rolled out simultaneously. He said his reason for this was to prevent the strikers from moving to the area that was not yet covered by the uncoiled wire. This area has sometimes been referred to as the “police enclosure”. Thus, the purpose of the planned simultaneous deployment of the barbed wire was to ensure the rapid deployment of the barbed-wire allegedly to prevent the strikers from “entering” the so-called “police enclosure”.

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271 Day 137, T.14560, lines 9 - 14.
272 Day 137, T.14565, lines 12 - 20.
273 Day 137, T.14565, line 21 - 14566, line 1.
If the razor wire had been deployed simultaneously it would have taken two minutes from the time of instruction to deploy. The sequential roll-out took approximately 9 minutes and 20 seconds (although Lt Col Scott estimated it would take 10 – 12 minutes).

Although Lt Col Scott stated in his briefing that the razor wire was to be rolled out simultaneously he was not informed, by people who ought to have known better, such as Brig Calitz, that this would not be possible. Rather, Brig Calitz simply decided to deviate from Lt Col Scott’s plan, in this material respect, without telling him that he intended to do so.

This had certain consequences:

Lt Col Scott wanted the barricade up as quickly as possible to prevent the protestors from breaching the barricade. He must, therefore, have anticipated that there was a risk that in the absence of a barricade the protestors would enter that area for

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274 Day 137, T.14568, lines 15 - 20.
275 Day 137, T.14571, line 7 - 14572, line 10.
276 Day 137, T.14573, line 18 - 14574, line 5.
whatever reason, including to go home to Wonderkop or Nkaneng.277

230.2 Thus, the key to the plan was a quick roll out of the barbed wire so that there would be a barrier between the police and the protestors. It was to get the vehicles in place in order to start the dispersal action without the risk of an attack from the protestors.278

230.3 Thus, once the instruction for a simultaneous rollout was overridden, without consulting Lt Col Scott, the plan became much riskier because there was now a period of 10 minutes where there wouldn’t be a barricade. The strikers would consequently have had 10 minutes in which they could see SAPS deploying the barbed wire and to respond to this.279

231 Thus, Lt Col Scott clearly foresaw that the strikers might try to get ahead of the razor wire if it was deployed sequentially. This is clear from the fact that the whole purpose of the simultaneous roll-out of

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277 Day 137, T.14589, lines 16 – 25.
278 Day 137, T.14588, lines 12 - 23.
279 Day 137, T.14589, lines 7 - 15.
the barbed wire was to prevent this from happening. In addition, he conceded that the formation of the barbed-wire Nyalas was to prevent a possible advance by the lead group of strikers towards Nkaneng.  

232 SAPS commanders must have foreseen that at least some of the strikers would have thought that the purpose of the razor wire was to encircle them and thus to try and escape encirclement by outrunning it. Indeed, a number of SAPS members believed that the purpose of the barbed wire was to encircle the strikers:

232.1 Thus, Colonel Makhubela, who was the commander of the barbed-wire Nyalas, stated as follows in the first statement that he deposed to: “During the operation my task was to surround the employees with barbed wire at the place where they gathered at a small hill near Wonderkop Village. I was in command of the armoured vehicles ... which were used to spread out the barbed wire...the aim to use the barbed wire was to can manage to control the said employees to be searched as only one entrance or exit was to be made for the weapons they were having.”  

The reference to

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280 T.15629, lines 9 - 17, T.15629, line 24 - 156631, line 20.
281 Exhibit GGG29, para.2.
leaving an exit point was only a feature of the encirclement plan and not the dispersal plan.\(^{282}\)

232.2 Captain Mooketsi stated the following in his statement: “A command has been issued by Brigadier Calitz for the Nyala drivers to drop the barbed wire on the ground to encircle those gathered crowd with the intention to disarm and disperse them.”\(^{283}\)

232.3 Constable Thebeetsile stated the following in his statement: “Some of them were carrying knobkieries and pangas and it was alleged that some of them having guns. The main aim for us was to encircle them with barbed wire and disarm them peacefully. As soon as Nyalas put barbed wire and we tried to encircle them, they started to move towards the western of the hill. When we tried to block them with Nyala, they started to move further towards our top vehicle.”\(^{284}\)

\(^{282}\) T.14609, line 20 - 14612, line 7.

\(^{283}\) Exhibit GGG10, para.5.

\(^{284}\) Exhibit GGG11, paras.3 – 4. See also Exhibits KKK26, KKK27.
232.4 In her testimony, the National Commissioner also made a number of references to the plan being to “encircle, disperse and disarm” as opposed to “disperse, encircle and disarm.”

232.5 From Exhibit JJJ.91 it is clear that the place where barbed-wire Nyalas 3 - 6 chose to position themselves was on the blue line that on the encirclement plan was the barbed wire cordon.

232.6 In addition to the above, Classens stated as follows in his statement: “Furthermore, if not [if they did not lay down their weapons voluntarily], we have to respond as per planning by encircling the koppies and disarming the miners and arresting them.”

233 When it was put to Lt Col Scott that a number of the SAPS members, including Colonel Makhubela, had thought that the plan was still encirclement he responded that the barbed-wire Nyalas did not encircle the Koppie nor could they have done so. However, phase 2 of the encirclement plan – the show of force – would have been in a

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285 T.7752, line 15, T.7303, line 10, T.7319, line 20, T.7447, line 9.
286 Exhibit RRR11, para.6; Day 227, T.28049, lines 12 - 15.
formation very much like the one rolled out on the 16 August 2012. The fact that the barbed wire Nyalas were not deployed in a circle was therefore not an explanation.\textsuperscript{287}

234 SAPS must therefore reasonably have foreseen that many of the strikers would think that they were being encircled and attempt to run back to Nkaneng using the road to Nkaneng to do so.

235 Brigadier Mkhwanazi conceded that it was both inevitable and predictable that some of the strikers on the Koppie would head in a north-westerly direction towards their homes (in Nkaneng) when the barbed wire was being deployed.\textsuperscript{288} It was a positive attraction point.\textsuperscript{289} In addition, there was nothing to stop them from doing so because the TRT, the STF and the NIU were not yet deployed to the kraal area.\textsuperscript{290}

\textsuperscript{287} T.14612, line 22 - 14614, line 15.

\textsuperscript{288} Day 29, T.3117, lines 11 - 25.

\textsuperscript{289} See also the Report of Mr Gary White, JJJ178, pp 81 - 84.

\textsuperscript{290} Day 29, T.3117, line 11 - 3118, line 16.
In addition, in response to a question about whether in Brig Mkhawanazi’s experience barbed wire had ever been used as an aid to effect an arrest, he testified as follows:291

“No, I don’t recall any incident using a barbed wire to arrest people, because people, maybe if you, they are sitting already, you take the barbed wire, you put it around, definitely you’re going to have a stampede into that because always people will seek for the position to run out if it’s that position.”

SAPS should therefore have given a warning to the strikers before the barbed-wire was deployed.

Major-General Annandale testified in this regard that when Mr Noki questioned Brig Calitz about the purpose of the barbed-wire, it was explained over the loudhailer that the purpose of the barbed-wire was to protect the police and the media.292

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292 Day 178, T.8710, line 12 - 8710, line 24.
Yet, this clearly did not constitute a warning to the strikers regarding the proposed deployment of the barbed-wire and the implementation of the operation.

The movement of the lead group of strikers

Introduction

We have dealt with Lt Col Scott’s evidence was that he wanted the razor wire deployed as quickly as possible to prevent the strikers from entering the “police enclosure”. The barbed-wire was in fact rolled out sequentially. More than nine minutes elapsed from the time that Nyala 1 began to deploy its razor wire and the time that Nyala 4 reached the kraal. Yet there is no evidence whatsoever that the strikers attempted to approach, or attack, the police during this period.

SAPS alleges that the strikers attacked the police three times. Two of these incidents are alleged to have occurred before the strikers moved around the kraal. The objective evidence shows that the first “incident” did not occur at all and the second “incident” was not an
attempt to attack the police, as alleged, but an attempt to get onto the road to Nkaneng. It is also did not occur as described by the SAPS.

242 The two incidents that are alleged to have occurred before the strikers reached the kraal are as follows:

242.1 Incident 1 is alleged to have occurred when the strikers approached the police line as Nyala 4 started to deploy its barbed wire. There was no engagement by POP and the protestors were cut off by Nyala 4 driving towards the kraal quickly while deploying its barbed wire. Exhibit L, slides 197-198, allegedly depicts “Incident 1.” Thus, the yellow arrow on Exhibit L, slide 197, is alleged to depict the direction of the strikers’ approach to Nyala 4.

242.2 Incident 2 is alleged to have occurred at 15:47 at the kraal when the protestors attempted to get onto the route to Nkaneng before that route was blocked by Nyala 4 before it reached the kraal. The SAPS alleges that POP members from Nyalas 3 and

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293 Exhibit L, slide 195.
294 Exhibit L, slide 196.
4 engaged the strikers with rubber bullets, stun grenades and tear gas and that the water cannons were also used to prevent the strikers from entering “the police enclosure”. Nyala 4 then closed the gap with the remaining barbed wire. Exhibit L, slide 198 is alleged to depict the strikers approach in formation towards Nyala 4, when it started deploying its barbed wire.

The objective evidence shows that Incidents 1 and 2 did not occur as alleged. It also shows that rather than “charging towards the police”, the strikers walked slowly in a north-easterly direction towards the road to Nkaneng. They made no attempt to approach the police line despite the fact that there was no barrier between the police and the strikers. We address this in detail below.

Incident 1 did not occur at all

As noted above, SAPS alleges that the lead group of strikers approached Nyala 4 as it began deploying its barbed wire.

The objective evidence shows that this did not occur.

Exhibit L, slides 198 - 199.
Exhibit JJJ194.11, at 6 seconds into the video, shows Mr Noki emerging onto the left hand side of the screen. At 15:48:27 he began to lead the strikers away from Koppie 2.296

Exhibit JJJ194.11 at 34 seconds into the clip, which is T-TV time 15:48:55:02, shows Mr Noki and the lead group move past the single pylon.297

In the next video clip in the series, Exhibit JJJ194.12, most of the lead group of strikers,298 can be seen moving past the pylon.299 The clip ends at 15:49:27 E-TV time.300

In Exhibit JJJ194.13, Nyala 3 can be seen leaving Nyala 2 at E-TV time 15:50:06. This means that at the end of the previous clip, which shows the last of the lead group of strikers about to pass the single pylon, Nyala 3 had still not left Nyala 2.301

296 Day 160, T.18345, line 21 - 18346, line 3.
299 Day 160, T.18350, line 8 - 18353, line 10.
300 Day 160, T.18356, lines 4 - 7.
301 Day 160, T.18356, lines 12 - 14.
Exhibit L, slide 197 indicates the starting position of Nyala 5, with its trailer straddling the path to the left of arrow, which is meant to indicate the movement of incident 1. Exhibit L, slide 198, shows the strikers moving past Nyala 5 broadly parallel to the path to Nkaneng. The reference to Nyala 4 on Exhibit L, slide 198 is wrong.

Exhibit JJJ.194.13 the scene from the other side. At the end of Exhibit JJJ.194.13, the crowd can be seen moving past Nyala 5. The end of that clip is at E-TV time 15:50:27. Nyala 3 reaches Nyala 4 at 15:50. At that time, the protestors were not anywhere near the mast, having moved in a North Eastery direction.

The next clip in the video series is Exhibit JJJ194.14. On that clip, Nyala 4 can be seen on the left-hand side of the screen at the commencement of the video. It is to the left of the Casspir. When the clip is played, the lead group of strikers can be seen a long way past Nyala 5.

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302 Day 160, T.18357, line 16 – 18358, line 11.
303 Day 160, T.18359, line 22 - 18360, line 5.
Nyala 4 started to deploy its barbed wire at 15:51:26, which was 27 seconds after the end of Exhibit JJJ194.14.\textsuperscript{305} The next clip in the video series, Exhibit JJJ194.15, begins at 15:51:38, which was 12 seconds after Nyala 4 has begun to deploy its barbed wire. The lead group of strikers is visible to the right of Nyala 6.\textsuperscript{306} That is almost the point at which Exhibit L, slide 197 is taken.\textsuperscript{307}

The movement of the strikers from 15:48:30 to 15:50:30 is depicted in the diagram below.\textsuperscript{308}

\textsuperscript{305} Day 160, T.18300, lines 18 - 20.
\textsuperscript{306} Day 160, T.18361, lines 14 - 22.
\textsuperscript{307} Day 160, T.18361, lines 22 - 23.
\textsuperscript{308} Extract from Exhibit OOO34, slide 12.
Thus, Exhibit JJJ.194 proves that there was no movement forward to the mast and towards the police by the lead group of strikers.

Nothing that approximates the alleged Incident 1, as it is depicted on slide 197 of Exhibit L occurred. Most importantly, the lead group of
strikers had moved away from the single pylon a long time before Nyala 4 even reached the mast.  

Moreover, the Commission will note that there are indications that “Incident 1” was dreamt up at Roots. This appears, inter alia, from Exhibit JJJ.34. This was a presentation that Scott produced on the first day of the Roots conference. The first day of the Roots conference was 27 August 2012, which was 11 days after the incident and after a full day’s workshop session at Roots. The presentation describes the movement of the strikers in a manner that makes no mention of incident 1 and which was much closer to the true route of the strikers as depicted by the objective evidence.

Accordingly, the Commission should conclude on the basis of the objective evidence that the alleged incident 1 did not occur.

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311 Exhibit JJJ.34, p.46 (15:48); Day 160, T.18363, line 20 - 18364, line 5.
Incident 2 did not occur as alleged by the SAPS

As noted above, incident 2 is alleged to have occurred at approximately 15:47:00, when the protestors attempted to get onto the road to Nkaneng, in front of Nyala 4 before it reached the kraal. POP members from Nyalas 3 and 4 are alleged to have engaged the strikers with rubber bullets, stun grenades and tear gas. SAPS also alleges that water cannons were used to “prevent [the strikers] from entering the police enclosure.” The objective evidence shows that this did not happen.

The objective evidence shows that no tear gas or stun grenades were used before 15:53:30, in particular around the time that Nyala 4 reached the kraal. This is clear from Exhibit UUUU10.5, the expert video presentation regarding the use of tear gas and stun grenades. The video presentation is an analysis of the following video evidence:

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312 Exhibit L, slide 198.
313 Exhibit L, slide 199.
The Rowland Headgear video of scene 1 (Exhibit CC37), which clearly captured the characteristic “double bang” of stun grenades and the plume from tear gas when discharged;

The Flir IR camera (Exhibit CC38), which picks up stun grenade explosions as a white flash; and

The SABC, Al Jazeera camera (Exhibits JJJ194), Channel 4 (Exhibit JJJ197) and Reuters (Exhibit UU3bis) footage on which stun grenade and tear gas explosions can be seen and heard.

There is clear evidence of discharges at:

15:53:30 (stun grenade);\textsuperscript{314}

15:53:39 (stun grenade);\textsuperscript{315}

15:53:40 (tear gas);\textsuperscript{316} and

15:53:42 (tear gas).\textsuperscript{317}

\textsuperscript{314} Exhibit UUUU10.5, 00:34 - 01:57.

\textsuperscript{315} Exhibit UUUU10.5, 01:57 - 02:46.

\textsuperscript{316} Exhibit UUUU10.5, 02:48 - 04:48; 04:51 - 05:04.
There is also possible evidence of discharges at:

262.1 15:53:40 (possible tear gas);\textsuperscript{318} and

262.2 15:53:44 (tear gas or stun grenade).\textsuperscript{319}

There is no other evidence of the use of tear gas and stun grenades before the TRT open fire. In particular, there is no evidence of tear gas or stun grenades around the time that Nyala 4 reached the kraal.

263.1 On the Rowland Headgear footage there is a haze in the air, which appears to be dust and exhaust fumes. What is not visible is the distinctive “double bang” of stun grenades or the “plume” from tear gas. This is also evident from the SABC footage of Nyala 4 reaching the kraal.\textsuperscript{320}

\textsuperscript{317} Exhibit UUUU10.5, 02:48 - 04:48; 04:51 – 05:04.
\textsuperscript{318} Exhibit UUUU10.5, 05:15 - 05:23.
\textsuperscript{319} Exhibit UUUU10.5, 05:36 - 05:38.
\textsuperscript{320} Exhibit UUUU10.5, 0:800 - 10:03.
263.2 The FLIR IR camera also contained no footage of the “white flash” of stun grenades.\textsuperscript{321}

263.3 The SABC, Al Jazeera, and Channel 4 cameras followed the strikers for most of their movement around the kraal from the point that Nyala 4 cut them off. They contain no evidence – either visual or audio – of tear gas or stun grenades being used around the time that Nyala 4 reached the kraal.\textsuperscript{322}

264 Exhibit UUUU10.4, the expert video presentation regarding the use of water cannons, demonstrates that water cannons were not used at the time and in the vicinity when Nyala 4 reached the kraal. At 15:51:47, which was approximately the time that Nyala 4 reached the kraal, both water cannons were still stationery in their starting positions in the neutral area.\textsuperscript{323} The video presentation demonstrates further that the water spray from the water cannons was not used until seconds before the TRT opened fire:

\textsuperscript{321} Exhibit CC37, Exhibit UUUU10.5, 10:06 - 10:14.
\textsuperscript{322} Exhibit UUUU10.5, 10:32.
\textsuperscript{323} Exhibit UUUU10.4, 00:24 - 04:04.
264.1 The Johannesburg water cannon did not spray any water until 15:53:40 (10 seconds before the TRT opened fire);\textsuperscript{324} and

264.2 The North West water cannon did not spray any water until 15:53:46 (4 seconds before the TRT opened fire).\textsuperscript{325}

265 The objective evidence therefore shows that the alleged Incident 2 did not occur as described by the SAPS in Exhibit L.

266 This was ultimately confirmed by both Captain Loest and Captain Thupe.

266.1 Captain Loest conceded that he witnessed Nyala 4 deploying its barbed wire and reaching the kraal.\textsuperscript{326} However, he did not witness any attack on Nyala 4.\textsuperscript{327}

266.2 Captain Thupe conceded that saw the miners walked alongside the Nyalas that were deploying the barbed wire. However, he did not witness anything unusual. In particular, he did not the

\textsuperscript{324} Exhibit UUUU10.4, 09:37 - 11:01, 11:04 - 13:00.

\textsuperscript{325} Exhibit UUUU10.4, 09:04, 11:04 - 13:00.

\textsuperscript{326} Day 229, T.28446, lines 21 – 23.

\textsuperscript{327} Day 229, T.28445, line 22 – 28446, line 10.
strikers attack any of the Nyalas while they were walking alongside the barbed wire vehicles.\footnote{Day 236, T.29612, lines 1 - 23.}

Accordingly, the Commission should conclude on the basis of the objective evidence that the alleged incident 2 did not take place.

**The actual movement of the strikers from the koppie to the kraal**

From the Koppie to the kraal, the strikers walked slowly and closely together. They walked in a north-easterly direction towards the road to Nkaneng. They made no attempt to approach the SAPS members and resources.

This is despite the fact that until shortly before Nyala 4 cut the strikers off at the kraal, the barbed-wire was not yet deployed as a barrier between the strikers. It was only when Nyala 4 reached the kraal that it did so.

From the time that Mr Noki began to lead the strikers away from Koppie 2 until they were cut off by Nyala 4 at the kraal, the strikers walked slowly and closely together.
270.1 At 15:48:27, Mr Noki began to lead the “lead group” of strikers away from Koppie 2. They can be seen walking slowly and closely together.329

270.2 At 15:48:59, most of the lead group can be seen walking to the north and west of the single pylon. They continued to walk slowly and closely together.330

270.3 At approximately 15:50:00, the lead striker group passed to the north of Nyala 5. They continued to walk slowly and closely together.331

270.4 At approximately 15:50:15, the lead striker group were still passing to the north of Nyala 5. They continued to walk slowly and closely together.332

329 Exhibit UUUU10.3, 5:23 - 6:00; Exhibit JJJ194.11 at 6 seconds; Exhibit OOO34, slide 6.
330 Exhibit UUUU10.3, 6:02; Exhibit JJJ194.11 at 38 seconds; Exhibit OOO34, slide 7.
331 Exhibit OOO34, slide 8.
332 Exhibit OOO34, slide 9.
270.5 Nyala 5 began to move at approximately 15:50:23, as the lead group of strikers passed it.\textsuperscript{333}

270.6 By 15:50:57, the lead group of strikers can be seen still walking slowly and closely together.\textsuperscript{334}

270.7 At 15:51:43, the strikers continued to walk slowly and closely together.\textsuperscript{335}

270.8 At 15:52:03, Nyala 4 reached the kraal cutting off the strikers.\textsuperscript{336}

271 From the time that Mr Noki began to lead the lead group of strikers away from Koppie 2 (15:48:27) until shortly before Nyala 4 cut the strikers at the kraal (15:52:03):\textsuperscript{337}

271.1 The strikers walked in a north-easterly direction towards the road to Nkaneng;

\textsuperscript{333} Exhibit OOO34, slides 10 and 11.

\textsuperscript{334} Exhibit UUUU10.3, 10:44; Exhibit JJJ194.14 at 10 seconds.

\textsuperscript{335} Exhibit UUUU10.3, 12:41; Rowland Headgear Camera, Exhibit CC37, from RH camera time 16:14:23.

\textsuperscript{336} Exhibit UUUU10.3, 15:03; Exhibit CC37.

\textsuperscript{337} Exhibit UUUU10.3, 5:23 - 15:03; Exhibit UUUU10.3.1, 5:47 – 15:09.
271.2 They made no attempt to approach the police line; and

271.3 The barbed wire was not in fact deployed between the strikers and the police line. Thus, it did not form a barrier between them. It was only when Nyala 4 reached the kraal and cut the protestors off that it did so.

Conclusion

272 We therefore submit that the following is clear from the objective evidence:

272.1 Incident 1 did not occur at all;

272.2 Incident 2 did not occur as alleged by the SAPS;

272.3 When the lead group of strikers dispersed from Koppie 2 to the kraal, they walked slowly and in a north-easterly direction. They walked towards the road to Nkaneng. At no stage did they move towards the police line or resources.
272.4 This was despite the fact that there was no barrier between the police and the strikers until they were cut off by Nyala 4 at the kraal.

The movement of the strikers around the kraal

Introduction

273 After the strikers were cut off at the kraal they moved around the kraal in order to reach the road to Nkaneng on the other side of the kraal. Before they moved around the kraal, the TRT line moved to form up on the northern side of the road.

274 This was in response to orders to do so, on the basis that it was anticipated by SAPS’ commanders that once the strikers came around the kraal they would try and get through the gap between the fence and the kraal. After Nyala 4 cut the strikers off at the kraal there was nowhere else they could go.

275 As the protestors moved around the kraal, the Nyalas formed a crescent-shaped formation between the kraal and the fences to the
eastern side of the kraal. The effect of this formation was to channel the strikers towards the TRT line.

276 In what follows, we address the following in turn:

276.1 The formation of the TRT line;

276.2 The movement of the strikers and around the kraal and the movement and formation of the Nyalas;

276.3 SAPS use of tear gas and stun grenades at scene 1; and

276.4 SAPS use of rubber bullets at scene 1.

277 All of this evidence leads to the conclusion that the strikers were deliberately channelled towards the waiting TRT line.

The formation of the TRT line

278 As noted above, the TRT line moved to form up at the kraal before the strikers moved around it. It did so on the basis of instructions and in
anticipation of the fact that the strikers were moving to the gap between the kraal and the fence.

279 It is clear from Brig Calitz’s testimony that he foresaw that the strikers were going to move around the kraal and through the gap between the kraal and the fence. He said the following in this regard:

279.1 After Nyala 4 cut the strikers off at the kraal, he realised that they would move around the kraal and that the only way that the strikers could get through was for them to go through the passage between the corrugated iron shack and the wall of the kraal facing it (“Passage A”).

279.2 He alleged that he wanted to block the strikers from passing through Passage A. In particular, what he wanted to do was to stop them from passing between the edge of the kraal and the opposite side where the corner of the fenced enclosure was.

338 Day 160, T.18242, line 16 -18243, line 17
339 Day 159, T.18139 – 18140.
279.3 He knew at all stages that once the gap to the west of the kraal had been closed the only way the strikers could get into the so-called “safe enclosure” was by going around the kraal and through Passage A.\textsuperscript{341}

280 Captain Loest gave similar evidence. Thus, he conceded that after the strikers were blocked by Nyala 4 at the kraal it was clear that they were coming around the kraal. Consequently, if there was a potential threat it would be in the gap between the kraal and the fence because Nyala 4 had blocked off the south-western corner of the kraal.\textsuperscript{342}

281 Notably, the TRT members who were in the police enclosure started to move forwards, towards their final position, before the strikers started to move around the kraal. Captain Thupe conceded the following in this regard:

281.1 Exhibit JJJ11.1515, which is one of Vermaak’s blackberry photographs, was taken at 15:51:47. Captain Thupe conceded that he saw the lead group of strikers when they were in the

\textsuperscript{341} Day 160, T.18243, line 18 -18244, line 13.

\textsuperscript{342} Day 229, T.28445, lines 10 – 21.
position depicted on the photograph, which was heading to the north of the road to Nkaneng and the position from where they moved towards the gap between Nyala 4 and the kraal.\textsuperscript{343}

281.2 At the time he saw the strikers in the position depicted on Exhibit JJJ.11.1515, his TRT line was still in its position in the neutral area. It was at this time that the TRT line started moving forward towards the road to Nkaneng.\textsuperscript{344}

281.3 The distance from the TRT starting position to the road near the kraal is 110 metres. It took less than a minute for the TRT line to move from their starting position to where they formed up behind the road to Nkaneng.\textsuperscript{345}

282 Moreover, and importantly, the TRT members who were in the so called police enclosure moved forward on the basis of an instruction from Brig Calitz:

\textsuperscript{343} Day 227, T.28059, lines 4 - 13.
\textsuperscript{344} Day 227, T.28059, lines 4 - 13.
\textsuperscript{345} Day 227, T.28059, line 22 – 28060, line 13.
282.1 In his statement, Lt Col Classens stated that whilst the TRT members were in the neutral area, they heard Brigadier Calitz issue an instruction over the radio for the TRT to move in.\textsuperscript{346} He confirmed this in his testimony.\textsuperscript{347}

282.2 Captain Thupe conceded that while Nyala 4 was busy deploying its barbed wire, Captain Loest instructed the TRT to run in the direction of the kraal and to form a line.\textsuperscript{348}

282.3 Captain Loest testified that he could not remember whether he had received an instruction from Brig Calitz for the TRT to move in. However, he testified further that he thought Brig Calitz must have done so because he would not have given an instruction to the TRT to move forward in the absence of such an order from Brigadier Calitz.\textsuperscript{349}

283 The TRT basic line formed up at its position at the kraal (to the north of the road to Nkaneng) as the strikers began moving around the kraal:

\textsuperscript{346} Exhibit RRR11, para.9.
\textsuperscript{347} Day 236, T.29480, lines 16 - 19.
\textsuperscript{348} Day 227, T.28057, line 2 – 28058, line 17.
\textsuperscript{349} Day 229, T.28439, line 19 – 28440, line 8.
283.1 From **15:52:27 - 15:52:32**, strikers can be seen walking closely behind the edge of the kraal and thus starting to move around it.\(^{350}\)

283.2 At **15:52:32** (1 minute and 18 seconds before the TRT opened fire), the strikers are visible on Exhibit JJ194.16 (at 19 seconds) between the Nyala and its wire cage over the edge of the small as they began to move around it. Thus, at this stage, the strikers had not yet moved around the kraal. It is at that moment that the first call for the TRT line to from a basic line can be heard on the video clip.\(^{351}\)

283.3 At **15:52:40**, several things happened;\(^{352}\)

283.3.1 The media were ordered to go away;\(^{353}\)

283.3.2 TRT members can be seen moving forwards, running or jogging, towards the road to Nkaneng;

\(^{350}\) Exhibit UUUU10.3, 18:15 - 18:58.

\(^{351}\) Exhibit JJ194.16, Exhibit RRR14, slide 3; Day 228, T.28164, lines 17.

\(^{352}\) Exhibit UUUU10.3, 19:16.

\(^{353}\) Exhibit JJ194.16; Exhibit RRR14, slide 4; Day 228, T.28167, line 18 – 28168, line 13.
283.3.3 TRT members can be seen cocking their guns;\(^{354}\) and

283.3.4 Two TRT members can be seen drawing their weapons out of their holsters and cocking them.\(^{355}\)

283.4 At \textbf{15:52:50 - 15:52:53}, the strikers can still be seen walking closely behind the edge of the kraal and thus moving around it.\(^{356}\) At the same time, Nyala 6 can be seen driving across the screen with POPS members moving on the right-hand side of it. The POPS members could not be seen by the strikers.\(^{357}\)

283.5 At \textbf{15:52:55:00 - 15:53:07:03}, the TRT line can be seen forming up. TRT members can be seen going backwards and forwards. A TRT member can be seen signalling with hand gestures for the basic line to move forward and form up.\(^{358}\)

\(^{354}\) Exhibit JJJ194.16; Exhibit RRR14, slide 4; Day 228, T.28169, lines 19 - 23.

\(^{355}\) Day 228, T.28172, lines 10 – 16.

\(^{356}\) Exhibit UUUU10.3, 19:29.

\(^{357}\) Exhibit UUUU10.3, 19:29.

\(^{358}\) Exhibit UUUU10.3, 19:54 - 20:10.
283.6 By 15:52:34, the TRT line had essentially formed up.\textsuperscript{359}

284 Thus, as Captain Loest conceded, the TRT members moved directly to the northern side of the road and formed up in the gap between the road and the shack. They did so before the strikers had moved around the kraal.\textsuperscript{360}

285 The manner in which the TRT line formed up was different to the planned deployment of the TRT line.

285.1 Exhibit UU2 shows the approximate position of the TRT line during the shooting. On this photo the TRT line was about 10 metres from the road to Nkaneng. At the time of the shooting they were about 5 - 7 metres closer to the road. Thus, they were about 3 - 5 metres away from the road during the shooting. The line also stretched the distance that it did on the photograph, which was approximately 40 metres long.\textsuperscript{361}

285.2 Captain Loest said the following in this regard:

\textsuperscript{359} Exhibit JJ194.16, 39.

\textsuperscript{360} Day 229, T.28445, lines 10 – 21.

\textsuperscript{361} Exhibit UU2, Day 230, T.28462, line 12 – 28464, line 14.
285.2.1 According to the plan, the TRT members were supposed to be parallel to the POP members. Their actual deployment was perpendicular to the POP line.\textsuperscript{362}

285.2.2 The decision to line up in this manner was not something that was contemplated at the 15:30 briefing. It was a decision that was taken on the ground.\textsuperscript{363}

285.3 Lt Col Classens said the following:

285.3.1 He agreed with Captain Loest’s testimony that the basic line was not formed in accordance with the plan.\textsuperscript{364}

285.3.2 He was unable to say why the line formed up where it did – the POPS members were in front of the TRT

\textsuperscript{362} Day 230, T.28464, line 25 – 28465, line 10.
\textsuperscript{363} Day 230, T.28465, line 16 – 28466, line 4.
\textsuperscript{364} Day 236, T.29602, lines 2 – 6.
and they just all took it that that was where they could form the line.\textsuperscript{365}

285.3.3  The basic line was retained even after the shooting at scene because they “had to form a line again so that we can be unified because we were falling apart within the shooting there.”

286  The only reasonable inference from this evidence is that the TRT line formed up in the place and manner in which it did on the basis of an instruction to do so.

286.1  Lt Col Classens testified that no commander took control of the TRT basic line and that it formed up in the place and manner in which it did because the TRT members “were like … gelling with each other.”

286.2  It is entirely implausible that the TRT line fortuitously formed up in a manner that was inconsistent with the planned deployment of the TRT line and the debriefing that the TRT

\textsuperscript{365} Day 236, T.29602, lines 7 - 12.
had been given less an hour before. They would only have
done so on the basis of a specific instruction to his effect.

286.3 Lt Col Classens’ testimony to the contrary must therefore be
rejected.

287 We submit that the instruction for the TRT line to form up in the
manner in which it did originated with Brigadier Calitz. As noted
above:

287.1 Lt Col Classens testified that it was Brig Calitz who gave the
initial instruction for the TRT line to move forward.

287.2 Captain Loest testified that he would not have given an
instruction to the TRT to move forward unless he had been
instructed to do so. The only reasonable inference is therefore
that he would not have given an instruction for the TRT to
form up in a manner that was not in accordance with the plan
unless he was specifically instructed to do so.
Captain Thupe conceded in this regard that the order to form a basic line is normally given to block people or to prevent them from passing.\textsuperscript{366}

Therefore, the only reasonable inference is that Brig Calitz instructed the TRT line to move forwards to its final position at the kraal in order to block the strikers at the gap between the fence and the kraal.

**The formation of the Nyalas**

As the strikers moved around the kraal, the SAPS vehicles formed a crescent-shaped formation on the eastern side of the kraal. The SAPS vehicles formed up in this manner on the basis of instructions to do so. The effect of this formation was to channel the strikers towards the TRT line.

Exhibit KKK52 sets out the position of the SAPS vehicles at scene 1 at 15:53:30. With the exception of Papa 1 Brig Calitz confirmed that the

\textsuperscript{366} Day 228, T.28173, lines 5 - 9.
depiction of the position of the SAPS vehicles on Exhibit KKK52 is correct.\textsuperscript{367}

Exhibit KKK57.1 and 57.2 shows the effect of the SAPS vehicle formation, the fences and the deployed barbed-wire. The deployment of the barbed wire from Nyala 1 to Nyala 5 and then to the kraal on the one side and the fences and on the other effectively funnelled the strikers to the gap between the kraal and the fence. \textsuperscript{368} The SAPS vehicle formation then effectively channelled the strikers to where the TRT line formed up.

In addition to setting out the position of the SAPS vehicle, Exhibit KKK52 also depicts the position of the strikers relative to the SAPS vehicles as they moved around the kraal. Thus, from Exhibit KKK52 and other objective evidence, the following is clear:

293.1 At 15:52:03, Nyala 4 reached the kraal cutting off the strikers.\textsuperscript{369}

\textsuperscript{367} Day 175, T.20913, line 17 - 20914, line 15.

\textsuperscript{368} Day 176, T.20965, lines 7 - 22.

\textsuperscript{369} Exhibit UUUU10.3, 15:03; Exhibit CC37.
293.2 From 15:52:27 - 15:52:32, strikers can be seen walking closely behind the edge of the kraal and thus starting to move around it.\textsuperscript{370}

293.3 At 15:52:50 - 15:52:53, the strikers can still be seen walking closely behind the edge of the kraal and thus moving around it.\textsuperscript{371} At the same time, Nyala 6 can be seen driving across the screen with POPS members moving on the right-hand side of it. Thus, the POPS members could not be seen by the strikers.\textsuperscript{372}

293.4 At 15:53:08, the strikers can still be seen behind the kraal.\textsuperscript{373}

293.5 At 15:53:13, the strikers were at the position depicted by the blue/white cloud on Exhibit KKK52, slide 2. At this stage, the strikers were moving relatively slowly towards the northern edge of the small kraal. They were moving down the channel

\textsuperscript{370} Exhibit UUUU10.3, 18:15 - 18:58.

\textsuperscript{371} Exhibit UUUU10.3, at 19:29.

\textsuperscript{372} Exhibit UUUU10.3, at 19:29.

\textsuperscript{373} Exhibit UUU10.3, at 20:11.
between the small kraal on their right-hand side and the wire fence on their right-hand side.\textsuperscript{374}

293.6 At this point, the strikers would not have been able to see the TRT line. All they would have been focussing on was the POP Casspir moving into position. They may have been able to see Papa 2. However, they would not have been able to see Papas 4, 5, 19, Nyala 5 and the STF Casspir. Papas 1, 9 and 5 were probably out of their line of sight as well.\textsuperscript{375}

293.7 In addition, it would have been extremely difficult for the strikers to turn around at this stage. They could not have gone right because they would have come into contact with Nyala 4. They could not have gone left because of the fence.\textsuperscript{376}

\textsuperscript{374} Exhibit KKK52, slide 2.

\textsuperscript{375} Day 176, T.21099, lines 7 – 16.

\textsuperscript{376} Day 176, T.21095, line 12 - 21097, line 15.
293.8 Captain Thupe conceded that at this stage the strikers were moving slowly towards Nkaneng as opposed to storming the police; they were not attacking the police. 377

293.9 At 15:53:17, the strikers can be seen walking slightly closer to the north-western edge of the kraal.378 They are walking slowly towards the direction of the gap between the shack and the kraal.379

293.10 At 15:53:18 – 15:53:19, the strikers at the front of the lead group appear to take steps away from the POPS members to their left.380

293.11 At 15:53:21, the strikers were closer to the north-western edge of the kraal but they had not yet reached it. Papas 2, 4, 5 and 2

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377 Day 228, T.28174, lines 18 -21.
379 Exhibit UUUU10.3, 20:35.
had started to move into formation. The Casspir had also
moved into position behind the STF Casspir.381

293.12 In addition, at 15:53:21, the lead group of strikers appeared to
be keeping a distance from Papa 11 and the STF Casspir as they
approached the north-western edge of the kraal.382

293.13 At 15:53:24 - 15:53:25, the strikers can be seen approaching the
north-western edge of the kraal. They appeared to maintain a
distance from the SAPS members to their left.383

293.14 From 15:53:21 - 15:53:30, Papas 2, 4 and 19 moved forward to
their positions depicted on KKK52, slide 4. The strikers had
moved closer to the kraal. Papas 2 and 4 had reached their final
positions. They remained in these positions until the TRT
opened fire.384

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381 Exhibit KKK52, slide 3; Day 176, T.21105, lines 5 - 25.
384 Exhibit KKK52, slide 4; Day 176, T.21105, line 25 - 21106, line 11.
293.15 At 15:53:35, which is 15 seconds before the TRT open fire, the lead group of strikers, at the front of which was Mr Noki, reached the north-western corner of the kraal.\textsuperscript{385} Papa 5 was moving. It started out from the position shown on slide 5 of Exhibit KKK52. A few seconds later it moved past the bush and came to rest behind Papa 4.\textsuperscript{386} Its movement can be clearly seen on Exhibit RRR17 at 5 – 10 seconds (15:53:34 – 15:53:39). The fact that it moved at this time and up behind strongly suggests that it being instructed to do so.

293.16 The channel was all but complete. Only Papa 19(10) needed to move into position.

293.17 At 15:53:35, the first tear gas canister was fired. It is fired from the position between Papa 11 and the Casspir. It was thus fired behind the strikers. This also made it extremely difficult for the strikers to turn around.\textsuperscript{387}

\textsuperscript{385} Exhibit KKK52, slide 5; Day 176, T.21108, lines 11 - 20.
\textsuperscript{386} Day 176, T.21120, lines 10 - 16.
\textsuperscript{387} Day 176, T.21121, lines 4 - 20, 21122, lines 20 – 25, 21123, line 9 - 21124, line 3.
293.18 At 15:53:40, which is 10 seconds before the TRT open fire, the strikers had just moved around the north-western corner of the kraal. Until then, the strikers were not running or moving particularly quickly. They were still walking slowly. Captain Thupe conceded this.  

293.19 At this moment, the striker in the brown shirt fired a single shot. In the seconds before he fired (from 15:53:36), he was shot at with rubber bullets. One of the rubber bullets struck the ground and then his ankle.  

293.20 However, the firing of the shot by the striker coincided exactly with the discharge of a stun grenade. This is why it sounded as if two shots were fired. In reality, it was one shot. The first sound of an explosion that preceded the striker’s shot was the sound of a stun grenade. The striker then fired his shot into the ground behind the Casspir. The shot coincided exactly with the

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388 Exhibit KKK52, slide 6; Exhibit JJJ194.17 (15:53:36 E-TV time); Day 228, T.28178, line 15 - 28179, line 5.
389 Exhibit UUUU10.6, 00:37.
390 Exhibit UUUU10.6, 01:45.
second explosion of the stun grenade so only one sound is heard.\textsuperscript{391}

293.21 After the sound of the pistol and the stun grenade explosion, the strikers increase their pace substantially.\textsuperscript{392}

293.22 At this point it was therefore virtually impossible for the lead group of strikers to turn around. This was because of the increase in speed of the strikers behind the lead group of strikers (due to the sound of the pistol being fired and the stun grenade exploding). It was also due to the tear gas that had been fired behind the strikers.\textsuperscript{393}

293.23 Thus, the lead group of strikers was propelled forwards towards the TRT line.

293.24 From \textbf{15:53:45} to \textbf{15:53:47}, Papa 19(10) moved up into its position behind Papa 5 (depicted on KKK52, slide 8). There was no necessity for it to move.

\textsuperscript{391} Exhibit UUUU10.6, 01:10 – 02:00.
\textsuperscript{392} Exhibit UUUU10.3, at 22:33.
\textsuperscript{393} Day 176, T.21130, line 6 – 21132, line 4.
293.25 This completed the channel.

294 Brig Calitz described the formation of the SAPS vehicles at scene 1 as “the perfect block.”394 It is implausible that the SAPS vehicles would have formed up into this formation fortuitously. If regard is had to Exhibit JJJ194.16, at 15:52:52, which was 58 seconds before the TRT opened fire, the SAPS vehicles were not in any formation. Brigadier Calitz conceded this.395 Less than one minute later they had formed up in a manner that Brigadier Calitz described “as the perfect block.”

295 Colonel Scott testified that at this time he heard Brigadier Calitz over the radio giving instructions to the vehicles to move up into some formation.396 Mr Botes effectively confirmed this evidence.397

296 Thus, on the basis of the evidence as a whole, the only reasonable inference is that the vehicles moved into the half-moon formation at Scene 1 in response to orders from Brigadier Calitz to do so. At the

394 Day 160, T.18270, lines 6 - 7.
395 Day 176, T.21089, lines 11 - 14.
396 Exhibit HHH20, para.18.
397 Day 266, T.33647, line 21 – 33650, line 13.
least, it must be concluded that this formation could have not have been fortuitous.

This is confirmed by the following:

297.1 First, POP members are trained to use vehicles to block protestors.

297.1.1 Exhibit KKK47 is a POP training manual.

297.1.2 If regard is had to slide 15 of Exhibit KKK47, it is clear that POP are trained to use vehicles to block protestors from proceeding and thus to control/direct their movement.

297.1.3 POP are also trained to use vehicles to channel protestors in specific directions. This appears clearly from slide 16 of Exhibit KKK47.

297.1.4 Slide 21 of Exhibit KKK49 states further that the tactical option of “block” is commonly used as the basis of other tactical options, including to isolate,
canalise and to encircle. Brigadier Calitz conceded that encirclement was part of the plan.398

297.1.5 In POP’s language the word “encircle” means to set an ambush or a trap. Thus, Exhibit KKK49, provides as follows:399

“At the EEP members must remain out of sight of participants to maintain an element of surprise. On command sections will appear from their positions and close all escape routes so that it is then coordination between all sections involved in the operation and then the trap must be sprung once the participants are in a distance inside the street so that there is no chance of escape.”

297.2 Second, in view of the fact that POP members are specifically trained to use vehicles to block protestors, if this had really been the plan/objective it could have been easily achieved by using vehicles to block Passage A.

398 Day 175, T.20929, lines 16 – 19.
399 Day 175, T.20930, lines 13 - 20.
297.2.1  SAPS used Nyalas to block the western edge of the kraal before the gap was closed by Nyala 4 deploying its barbed-wire to the edge of the kraal. Exhibit L, slide 200 shows that while Nyala 4 was in the process of closing off the gap while deploying the barbed-wire, Nyalas 5 and 6 were positioned parallel to the gap, almost length-on-length, leaving space for Nyala 4 to come in front of them. These Nyalas essentially closed the gap that would be there before Nyala 4 reached the western edge of the kraal. They were physically blocking the gap by placing themselves in the position in which they did.  

297.2.2  There is also a line of three Papa Nyalas behind Nyala 5. To the east of that line of three Nyalas there are a further two Nyalas. They were all lined up to drive in such a way that if they had driven straight they would find themselves driving on a line to close the gap which would remain if the gap to the kraal still required closing. The Nyalas therefore lined up

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400 Day 160, T.18253, line 1 - 18254, line 9.
in such a manner that if they were to hold their line and keep driving to the edge of the kraal they would be in a position where they would have blocked the gap between Nyala 4 and the western edge of the kraal.\textsuperscript{401}

297.2.3 The block manoeuvre at 15:51:47 was performed within a maximum time of 21 seconds. This is clear from the CCTV footage. Nyala 4 started uncoiling its wire at 15:51:26, which was when it moved away from Nyala 3. The picture that formed the basis of Exhibit L, slide 200 was taken at 15:51:47. There was therefore a maximum of 21 seconds for the Papa Nyalas to move themselves into this formation after Nyala 4 started deploying its barbed wire. Thus, the instruction to perform the block could not have been given more than 21 seconds before.\textsuperscript{402}

\textsuperscript{401} Day 160, T.18257, line 21 - 18258, line 23.

\textsuperscript{402} Day 160, T.18300, line 18 - 18301, line 4.
297.2.4 Exhibit JJJ194.16 shows Brig Calitz’s Nyala (Papa 1) reaching the path south of the kraal at 15:52:36. Exhibit JJJ198.16 is the video of Brig Calitz’s Nyala reaching the path south of the kraal at 23 seconds, which is 15:52:36 pm. That was 1 minute and 14 seconds before the shooting. It was 45 seconds before the photograph that formed the basis of Exhibit L, slide 205 was taken. On that photograph there were six armoured vehicles ahead of Calitz in the gap. They were Papa 11, the STF Casspir, Papa 7, Papa 18, the POPs Casspir and Nyala 6. Thus, including Calitz’s vehicle there were seven armoured vehicles either on the path or across the path.\footnote{Day 160, T.18301, lines 5 -14.}

297.2.5 In addition, behind Papa 1 there were another seven armoured vehicles. These were Nyala 5, Papa 2, Papa 5, Papa 19(10), Papa 4 and Papa 3. The gap at Passage A was 18.5 metres. Thus, if Calitz and the Nyalas in front of him had reacted with the same purpose and speed that the Nyalas reacted at the so-called incident
2 it would have been possible to close the gap at Passage A within the remaining 45 seconds.  

297.2.6 Calitz’s Nyala was on the road to Nkaneng. The path was 52 metres away from Passage A. Accordingly, the furthest distance that any Nyala would have to travel was 52 metres.  

There was thus more than sufficient time for the vehicles to block Passage A.  

297.2.7 Exhibit KKK52, slides 11 and 12 show further alternative formations that could have properly blocked Passage A. This could easily have been done within the 20 - 30 seconds that remained before the TRT opened fire.  

298 On the basis of the evidence set out above, the only reasonable inference is that Brig Calitz employed a blocking tactic (of the type that can be seen on Exhibit KKK49, slide 16) to channel the strikers down the line of Papa Nyalas towards the TRT line.  

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In addition, it was an encirclement operation because, due to poor visibility and the position of Papa 19(10), the strikers could not see the TRT line until seconds before the TRT opened fire.\footnote{Day 175, T.20940, line 21 – 20941, line 13.}

Captain Loest effectively conceded that the strikers were channelled towards the TRT line:

“MR GOTZ: Ja, Papa 5 has just moved up and in fact, in fact what happens is that the Nyala, which we’ve marked as Papa 19 which was in fact Papa 10, moves five seconds later, moves right up behind Papa 5 and so a channel was created, Captain Loest, which prevented the strikers from moving in the direction you said they could. Correct?

CAPTAIN LOEST: I agree on that.

CHAIRPERSON: The case being put is they were, in effect, channelled along that corridor to the right on the photograph of the kraal, by the position of these vehicles.”

CAPTAIN LOEST: No, I agree on that, Mr Chair.

MR GOTZ: And so the reason that they’re moving towards your line and in fact heading directly towards you is because of the fact they’re being channelled in that direction, correct?

CAPTAIN LOEST: Yes, Mr Chair, I agree on that point.”
The only reasonable conclusion is that Brigadier Calitz instructed the Nyalas at scene 1 to form up in the crescent-formation in order to channel the strikers towards the TRT line.

The channelling effect of the Nyalas was compounded by the manner in which tear-gas, stun grenades and rubber balls were used at scene 1. In the following sections, we deal with this in detail. It is also important to note that SAPS has alleged that the use of live ammunition at scene 1 was the only option available after all other less lethal means of dealing with the strikers, including tear gas, stun grenades and the water cannon, had failed. The evidence does not bear this out.

**SAPS’ use of tear gas and stun grenades at scene 1**

The strikers were fired at with tear gas and stun grenades as they moved around the kraal. The first discharge was at 15:53:30, which was only ten seconds before the TRT open fire. But it is notable that the tear gas and stun grenades were discharged *behind* the strikers, not in
front of them, despite the fact they were moving exceptionally slowly at this point.

304 The effect of the tear gas and stun grenades would also have been to channel or push the lead strikers forwards towards the TRT line. There is no evidence of the use of tear gas or stun grenades before 15:53:30.

304.1 The first stun grenade was discharged at approximately 15:53:30; at 15:53:30:15 and 15:53:31:05, the double bang of a stun grenade and its smoke can be seen and heard on the relevant video footage.\footnote{407} The stun grenade was discharged from the direction of Papa 11 behind the strikers.\footnote{408} At 15:53:34:11 the smoke is visible behind the strikers with the strikers silhouetted against it.\footnote{409} Thus, the stun grenade was fired or thrown from behind the strikers. This also served to push the strikers towards the TRT line.

\footnote{407} Exhibit UUUU10.5, 00:29 - 01:04. \footnote{408} Exhibit UUUU10.5, 01:24; for the position of Papa 11 at the time, see Exhibit KKK52, slide 5. \footnote{409} Exhibit UUUU10.5, 01:28.
304.2 The next stun grenade was discharged at 15:53:39, just over 10 seconds before the TRT volley.\textsuperscript{410} The grenade exploded above and in the vicinity of the Casspirs, the position of which, at the time, are drawn on Exhibit KKK52, slide 6. It exploded to the left of and behind the strikers (from their perspective). As noted above, this coincided exactly with the striker firing the pistol. As a consequence, only one sound is heard.\textsuperscript{411} This is most likely what caused the strikers to start running. It explains their reaction on Exhibit JJJ194.17 at 5 seconds.

304.3 The next evidence of the use of a stun grenade or tear gas is at 15:53:40 and 15:53:42. This is clearly the discharge of two tear gas canisters. Both tear gas canisters were discharged behind the front of the lead group of strikers.\textsuperscript{412} The discharge of these tear gas canisters would have channelled the lead group of strikers towards the TRT and made it extremely difficult for the lead group to turn around.

\textsuperscript{410} Exhibit UUUU10.5, 01:53 – 02:47.

\textsuperscript{411} Exhibit UUUU10.6, 01:10 - 02:00.

\textsuperscript{412} Exhibit UUUU10.5, 02:48 - 03:39.
Thus, tear gas was only used seconds before the TRT line opened fire. Captain Classens effectively conceded this. He testified that he only felt the effects of tear gas for the first time shortly before he reached his final position in the TRT line. This was not long before the TRT line opened fire.

**SAPS’ use of rubber balls at scene 1**

As the strikers came around the kraal they were also fired at extensively with rubber bullets. Once in the channel, the rubber balls fired at the strikers would have served to channel the strikers forwards towards the TRT line with blankets over their heads.

Captain Thupe conceded the following regarding the use of rubber rounds:

307.1 Rubber rounds are normally used for dispersal purposes.

307.2 It is a normal response when one is being shot at with rubber balls to try and get away as quickly as possible.

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414 Day 228, T.28208, lines 23 – 25.
307.3 Individuals in a crowd of people who are being shot at with rubber balls will tend to run to get away rather than stand stationary while they are being shot at with rubber bullets.416

308 It is clear from the objective evidence that a large number of rubber rounds were fired at the protestors. Exhibit L, slide 211 shows that 522 rubber rounds were shot at scene 1. Each round has two rubber balls in it. Therefore, over 1 000 rubber rounds were fired at the protestors at scene 1 alone. This is extraordinary when compared to the amount of teargas and the number of stun grenades utilised.

309 We submit that the rubber bullets would have served to channel the strikers towards the TRT line with blankets over their heads.

309.1 Exhibit RRR15, slide 3, is a photograph of the lead strikers one second before the TRT opened fire. The lead group of strikers were bent forward and they had blankets or jackets around their heads. Captain Thupe conceded this.417 He also conceded

415 Day 228, T.29209, lines 1–5. See also Captain Loest’s concession at Day 229, T.28393, lines 11–17.

416 Day 228, T.28209, lines 6–11.

417 Day 228, T.28207, line 18 – 28208, line 14.
that the reason they had blankets and jackets over their heads was because at that stage they were being shot at by POP members with rubber rounds.\textsuperscript{418}

309.2 Exhibit RRR16 is an enhanced version of Exhibit JJJ194.17 from 10 - 14 seconds. It shows the lead group of strikers approaching the TRT line. Most if not all of the people are bent over and have blankets or jackets over their heads. Captain Thupe also conceded this.\textsuperscript{419}

310 Thus, the only reasonable inferences from the objective evidence are the following:

310.1 Rubber balls were fired at the strikers at scene 1 after they entered the channel; and

310.2 This also served to drive the strikers forwards towards the TRT line with blankets and jackets over their heads.

\textsuperscript{418} Day 228, T.28208, lines 15 - 19.

\textsuperscript{419} Day 228, T.28205, line 1 – 24, 28206, line 16 – 28207, line 17.
SAPS foresaw the risk of strikers being killed

311 It was reasonably foreseeable and in fact foreseen by the commanders on the ground that at least some of the strikers would be killed if they were channelled towards the TRT line.

312 Brig Calitz clearly foresaw that if he channelled the strikers towards the TRT line it was likely that at least some of them would be killed. He conceded the following in this regard:

312.1 He knew that if he could not block the strikers from getting down the eastern side of the kraal, there was likely to be a confrontation between the strikers and the TRT who were supposed to be forming up behind the POP members.420

312.2 He said that POP’s function was to block the strikers. If they could not do so because the strikers were undeterred by the tear gas and the stun grenades and the water cannon then POP

420 Day 160, T.18245, line 15 – 18246, line 22.
would retreat to the Nyalas and the next line of defence would be the TRT.\textsuperscript{421}

312.3 He also knew that if there was a confrontation between the TRT and the strikers there was likely to be a high risk of loss of life, at least on the part of the strikers.\textsuperscript{422}

313 Captain Thupe conceded that by 15:52:40, which was when the media was ordered to go away and TRT members were moving to where the TRT line formed up, whilst drawing their weapons and cocking them, the TRT knew that there was going to be a confrontation.\textsuperscript{423}

314 Captain Thupe also said the following on the basis of Brig Calitz’s briefing to the TRT:\textsuperscript{424}

314.1 What was envisaged was that POP would advance on the strikers and try to disperse them using water cannons, tear gas and rubber bullets.

\textsuperscript{421} Day 160, T.18245, line 15 – 18246, line 22.
\textsuperscript{422} Day 160, T.18246, line 23 - 18247, line 12.
\textsuperscript{423} Exhibit JJJ194.16, Exhibit RRR14, slide 4, Day 228, T.28167, line 18 - 28168, line 13, T.28172, lines 10 - 16.
\textsuperscript{424} Day 227, T.28054, line 3 - 28056, line 12.
314.2 It was however always possible that these methods would not work and that POP members would have to retreat and take refuge in the armoured vehicles.

314.3 If that occurred, the purpose of the TRT was to move forwards and engage the strikers. The TRT would then engage them with their R5 rifles. If the strikers approached the TRT aggressively, the TRT would have to respond with their rifles.

314.4 If that happened the TRT would try to shoot at the strikers’ legs to avoid killing them. However, the TRT could not be sure that they would succeed in not killing any strikers because of the nature of R5 rifles.

314.5 There was therefore the risk that at least some of the strikers would be killed.

315 Accordingly, the only reasonable inference is that the SAPS, and particularly Brig Calitz, foresaw that at least some of the strikers might be killed if they were channelled towards the TRT line. It was also reasonably foreseeable that this would occur.
Conclusion

The strikers were channelled towards the line. This was in circumstances where it was foreseen and reasonably foreseeable that this would result in at least some strikers being killed.

The shooting

Introduction

The SAPS alleges that after the strikers came around the kraal (and were shot at by POP with rubber bullets), they charged towards the TRT line, brandishing weapons. TRT members were thus forced to use live ammunition as a last resort and in defence of their own lives and the lives of their colleagues. SAPS alleges further that the TRT opened fire in the absence of an instruction from anyone.

This version is entirely inconsistent with the objective evidence. It must be rejected for the following reasons, which we deal with in turn below:

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425 Exhibit L, slide 204.
426 Exhibit FFF9, para.44.10.
318.1 The co-ordinated manner in which the TRT acted is entirely inconsistent with the allegation that they acted in self-defence, private-defence or putative self-defence.

318.2 The strikers did not attack the police nor could they reasonably be believed to be engaged in an attack on the police.

318.3 The strikers were not given any verbal warning nor were any warning shots fired before the TRT opened fire.

318.4 All 17 of the strikers who were shot and killed at scene 1 were shot in the head or the upper body.

318.5 The failure to get paramedics to scene 1 in a timely manner is inconsistent with SAPS version that the strikers were shot in self-defence, private defence or putative self-defence.

318.6 The manner in which the deceased and the injured were treated at scene 1 is inconsistent with SAPS version of self-defence.
The co-ordinated manner in which the TRT acted

The co-ordinated manner in which the TRT acted in forming up, taking aim and opening fire is inconsistent with the allegation that they acted in self-defence or private defence:

319.1 By 15:53:17, which was 33 seconds before the TRT opened fire, the TRT line had formed up in the position that it was in when the TRT opened fire. By that stage the strikers had just moved around the kraal and were approaching the northern corner of the kraal.\footnote{Exhibit JJJ194.16.}

319.2 At 15:53:36 (14 seconds before the TRT open fire), a TRT member can be seen using two hand signals. The first hand signal is pointing his hand horizontally outwards. The second hand signal is clenching his fist in front of him. Captain Thupe testified that the first hand signal is an instruction to the TRT line to form the basic line. The second hand signal is an instruction to the TRT to hold the line.\footnote{Day 228, T.28216, line 8 – 28217, line 13.} At that stage the
strikers had not yet reached the edge of the kraal. They were approximately 40 - 50 metres away from the TRT line and were barely visible to the TRT line.\textsuperscript{429}

319.3 At 15:53:43, Browning can be seen lifting his R1 rifle, which has a telescopic sight. He aimed it in the direction of the strikers.\textsuperscript{430} At the same time, other TRT members can also be seen lifting their weapons and bracing themselves as if preparing to take aim.\textsuperscript{431}

The strikers did not attack SAPS at scene 1

320 SAPS’ version that the TRT line shot in self-defence or private defence and/or that the TRT members reasonably believed that their lives were in danger must be rejected:

\textsuperscript{429} Day 228, T.28217, lines 14 – 20.

\textsuperscript{430} Exhibit RRR17, between 15:53:43 and 15:53:46

\textsuperscript{431} Exhibit AAA, VIDEO_TS\VTS_04_1.VOB at 00:01:05 to 00:01:10.
320.1 Only approximately 37 strikers passed the edge of the kraal and moved towards the TRT line.\textsuperscript{432}

320.2 As the strikers came around the kraal they did not present any threat to the TRT line or other police resources:

320.2.1 As Brigadier Calitz conceded, when the strikers came around the kraal they could not see the TRT line, which had only recently formed up.\textsuperscript{433} They were therefore clearly not going to attack the TRT line.

320.2.2 In addition, as Brigadier Calitz conceded, when the strikers moved around the kraal they walked close to the edge of the kraal. They walked past the POP officers and did not attack them.\textsuperscript{434}

320.2.3 As Captain Thupe conceded, the striker in the brown shirt who fired the single shot did so 10 seconds

\textsuperscript{432} Exhibit UUUU13, paras 45 – 48.
\textsuperscript{433} Day 176, T.21099, line 19 – 21101, line 1.
\textsuperscript{434} Day 176, T.21099, line 19 – 21101, line 1.
before the TRT opened fire. The TRT therefore clearly did not open fire in response to this shot.\footnote{Day 228, T.28184, lines 9 – 20.}

320.2.4 The objective evidence does not substantiate SAPS members’ allegations that the strikers attacked SAPS vehicles. There were two cameras, which were filming from two different angles. The first was the Al Jazeera camera, which was taken from where Papa 1 was located on Exhibit KKK52, slide. The second was filming from where the white bakkie is located on the same diagram. There is no evidence on the footage from either camera of attacks against the SAPS vehicles.

321 The Commissioners are again respectfully invited to study the photograph of the lead strikers taken one second before the TRT opened fire, which is reproduced in Exhibit RRR15, slide 3. The TRT volley commenced a second after this photograph was taken. We respectfully submit that it cannot confidently be said that the strikers are attacking the SAPS. The strikers are at that moment bent over with
blankets over their heads to protect themselves from the rubber bullets being fired by the POPS members to their left. They do not appear to even be looking at the TRT line towards which they are moving.

On a balance of probabilities, they were not attacking the SAPS.

Accordingly, the only reasonable inference is that the strikers did not engage in any attack on the TRT line.

Nor was it reasonable for the SAPS to believe that the strikers were attacking them.

**SAPS’ failure to give a warning to the strikers**

The strikers were not given any warning before the TRT opened fire. This was despite the fact that there was sufficient time to do so. This is inconsistent with SAPS’ version that the TRT fired in self-defence/private defence.
The call to form the basic line is heard for the first time at 15:52:32 pm. The TRT open fire at 15:53:50. Thus, the call to form the basic line was one minute and eighteen seconds before the TRT opened fire.\textsuperscript{436}

On Exhibit JJJ194.16, the media were ordered to “go away” at 15:52:40 by means of a loudhailer. This was eight seconds after the TRT were called to form the basic line. It was still more than a minute before the TRT opened fire. As Lt Col Classens conceded there was therefore more than enough time for the strikers to be told to stop, put down their weapons and not come any closer.\textsuperscript{437}

Lt Col Classens conceded further that the person who gave the instruction to the media did so for a reason. The reason would have been that it was not safe because something was going to happen. Therefore, some event that necessitated the media having to move away was anticipated. And it was likely to happen soon. Lt Col Classens conceded that there would have been sufficient time for the same SAPS member to give a warning to the approaching strikers to

\textsuperscript{436} Exhibit RRR14, slide 4; Day 238, T.29858, lines 15 - 25.

\textsuperscript{437} Day 238, T.29859, line 4 – 29860, line 13.
turn around and not come forward any further. No such warning was given.438

SAPS’ failure to fire warning shots

Lt Col Classens conceded that a warning shot must give the person concerned enough time between the warning shot and a subsequent aimed shot to change his or her mind and act accordingly.439

Exhibit UUU10.6 shows that no such warning shots were fired. The TRT volley commenced at 15:53:50. No shots can be heard from the TRT line before this. Indeed, SAPS has never contended that the TRT fired any shot before 15:53:50. No puffs of dust appear in the seconds before the volley or when the volley commences. Within the first second of the TRT volley, one shot appears to have been fired into the ground within one second of the TRT opening fire. However, shots fired into the ground appear to have been fired simultaneously with lethal shots fired at strikers.

438 Day 238, T.29860, line 14 - 29861, line 11.
439 Day 236, T.29559, lines 5 - 23.
The only reasonable conclusion is that the TRT failed to give any warning to the strikers, either verbally over the loudhailer when this was possible, or in the form of warning shots.

**The injuries sustained by those who were killed at the kraal**

The 14 victims who were shot and killed at the kraal, were all shot numerous times, including to their upper heads and/or upper bodies. This is entirely inconsistent with SAPS’ version that the TRT fired in self-defence/private defence.

As noted above, the strikers did not attack SAPS members at scene 1, nor could the TRT members at scene 1 reasonably have believed that they were engaged in an attack. However, even if the Commission were to find that the strikers did attack the TRT members at scene 1 or that the TRT members could reasonably have believed that they were engaged in an attack, the response by the TRT members was completely disproportionate. Thus, the killings were still unjustified and thus unlawful.
The lead group of strikers were at most 20 - 25 metres away from the TRT line when the TRT opened fire. From this distance, one shot to a strikers lower leg would in all likelihood have broken the striker’s leg but in any event caused a serious injury and made it impossible for the striker to continue running.

This is clear from the following evidence:

335.1 Warrant-Officer Wessels testified as follows regarding the nature of R5s and the injuries they inflict:

“Mr Ntsebeza SC: My intention is just to get an unequivocal statement from you, if it is possible, that agrees with me that when once you bring R1 rifles and R5 rifles to a scene, you are likely to incur fatalities because those are lethal weapons intended to kill.

W/O Wessels: I will agree with you there.

... 

Chairperson: sorry to interrupt you, isn’t the expression assault rifle? Have you ever come across that expression, assault rifle?

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440 T.2152, lines 3 - 9, 2098, lines 1 -12, 2105, lines 14 - 24.
W/O Wessels: assault rifle is the correct –

Chairperson: now R4s and R5s assault rifles?

W/O Wessels: they conform to the description of an assault rifle.

Chairperson: you use them on the battlefield to kill the enemy, don’t you?

W/O Wessels: That is correct.

... 

W/O WESSELS: Sir, a serious wound can certainly cause death, there is however a theory from the military from the US which states that the cartridge was also designed to such a state that it would inflict such a wound that it would take two or three soldiers from the battlefield to carry the wounded soldier to the back, thus making less soldiers available on the front line and also having an effect of inducing fright to the enemy’s soldier. If someone – in my instance, in my point of view, if it’s just designed to kill and not just incapacitate, then it would not have the same effect.”

335.2 De Rover, SAPS own expert, testified as follows regarding the type of injuries inflicted by R5s:\textsuperscript{441}

\textsuperscript{441} Day 285, T.36944, lines 6 - 24.
“...but at least in understanding the risks these weapons pose, and I’ll be more specific that a 556-round fired at close range is virtually and per definition a kill shot. It doesn’t even matter where on the body you hit because if you strike, the problem is with the fact that the bullet on impact disintegrates because of the high kinetic energy it carries. It’s designed actually for the battlefield where the confrontation per definition happens at a larger distance and you want to be able to engage targets from 300 metres out to 600 metres, and then after 100 metres there is a slight deformation and after 200 that bullet stays with the shape it has and it produces a minimal wound cavity. But at close range that bullet shatters on impact and it produces horrific wounds. If you get hit on the arm you’re likely losing that arm. If you get hit centre body mass you get a wound cavity from what I understand to be 20 centimetres across. So your chances of surviving that are minimal.”

335.3 Brigadier Calitz conceded that a shot by an R5 rifle to the bony part of the lower leg of a charging striker would in all probability break or fracture the bone and the striker would be unable to carry on running. His testimony that an R5 rifle to the non-bony part of the lower leg could cause a “flesh wound” with which a striker could carry on running is clearly incorrect and reflects negatively on Brigadier Calitz’s credibility.
The victims who were killed at scene 1 were:

336.1.1 Mr Elias Khanare Monesa (Body A);

336.1.2 Mr Noki (Body B);

336.1.3 Mr Zibambele (Body C);

336.1.4 Tukuza (Body D);

336.1.5 Mr Lehupa (Body E);

336.1.6 Mr Ntenetya (Body F);

336.1.7 Mr Sompeta (Body G);

336.1.8 Mr Ngweyi (Body H);

336.1.9 Mr Yona (Body I);

336.1.10 Mr Ntsenyeho (Body J);

336.1.11 Jijase (Body K);
336.1.12 Mr Yawa (Body L);

336.1.13 Mr Bongani Nqongophele (Body M);

336.1.14 Mr Ledingoane (Body N);

336.1.15 Mr Mtshazi (Body O);

336.1.16 Mr Gwelani (Body P); and

336.1.17 Mr Mdze (died later in hospital).

The nature of the gunshot injuries that they sustained, and which killed them, are described in turn below.

**The victims who were killed at the kraal**

338 Mr Elias Khanare Monesa (Body A) sustained the following wounds:

338.1 A large, irregular, indirect gunshot entrance wound on the front, inside of the left lower leg by R4/5 rifle.\(^{442}\)

\(^{442}\)Exhibit A, p.585 - 599, para.4.8.
338.2 An irregular gunshot entrance wound on the front, inside of the right lower leg.\textsuperscript{443}

338.3 An entry wound on the left shoulder.\textsuperscript{444}

338.4 An irregular gunshot entrance wound on the left elbow.\textsuperscript{445}

338.5 An entrance wound on the left groin, the direction of the bullet was from up to down and slightly to the right.\textsuperscript{446}

338.6 An exit wound, left upper thigh, front, towards the inside of thigh.\textsuperscript{447}

338.7 An irregular gunshot wounds on the left buttock.\textsuperscript{448}

338.8 The state pathologist and private pathologist agreed that the main cause of Mr Monesa’s death was the high-velocity gunshot wound to his chest.\textsuperscript{449}

\textsuperscript{443} Exhibit A, p.584 - 599, para.4.9.
\textsuperscript{444} Exhibit A, p.584 - 599, para.4.7.
\textsuperscript{445} Exhibit A, p.584 - 599, para.4.5.
\textsuperscript{446} Exhibit A, p.584 - 599, para.4.6.
\textsuperscript{447} Exhibit A, p.584 - 599, para.11.
\textsuperscript{448} Exhibit A, p.584 – 599, para.4.6.
Mr Noki (Body B) sustained the following wounds:

339.1 A high-velocity distant gunshot entrance wound to the upper side of the left neck. The projectile fragments were lodged in the jaw. The direction of the shot was left to right and slightly upwards.\(^{450}\)

339.2 A gutter wound on the left cheek.\(^{451}\)

339.3 An entrance wound on the front of the left lower leg, which was 6cm below the knee (there is no mention of corresponding exit wound).\(^{452}\)

339.4 An entrance wound on the front of the left leg, which was below wound the wound described in para.127.2.3 above.\(^{453}\)

339.5 An entrance wound on the front of left leg, which was 20 cm above the ankle.\(^{454}\)

\(^{449}\) Exhibit Abis, Annexure C, number 25 (DR 589/2012).

\(^{450}\) Exhibit A, p.568 - 583, para.4.4.

\(^{451}\) Exhibit A p.568 - 583, para.4.5.

\(^{452}\) Exhibit A, p.568 - 583, para.4.10.

\(^{453}\) Exhibit A, p.568 – 583, para.4.11.
339.6 An atypical gunshot entrance wound on the front of the left thigh. The bullet was embedded in the thigh muscle close to the groin.  

339.7 A fracture of the left lower leg.  

339.8 An entrance wound on the left forearm.  

339.9 A tangential wound of the elbow joint.  

339.10 An exit wound on the back of arm and above the elbow.  

339.11 An entrance wound on the right buttock.  

339.12 An exit wound on the right buttock.  

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454 Exhibit A, p.568 – 583, para.4.12.  
455 Exhibit A, p.568 – 583, para.16.  
456 Exhibit A, p.568 – 583, para.21.  
457 Exhibit A, p.568 – 583, para.6.  
458 Exhibit A, p.568 – 583, para.6.  
459 Exhibit A, p.568 – 583, para.4.6.  
460 Exhibit A, p.568 – 583, para.4.7.  
461 Exhibit A, p.568 – 583, para.4.7.
339.13 A lacerated (gutter-type), indirect gunshot wound on the back of the right thigh.\textsuperscript{462}

339.14 An entrance wound on the back of the right calf.\textsuperscript{463}

339.15 An irregular exit wound on the right calf above the above-mentioned entry wound.\textsuperscript{464}

339.16 An exit wound on the back of the left calf.\textsuperscript{465}

339.17 A lacerated gunshot wound on the left lower leg.\textsuperscript{466}

339.18 An atypical gunshot wound on the back of the left lower leg, which was 29 cm above the ground.\textsuperscript{467}

339.19 A lacerated, indirect gunshot wound on the inner side of the right thigh.\textsuperscript{468}

\textsuperscript{462} Exhibit A, p.568 – 583, para.8.
\textsuperscript{463} Exhibit A, p.568 – 583, para.4.9.
\textsuperscript{464} Exhibit A, p.568 – 583, para.4.9.
\textsuperscript{465} Exhibit A, p.568 – 583, para.4.13.
\textsuperscript{466} Exhibit A, p.568 – 583, para.4.14.
\textsuperscript{467} Exhibit A, p.568 – 583, para.4.15.
339.20 A laceration on the front of the right knee.\textsuperscript{469}

339.21 A laceration just below the right knee.\textsuperscript{470}

339.22 The state pathologist and private pathologist agreed that the main cause of Mr Noki’s death was the high-velocity gunshot wound to his face (base of his skull).\textsuperscript{471}

340 Mr Zibambele (Body C) sustained the following wounds:

340.1 A high-velocity gunshot entrance wound on the side of the left shoulder. The bullet travelled downwards from left to right through the lungs.\textsuperscript{472}

340.2 The projectile from the wound above was lodged in the right upper back.\textsuperscript{473}

340.3 A high-velocity gunshot entrance wound right inner thigh.\textsuperscript{474}

\textsuperscript{468}Exhibit A, p.568 – 583, para.4.17.
\textsuperscript{469}Exhibit A, p.568 – 583, para.4.18.
\textsuperscript{470}Exhibit A, p.568 – 583, para.4.19.
\textsuperscript{471}Exhibit Abis, Annexure C, number 24 (DR 588/2012).
\textsuperscript{472}Exhibit A, p.521 - 543, para.4.3.
\textsuperscript{473}Exhibit A, p.521 – 543, para.4.4.
340.4 The projectile from the wound above was lodged in the right buttock.\footnote{Exhibit A, p521 – 543, para.4.5.}

340.5 An atypical high-velocity gunshot entrance wound on the right shoulder.\footnote{Exhibit A, p.521 – 543, para.4.6.}

340.6 The exit wound for the wound above was on the back/side of the right upper arm.\footnote{Exhibit A, p.521 – 543, para.4.7.}

340.7 Shrapnel injury on the right lower leg/shin area.\footnote{Exhibit A, p.521 – 543, para.4.8.}

340.8 A cut on the chin.\footnote{Exhibit A, p.521 – 543, para.4.9.}

340.9 An abrasion caused by shrapnel on left chest, fragment seen on x-ray.\footnote{Exhibit A, p.521 – 543, para.4.10.}

\footnote{Exhibit A, p.521 – 543.}
340.10 Four small shrapnel punctures on the left buttock and one just below left buttock on rear of thigh.\textsuperscript{481}

340.11 The state and private pathologist agreed that the main cause of Mr Zibambele’s death was the high-velocity gunshot wound to his chest.\textsuperscript{482}

341 Mr Tukuza (Body D) sustained the following wounds:

341.1 A high-velocity gunshot entrance wound under the left ear. The exit wound was over the left eye. A large gaping open-wound is present which extends from the bridge of the nose over the forehead.\textsuperscript{483}

341.2 A high-velocity gunshot entrance wound, left arm.\textsuperscript{484}

341.3 An exit wound on the left arm.\textsuperscript{485}

\textsuperscript{481} Exhibit A, p.521 - 543.

\textsuperscript{482} Exhibit Abis, Annexure C; number 25 (DR 586/2012)

\textsuperscript{483} Exhibit A, p.496 - 520, paras. 4.3-4.4.

\textsuperscript{484} Exhibit A, p.496 - 520, paras. 4.5.

\textsuperscript{485} Exhibit A, p.496 - 520, paras. 4.5
341.4 A single bird-shot pellet to the back of left arm.\textsuperscript{486}

341.5 A shrapnel injury to back of the left knee. \textsuperscript{487}

341.6 A high-velocity gunshot entrance wound on the right knee. There were four pieces of shrapnel lodged in the right knee.\textsuperscript{488}

341.7 Nine shrapnel wounds on the right side of the back. None of the wounds penetrated the thoracic or abdominal cavity.\textsuperscript{489}

341.8 The state pathologist and the private pathologist agreed that the main cause of Mr Tukuza’s death was the high-velocity gunshot wound to his head.\textsuperscript{490}

342 Mr Lehupa (Body E) sustained the following wounds:

342.1 A 5 x 7 mm lacerating wound, 6 cm lateral to the midline along the shoulder line, 145 cm above the sole.\textsuperscript{491}

\textsuperscript{486} Exhibit A, p.496 – 520, para. 4.10.
\textsuperscript{487} Exhibit A, p.496 – 520, paras. 4.9.
\textsuperscript{488} Exhibit A, p.496 – 520, paras. 4.8.
\textsuperscript{489} Exhibit A, p.496 – 520, paras. 4.7.
\textsuperscript{490} Exhibit Abis. Annexure C, number 21, (DR 585/2012).
342.2  A lacerating wound to the right, upper back.  

342.3  A lacerating gunshot entrance wound, 10 mm over the left late left side of the scrotal sac.  

342.4  A lacerating wound measuring 10 x 7 mm that is situated on the right side of the scrotal sac.  

342.5  A lacerating wound, 9 x 7 mm in diameter, situated over the left inner thigh.  

342.6  A lacerating wound, 11 x 10 mm, situated on the right thigh posteriorly, 820 cm above the thigh.  

342.7  A lacerating exit wound.  

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491 Exhibit A, p.450 – 471(b), para.4.1.
492 Exhibit A, p.450 – 471(b), para.4.2.
493 Exhibit A, p.450 – 471(b), para.4.11.
495 Exhibit A, p.450 – 471(b), para.4.10.
496 Exhibit A, p.450 – 471(b), para.4.13.
497 Exhibit A, p.450 – 471(b), para.4.3.
342.8 A lacerating wound on the back.\textsuperscript{498}

342.9 A lacerating wound to the lower back.\textsuperscript{499}

342.10 Two lacerated entrance wounds on the back of the calf.\textsuperscript{500}

342.11 A lacerated wound over the medial aspect of the right foot.\textsuperscript{501}

342.12 A lacerated wound on the left foot.\textsuperscript{502}

342.13 The state pathologist and private pathologist agreed that the main cause of Mr Lehupa’s death was the high-velocity gunshot wound to his chest and abdomen.\textsuperscript{503}

343 Mr Ntenetya (Body F) sustained the following wounds:

343.1 An entrance wound to the right temporal area. The state pathologist’s view was that this was a gunshot wound and the

\textsuperscript{498} Exhibit A, p.450 – 471(b), para.4.2.
\textsuperscript{499} Exhibit A, p.450 – 471(b), para.4.4.
\textsuperscript{500} Exhibit A, p.450 – 471(b), para.4.7.
\textsuperscript{501} Exhibit A, p.450 – 471(b), para.4.9.
\textsuperscript{502} Exhibit A, p.450 – 471(b), para.4.8.
\textsuperscript{503} Exhibit Abis, Annexure C, number 19 (583/2012).
direction of the bullet was downwards and came out of the deceased’s mouth. The private pathologist disagreed. His view was that it was a non-penetrating rubber bullet injury. For the state’s description to be correct there would have to be a fractured jaw and tearing of the lining of the mouth. In addition from photo you can see that it is non-penetrating.\(^{504}\)

343.2 A small regular entrance wound on the left thigh and an exit wound next to it.\(^{505}\)

343.3 A lacerated wound (exit or indirect), which was 20 cm above sole on the right shin.\(^{506}\)

343.4 An entrance wound on the outside of the right foot.\(^{507}\)

343.5 A wound on the inner side of the right foot.\(^{508}\)

\(^{504}\) Exhibit A, p.472 – 495, para.4.1.  
\(^{505}\) Exhibit A, p.472 – 495, para.4.3.  
\(^{506}\) Exhibit A, p.472 – 495, para.4.6.  
\(^{507}\) Exhibit A, p.472 – 495, para.4.5.  
\(^{508}\) Exhibit A, p.472 – 495, para.4.4.
343.6 A shot to the left, upper back, which probably penetrated into the abdomen and was the chief cause of death (private pathologist). The state pathologist missed this wound and did no correlate it with 1 500 ml of blood found in the abdomen.\textsuperscript{509}

343.7 A lacerated gunshot wound to the right elbow.\textsuperscript{510}

343.8 Multiple lacerations/fractures on the outside and fingers of the right hand.\textsuperscript{511}

343.9 The private pathologist found that the main cause of Mr Ntenetya’s death was the high-velocity gunshot wound to his chest and abdomen.\textsuperscript{512} The state pathologist did not state what the cause of death was but presumably in his view what he considered to be the gunshot wound to Mr Ntenetya’s head.

344 Mr Sompeta (Body G) sustained the following wounds:

\textsuperscript{509} Exhibit Abis, Annexure C, number 20 (DR 584/2012).

\textsuperscript{510} Exhibit A, p.472 – 495, para.4.8.

\textsuperscript{511} Exhibit A, p.472 – 495, para.4.10.

\textsuperscript{512} Exhibit Abis, Annexure C, number 20 (DR 584/2012).
344.1 A high-velocity gunshot entrance wound, with a collar of abrasion, 4cm below the tip of left shoulder.\textsuperscript{513}

344.2 A lacerated wound with an eccentric inverted margin, which was 170 mm above the sole and 30 x 12 mm. It was 10 cm to the side of the midline.\textsuperscript{514}

344.3 A medium-velocity gunshot entrance wound with a 2mm collar of abrasion. The bullet lodged under the skin at the back of the chest.\textsuperscript{515}

344.4 The private pathologist’s view was that the main cause of Mr Sompeta’s death was the high-velocity gunshot wound to his abdomen.\textsuperscript{516}

345 Mr Ngweyi (Body H) sustained the following wounds:

345.1 A high-velocity gunshot wound to the right side of the chest. The bullet travelled downwards and to the right.\textsuperscript{517}

\textsuperscript{513} Exhibit A, p.425 – 449 para.4(1)
\textsuperscript{514} Exhibit A, p.425 – 449, para.4(2).
\textsuperscript{515} Exhibit A, p.425 – 449, para.4(3).
\textsuperscript{516} Exhibit Abis, Annexure C, number 18 (DR 582/2012).
345.2 A gunshot wound to the inside of right arm.\textsuperscript{518}

345.3 A wound to right forearm surrounded by bruising.\textsuperscript{519} The private pathologist was of the view that this was a rubber bullet injury, which was missed by the state pathologist.\textsuperscript{520}

345.4 A wound to the right inner thigh surrounded by bruising.\textsuperscript{521}

345.5 The state and private pathologist agreed that the main cause of Mr Ngweyi’s death was the gunshot wound to his chest and abdomen.\textsuperscript{522}

346 Mr Yona (Body I) sustained the following wounds:

346.1 A handgun entrance wound (9mm) on the right side of the back.\textsuperscript{523}

\textsuperscript{517} Exhibit A, p.323 – 346(b), para.5.A1.
\textsuperscript{518} Exhibit A, p.323 – 346(b), para.5.A2.
\textsuperscript{519} Exhibit A, p.323 – 346(b), para.5.A3.
\textsuperscript{520} Exhibit Abis, Annexure C, number 14 (DR 578/2012).
\textsuperscript{521} Exhibit A, p.323 – 346(b), para.5.A4.
\textsuperscript{522} Exhibit Abis, Annexure C, number 14 (DR 578/2012).
\textsuperscript{523} Exhibit A, p.371 – 399, para.5(A1).
346.2 The exit wound for the above wound was on the midline of the upper back.\(^{524}\)

346.3 A rubber bullet injury on rear of upper back, which was missed by the state pathologist.\(^{525}\)

346.4 Multiple, small wounds on chest and left upper arm, injuries from pellets or rubber bullets.\(^{526}\)

346.5 The state pathologist and private pathologist agreed that the main cause of Mr Yona’s death was the gunshot wound to his chest and neck.\(^{527}\)

347 Mr Ntsenyeho (Body J) sustained the following wounds:

347.1 A high-velocity, gunshot entrance wound on the front, left side of the neck. The bullet travelled from left to right, downward

\(^{524}\) Exhibit A, p.371 – 399, para.5(A1).

\(^{525}\) Exhibit Abis, Annexure C, number 16 (DR 580/2012).

\(^{526}\) Exhibit A, p.371 – 399, para.5(A2).

\(^{527}\) Exhibit Abis, Annexure C; number 16 (DR 580/2012).
and to the back. It lacerated the trachea, carotid artery and the jugular vein.\textsuperscript{528}

347.2 The exit wound for wound the above-mentioned entrance was on the right shoulder.\textsuperscript{529}

347.3 There was a “key hole” type bullet wound on the front of the left thigh.\textsuperscript{530}

347.4 An entrance wound on the front of the right thigh. The bullet travelled backwards, to the left and slightly upwards and exited on the front of the right thigh. It fractured the femur and lacerated blood vessels before exiting.\textsuperscript{531}

347.5 An exit wound (for the above-mentioned entrance wound) on the back of the right thigh.\textsuperscript{532}

\textsuperscript{528} Exhibit A, p.400 - 424, para.4.1.
\textsuperscript{529} Exhibit A, p. 400 - 424, para.4.2.
\textsuperscript{530} Exhibit A, p.400 - 424, para.4.4.
\textsuperscript{531} Exhibit A, p.400 - 424, para.4.3.
\textsuperscript{532} Exhibit A, p.400 - 424, para.4.5.
The state and private pathologists agreed that the main cause of Mr Ntsenyeho’s death was the gunshot wound to his neck.\textsuperscript{533}

Mr Jijase (Body K) sustained the following wounds:

348.1 A high-velocity gunshot entrance wound to the right side of temporal scalp. The wound went through the temporal bone, and lacerated the brain.\textsuperscript{534}

348.2 The left frontal area of the scalp was lacerated. This was possibly the gunshot exit wound for the entrance wound referred to in the paragraph above.\textsuperscript{535}

348.3 An abrasion on the right cheek.\textsuperscript{536}

348.4 Two oval perforating wounds on the left forearm consistent with a through-and-through perforating gunshot wound.\textsuperscript{537}

\textsuperscript{533} Exhibit Abis, Annexure C, number 17 (DR 581/2012).
\textsuperscript{534} Exhibit A, p.347 – 370, para.5.A.1.
\textsuperscript{535} Exhibit A, 347 – 370, para.5.A.2.
\textsuperscript{536} Exhibit A, 347 – 370, para.5.A.3.
\textsuperscript{537} Exhibit A, 347 – 370, para.5.A.5.
348.5 Multiple abrasions on the right forearm.\textsuperscript{538}

348.6 A linear abrasion on the left ankle.\textsuperscript{539}

348.7 The state pathologist and private pathologist agreed that the main cause of Mr Jijase’s death was the gunshot wound to his head.\textsuperscript{540}

349 Mr Yawa (Body L) sustained the following wounds:

349.1 A handgun gunshot entrance wound (9mm) on the left lower back, consistent with 9mm.\textsuperscript{541}

349.2 A 5.56 mm bullet was lodged in the sternum.\textsuperscript{542}

349.3 A high-velocity gunshot entrance wound in the left buttock.\textsuperscript{543}

349.4 A second 5.56mm projectile lodged in the sternum.\textsuperscript{544}

\textsuperscript{538} Exhibit A, p.347 - 370, para.5.A.6.
\textsuperscript{539} Exhibit A, 347 - 370, para.5.A.8.
\textsuperscript{540} Exhibit Abis, Annexure C, number 15 (DR 579/2012).
\textsuperscript{541} Exhibit A, p.544 - 567, para.4.4.
\textsuperscript{542} Exhibit A, p.544 - 567, para.4.4.
\textsuperscript{543} Exhibit A, p.544 - 567, para.4.5.
349.5 There were eleven bird-shot type shotgun pellet injuries to the left side of the face.\footnote{Exhibit A, p.544 - 567, para.4.6.}

349.6 There were multiple birdshot-type shotgun pellet injuries on the lateral aspect of the left upper arm.\footnote{Exhibit A, p.544 - 567, para.4.7.}

349.7 The state pathologist and private pathologist agreed that the main cause of Mr Yawa’s death was the gunshot wound to his chest and abdomen.\footnote{Exhibit A, p.544 - 567, para.4.8.}

350 Mr Mdze (who died later in hospital) sustained the following wounds:

350.1 A distant high-velocity gunshot wound to the back of the left arm.\footnote{Exhibit A bis, Annexure C, number 23 (DR 587/2012).}

350.2 A second high-velocity gunshot wound to the back of the left arm.\footnote{Exhibit A, p.662 – 682, para.4(a).}
A distant high velocity gunshot wound to the back of the right lower leg.\textsuperscript{550}

A gunshot entrance wound on the right lower leg.\textsuperscript{551}

Six shot gun pellet injuries to the right lower back.\textsuperscript{552}

A seventh shotgun pellet entrance wound to the left lower back.\textsuperscript{553}

An eight shotgun pellet entrance wound to the back of the head.\textsuperscript{554}

An exit wound on the inside of the left arm near elbow joint.\textsuperscript{555}

The cause of death was the gunshot wounds to Mr Mdze’s left arm and the associated blood loss.\textsuperscript{556}

\textsuperscript{549} Exhibit A, 662 - 682, para.4(b).
\textsuperscript{550} Exhibit A, 662 - 682, para.4(c).
\textsuperscript{551} Exhibit A, 662 - 682, para.4(d).
\textsuperscript{552} Exhibit A, 662 - 682, para.4(e).
\textsuperscript{553} Exhibit A, 662 - 682, para.4(f).
\textsuperscript{554} Exhibit A, 662 - 682, para.4(g).
\textsuperscript{555} Exhibit A, 662 - 682, para.4(a)(c).
Thus, the injuries that were sustained by the injured at Scene 1 are entirely inconsistent with SAPS’ version that the TRT shot in self-defence and/or private defence.

The victims who were killed behind and away from the kraal

Introduction

Two of the victims, Mr Mtshazi and Mr Nqongophele were approximately 100 - 150 metres away from the TRT line when they were shot. Mr Gwelani was shot approximately 210 metres from Scene 1.

From these distances these victims could not have posed a threat to the TRT line. Thus, they could not have been killed in self-defence or private defence. The fact that they were not shot in self-defence or private defence is confirmed by the nature of their injuries.

In what follows, we deal in turn with the circumstances in which each of these victims was killed.

556 See below, para.389.
Mr Nqongophele

355 As noted above, from the position where Mr Nqongophele’s body was found and the injuries that he sustained, it is clear that was not killed in self-defence or private defence.

356 The place where Mr Nqongophele was shot and killed:

356.1 Exhibit B, slide 15 indicates that Mr Nqongophele died in front of the fence that runs in front of the zinc hut. However, this was not where he was shot. It was where he was taken to for the administration of first-aid treatment.557

356.2 Mr Nqongophele is visible on Henderson’s video receiving first-aid treatment at this position. In addition, the post-mortem report for Mr Nqongophele and the post-mortem photos both confirm that there were signs of attempted resuscitation.

356.3 Exhibit VVV8, slide 2 shows the position where Mr Nqongophele was in fact shot. The position where he was shot is depicted by the yellow circle.

557 Day 238, T.29912, lines 1 - 8.
356.4 This can be seen from a comparison of photos Exhibit JJJ10.5062 and JJJ10.4549. On the first photo, blue barrels can be seen behind Mr Nqongophele’s body. In the second photo, the blue barrels are also visible. They are circled in red.558

357 Thus, Mr Nqongophele was shot behind the kraal, approximately 100 - 150 metres away from the TRT line. At this distance he would clearly not have posed any threat to the TRT line. Lt Col Classens conceded this.559 Thus, he was clearly not killed in self-defence or private defence.

358 This is confirmed by the nature of Mr Nqongophele’s injuries:

358.1 Mr Nqongophele’s was shot in his forehead over the right eyebrow with an R4/5 rifle. The bullet lacerated his left frontal brain and fractured his skull.560

358.2 The exit wound was on the left side of the head above the left ear.561

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558 Day 238, T.29914, line 24 - 29915, line 12.
559 Day 238, T.29920, lines 2 - 6.
560 Exhibit A, p.599 (a) – 599 (t), para.4(2).
The left eye was disorganised/lacerated.\textsuperscript{562}

The state pathologist and LRC pathologist agreed that the main cause of Mr Nqongophele’s death was the high-velocity gunshot wound to his head.\textsuperscript{563} As Lt Col Classens conceded, being shot in the head with a high-velocity rifle will almost certainly result in death.\textsuperscript{564} It is thus entirely inconsistent with SAPS’ version of self-defence or private defence.

Therefore, the only reasonable inference from the facts is that Mr Nqongophele was not shot in self-defence or private defence.

\textit{Mr Mtshazi}

As noted above, from the position of Mr Mtshazi’s body and the injuries that he sustained, the only reasonable inference is that he was not killed in self-defence or private defence.

\textsuperscript{561} Exhibit A, p.599 (a) – 599 (t), para.4(2).
\textsuperscript{562} Exhibit A, p.599 (a) – 599 (t), para.4(2).
\textsuperscript{563} Exhibit \textit{Abis}, Annexure C, number 26 (DR 590/2012).
\textsuperscript{564} Day 238, T.29920, lines 18-22.
The position of Mr Mtshazi’s body can be seen on Exhibit B, slide 15. This position is behind the kraal approximately 100 - 150 metres away from the TRT line. The fact that Mr Mtshazi was shot and killed at this position is clear from the fact that he was immediately incapacitated by his injuries and his death was rapid.\textsuperscript{565}

He therefore clearly did not pose any threat to the TRT line at the time that he was shot. Lt Col Classens conceded this.\textsuperscript{566} Therefore, the only reasonable inference is that Mr Mtshazi was not shot in self-defence or private-defence.

This is further confirmed by the nature of Mr Mtshazi’s injuries. He was shot in the right cheek with a high-velocity firearm. The bullet passed to the left and downwards through the cervical spine to the left side of the neck where the bullet was removed.\textsuperscript{567}

The state and private pathologist agreed that the main cause of Mr Mtshazi’s death was the gunshot wound to his cervical spine.\textsuperscript{568}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{565} Exhibit A\textit{bis}, Annexure C, number 28 (DR 592)
\item \textsuperscript{566} Day 238, T.29921, line 23 - 29922, line 5.
\item \textsuperscript{567} Exhibit A, p.616 – 630, para.1.
\item \textsuperscript{568} Exhibit A\textit{bis}, Annexure C, number 31, (DR 592/2012).
\end{itemize}
\end{footnotesize}
shot in the head with an R5 rifle would almost certainly result in death and is thus entirely inconsistent with SAPS’ version that Mr Mtshazi was shot in self-defence or private defence.

Therefore, the only reasonable conclusion is that Mr Mtshazi was not shot in self-defence or private defence.

Mr Gwelani

As noted above, from the position of Mr Gwelani’s body and the injuries that he sustained, it is clear that he was not killed in self-defence or private-defence.

Mr Gwelani was killed 210 metres from scene 1. The fact that Mr Gwelani was killed here is clear from the fact that he was immediately incapacitated by his wounds and his death was almost immediate. It is also clear that he would not have posed any threat to the TRT line from this distance. Lieutenant-Colonel Classens conceded this.

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569 Exhibit B16.
570 Exhibit Abis, Annexure C, number 29 (DR 593).
571 Day 239, T.29940, lines 7 - 15.
Gwelani could therefore not have been killed in self-defence or private
defence as alleged by SAPS.572

This is confirmed by the nature of the injury that he sustained:

369.1 Mr Gwelani was shot in the back of his head (right-side) just
above the base of the skull with a high-velocity firearm. The
bullet terminated in the soft tissues of the occipital/mastoid
scalp tissue where a bullet fragment was found. There was
extensive laceration of the brain.573

369.2 There were irregular abrasions of the right side of the face, the
back of the right shoulder, the right forearm and the left
hand.574

The state pathologist and private pathologist agree that the cause of
Mr Gwelani’s death was the high-velocity gunshot wound to his
head.575 Thus, the nature of his injury is entirely inconsistent with

572 Day 239, T.29940, lines 16 - 23.
573 Exhibit A, p.631 – 646, paras.4.1, 4.4, 4.6.
574 Exhibit A, p.631 – 646, para.4.2.
575 Exhibit Abis, Annexure C, number 32 (DR 593/2012).
SAPS’ version of self-defence/private-defence for two reasons. First, a high-velocity wound is almost always fatal. Second, Mr Gwelani was not facing the person who shot him.\textsuperscript{576}

Thus, the only reasonable inference from the facts is that Mr Gwelani was not killed in self-defence or private-defence.

\textit{Conclusion}

We therefore submit that it is clear from the facts that Mr Nqongophele, Mr Mtshazi and Mr Gwelani were not killed in self-defence or private defence.

\textbf{Brigadier Calitz issued an instruction to the TRT to fire at Scene 1}

SAPS’ alleges that the individual TRT members at Scene 1 were not given an instruction to fire at the strikers but fired on the basis of individual assessments that their lives were in danger.\textsuperscript{577} We submit that this allegation is inconsistent with the evidence and it must be rejected.

\textsuperscript{576} Day 239, T.29941, lines 1 - 19.

\textsuperscript{577} Exhibit FFF9, para.4.10.
As noted above, Mr Botes was the Lonmin representative in the JOC who heard the TRT volley over the radio in JOC. He confirmed that after Brig Calitz did so the TRT opened fire “almost instantaneously” /”immediately.”

We submit that the Commission must find that the TRT opened fire in response to an instruction from Brigadier Calitz to do so. It must therefore reject SAPS’ allegations that the TRT members who fired at Scene 1 did so on their own initiative on the basis of individual assessments that their lives were in danger.

The use of shot-gun pellets at Scene 1

The use of shot-gun pellets by SAPS at scene 1 is entirely inconsistent with SAPS’ version that the strikers were shot in self-defence or private defence. Indeed, it supports the proposition that scene 1 was an ambush.

No less than 4 people who were killed at scene 1 were shot with shotgun pellets. They were: Mr Yona; Mr Yawa; Mr Tukuza and Mr

578 T, Day 266, 33642, line 12 – 33641, line 6
Mdze. Two of these people, Mr Yona and Mr Mdze, died from their shotgun wounds.

In addition, at least two other people were injured with shotgun pellets at scene 1. These include the unidentified man in the photographs on pages 11 to 15 of Exhibit KKK11, as well as Mr Siphethe Phatsha, who gave evidence before the Commission. His medical reports say that he was injured with shotgun pellets.579

The spread of the shotgun victims (i.e. the respective places where their bodies were found at scene 1) is depicted on Exhibit VVV9.580

The Commission must consider who was responsible. The use of shotgun pellets in the SAPS has been banned for many years581 and SAPS has asserted that, despite the fact that shotgun pellet rounds are still kept in SAPS stores, they are not issued to members and none were carried by SAPS members on 16 August 2012.

579 Exhibit DDD4, p.4.
580 The basis of this analysis is Exhibit KKK11.
581 See Day 155, T.17464, lines 1 – 21.
Brigadier Calitz offered the rather absurd explanation that the strikers who were shot and injured or killed with shotgun pellets on 16 August 2012 were shot and killed by their own people.\(^{582}\) He was unable to offer any evidence to support this hypothesis, other than to say that a striker may have obtained the rounds from Lonmin security personnel.\(^{583}\) But no shotgun was found on any of the strikers at scene 1 (or scene 2 for that matter)\(^{584}\) and no shotgun cartridges (used or otherwise) were found either in any of the striker’s possession or at the scene where they were shot.\(^{585}\) It was suggested that this was no indication of anything because a shotgun shell would only have been found if the shotgun was reloaded. The problem with this theory is that given the number of people who were shot, and the spread of the victims, it is very likely that the shotgun was fired more than once (or that two shotguns were fired).\(^{586}\)

We submit that it is far more plausible that it was one or more SAPS members who shot the shotgun rounds, which they had obtained from

\(^{582}\) Day 155, T.17469, lines 2 – 7.
\(^{583}\) Day 155, T.17470, lines 20 – 25.
\(^{584}\) Day 161, 18557, lines 1 – 21.
\(^{585}\) Day 161, 18559, line 22 – 18560, line 5.
\(^{586}\) Day 161, 18562, line 4 - 18563, line 7.
Lonmin security personnel, or simply purchased from any gunshop.

We make this submission on the basis of the following evidence:

382.1 Most of the POPS members were in possession of shotguns.

Most of them therefore had the instruments to fire the shotgun pellets;

382.2 The POPS members were firing their shotguns at the strikers as they moved down the channel created by the Nyala. We have already dealt with this evidence;

382.3 For several of the victims, the shotgun wounds were clearly on the left hand side of their bodies.\(^\text{587}\)

382.4 There is prima facie evidence of a shotgun being fired from Papa 19(10). As set out in Exhibit VVV10, a large dust cloud can be seen kicked up by a shot into the ground, from the direction of Papa 19(10), after the TRT volley had commenced.

The size of the dust cloud is inconsistent with rubber balls or

\(^{587}\) Mr Yona (Exhibit KKK11, slide 2); Mr Yawa (Exhibit KKK11, slide 7); the unidentified man in the photographs on pages 11 to 15 of Exhibit KKK11; and Mr Tukuza (Exhibit ZZZ5, Annexure L).
even an R5 round. It is consistent with shotgun pellets being fired into the ground at a distance of 2 to 3 metres.

382.5 Papa 19(10) was on the strikers’ left hand side.

382.6 In paragraph 5 of Lt Col Mere’s original statement, written in August / September 2012, he sought to emphasise that it was not his troops that used shotgun pellets at scene 1. He says that they: “wish to distance ourselves with pellets guns used to disperse the crowd near the Lonmin Marikana (sic)”. The strong implication of his statement is that he knew that someone else’s troops were using shotgun pellets on the day. Despite repeated request by the Families team, Lt Col Mere was not called to given evidence to explain this statement.

382.7 Lt Col L T L Mere was in charge of Papa 19(10).\(^{588}\)

383 Accordingly, we submit that the most likely explanation is that the shotgun pellets were fired by a member of POPS in Papa 19(10).

\(^{588}\) Exhibit JJJ135, p.6.
The failure to render first-aid treatment to the injured at scene 1

**Introduction**

384 The paramedics only first arrived at Scene 1 an hour after the shootings. Despite there being members at Scene 1 who were able to provide first-aid training to the injured none did so. This shocking failure to ensure that the injured at Scene 1 were provided with timeous first-aid treatment is entirely inconsistent with SAPS’ version that the strikers were shot in self-defence or private defence.

385 From the FLIR camera footage it is clear that the paramedics only arrived at scene 1 at 16:53:16, which was an hour after the shootings occurred. In addition, it was only approximately five minutes later that the paramedics attempted to make their way around the police line to render assistance to the deceased. They only succeeded in doing so approximately two minutes later. In addition, no first-aid treatment was provided to the injured at Scene 1 pending the arrival of

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589 Exhibit CC38, at 16:49:40.  
591 Exhibit CC38, at 16:58:36.
the paramedics, despite there being members at and near to Scene 1 who were capable of providing such treatment.

386 The shocking delay in ensuring that those who lay injured and dying at Scene 1 received first-aid treatment is entirely at odds with SAPS’ version that the TRT members shot in defence of their lives and as a measure of last resort. In such circumstances, the TRT members or at least their commander, would have acted with all haste to ensure that first-aid treatment was provided as speedily as possible. It speaks to a callous disregard for the sanctity of human life and an attitude of viewing the strikers as less than human.

387 Captain Loest conceded that no one provided first-aid treatment to the injured at Scene 1 pending the arrival of the paramedics. He provided the following reasons for this:

387.1 He did not do so personally because he was still in command of scene 1 and that he had to attend to his members who were traumatised.\textsuperscript{592}

\textsuperscript{592} Day 230, T.28495, lines 16 - 22.
No one else did so because no other member at Scene 1 had first-aid training.

In what follows, we address these allegations in turn. Before, doing so, we consider the relevant SAPS’ policies and procedures.

The relevant SAPS policy and procedures documents

The relevant SAPS policy and procedures documents make it clear that any SAPS member on the scene with first-aid training was obligated to provide first-aid training to the injured.

The Crime Scene Management Policy 2 of 2005 provides that the First Member on a scene “must with due consideration for the integrity of the physical evidence assist the injured within the limitations of his or her training as a matter of priority.” The First Member is defined as “the, irrespective of his Unit, who is dispatched to the crime scene first.”

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593 Exhibit MMM49.1, para.(iv)(aa).
594 Exhibit MMM49.1, para.(2)(12).
The Crime Scene Management Module, which was conceded by SAPS to have been in application since 2010 and to still be in application, provides that the First Member is the “first SAPS Member to arrive on the Crime Scene.”\(^{595}\) It provides further that “[c]are for the Injured takes preference over all other activity, with due consideration for the integrity of physical evidence. If injured persons can be moved, they should be moved to a designated area away from the scene, after marking and noting the positions that they were found in.”\(^{596}\)

Applying these policies and procedures to Scene 1, any persons who were qualified and able to provide first aid treatment to the injured were obligated to do so.

*Captain Loest’s failure to provide first-aid treatment to the injured at scene 1*

There was no justifiable reason for Captain Loest’s failure to personally provide first-aid treatment to the injured at scene 1. His failure to do so was thus grossly negligent and entirely inconsistent

\(^{595}\) Exhibit MMM49.3, p.424.

\(^{596}\) Exhibit MMM49.3, p.428.
with SAPS’ version that the strikers at Scene 1 were killed in self-defence or private-defence.

394 Captain Loest clearly had the requisite knowledge and training to provide first-aid treatment to the injured at Scene 1:

394.1 He was trained to administer first aid. His training was of a high level. In general, there are six levels of first-aid training with the sixth level being the highest. To the best of his knowledge, his training was roughly equivalent to the fifth level of training.\(^5\)

394.2 The term “the golden hour” referred to the fact that the sooner that someone is treated within the first hour of sustaining a traumatic injury the greater their chances of survival.\(^6\)

394.3 After someone is severely injured their chances of survival are highest if they are treated within a short amount of time after being injured.\(^7\)

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\(^5\) Day 230, T.28493, lines 6 - 20.

\(^6\) Day 230, T.28493, lines 6 - 23.
394.4 It was not necessary to know that if someone was seriously injured, for example by being shot with an assault rifle, they needed to be treated as quickly as possible to ensure their greatest chances of survival.\footnote{Day 230, T.28493, lines 6-23.}

395 Captain Loest also had no reason, or at the very least no justifiable reason, for his failure to provide first-aid treatment to the injured at Scene 1:

395.1 The first reason that Captain Loest provided for his failure to treat the injured at scene 1 was the fact that he needed to ensure that the scene was secured. Yet, the objective evidence shows that this took approximately five minutes. Captain Loest conceded this.\footnote{Day 230, T.28495, lines 4-10.}

395.2 The second reason that Captain Loest provided was that his first-aid training was not current and if he had attempted to provide treatment to the injured he may have exposed himself to the risk of a lawsuit. It was however put to Captain Loest \footnote{Day 230, T.28496, line 6 - 28497, line 16.}
that he had performed CPR on Warrant Officer Monene 13 August 2012, which he conceded.  

395.3 Captain Loest then provided a third reason. He stated that his failure to provide medical assistance was because his first priority was to see to his members who were clearly “traumatised” and “in a bad state of mind” and he feared that one or more of them may try to take their own life. He conceded that the reason was therefore not that he did not have the requisite skills and training but that he needed to prioritise the needs of his traumatised members.

395.4 It was put to Captain Loest that it was completely unjustifiable for him to prioritise the needs of his traumatised members over strikers who lay injured and dying. He then reverted to saying that he would have been at risk of possible legal action against him because his training was not current. However, minutes

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602 Day 230, T.28498, lines 7 - 18.  
603 Day 230, T.28499, lines 7 - 21.  
previously he had conceded that this was not the reason for his failure to do so.\textsuperscript{605}

396 Therefore, Captain Loest should have performed a triage and prioritised the treatment needs of the injured on the basis of the injuries sustained and then provided whatever assistance he was able to provide until the paramedics arrived.\textsuperscript{606}

397 His failure to do was grossly negligent. It was also entirely at odds with SAPS' version that the TRT members at Scene 1 shot in self-defence and/or private defence.

\textit{Loest's allegation that he was the only SAPS member who had first-aid training}

398 Captain Loest's allegation that he was the only member at Scene 1 with first-aid training was incorrect. The TRT, the STF and the NIU all receive first-aid training and were at or near to Scene 1 at the relevant time.

\textsuperscript{605} Day 230, T.28499, line 22 - 28500, line 2.

\textsuperscript{606} Day 230, T.28947, line 23 - 28948, line 5.
In relation to the TRT, Captain Loest conceded the following:\textsuperscript{607}

399.1 The TRT do not receive any first aid training.

399.2 However, he only knew as a fact that the TRT members under his command as the provincial co-ordinator of the TRT for Potchefstroom, did not have any first aid training.

399.3 There were TRT members from other provinces deployed to Scene 1. He could therefore not say as a fact that none of the TRT members had any first-aid training.

399.4 He made no attempt to establish, as a matter of fact, whether any of the TRT members had first-aid training.

With regards to the STF and the NIU, Captain Loest conceded the following:

400.1 The STF receives first-aid training.\textsuperscript{608} Captain Loest could not dispute this.\textsuperscript{609}

\textsuperscript{607} Day 230, T.28508, line 7 - 28511, line 3.
400.2 After the STF drove off after the Scene 1 shootings he did not make any attempt to phone them in order to come and assist with treating the injured at scene 1.\textsuperscript{610}

400.3 The NIU also receive first-aid training (up to level 3).\textsuperscript{611} Captain Loest conceded this.\textsuperscript{612}

400.4 The NIU were within easy access of the Koppie until ten minutes after the shootings.\textsuperscript{613} Captain Loest was not able to dispute this. He conceded further that he made no attempt to get the NIU to assist with treating the injured at Scene 1, either by sending a TRT member to ask them for assistance or by phoning them.\textsuperscript{614}

\textsuperscript{608} Exhibit Q, slide 95.
\textsuperscript{609} Day 230, T.28511, lines 8 - 14.
\textsuperscript{610} Day 230, T.28512, lines 3 - 6.
\textsuperscript{611} Exhibit Q, slide 79.
\textsuperscript{612} Day 230, T.28512, lines 13 - 17.
\textsuperscript{613} Day 230, T.28512, line 21 - 28513, line 10.
\textsuperscript{614} Day 230, T.28513, line 11 - 28514, line
SAPS’ failure to provide timeous medical treatment to the injured

401 If SAPS had provided timeous medical treatment to the injured at scene one, at least one victim, Mr Mdze, would have been saved.

402 Thus Dr Boffard’s report, which dealt with which of the seventeen victims who were shot at Scene 1 would have been likely to survive if they had received treatment 30 to 40 minutes earlier, made the following findings regarding Mr Mdze:615

402.1 Mr Mdze was shot twice in his upper arm, which caused it to fracture;

402.2 He bled to death and it was most likely from the wounds to his upper arm;

402.3 He had a greater than 90% chance of survival and the cause of death was the failure to control the bleeding in a timeous fashion due to the non-availability of medical personnel; and

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615 Exhibit MMM10, p.24.
402.4 Bleeding in the upper limb could have been controlled by direct pressure on the vessels or a tourniquet.

403 Thus, all Mr Mdze needed to survive was for a tourniquet around his upper arm. When this was put to Captain Loest, he responded that he did not have any equipment with him. Yet, as was put to Captain Loest, all that was needed to save Mr Mdze was a sock or a piece of cloth. Captain Loest had no response to this.616

404 Yet, Captain Loest’s failure to ensure, to the best of his ability, that timeous medical assistance was provided to the injured strikers at Scene goes beyond the issue of which victims who could potentially have been saved. There are two issues that arise in this regard.

405 The first issue is that at the time, Captain Loest would not have known how many of the injured strikers could potentially have been saved. Thus, it was of paramount importance that he did his best to ensure

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616 Day 230, T.28502, line 8 - 28503, line 9.
that as many victims as possible were assisted pending the arrival of the paramedics. He clearly failed to do so.  

The second issue is that it was not simply a matter of saving those who could be saved but of treating all of the injured with dignity and respect. A case in point is Mr Ntenetya who can be seen on the video footage sitting up and clearly in a lot of pain. Mr Ntenetya was one of those who died on the scene. Thus, he died alone and in pain without anyone to offer him care or comfort of any sort.

Conclusion

SAPS failure to provide timeous medical assistance at Scene 1 is entirely inconsistent with SAPS’ version of self-defence. It is indicative of a shocking disregard for the sanctity of human life and an attitude of wanting to exact revenge on the part of SAPS or at least of a belief that the strikers deserved to die.

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617 Day 230, T.28503, line 10 - 28504, line 3.
618 Exhibit EEE16, at 14:02 - 14:13; Day 230, T.28515, lines 4 - 11.
619 Day 230, T.28517, line 14 - 28518, line 18.
In addition, we submit that the Commission must find that SAPS’ is liable for the death of Mr Mdze on the basis that it did not provide timeous medical assistance and if it had he would have survived.

**The brutal manner in which the injured were treated at Scene 1**

Instead of providing medical assistance to the injured at scene 1, the TRT members treated them brutally and inhumanely.

On the relevant video footage, the following can be seen:

410.1 A number of instances where TRT members dragged strikers; and

410.2 An instance where a TRT member put his boot on a striker’s face.

Captain Loest conceded that there was no operational need for the TRT members to treat the strikers in such a manner. He conceded further that if he had seen his members behaving in this manner he

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would have stopped them from doing so.\textsuperscript{622} He conceded further that such conduct was inhumane and amounted to gratuitous police brutality.\textsuperscript{623} Captain Classens conceded similarly.\textsuperscript{624}

412 SAPS’ failure to provide timeous medical assistance at Scene 1 is entirely inconsistent with SAPS’ version of self-defence. It is indicative of a shocking disregard for the sanctity of human life and of wanting to exact revenge. At the very least it is indicative of an attitude of believing that the strikers were less than human and that they deserved to be treated as such.

Conclusions in relation to Scene 1

413 On the basis of the evidence that we have referred to above, we submit that the Commission must make the following findings regarding Scene 1:

413.1 Scene 1 was a trap, in the sense of an attempt to encircle the strikers and within the meaning contemplated by Exhibit

\textsuperscript{622} Day 230, T.28506, lines 9 - 25; T.28507, lines 1 - 6.

\textsuperscript{623} Day 230, T.28507, lines 7 - 13.

\textsuperscript{624} Day 239, T.29952, line 24 - 29953, line 22.
KKK49, slide 5. Whether this was with the premeditated intent to kill or to disarm and arrest them forcibly is unclear. Nevertheless, even if it was the latter, the SAPS acted with, at least, dolus eventualis.

413.2 The strikers were channelled to the TRT line. We submit that the Commission should find that SAPS did so intentionally, but even if the Commission is not inclined to do so, the undeniable fact that they were in effect channelled is wholly inconsistent with the notion that they were attacking the TRT members.

413.3 There was in fact no attack by the strikers on the TRT line. This is clear, inter alia, from the photograph on page 3 of Exhibit RRR15.

413.4 Given that Brig Calitz gave the instruction to “engage, engage, engage” a few seconds before the TRT volley, it is difficult to comprehend the claim that TRT members acted in self or private defence or that the TRT members reasonably believed that their lives, or any of their colleagues lives, were in danger.

625 In the form of dolus directus.
At the very least, given the *prima facie* evidence that they were acting in *response* to an order from the Operational Commander, it was necessary for the SAPS to lead the evidence of the members who actually fired their weapons. They were not led. In addition, the statements filed were wholly inadequate for the Commission to make a finding that the TRT members acted in self-defence, private defence or putative self-defence. The relevant test for whether they acted in putative self-defence is not how the average human being would have perceived the alleged threat to his or her life. The relevant test is how a reasonable, highly trained police officer would have responded in the situation, after being given the order given to engage.

413.5 Alternatively, the response of the shooters was disproportionate to any perceived threat. Thus, their shooting exceeded the bounds of reasonable self / private defence. Our law is that if it is necessary to use force to repel an unlawful attack, the measure of force used must be reasonable in the circumstances. And the defence must be deterrent and not
retributive.\textsuperscript{626} The measure of force used by the SAPS was, we submit, excessive.

413.6 Accordingly, SAPS members are \textit{prima facie} guilty of murder, alternatively culpable homicide, for the deaths of 17 people and injuries and attempted murder and/or assault with intent to do grievous bodily harm to others injured at scene 1. SAPS is also civilly liable.

414 In terms of clause 5 of the Commission’s terms of reference, we submit that the Commission must recommend that Brig Calitz should be investigated and prosecuted for murder; alternatively culpable homicide, for the 17 victims who were killed at Scene 1.

414.1 Brigadier Calitz clearly foresaw that if the strikers were channelled to the TRT line there was the possibility that some of them would be killed. He conceded the following in this regard:

\footnotesize{\textsuperscript{626} S \textit{v Trainor} 2003 (1) All SA 435 (SCA); 2003 1 SACR 35 (SCA) in which it was that as far as one can generalise, there should be a reasonable relationship between the attack and the defensive act. See also, \textit{Snyders v Louw} 2009 2 SACR 463 (C); S \textit{v Steyn} 2010 1 SACR 411 (SCA).}
414.2 Calitz knew that if he couldn’t block the strikers from getting down the eastern side of the kraal there was likely to be a confrontation between the strikers and the TRT who were supposed to be forming up behind the POP members. POP’s function was to block the strikers. If they could not do so because the strikers were undeterred by the tear gas and the stun grenades and the water cannon then POP would retreat to the Nyalas and the next line of defence would be the TRT.\(^627\)

414.3 Calitz also knew that if there was a confrontation between the TRT and the strikers there was likely to be a high risk of loss of life, at least on the part of the strikers.\(^628\)

414.4 Despite this, he implemented the plan to channel the strikers to the TRT line:

414.4.1 At 15:48:27, when Mr Noki begins to lead the lead group of strikers away from Koppie 2, Brigadier Calitz’s voice can be heard on the radio saying the

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\(^627\) Day 160, T.18245, line 15 – 18246, line 22.

\(^628\) Day 160, T.18246, line 23 – 18247, line 12.
following: “we will go towards the village…we will meet up on the top side. We will go around it to the outside. We will close.”

414.4.2 For the reasons set out above, the effect of the half-moon formation of Nyalas at scene 1 was to channel the strikers to the TRT line. This formation could not have occurred fortuitously. At the time that the Nyalas were forming up, Colonel Scott heard Brigadier Calitz giving instructions to the Nyalas. The only reasonable inference is that Brigadier Calitz instructed the Nyalas to form up in the half-moon formation at scene 1.

414.4.3 Brigadier Calitz also gave the instruction for the TRT line to come forward. The TRT line could only have formed up where it did in response to orders to do so; it could not have happened fortuitously. The only reasonable inference is that it formed up where it did

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629 JJJ194.
in response to an order from Brigadier Calitz to do so.

414.4.4 Brigadier Calitz gave the instructions for the deployment of the tear gas, rubber bullets and water cannons.

414.4.5 Brigadier Calitz also gave the instruction for the TRT to open fire.

415 In addition to Brigadier Calitz, we submit that the Commission should recommend that the following should be referred for investigation and prosecution:

415.1 The then Minister of Police, Minister Mthethwa;

415.2 The SAPS leadership that endorsed the tactical intervention at the extraordinary session of the National Management Forum (NMF) on 15 August 2012;
415.3 The SAPS members of the JOCCOM who attended the 13:30 Special JOCCOM meeting on 16 August 2012 at which the decision to implement the tactical plan was made;

415.4 The commanders of the different SAPS units who took part in the operation; and

415.5 The individual shooters on 16 August 2012.
Part E – Scene 2

The failure to call a halt to the operation after Scene 1

416 Approximately 13 minutes elapsed between the killings at Scene 1 and the killings at Scene 2. There was more than enough time for SAPS to call a halt to the operation. If SAPS had done so, the killings at Scene 2 would not have occurred.

417 Indeed, Mr De Rover, SAPS’ own public order policing expert, stated that problems of the radio prevented the overall and operational commander from being aware of the killings at Scene 1 but if they had been aware “[i]t virtually goes without saying that SAPS doctrine and experience in crowd management dictate such a decision.”

418 The relevant SAPS commanders allege that they did not call a halt to the operation after Scene 1 because they only found out about the killings at Scene 1 after the killings at Scene 2 had occurred.

630 Exhibit FFF11, para 81.
418.1 Thus, Major-General Annandale testified that due to problems with the radio he only found out about the killings at Scene 1 after 4:30.\textsuperscript{631}

418.2 Brigadier Calitz testified that when the shootings happened his Nyala was in the process of driving away in the opposite direction. He therefore did not see the shootings or hear them due to the noise in the Nyala.\textsuperscript{632}

419 Yet, this evidence was manifestly false. This is clear from the evidence below.

420 The shootings at Scene 1 were audible over the radio. Thus, everyone in the JOC, including Major-General Annandale, would have heard them. This is clear from the following evidence:

420.1 Warrant-Officer Masinya is a member of POP and he is a video operator.\textsuperscript{633} On 16 August 2012, he was deployed by Brigadier

\textsuperscript{631} Day 78, T.8339, lines 17 – 24, 835, lines 3 - 10.
\textsuperscript{632} Day 154, T.17336, line 5 – 17338, line 2.
\textsuperscript{633} Exhibit HHH8, para.1.
Calitz to take video footage of the Koppie. At approximately 13:30, Captain Adriao allegedly informed him that he had been identified as a police spy and should withdraw. He withdrew to the JOC. After doing so, he heard the shooting over the radio, to which he was listening.

420.2 Captain Kidd testified similarly that he heard the attack on the radio. When asked what precisely he heard he stated that he heard commotion, the firing of ammunition and people screaming. He confirmed that he heard a volley of live ammunition from R5 rifles, the sound of which was clearly distinguishable from the sound of rubber balls being fired from a shotgun. He confirmed that anyone who was listening to the radio would have heard the same thing.

420.3 Mr Dirk Botes was the Lonmin representative in the JOC. He testified that everyone who was in the JOC heard the shootings and knew that something very serious had happened. He testified as follows in this regard:

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634 Exhibit HHH8, statement dated 6 May 2013, para.4.
635 Exhibit HHH8, statement dated 6 May 2013, para.12.
636 Day 232, T. 29004, Lines 1 - 24
“CHAIRPERSON: ...You’ve told us how you heard the words “engage, engage, engage.” And instantaneously thereafter you heard the beginnings of a lot of firearms being fired, did it sound to you like automatic fire?

MR BOTES: Mr Chair, it sounds like automatic fire, but it also sounds like a lot of people firing. If there is not one firearm that shoots automatically, it sounds like a lot of firearms firing.

CHAIRPERSON: Okay. So it must have been obvious to you that something quite serious had happened.

MR BOTES: We were shocked, I was shocked in the control room there, and expect that the police were severely attacked and a number of people were killed both ways, and I expected –

CHAIRPERSON: Well we know a number were killed, but only one was –

MR BOTES: Yes, yes.

CHAIRPERSON: But you were shocked, it was obviously that something, I don’t want to use too strong a word, but the word that comes to mind is catechistic, I mean something very, very serious had happened.

MR BOTES: It was.

CHAIRPERSON: It was so serious that it obviously shocked you and it must have shocked everybody else in the JOC.”
420.4 Brigadier Pretorius’s role in the JOC was to manage the information flow and record keeping in the JOC. Her role was therefore to receive and distribute information. At 16:03:34, which was before the SAPS action at Scene 2 commenced, Brigadier Pretorius sent an SMS to Mr Molatedi, which read as follows: “Having operation at Wonderkop, bad, bodies. Please prepare your members as going to be bad.”

420.5 It is therefore clear that by 16:03 at the latest, those who were present in the JOC, including Major-General Annandale, knew about the shootings at Scene 1.

421 In addition, it is clear that Brigadier Calitz knew about the shootings as soon as they occurred:

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637 Exhibit L, slide 67.

638 Exhibit K444, p.7.
421.1 He testified that he was sitting next to the base radio in the Nyala. It is entirely implausible that he would not have heard the TRT volley.

421.2 Just after the shootings at scene 1 Brigadier Calitz can be heard saying “No lethal firearms now unless the target engage you. No need to shoot while they are running unless the target engages you.”639 He therefore clearly knew that lethal firearms had been used at Scene 1.

421.3 Brigadier Calitz also conceded that he heard Vermaak say “bodies down”, which was reported immediately after a report that stated that the strikers were moving towards the TRT and tried to attack them. However, he thought this meant that the people had been shot with rubber bullets fired from a shotgun or were lying down on the ground to avoid arrest.640 This is entirely implausible for the following reasons:

639 Exhibit C22; and Exhibit OOO11, p 1 (entry for 16:04:30).
640 Day 154, T.17343, lines 1 – 5.
421.3.1 Vermaak conceded that in those circumstances no reasonable person could think that the people concerned had been shot with rubber bullets because the TRT are armed with R5s.\textsuperscript{641}

421.3.2 Major-General Mpembe testified that when he heard the report of “bodies down” he knew that something was wrong. He tried to contact Brigadier Calitz immediately. When he could not do so he asked the pilot of the helicopter that he was in to take him back to the JOC immediately.\textsuperscript{642}

421.3.3 Major-General Naidoo stated that he heard Vermaak say there were people down and that medical assistance was needed at Scene 1.\textsuperscript{643}

Thus, Major-General Annandale and Brigadier Calitz’s respective versions about SAPS’ lack of knowledge of the killings at Scene 1 until

\textsuperscript{641} Day 206, T.25373, lines 1 – 17.
\textsuperscript{642} Day 107, T.11490, lines 18 – 24.
\textsuperscript{643} Day 162, T.18630, lines 1 – 9.
significantly later must be rejected. It is clear that they knew immediately.

They should therefore have called a halt to the operation immediately. Their failure to do was grossly negligent. SAPS should be found liable for the killings at Scene 2 on this basis alone.
The killings at scene 2: Introduction

424 The onus is on SAPS to establish that the killings were lawful. There is no onus on the Families to establish that the killings were not justified. Thus, where SAPS has failed to set out a version or a sufficiently detailed version regarding the circumstances in which one or more of the deceased were killed, the Commission must find such killings to be unlawful.

425 In SAPS' opening statement and evidence before the Commission, it has only sought to justify four of the killings at scene 2. These are the killings of Mr Mdizeni (Victim A), Mr Thelejane (Victim B), Mr Mpumza (Victim C) and Mr Mkhonjwa (Victim N). In summary, SAPS’ version is that these victims were shot while they were charging at SAPS members.

426 The version that SAPS has alleged in relation to Mr Mdizeni, Mr Thelejane, Mr Mkhonjwa and Mr Mpumza is entirely inconsistent with the objective evidence and must be rejected. The only reasonable inference on the basis of the objective evidence is that the killing of these victims was unlawful.
For the other victims who were killed at scene 2, namely Mr Mangcotywa (Victim D), Mr Liau (Victim E), Mr Mosebetsane (Victim G), Mr Mabiya (Victim H), Mr Nokamba (Victim I), Mr Saphendu (Victim J), Mr Ngxande (Victim K), Mr Gadlela (Victim L), Mr Pato (Victim M), Mr Xalabile (Victim O), Mr Mohai, Mr Sagalala and Mr Ntsoele, SAPS has not given any account of the circumstances in which they were shot.

Indeed, in its opening statement, SAPS conceded the following:

428.1 Aside from “some” of the victims who charged at police officers with dangerous sharp weapons (as set out above SAPS has only made out such a version in relation to four victims), “others” (in other words the rest) could have been killed by SAPS responding to “friendly fire” believing it to be fire from the protestors.\(^{644}\)

428.2 SAPS alleged further that eight of the victims; Mr Mangcotywa (Victim D), Mr Liau (Victim E), Mr Mosebetsane (Victim G), Mr Mabiya (Victim H), Mr Nokamba (Victim I), Mr Saphendu

\(^{644}\) SAPS opening statement, para.45.5.
(Victim J), Mr Ngxande (Victim K), Mr Gadlela (Victim L) and Mr Pato (Victim M), were among the large group of armed protestors who were inside the Koppie. SAPS “fired shots in the direction of the group killing these eight people which may have been disproportionate to the threat faced from the group of 200 protestors.”

Thus, in its opening statement, SAPS made no attempt to justify the killings of 13 of the 17 victims who were killed at Scene 2. It has also not sought to do so in its evidence before the Commission. Not a single SAPS statement sets out a version in relation to the killings of these victims. On SAPS’ version alone, the Commission must therefore find that these killings were unlawful.

However, for 9 of these 13 victims (Mr Mangcotywa (Victim D), Mr Liau (Victim E), Mr Mosebetsane (Victim G), Mr Mabiya (Victim H), Mr Nokamba (Victim I), Mr Saphendu (Victim J), Mr Ngxande (Victim K) and Mr Gadlela (Victim L) and Mr Mohai) the evidence of the relevant SAPS’ witnesses and the objective evidence establishes that these victims were killed in circumstances that were plainly unlawful.
Thus, while as a matter of legal principle, it is not necessary for the Commission to even consider this evidence in order to find that the killings of these victims was unlawful, restorative justice and the public interest require otherwise. In order to fulfil its restorative justice mandate and to account fully to the public, it is necessary for the Commission to consider the totality of the evidence as to the legality of the killings of these victims and to make findings in this regard.

For the other 2 victims, Mr Sagalala and Mr Ntsoele (who both died later in hospital) there is simply no information about how they were killed. It isn’t even known where in Koppie 3 they were shot and killed. The only reasonable conclusion therefore is that they were killed unlawfully.

In what follows, we therefore address the following in turn:

433.1 The deaths of Mr Mdizeni (Victim A) and Mr Thelejane (Victim B);

433.2 The deaths of Mr Xalabile (Victim O) and Mr Pato (Victim M); and
The deaths of Mr Mangcotywa (Victim D), Mr Liau (Victim E), Mr Mosebetsane (Victim G), Mr Mabiya (Victim H), Mr Nokamba (Victim I), Mr Saphendu (Victim J), Mr Ngxande (Victim K) and Mr Gadlela (Victim L) and Mr Mohai;

The death of Mr Mkhonjwa (Victim N);

The death of Mr Mpumza (Victim C); and

The deaths of Mr Sagalala and Mr Ntsoele.

Mr Mdizeni (Victim A) and Mr Thelejane (Victim B)

Introduction

Mr Mdizeni (Victim A) and Mr Thelejane (Victim B) were killed on the eastern side of scene 2 in front of the large rock outcrop.645

SAPS have alleged that the first NIU shooting incident occurred on the eastern side of the Koppie at approximately 16:12 pm.646 Thus, Mr Mdizeni and Mr Thelejane were probably killed during this incident.

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645 Exhibit B, slides 46 - 47.
SAPS have alleged that the NIU fired at armed protestors charging at them in front of the large rock outcrop at scene 2. However, the facts are wholly inconsistent with any suggestion that Mr Mdizeni and Mr Thelejane were killed whilst charging at the NIU line.

The only reasonable inference on the basis of the objective evidence is that Mr Mdizeni and Mr Thelejane were killed unlawfully.

**Mr Mdizeni (Victim A)**

As foreshadowed above, Mr Mdizeni’s body was found at the bottom of the large rock outcrop on the eastern side of scene 2.

Mr Mdizeni sustained the following injuries:

1. A high-velocity gunshot entrance wound to the right side of right hip.

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646 Exhibit L242.

647 Exhibit L242.

648 Exhibit MMM47, slide 8.

649 Exhibit A. p.66-90, para.4.1.
439.2 The bullet perforated the pelvis from right to left in a slightly backwards direction. It terminated in the muscles of the left hip.\textsuperscript{650}

439.3 The bullet was removed from the muscles on the left side of the hip. It was flattened and deformed.\textsuperscript{651}

439.4 There was an irregular abrasion on Mr Mdizeni’s left cheek.\textsuperscript{652}

440 The state and LRC pathologists agree that the single high-velocity gunshot wound to Mr Mdizeni’s pelvis killed him.\textsuperscript{653} In addition, it caused lower limb paralysis and Mr Mdizeni was therefore immediately incapacitated.\textsuperscript{654} Thus, Naidoo and Steyl conclude that the change in Mr Mdizeni’s position in a latter photograph was most likely due to him being moved by other persons and not due to Mr

\textsuperscript{650} Exhibit A, p.66-90, para.4.7.
\textsuperscript{651} Exhibit A, p.66-90, para.4.6.
\textsuperscript{652} Exhibit A, p.66-90, para.4.2.
\textsuperscript{653} Exhibit Abis, Annexure C, number 3 (DR 567).
\textsuperscript{654} Exhibit Abis, Annexure C, number 3 (DR 567).
Mdizeni moving his own position.\textsuperscript{655} In addition, Mr Mdizeni’s death was rapid.\textsuperscript{656}

Mr Mdizeni’s legs were approximately perpendicular to this body with his feet resting on a smaller rock above his body. He was almost certainly higher up or even on top of the rock when he fell.\textsuperscript{657} Mr Mdizeni fell with his right cheek against the rock. However, as indicted above, the post-mortem report records an abrasion on his left cheek.\textsuperscript{658} It is thus possible that the abrasion on his right cheek was caused by him falling or being dragged down the rocks.\textsuperscript{659}

The scene where Mr Mdizeni’s body was lying was littered with blue cable ties. The ties have been used and cut. One of the cut cable ties is on top of Mr Mdizeni’s left leg. It would have to have fallen there after Mr Mdizeni’s collapsed. Mr Mdizeni’s right arm is behind his back. His left arm could also have been behind his back given its position.\textsuperscript{660}

\textsuperscript{655} Exhibit ZZZ5, p.14.
\textsuperscript{656} Exhibit B, Annexure C, number 3 (DR 567); Exhibit ZZZ5, p.14.
\textsuperscript{657} Exhibit MMM47, slide 8.
\textsuperscript{658} Exhibit A, p.66-90, para.4.2.
\textsuperscript{659} Exhibit MMM47, slide 8.
\textsuperscript{660} Exhibit JJJ29.206, Exhibit MMM47, slide 9.
The only reasonable inference from these facts is that Mr Mdizeni’s hands were tied behind his back after he was shot and fell to the position where his body was found. The cable ties were cut before the photograph was taken. Thus, it appears as if instead of providing Mr Mdizeni with emergency first-aid treatment, he was instead restrained.\footnote{Exhibit ZZZ5, p.26.}

Naidoo and Steyl made the following findings in this regard:\footnote{Exhibit ZZZ5, p.26.}

444.1 It is possible that Mr Mdizeni’s life could have been saved if he had received immediate or early medical attention;

444.2 The manacling of a severely injured person’s hands immediately after injury, instead of administering emergency care or first aid, would likely compromise respiration and probably hasten death; and

444.3 It is a disturbing concern that the forced positioning of a severely injured person such as this would inhibit any self-application of relief from severe distress and pain, such as a

\footnote{Exhibit ZZZ5, p.26.}
change in posture, and may be considered cruel and inhuman treatment.

Naidoo and Steyl confirm further that from the direction of the shot, Mr Mdizeni was most likely shot from the eastern side of the Koppie (positions 01 and 02 on Annexures E - G). This was the direction from which the NIU approached.⁶⁶³

However, the direction of the single, high-velocity gunshot wound that killed Mr Mdizeni was right to left. He was therefore not facing the person who shot him.⁶⁶⁴ Naidoo and Steyl confirm in this regard that the direction of Mr Mdizeni’s wound is consistent with him facing north when he was shot.⁶⁶⁵ This confirms that he was not running towards the NIU line which approached and fired at him from the eastern side of scene 2 (positions 01 and 02 on Annexures E - G).⁶⁶⁶ The closest rifle cartridge to Mr Mdizeni’s body was 41.9 metres away.⁶⁶⁷

⁶⁶³ Exhibit ZZZ5, p.13.
⁶⁶⁴ Exhibit MMM47, slide 8.
⁶⁶⁵ Exhibit ZZZ5, p.15.
⁶⁶⁶ Exhibit L242.
⁶⁶⁷ Exhibit B48, Exhibit MMM47, slide 7.
In addition, there were multiple bullets impact marks on the rock-face directly above where he was shot and killed. This suggests that Mr Mdizeni was fired at repeatedly.\textsuperscript{668}

No weapons were found in the vicinity of Mr Mdizeni’s body.\textsuperscript{669}

The Commission must therefore reject SAPS’ version that Mr Mdizeni was killed whilst charging towards the NIU line. It must find that the only reasonable inference is that he was killed unlawfully.

Mr Thelejane (Victim B)

As foreshadowed above, Mr Thelejane’s body was also found at the bottom of the large rock outcrop on the eastern side of scene 2.\textsuperscript{670} He was found approximately 20 metres away to the east of Mr Mdizeni’s body.

Mr Thelejane sustained the following wounds:

\textsuperscript{668} Exhibit ZZZ5, p.15.
\textsuperscript{669} Day 7, T.706, lines 1 - 6.
\textsuperscript{670} Exhibit MMM47, slide 8.
451.1 A high-velocity gunshot entrance wound in the back of the head, on the right side, 2cm behind the right ear.  

451.2 The bullet travelled from front to back, right to left and upwards.  

451.3 The exit wound was on the left side of the back of the head.  

451.4 A high-velocity gunshot penetrating wound of the left side of the head, 10 cm above and 3cm behind the left ear. This was consistent with a secondary missile. There was no corresponding bullet defect on the skull.  

451.5 A high-velocity gunshot entrance wound, upper, outer aspect of right buttock.  

451.6 The bullet terminated in the middle and left side of the pelvis.  

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671 Exhibit A, p.41 - 65, para.4.1.  
672 Exhibit A, 41 - 65, para.4.10.  
673 Exhibit A, 41 - 65, para.4.2.  
674 Exhibit A, 41 - 65, para.4.3.  
675 Exhibit A, 41 - 65, para.4.4.
Multiple, patchy abrasions on the knees and forehead.\footnote{Exhibit A, 41 – 65, para.4.11.}

The state and LRC pathologists agreed that the main cause of death was the gunshot wound to Mr Thelejane’s head.\footnote{Exhibit A, 41 – 65, para.4.5.} Mr Thelejane was not immediately unconscious but he was incapacitated due to the injuries to his head and pelvis. His death was rapid.\footnote{Exhibit B, Annexure C, number 2 (DR 566).}

From the position of Mr Thelejane’s body and the direction of his wounds (right to left), he was running in a north/north-westerly direction.\footnote{Exhibit B, Annexure C, number 2 (DR 566); Exhibit ZZZ5, p.14.} This was away from the NIU line, which approached from the eastern side of Koppie 2.\footnote{Exhibit MMM47, slide 14, Exhibit ZZZ5, p.14.} As in the case of Mr Mdizeni, he appears to have been shot at from positions 01 and 02 (Annexure E), which is consistent with him having been shot by the NIU.\footnote{Exhibit L242.}

As in the case of Mr Mdizeni, there were multiple bullets impact marks on the rock-face directly above where he was shot and killed.\footnote{Exhibit ZZZ5, p.15.}
This suggests that he was fired at repeatedly from positions 01 and 02 (Annexure E).683

There were no weapons in the vicinity of Mr Thelejane’s body.684

SAPS’ suggestion that Mr Thelejane was killed whilst charging towards the NIU line is wholly inconsistent with the objective evidence and must be rejected. The only reasonable inference is therefore that Mr Thelejane was killed unlawfully.

Mr Pato (Victim M) and Mr Xalabile (Victim O)

Introduction

Mr Pato (Victim M) and Mr Xalabile (Victim O) were killed on the south-eastern side of scene 2.685 SAPS have alleged that the second shooting incident occurred on the south-eastern side of the Koppie at approximately 16:13 pm. Thus, Mr Pato and Mr Xalabile may have been killed by the NIU in this incident.

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683 Exhibit ZZZ5, p.15.
684 Day 7, T.706, lines 1 - 6.
685 Exhibit B46 - 47, Exhibit MMM47, slide 2.
SAPS allege in this regard that NIU members fired at strikers who charged at them in the bushes. However, the objective evidence is entirely inconsistent with any suggestion that Mr Pato and Mr Xalabile were killed in circumstances where they charged at the NIU.

The only reasonable inference from the objective evidence is that Mr Pato and Mr Xalabile were killed unlawfully.

**Mr Xalabile (Victim O)**

As noted above, the facts are wholly inconsistent with any suggestion that Mr Pato was killed lawfully. The only reasonable inference on the basis of the facts is that Mr Pato was shot execution-style from the top of the rocks above him.

Mr Xalabile’s body was wedged between a small tree trunk and a large rock at the southern edge of the large rock outcrop. The position of Mr Xalabile’s body can be seen from Exhibit MMM47, slide 30. Mr Xalabile’s body was within the thicker short trees and the shrubs. He

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686 Exhibit L244.
was lying on his left side and slightly face-down. He was facing the large rock and had both hands crossed behind his back.\textsuperscript{687}

462 Mr Xalabile sustained the following injuries:

462.1 A high-velocity gunshot entrance wound, left side of bottom of neck (just above the collar bone).\textsuperscript{688}

462.2 Two slit-shaped exit wounds on the right chest wall at the level of the 7\textsuperscript{th} intercostal space. Two bullet fragments were lodged under the skin.\textsuperscript{689}

462.3 The direction of the wound was left to right and downwards.\textsuperscript{690}

462.4 An entrance wound on the side of the left thigh.\textsuperscript{691}

463 The state and LRC pathologists agree that the main cause of Mr Xalabile’s death was the high-velocity gunshot wound to his chest. In

\textsuperscript{687} Exhibit MMM47, slide 20; Exhibit ZZZ5, p.23.
\textsuperscript{688} Exhibit A, p.646 – 661, para.4.1.
\textsuperscript{689} Exhibit A, p.646 – 661, paras.4.2 – 4.3.
\textsuperscript{690} Exhibit A, p.646 – 661, para.4.7.
\textsuperscript{691} Exhibit A, p.646 – 661, para.4.4.
addition, he was not immediately incapacitated and his death was slightly delayed.\textsuperscript{692}

464 The direction of the wound to Mr Xalabile’s chest was from the left side of his neck downwards to the right chest. This suggests two possibilities as to how he was shot:\textsuperscript{693}

464.1 He was not facing the shooter and was thus shot from a higher point.

464.2 He was facing the shooter but was bending forwards.

465 This is supported by the ballistic evidence. Rifle cartridges V1 – V3 were 2.8 metres away from and above Mr Xalabile’s body.\textsuperscript{694} In total, 16 rifle cartridge cases were found at this position.\textsuperscript{695} Naidoo and Steyl confirm that Mr Xalabile was probably fired at from this position.\textsuperscript{696}

\textsuperscript{692} Exhibit B, Annexure C, number 30 (DR 594), Exhibit ZZZ5, p.23.

\textsuperscript{693} Exhibit ZZZ5, p.23.

\textsuperscript{694} LCRC Forensics IMG_0788; Exhibit MMM47, slide 30; Day 7, T.730, line 5 - 731, line 17.

\textsuperscript{695} LCRC Forensics IMG_0788; Exhibit MMM47, slide 30; Day 7, T.731, lines 9 - 14.

\textsuperscript{696} Exhibit ZZZ5, p.23.
In addition, Naidoo and Steyl found the following regarding Mr Xalabile’s death:

“The posture seen of the body in all images, with hands and wrists crossed at his lower back, is exceedingly strange for a live person with these injuries to adopt. This posture tends to occur if the death supervened whilst in this precise posture, then not resisted/alterred by the primary flaccidity immediately after death, and then retained by the subsequent onset of early rigor mortis.

These, together with our medical opinion that his death was delayed and that the person was capable of reactive movement after the injury, opens the possibility that the deceased was handcuffed shortly after the injuries. It also suggests that the handcuffs were removed prior to the photography [Note: the probable use of plastic cable ties identified with Body A].”

They note that it is possible that Mr Xalabile could possibly have been salvaged by immediate or early medical attention. In Mr Xalabile’s case they say immediate emergency attention was more likely necessary than in Mr Mdizeni’s case due to the severity of the injury to his chest. They also express the *prima facie* view that manacling a

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697 Exhibit ZZZ5, p.23.
severely injured person immediately after injury, instead of administering emergency care or at least first aid, would likely compromise respiration and probably hasten death.698

468 In Warrant-Officer Ramanala’s photographs, there were no weapons next to Mr Xalabile’s body.699 In the later photograph that was taken by Captain Mohlaki there were two iron rods, one with a yellow handle and one with a black handle, next to his body.700

469 The Commission must therefore reject SAPS’ version that Mr Xalabile was killed whilst he was charging at NIU members. The only reasonable inference on the basis of the objective evidence is that Mr Xalabile was shot execution-style from the rocks above him.

Mr Pato (Victim M)

470 The facts are wholly inconsistent with any suggestion that Mr Pato was killed in circumstances that were justified. The only reasonable

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699 Exhibit JJ29.278 - 279.
700 Exhibit K, slides 11 - 12.
inference from the objective evidence is that Mr Pato was shot execution-style from the top of the rocks above him.

471 Mr Pato’s body was lying in a crevice between a rock and a tree. The place where his body was lying can be seen from Exhibit MMM47, slide 31. Mr Pato was lying on his back facing upward. His legs were bent underneath him. His left arm was lying over his stomach and his right arm was bent next to his body.

472 Mr Pato sustained the following injuries:

472.1 A high-velocity, atypical gunshot entrance wound to the right upper back, between the shoulders and at the base of the neck.

472.2 An exit wound on the front, right side of the neck.

472.3 An entrance wound on the bottom of the left palm.

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701 Exhibit MMM47, slide 31.
702 Exhibit JJ29.271, Exhibit MMM47, slide 25.
703 Exhibit A, p.295 – 322, para.5A.1.
704 Exhibit A, p.295 – 322, para.5A.1.
472.4 An exit wound on the bottom, side of the left thumb.\textsuperscript{706}

472.5 There were abrasions, which was a possible rubber bullet injury in the middle and to the left of the back.\textsuperscript{707}

472.6 There were fine abrasions on the front of the shins, more on the right shin than on the left shin.\textsuperscript{708}

473 The state and LRC pathologists agreed that the wound to the base of Mr Pato’s neck was the main cause of his death. The direction of the wound was back to front. Mr Pato was shot in the back of his neck. He was therefore not facing the person who shot him.\textsuperscript{709} He was immediately incapacitated due to the damage to his spinal cord that was caused by this gunshot. His death was rapid.\textsuperscript{710}

\textsuperscript{705}Exhibit A, p.295 – 322, para.5A.2.
\textsuperscript{706}Exhibit A, p.295 – 322, para.5A.3.
\textsuperscript{707}Exhibit A, p.295 – 322, para.5A.3.
\textsuperscript{708}LRC post-mortem report, para.3.
\textsuperscript{709}Exhibit JJ29.270; Exhibit MMM47, slide 24.
\textsuperscript{710}Exhibit Abis, Annexure C, number 13 (DR 577); Exhibit ZZZ5, p.21.
474 From the bullet trajectories and the bullet marks on nearby rocks, it is possible that Mr Pato was shot from positions 22 and 23 (Annexures). However, there are no cartridge cases in that vicinity to support this.\footnote{Exhibit ZZZ5, p.22.}

475 The most reasonable inference is therefore that Mr Pato was shot from the top of the rocks above him.\footnote{Exhibit ZZZ5, p.22.} This is supported by the ballistic evidence. Cartridge cases T, U and V were found on the top of these rocks.

476 Naidoo and Steyl also made the following findings:\footnote{Exhibit ZZZ5, p.21.}

"The wound at the rear of neck is atypical and indicates an unstable bullet injury. This could be on the basis of woody intermediary obstructions or if the entry bullet passed through the left hand (which does not have such a wound) and re-entered the neck.

The nature of the blood flow patterns on the front of the neck which has saturated the entire front of the clothing including the pants, as well as side flow pattern at the right side of the neck leading to blood-pooling on the ground adjacent to the head, and transfer pattern at front of neck
and right chin, from blood stained right hand as possible source for transfer, may be explainable: the deceased was most likely in an upright position at receiving the gunshot for long enough time for the blood spill to drench the front of his clothing, placing his right hand at the front of his neck trying to stem the gush of blood, then dropping to the ground face up and allowing the blood pooling to occur around the head/shoulders.”

477 In addition, Warrant-Officer Ramanala’s photographs reveal no weapons in the vicinity of Mr Pato’s body.\textsuperscript{714} Captain Mohlaki’s photograph, which was taken later, shows a large panga planted under Mr Pato’s right hand.\textsuperscript{715} The only reasonable inference is that Mr Pato was not armed at the time that he was killed.

478 It is therefore respectfully submitted that the Commission must reject any suggestion from SAPS’ that Mr Pato was killed whilst he was charging toward the NIU. On the basis of the objective evidence, the only reasonable inference is that he was killed unlawfully.

\textsuperscript{714} Exhibit JJJ29.270-271, Exhibit K, slides 13 - 15, Exhibit MMM47, slide 25.
\textsuperscript{715} LCRC Forensics IMG_0575, Exhibit MMM47, slide 26.
The nine victims who were killed in the “killing zone” of scene 2

Introduction

479 Nine victims were killed at scene 2 in close proximity to each other in an area which has become known as the “killing zone” because such a large number of victims were killed in a relatively small area. The only reasonable inference is that these killings were unlawful.

480 These victims were:

480.1 Mr Mangotywa (Victim D),

480.2 Mr Liau (Victim E),

480.3 Mr Mosebetsane (Victim G),

480.4 Mr Mabiya (Victim H),

480.5 Mr Nokamba (Victim I),

716 If regard is had to Exhibit MMM2, the “killing zone” is the area covered by block C3 and the adjacent area of block B3.
480.6 Mr Saphendu (Victim J),

480.7 Mr Ngxande (Victim K),

480.8 Mr Gadlela (Victim L); and

480.9 Mr Mohai (who was shot at scene 2 but died later in hospital).

481 As foreshadowed above, SAPS has not provided a version regarding how any of these victims were killed. Their deaths must therefore be found to be unlawful. In addition, on the basis of the evidence of relevant SAPS witnesses and the objective evidence, the only reasonable inference is that they were killed unlawfully.

The circumstances of the killings in the killing zone

482 As noted above, the only reasonable inference is that the killings in the killing zone were unlawful.

483 Major-General Naidoo testified as follows in relation to this issue:
When Major-General Naidoo and the NIU members came over the rock, they found strikers hiding in the cleft whom they arrested. It took a couple of minutes for them to arrest these strikers, remove them and pass them down the line to NIU members who were following.\textsuperscript{717}

However, while this was going on, he didn’t hear any shooting taking place in his immediate vicinity. He also did not hear any shooting in the direction of the killing zone; this would have affected their ability to move forward and after they had affected the arrests they moved directly downwards.\textsuperscript{718}

After they went down the rocks a POPS member at his side fired rubber bullets into the Koppie to persuade the strikers to come out. The rubber bullet was fired in the direction of the killing zone. Major-General Naidoo then saw a large number of strikers emerged from the killing zone. Thus, he subsequently

\textsuperscript{717} Day 196, T.23923, line 9 - 23924, line 21.

\textsuperscript{718} Day 196, T.23924, line 23 - 23925, line 6.
discovered that a large number of strikers had been congregating in the bushy, rocky area of the killing zone.\textsuperscript{719}

483.4 Aside from Papa 11, when Major-General Naidoo and the NIU members came over the rocks they were the first SAPS members to enter the killing zone.\textsuperscript{720} At that stage the POPS members from Papa 11 were in the killing zone.\textsuperscript{721}

483.5 Based on what he witnessed as he came over the boulder, the strikers were not attacking the POPS members with dangerous weapons or shooting at them. He also did not witness POPS members killing any strikers\textsuperscript{722}

484 Warrant-Officer Mamabolo’s statement corroborates Major-General Naidoo’s evidence in certain respects. Thus, his statement, which was corroborated by all the members of Papa 11, provides as follows:

\textsuperscript{719} Day 196, T.23923, line 7 - 23924, line 6.
\textsuperscript{720} Day 196, T.23922, line 11 - 23923, line 2.
\textsuperscript{721} Day 196, T.23929, lines 8 - 24.
\textsuperscript{722} Day 196, T.23929, line 19 - 24.
484.1 He did not see any of the strikers shooting at or attacking the police with dangerous weapons.

484.2 None of the POPs members fired live ammunition at the strikers.\(^{723}\)

485 However, his statement contradicted Major-General Naidoo’s evidence in a number of material respects. Thus, his statement provided in relevant part as follows:

485.1 After assisting Brigadier Calitz to effect arrests to the north of the Koppie, he drove to the Koppie and parked his Nyala in the Koppie “such that the police and the arrested protestors were separated.”\(^{724}\) The position of his Nyala is visible on Exhibit MMM2 in block D3.

\(^{723}\) Exhibit KKK60, para.16.

\(^{724}\) Exhibit KKK60, para.15.
485.2 After he got out of his Nyala, he became aware of SAPS members on top of the large boulder firing live ammunition in the direction of the protestors.\footnote{Exhibit KKK60, para.15.}

485.3 He shouted to the SAPS members to “seize (sic) fire and stop fire.” He also raised his hands to indicate this. Despite this, they continued to fire.\footnote{Exhibit KKK60, para.15.}

485.4 As the SAPS members continued to fire ammunition from the top of the large boulder, he saw Major-General Naidoo emerging on top of the boulder from the direction that the firing was coming from.\footnote{Exhibit KKK60, para.15.}

485.5 He saw that Major-General Naidoo had a pistol in his hands. The other SAPS members had rifles.\footnote{Exhibit KKK60, para.15.}

485.6 At that stage, he did not see any deceased persons.\footnote{Exhibit KKK60, para.15.}
485.7 When the shooting of live ammunition stopped, he observed some of the protestors coming out of the bushes with their hands raised. He saw one protestor fall to the ground.730

Warrant-Officer Mamabolo’s version is confirmed on oath by the other members of Papa 11, namely Constable Sebane, Constable Zondi, Constable Xhosa, Constable Malesa and Warrant-Officer Makoyana who confirmed the correctness of Warrant-Officer Mamabolo’s version. Warrant-Officer Mathavha confirmed the correctness of Warrant-Officer Mamabolo’s version. However, he went further and also specifically stated that he saw Major-General Naidoo fire a pistol into the bush on the southern side while taking cover behind a rock.731

487 Thus, on Major-General Naidoo’s version:

487.1 The nine victims in the killing zone were not killed by the POPS members.732

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730 Exhibit KKK60, para.16.
731 Exhibit MMM29.
487.2 There was no shooting in the vicinity after Major-General Naidoo and the NIU members came over the top of the rocks.\textsuperscript{733}

487.3 In addition, aside from the POP members of Papa 11, Major-General Naidoo and the NIU members who were with him were the first SAPS members to enter the killing zone.

487.4 The strikers were not shot at or killed by the POPS members of Papa 11.

487.5 The nine victims must therefore have been killed before Major-General Naidoo and the NIU members entered the killing zone.\textsuperscript{734}

487.6 They were also clearly not killed at close quarters.

487.7 In addition, they were killed in circumstances where there was a large group of people in the area where their bodies were found.

\textsuperscript{733} Day 196, T.23928, lines 10 - 18.

\textsuperscript{734} Day 196, T.23928, lines 10 - 18.
On Major-General Naidoo’s version, there is consequently no basis on which the killings in the killing zone could be justified.\(^735\)

On the version of the POPS members in Papa 11:

489.1 Major-General Naidoo and the NIU members under his command were seen shooting in the direction of the protestors in the killing zone as they came over the large boulder;

489.2 They did so in circumstances where the members in Papa 11 could not see any shooting coming from the protestors; and

489.3 The shooting by Major-General Naidoo and the NIU members was sustained; it continued even after Constable Mamabolo called and gestured for a cease-fire.

Thus, on the version of the POPS members who were in Papa 11, it is possible or even probable that Major-General Naidoo and the NIU members under his command were responsible for the killings in the killing zone.

\(^735\) Day 196, T.23928, lines 10 - 18.
Thus, the only reasonable inference on the basis of the relevant SAPS members’ evidence is that the killings that took place in the killing zone were unlawful.

This is confirmed by the nature of the injuries inflicted on these victims and the positions in which their bodies were found. We will deal with this in detail in the next section.

**Mr Mangcotywa (Victim D)**

The position in which Mr Mangcotywa’s body was found and the injuries that he sustained are entirely inconsistent with him having been killed in self-defence or private-defence. The only reasonable inference is that he was killed unlawfully.

Mr Mangcotywa’s body was lying next to Mr Liau’s body. They were lying in a clearing between a rock and bushes. Mr Liau’s arm is touching Mr Mangcotywa’s leg. Mr Mangcotywa was lying facing upward with his head on a small boulder.

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736 Exhibit B46, Exhibit JJ29.250.
737 Exhibit JJ29.250; Exhibit ZZZ5, p.16.
Mr Mangcotywa sustained the following injuries:

495.1 High velocity gunshot entrance wound, right side of chest. The bullet travelled through the chest, through the lungs and heart and exited on the left side of the chest.\(^{738}\)

495.2 The exit wound was on the left side of the chest.\(^{739}\)

495.3 The track of the chest wound was right to left, slightly upwards and slightly backwards.\(^{740}\)

495.4 An additional bullet or shrapnel injury to the left buttock that was not recorded by state pathologist.\(^{741}\)

496 The state pathologist and LRC pathologist agreed that the gunshot wound to Mr Mangcotywa’s chest was the main cause of his death. He was not immediately incapacitated and his death was rapid.\(^{742}\)

\(^{738}\) Exhibit A, p.103 - 125, para.4.1.
\(^{739}\) Exhibit A, p.103 - 125, para.4.2.
\(^{740}\) Exhibit A, p.103 - 125, para.4.7.
\(^{741}\) Exhibit Abisr, Annexure C, number 5 (DR 569)
\(^{742}\) Exhibit A, paras.4.1 and 4.2, Exhibit ZZZ5, p.16.
Naidoo and Steyl thus found as follows:743

“Although a speedy death, it was not immediate or immediately incapacitating, so turning of the trunk after a first shot could explain the oppositely-directed shots, if not shot from both directions. The posture may also suggest that the deceased was alive for a brief period and either supported his head against the rock as a “pillow” or had his head placed/supported in that position, whilst he succumbed to shock due to internal blood loss.”

The direction of fire and the shooter appear to have been from the top of the large central rock (where rifle cartridge CC2 was found).

Mr Mangcotywa could also have been shot from positions 13, 14 and 15 from the east through the opening between the boulder.744 However, there were no cartridge cases at positions 13 and 15.

On the basis of these facts, the only reasonable inferences are the following:

743 Exhibit ZZZ5, p.16 - 17.
744 Exhibit ZZZ5, p.16.
At the time that he was shot, Mr Mangcotywa was hiding or taking shelter in the clearing between the rock and bushes where his body was found;

He was killed by an R5 bullet to his upper body, which was shot from a distance.

He clearly did not pose any threat to the SAPS member who shot him; and

He was thus either targeted by the SAPS member who shot him and shot execution style from a distance or caught in SAPS cross-fire at scene 2.

The only reasonable inference is that Mr Mangcotywa was killed unlawfully.

**Mr Liau (Victim E)**

The position in which Mr Liau’s body was found and the injuries that he sustained are entirely inconsistent with him having been shot and
killed in self-defence or private-defence. The only reasonable inference is that he was killed unlawfully.

As foreshadowed above, Mr Liau’s body was lying next to the body of Mr Mangcotywa in a clearing between a rock and bushes. Mr Liau was lying on his right side but half-facing upwards. His feet are lying in the direction of the rock on which Mr Mangcotywa’s head was resting. His arm was touching Mr Mangcotywa’s leg.

Mr Liau sustained the following wounds:

504.1 A handgun (9mm) gunshot entrance wound, left side of chest.

504.2 The exit wound on the back, right side of the chest.

504.3 The track of the wound was left to right, slightly backwards and slightly upwards. It went through the heart, the right lung and the seventh intercostal space.

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745 Exhibit B46, Exhibit JJ29.250.
746 Exhibit JJ29.250; Exhibit ZZZ, p.16.
747 Exhibit A, p.126 - 147, para.4.2.
748 Exhibit A, p.126 – 147, para.4.3.
The state pathologist and the LRC pathologist agree that the main cause of Mr Liau’s death was the gunshot wound to his chest. His death was rapid but not immediate. He was also not immediately incapacitated.

The entry wound was irregular and the spent bullet was found inside his clothing. It therefore cannot be excluded that the bullet ricocheted off nearby trees or foliage.

The closest and most accessible 9mm handgun cartridge to Mr Liau’s body was the one found on top of the central boulder (P). This may therefore have been the firing position. However, the handgun bullet removed from Mr Liau’s clothing could not be linked to a firearm in the ballistics report.

On the basis of these facts, the only reasonable inferences are the following:

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749 Exhibit A, .126 – 147, para.4.3.
750 Exhibit Abis, Annexure C, number 6 (DR 570).
751 Exhibit Abis, Annexure C, number 6 (DR 570); Exhibit ZZZ5, p.17.
752 Exhibit ZZZ5, p.17.
753 Exhibit ZZZ5, p.17.
At the time that he was shot, Mr Liau was hiding or taking shelter in the clearing between the rock and bushes where his body was found;

He was killed by a single handgun bullet to his chest which was fired from a distance;

He clearly did not pose any threat to the SAPS member who shot him; and

He was thus either targeted by the SAPS member who shot him and shot execution style from a distance or caught in the SAPS cross-fire at scene 2.

The only reasonable inference is that Mr Liau was killed unlawfully.

Mr Mosebetsane (Victim G)

The only reasonable inference on the basis of the objective evidence is that Mr Mosebetsane was killed unlawfully.
Mr Mosebetsane’s body was found lying in a crevice between two rocks underneath overhanging vegetation. He was lying on his right side with a red blanket draped over his shoulders. His head was resting on Mr Mabiya’s (Victim H) right leg.\footnote{Exhibit JJJ29.254, Exhibit JJJ29.258, Exhibit ZZZ5, p.17.}

According to the state pathologist, Mr Mosebetsane sustained the following wounds:

512.1 High-velocity gunshot entrance wound causing injury to the base of the skull and brain. The path of the projectile is from the right side of the face to the left parieto-temporal aspect of the head.\footnote{Exhibit A, p.148 - 165, paras.4.2 – 4.3}

512.2 Gunshot exit wound at the left side of the parieto-temporal skulp, 4cm above the pinna of the left ear.\footnote{Exhibit A, p.148 - 165, para.4.2.}

According to the private pathologist, Mr Mosebetsane sustained the following injuries:
513.1 Gunshot entrance wound underneath the right eye would have passed to the right side of the skull-base to the right side of the neck.\textsuperscript{757}

513.2 High velocity gunshot entrance wound at the centre of the upper lip. This bullet passed into the left side of the base of skull and brain causing the damage noted to the base of skull and brain on the left side.\textsuperscript{758}

514 Thus, according to the private pathologist, the state pathologist missed a second gunshot entrance wound on the upper lip and this caused damage to the left side of the base of skull and brain. This is supported by an atypical sutured autopsy incision at right side of neck and right-sided brain contusions that would not be otherwise explained in the context of a single, left-sided wound track.\textsuperscript{759}

515 However, the state pathologist and the LRC pathologist both agree that the main cause of Mr Mosebetsane’s death was the gunshot wound/s to his head. Mr Mosebetsane was probably (although not

\textsuperscript{757} Exhibit Abis, Annexure C, number 7 (DR 571/2012).
\textsuperscript{758} ExhibitAbis , Annexure C, number 7 (DR 571/2012)
\textsuperscript{759} Exhibit Abis, Annexure C, number 7 (DR 571/2012).
certainly) immediately incapacitated due to the gunshot wound/s to his head.\textsuperscript{760}

From the trajectories, Mr Mosebetsane was possibly shot from the high rock-face of the large, central boulder or from the clearing to the south (direction 15 on Annexure E). Impact marks on the rock adjacent to the southern area (direction 15 on Annexure E) indicates that this was the more likely firing position.\textsuperscript{761}

While these are opposite directions, the body position suggests rotation of the body to either firing shot. This could have happened when he fell after both headshots, which were probably received in quick succession from one of these directions.\textsuperscript{762}

On the basis of these facts, the only reasonable inferences are the following:

\textsuperscript{760} Exhibit Abis, Annexure C, number 7 (DR 571).
\textsuperscript{761} Exhibit ZZZ5, p.18.
\textsuperscript{762} Exhibit ZZZ5, p.18.
518.1 At the time that he was shot, Mr Mosebetsane was hiding or taking shelter in the crevice between the two rocks where his body was found;

518.2 He was killed by at least one and possibly two R5 gunshot wounds to his head which were shot from a distance;

518.3 He clearly did not pose any threat to the SAPS member/s who shot him; and

518.4 He was thus either targeted by the SAPS member who shot him and shot execution style from a distance; alternatively, that he was caught in the SAPS cross-fire at scene 2.

519 The only reasonable inference is that Mr Mosebetsane was killed unlawfully.

Mr Mabiya (Victim H)

520 The only reasonable inference on the basis of the objective evidence is that Mr Mabiya was shot and killed unlawfully.
As foreshadowed above, Mr Mabiya’s body was lying in the same crevice (between two rocks underneath overhanging vegetation) as Mr Mosebetsane’s body. Mr Mosebetsane’s head was on his right leg. Mr Mabiya was lying on his back. His right arm was outstretched next to him but bent at the elbow. His left hand was lying on his body and his left hand touching his waist. Mr Mabiya probably fell before Mr Mosebetsane.

Mr Mabiya sustained the following injuries:

522.1 A high-velocity gunshot entrance wound to the middle of the back of the head.

522.2 The bullet terminated in the right side of the face at the level of the eye where two relatively large bullet fragments were found.

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763 Exhibit JJ29.254, Exhibit JJ29.258, Exhibit ZZZ5, p.18.
764 Exhibit ZZZ5, p.18.
765 Exhibit A, p.166 – 190, para.4.1.
766 Exhibit A, p.166 – 190, para.4.5.
The state and private pathologists agree that the cause of his death was the high-velocity gunshot wound to his head. The direction of the shot was from back to front. The single gunshot to his head was immediately incapacitating and his death was rapid. The bullet-fragment that was removed from his brain during his autopsy was consistent with a high-velocity projectile and probably an R5 bullet.\footnote{Exhibit ZZZ5, p.18.}

As with Mr Mosebetsane, from the trajectory of the shot, it appears as if Mr Mabiya was shot from the high-rock face of the large, central boulder or from the clearing at the south (direction 15 on Annexure E). Impact marks on the rocks next to the southern area (direction 15 on Annexure E) suggests this to be the more likely firing position.\footnote{Exhibit ZZZ5, p.18.}

On the basis of these facts, the only reasonable inferences are the following:

525.1 At the time that he was shot, Mr Mabiya was hiding or taking shelter in the crevice between the two rocks where his body was found;
525.2 He was killed by an R5 gunshot wound to the back of his head which means that he was not facing the person who shot him and he was shot from a distance;

525.3 He clearly did not pose any threat to the SAPS member/s who shot him; and

525.4 He was thus either targeted by the SAPS member who shot him and shot execution style from a distance or caught in the SAPS cross-fire at scene 2.

526 The only reasonable inference is that Mr Mosebetsane was killed unlawfully.

Mr Nokamba (Victim I)

527 The only reasonable inference on the basis of the objective evidence is that Mr Nokamba was shot and killed unlawfully.

528 Mr Nokamba was lying on his left side next to Mr Saphendu (Victim J) with their legs touching. His torso was bent acutely at the hip. His
right leg was extended onto Mr Saphendu’s bent knees. They were lying in a clearing between rocks and bushes.\textsuperscript{69}

Mr Nokamba sustained the following injuries:

529.1 High-velocity gunshot entrance wound on the left side of the chest.\textsuperscript{70}

529.2 The bullet from the above-mentioned wound was lodged under the skin on the right side of the bottom of the neck (collar bone).\textsuperscript{71}

529.3 The projectile travelled from left-to-right, upwards and from back to front.\textsuperscript{72}

The state and LRC pathologist agree that the main cause of Mr Nokamba’s death was the high-velocity gunshot wound to his chest.

\textsuperscript{69} Exhibit ZZZ5, p.18; Exhibit JJJ.29.244, Exhibit JJJ29.245.

\textsuperscript{70} Exhibit A, p.191 - 215, para.4.3.

\textsuperscript{71} Exhibit A, p.191 – 215, para.4.4.

\textsuperscript{72} Exhibit A, p.191 – 215, para.10.
Mr Nokamba’s death was rapid. However, he was capable of movement immediately after injury.  

531 Mr Nokamba was most likely in a bended position to receive this shot that passed upwards through his body. From the direction of the shot, it appears as if the high rock and positions 13 and 14 (Annexures E and F) could be the firing positions.

532 In Warrant-Officer Ramanala’s photograph, there are no weapons next to Mr Nokamba’s body. In the photograph that was taken by Captain Mohlaki, which was taken later, there was an axe right next to the hand of Mr Nokamba.

533 On the basis of these facts, the only reasonable inferences are the following:

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773 Exhibit ZZZ5, p.18.
774 Exhibit ZZZ5, p.18.
775 Exhibit JJJ29.244; Exhibit K, slides 1 - 2.
776 Exhibit K, slides 1 - 2.
533.1 At the time that he was shot, Mr Nokamba was hiding or taking shelter in the rocky and bushy clearing where his body was found;

533.2 He was killed by a single R5 bullet to the back of his chest;

533.3 He was therefore not facing the person who shot him and he was bent forwards (possibly indicating an attempt to either hide/take shelter) at the time that he was shot;

533.4 He was shot from a distance;

533.5 He clearly did not pose any threat to the SAPS member/s who shot him; and

533.6 He was thus either targeted by the SAPS member who targeted him and shot him execution style from a distance; alternatively, he was caught in the SAPS’ cross-fire at Scene 2.

534 The only reasonable inference is that Mr Nokamba was killed unlawfully.
Mr Saphendu (Victim J)

535 The only reasonable inference on the basis of the objective evidence is that Mr Saphendu was shot and killed unlawfully.

536 As foreshadowed above, Mr Saphendu was lying next to Mr Nokamba (Victim I) with their legs touching. They were lying in a clearing between rocks and bushes. Mr Saphendu was found lying facing upwards with his eyes open. His legs were bent at the knees and curled back under his body. His right arm was outstretched and bent at the elbow next to him.  

537 Mr Saphendu sustained the following injuries:

537.1 Gunshot entrance wound (possible handgun), below the right underarm.  

537.2 Exit (irregular) wound below the left underarm.

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777 Exhibit ZZZ5, p.19.
778 Exhibit A, p.216 – 239, para.4.3.
779 Exhibit A, p.216 – 239, para.4.4.
537.3 The direction of the shot was right to left and horizontally through the thoracic cavity.\textsuperscript{780}

538 The state and LRC pathologist agree that the gunshot wound to his chest was the cause of his death. His death was rapid but not immediate. Nor was he immediately incapacitated.\textsuperscript{781}

539 Naidoo and Steyl also made the following findings:\textsuperscript{782}

“The bullet entry is neat, regular and typical, passing through to exit out and, in our opinion, re-enter Body I: both bodies are in close proximity to each other, and the phenomenon of a minimally damaged 5.56 mm bullet lodged in body I can be explained by a single trajectory through both bodies, first through Body J: Note that the track through the both bodies was largely through the soft non-bony tissue and further explains the minimal damage, providing reason to combine trajectories.”

540 In Warrant-Officer Ramanala’s photograph, there are no weapons next to Mr Saphendu’s body.\textsuperscript{783} In the photograph that was taken by

\textsuperscript{780}Exhibit A, p.216 – 239, para.10.
\textsuperscript{781}Exhibit ZZZ5, p.19.
\textsuperscript{782}Exhibit ZZZ5, p.19.
Captain Mohlaki, which was taken later, there was a butcher knife next to the body of Mr Saphendu.

Like Mr Nokamba, the possible firing positions are the high rock and positions 13 and 14 (Annexures E and F).\textsuperscript{784}

541.1 At the time that he was shot, Mr Nokamba was hiding or taking shelter in the rocky and bushy clearing where his body was found;

541.2 He was killed by a single handgun bullet to his upper body, which was shot from a distance;

541.3 He clearly did not pose any threat to the SAPS member/s who shot him; and

541.4 He was thus either targeted by the SAPS member who shot him and shot execution style from a distance or caught in the SAPS cross-fire at scene 2.

\textsuperscript{783} Exhibit JJ29.245; Exhibit K, slides 1 - 2.

\textsuperscript{784} Exhibit ZZZ5, p.19.
It is respectfully submitted that the Commission should find that the only reasonable inference is that Mr Nokamba was killed unlawfully.

Mr Ngxande (Body K)

The only reasonable inference on the basis of the objective evidence is that Mr Ngxande was shot and killed unlawfully.

Mr Ngxande was lying alongside a rock, face down in a clearing in the central part of the Koppie. His torso was wrapped in a beige/brown blanket.\textsuperscript{785}

The white and maroon track-suited arm and green track-suite leg of another victim is visible in the photograph above where Mr Ngxande was lying. This victim was Mr Mohai who died on the way to hospital. Thus, Mr Mohai was lying above Mr Ngxande.\textsuperscript{786}

Mr Ngxande sustained the following injuries:

\textsuperscript{785} Exhibit JJ29.248, Exhibit ZZZ5, p.19.

\textsuperscript{786} Exhibit Exhibit JJ29.249, Day 196, T.23917, line 22 – 23918, line 7; 23920, line 17.
546.1 A high-velocity, gunshot entrance wound to the left side of chest.\textsuperscript{787}

546.2 The bullet lodged under the skin below the right nipple, which resulted in a storm appearance on X-ray and a fragment of lead was retrieved.\textsuperscript{788}

546.3 A high-velocity gunshot, entrance wound on the left lateral aspect of thigh.\textsuperscript{789}

546.4 An exit wound on left aspect of thigh, above the entrance wound.\textsuperscript{790}

546.5 An abrasion over left eyebrow.\textsuperscript{791}

546.6 An abrasion on left side of face.\textsuperscript{792}

\textsuperscript{787} Exhibit A, p.240 – 262(b), para.4.3
\textsuperscript{788} Exhibit A, p.240 – 262(b), para.4.4.
\textsuperscript{789} Exhibit A, p.240 – 262(b), para.4.5.
\textsuperscript{790} Exhibit A, p.240 – 262(b), para.4.5.
\textsuperscript{791} Exhibit A, p.240 – 262(b), para.4.6.
\textsuperscript{792} Exhibit A, p.240 – 262(b), para.4.6.
The experts agree that the cause of death was the gunshot wound to the chest, which was from left to right. Mr Ngxande was not immediately incapacitated and his death was rapid.\footnote{Exhibit Abis, Annexure C, number 11 (DR 575/2012).}

Both wounds (chest and thigh) were large and irregular and were thus consistent with unstable bullets fired through the woody shrubbery. The possible shooting positions are positions 22 and 23 (Annexure E). However, if Mr Ngxande was shot from position 23 there is an unexplained absence of cartridge cases.\footnote{Exhibit ZZZ5, p.20.}

In Warrant-Officer Ramanala’s photograph, there are no weapons next to Mr Nngxande’s body.\footnote{Exhibit JJ29.248.} In the later photograph that was taken by Captain Mohlaki there was a spear next to the body of Mr Ngxande.\footnote{Exhibit K, slides 5 - 5.}

The only reasonable inferences on the basis of the facts are the following:
550.1 At the time that he was shot, Mr Ngxande was attempting to hide in the rocky clearing where his body was found;

550.2 He was killed by an R5 bullet to his upper body, which was shot from a distance;

550.3 He clearly did not pose any threat to the SAPS member/s who shot him; and

550.4 He was thus either targeted by the SAPS member who shot him and shot execution style from a distance or caught in the SAPS cross-fire at scene 2.

551 It is respectfully submitted that the Commission should find that the only reasonable inference is that Mr Ngxande was killed unlawfully.

Mr Gadlela (Victim L)

552 The only reasonable inference is that Mr Gadlela was shot and killed unlawfully
Mr Gadlela was found lying on his left side with his face towards the ground. There was a black jacket and a beige coloured blanket lying next to him. He was lying adjacent to the rock but within the clearing amongst the shrubs.797

Mr Gadlela sustained the following injuries:

554.1 A high-velocity gunshot entrance wound, right lower back.798

554.2 The exit wound for the entrance wound described above was in the left side of the neck.799

554.3 The direction of the wound was back to front, upwards, right-to-left.800

554.4 A tangential wound through the lateral aspect of the left hand index finger.801

797 Exhibit ZZZ5, p.20.
798 Exhibit A, p.263 – 294, para.4.3.
799 Exhibit A, p.263 – 294, para.4.4.
800 Exhibit A, p.263 – 294, para.10.
801 Exhibit A, p.263 – 294, para.4.5.
The state and private pathologists agree that the wound to Mr Gadlela’s lower back caused his death. It is likely that he was immediately incapacitated by paralysis due to injury to his spinal cord and that his death was rapid. The upward direction of the wound through his body indicates that he was probably bending away from the shotist.

The direction of the shot suggests that Mr Gadlela was shot from position 23 (Annexure E). However, positions 13 and 14 (Annexure E) cannot be excluded. If he was shot from position 23 there is an unexplained absence of cartridge cases.

The only reasonable inferences on the basis of these facts are the following:

At the time that he was shot, Mr Gadlela was attempting to hide or take shelter in the rocky and bushy clearing where his body was found;

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802 Exhibit B, Annexure C, number 12 (DR 576).
803 Exhibit ZZZ5, p.20.
804 Exhibit ZZZ5, p.21.
557.2 He was killed by a single R5 bullet to his lower back, which was shot from a distance;

557.3 He was therefore not facing the person who shot him;

557.4 He clearly did not pose any threat to the SAPS member/s who shot him; and

557.5 He was thus either targeted by the SAPS member who shot him and shot execution style from a distance or caught in the SAPS cross-fire at scene 2.

558 The only reasonable inference is that Mr Gadlela was killed unlawfully.

**Mr Mkhonjwa (Victim N)**

559 The SAPS alleges that Mr Mkhonjwa and another striker, who was dressed in a “red jacket”, charged at the TRT members who were on the western side of scene 2. The TRT members fired shots, which hit Mr Mkhonjwa. The other striker ran back to the bushes and then
charged towards the TRT members again. The TRT members thus fired at him and injured him.\textsuperscript{805}

These allegations are entirely inconsistent with the objective evidence. The objective evidence shows that Mr Mkhonjwa was not charging SAPS members and that his killing was unjustified and thus unlawful.

Captain Kidd’s TRT members from FHA 2 were the first group of SAPS members to reach scene 2.

\textsuperscript{561.1} Exhibit JJJ10.4546, is one of Colonel Vermaak’s pentax photos. It was taken at 16:07:24. In the photo Captain Kidd’s line has just reached the dry dam from FHA2. His members were the first to reach scene 2. This was conceded by Captain Kidd.\textsuperscript{806}

\textsuperscript{561.2} Exhibit JJJ10.4547 was taken at 16:07:30. Captain Kidd’s TRT line has just reached the dry dam from the south-west and the

\textsuperscript{805} Exhibit L236; Day 233, T.29030, line 13 - 29044, line 5.

\textsuperscript{806} Day 234, T.29223, line 14, 29226, line 12 - 29227, line 18.
leaders are moving into the dry dam (towards the cover of the rocks).  

Contrary to Captain Kidd’s allegations, it was not just Mr Mkhonjwa and the man in the arsenal shirt that ran out of the Koppie towards the dry dam. A group of approximately 40 - 50 strikers did so, which included Mr Mkhonjwa and the man in the arsenal shirt.

Lieutenant-Colonel Vermaak testified that shortly after he saw the group of strikers corralled at the eastern edge of the Koppie they ran out of the bushes and then ran back into the bushes.

That was what prompted him to make the radio transmission at 16:08:50 that the strikers were going to break through.

Lieutenant-Colonel Vermaak’s testimony that it was a group of strikers that ran out towards the western edge of the dry dam

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807 Exhibit UUU16, slide 3; Day 234, T.29228, line 16 - 29231, line 24.
808 Day 233, T.29036, line 23 - 29037, line 15, Exhibit UUU2, para.11.
809 Day 211, T.26040, lines 19 - 22.
810 Day 211, T.26042, lines 12 - 17.
is confirmed by the statements of TRT members under Captain Kidd’s command:

562.3.1 The statement of W/O Batsi records as follows:811

“As we approach the mountain the group of males arms with pangas, knobkerries, spears as well as the axes engage so I engage myself with the one who was approaching towards me with a … and a panga and I shot 1 bullet in front of his feet but the guy who was wearing a … football T-shirt keep on coming towards me and I shot the second shot on the ground but the guy didn’t give up. I was armed with 9mm Z. serial 1058839.”

562.3.2 The statement of Sergeant Mahlatsi records:812

“While on the ground trying to notice who was shooting +40 people carrying spears and knobkerries and other sorts of weapons appears from the side of the hill and approaching my position.

…”

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811 Exhibit UUU11, para.4 (emphasis added).
812 Exhibit UUU13, paras.4, 6 (emphasis added).
While on my feet all these people were closer to me with all kinds of weapons. I decided to throw my tonga and draw a pistol. I discharged a few warning shots to push them away. Hence my life as well as the one of a fellow member were absolutely in danger, as these people were all in the two of us I pointed a pistol in their direction and discharged few round. Then a Nyala appeared from the other side and give us a cover.”

562.3.3 The statement of Constable Pelaelo says:

“While two close to the hill group of +40 participants approached me and while looking on my side there was only two colleagues of mine from different units. I was lying as there was no cover next to me. I stand up to go backwards and from the same group of participants, I was thrown by the spear, and it missed me on my left hand side leg. One black suspect wearing the blanket was faster holding the panga up on his right hand and the others carrying the axes and shiny sticks.”

562.4 Mr Mkhonjwa and the man in the arsenal shirt were shot and killed between 6:08:50 and 16:09:17, which was the time that

813 Exhibit UUU15, para.2 (emphasis added).
the group of strikers who were corralled at the eastern edge of the Koppie ran out towards the western edge of the dry dam. This is clear from the following:

562.4.1 At 16:09:17, Lieutenant-Colonel Vermaak began to make a report as follows: “JOC Chopper.” He was interrupted by Brigadier Calitz 8 seconds later who was transmitting information regarding arrests that were being made. At 16:09:32, he made the following transmission: “JOC, JOC, Chopper two bodies, two bodies at the back of the second koppie, two bodies.”

562.4.2 Lieutenant-Colonel Vermaak confirmed that the two bodies to whom he was referring were the bodies of Mr Mkhonjwa and the man in the red arsenal shirt (who was injured but not killed). He confirmed further that he first saw the two bodies for the first time.

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814 Exhibit OOO11.
815 Day 211, T.26044, lines 10 - 13, 26046, lines 13 - 18, 26048, lines 10 - 18.
time during the twenty-second interval between 16:08:50 and 16:09:17.\textsuperscript{816}

562.4.3 Exhibit C22 (the Protea Coin Security chopper video) and the statement of Constable Palaelo confirm this. With reference to the shooting of Mr Mkhonjwa and the man in the red arsenal shirt, Constable Palaelo states the following: “Immediately after the shooting of the man in the red T-shirt an Nyala came rushing from my right.”\textsuperscript{817} On the Protea Coin Security chopper video, at 11:26, which falls within the twenty-second interval in Lieutenant-Colonel Vermaak’s transmissions, a Nyala can be seen driving very near to where Mr Mkhonjwa’s body was found. This confirms that Mr Mkhonjwa was shot during the twenty-second interval in between Lieutenant-Colonel Vermaak’s transmissions.

\textsuperscript{816} Day 211, T.26048, lines 10 - 18.

\textsuperscript{817} Exhibit UUU14, para.5.
562.4.4 Thus, Mr Mkhonjwa and the man in the arsenal shirt were shot between 16:08:50 and 16:09:17.\textsuperscript{818}

563 The group of strikers (of which Mr Mkhonjwa and the man in the arsenal shirt were a part) ran out of the Koppie and towards the dry dam because they were being driven in that direction by the water cannons.

563.1 Exhibit JJJ10.4547 is a photograph that was taken at 16:07:24 pm. It shows the two water-cannons on either side of the Koppie spraying into the Koppie. The photograph showed the two water-cannons on either side of the Koppie moving east to west and pushing the strikers to the west-south-west. Lieutenant-Colonel Vermaak conceded that the photograph shows the strikers moving away from where they were being sprayed by the water-cannons.\textsuperscript{819}

563.2 It was shortly afterwards, at 16:08:42, that Lieutenant-Colonel Vermaak made the following radio transmission “Alright guys,

\textsuperscript{818} Day 211, T.26048, lines 10 - 18.

\textsuperscript{819} Day 211, T.26035, line 13 - 26036, line 12, T.26042, lines 18 - 21.
you’ve got them in the middle.” He testified that, at that stage, a group of strikers were corralled on the eastern edge of the Koppie.\textsuperscript{820}

563.3 Lieutenant-Colonel Vermaak testified that at the time he made the radio transmission at 16:08:42, he was not aware that Captain Kidd’s group had reached the western edge of the dry dam.\textsuperscript{821}

564 In addition, Mr Mkhonjwa’s injuries and the direction from which he was shot are wholly inconsistent with SAPS’ version that he was shot whilst charging at SAPS members.

564.1 Mr Mkhonjwa sustained the following injuries:

564.1.1 A handgun distant gunshot entrance wound on the outer side of the left forearm.\textsuperscript{822}

\textsuperscript{820} Day 211, T.26036, line 22 - 26037, line 3.
\textsuperscript{821} Day 211, T.26036, line 11 - 26037, line 4.
\textsuperscript{822} Exhibit A, p.91 – 102, para.4.2.
564.1.2 The exit wound was on the inner side of the left forearm.  

564.1.3 The re-entry wound on the left, front side of the chest.  

564.1.4 The bullet lodged on the right side of the chest (9mm bullet).  

564.1.5 Thus, Mr Mkhonjwa was killed by a 9mm (pistol) gunshot wound to his chest. The direction of the wound was left to right.  

564.2 Thus, Mr Mkhonjwa was shot in his upper body from his left-hand side. He was therefore not running towards the SAPS members who shot him. This is confirmed by the ballistics evidence and the evidence of Captain Kidd:

\[823\] Exhibit A, p.91 – 102, para.4.2.

\[824\] Exhibit A, p.91 – 102, para.4.2.

\[825\] Exhibit A, p.91 – 102, para.4.2.

\[826\] Exhibit Abis, Annexure C, number 5 (DR 568/2012).
564.2.1 Captain Mohlaki testified that the closest 9mm cartridge cases to Mr Mkhonjwa were AA13 - 24, which were 20.2 metres away from his body.\footnote{Day 7, T.723, lines 19 - 25.}

564.2.2 Naidoo and Van Zyl’s report confirms this and states that he was probably fired at from this position.\footnote{Exhibit ZZZ5, at p.22.}

564.2.3 In their statements, Warrant-Officers Batsi, Mahlatsi and Pelaelo give evidence about firing at the man in the red arsenal shirt. They do not say anything about having fired at another striker.\footnote{Exhibit UUU11, paras.5 - 6; Exhibit UUU12, para.3; Exhibit UUU14, paras.4 - 5.}

564.2.4 Constable Letswalo who gives evidence about having fired at a striker in a white shirt (Mr Mkhonjwa was wearing a white/beige shirt with brown stripes).\footnote{Written statement of Letswalo, para.3; Typed statement of Letswalo, 19 June 2014, para.3.}

Thus, this is the only statement that could refer to Mr Mkhonjwa.
From the discharge sheet read together with Exhibit B46, it is clear that the above-mentioned SAPS members all shot from the position were cartridges AA13 - 24 are marked.

With reference to Exhibit UUU16, slide 4, Captain Kidd also confirmed this as the position from where Mr Mkhonjwa was shot. On Exhibit L, slide 249, this would be the rocky area above the rectangle at the bottom left-hand corner of the slide.

The Commission should reject Constable Letswalo’s version.

Constable Letswalo gave two statements; the one was written and the other one typed. The typed statement is dated 19 June 2014. This was after Captain Kidd, who gave evidence about the shooting of Mr Mkhonjwa, testified. It is therefore completely unacceptable for a statement to be submitted after the witness who gave evidence about the events in question has testified and been cross-examined. As such, the

831 Day 233, T.29238, line 6 - 29239, line 19.
Commission should accord no weight to the typed statement of Warrant-Officer Letswalo.

565.2 In any event, there are a number of inconsistencies between Constable Letswalo’s written and typed statements:

565.2.1 In his written statement, Constable Letswalo states that a striker in a red shirt and a striker in a white shirt came towards him. In his typed statement, he only gives evidence about the striker in the white shirt approaching him.\(^{832}\)

565.2.2 In his written statement, Constable Letswalo states that both strikers were holding spears. In his written statement, Constable Letswalo does not say anything about the striker in a white shirt carrying a spear.\(^{833}\)

565.2.3 In his written statement, Constable Letswalo states that both strikers charged at him from a distance of

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\(^{832}\) Written statement of Letswalo, para.3; Typed statement of Letswalo, 19 June 2014, para.3.

\(^{833}\) Written statement of Letswalo, para.3; Typed statement of Letswalo, 19 June 2014, para.3.
less than seven metres. In his typed statement, he
only refers to the striker in the white shirt having
done so.\textsuperscript{834}

565.2.4 In his typed statement, Constable Letswalo states that
he gave a verbal warning to the charging striker. In
his written statement, he does not do so.\textsuperscript{835}

565.2.5 In his written statement, Constable Letswalo states
that he does not know whether he hit the strikers but
confirms that he was aiming for them. In his typed
statement, he again speaks only of one striker. In
addition, he states that he does not know whether he
hit the striker but says nothing about having aimed at
him.\textsuperscript{836}

\textsuperscript{834} Written statement of Letswalo, para.3; Typed statement of Letswalo, 19 June 2014, para.3.

\textsuperscript{835} Written statement of Letswalo, para.3; Typed statement of Letswalo, 19 June 2014, para.3.

\textsuperscript{836} Written statement of Letswalo, dated para.3; Typed statement of Letswalo, 19 June 2014, para.3.
Constable Letswalo’s evidence was inconsistent with the objective evidence. In his statement, he stated that the striker whom he shot was running towards him. As set out above, Mr Mkhonjwa was shot from the left-hand side. Thus, Constable is either not referring to Mr Mkhonjwa. Alternatively, his version is incorrect.

Finally, the fact that Mr Mkhonjwa was shot with a single shot to his upper body means that even if he was charging towards the SAPS members who shot him as SAPS has alleged, the response was disproportionate. A single gunshot to his legs would have incapacitated him and he would not have been able to continue running.

In addition, there were no weapons next to Mr Mkhonjwa’s body. In Warrant-Officer Ramanala’s photograph, there are no weapons next to Mr Mkhonjwa’s body.\(^\text{837}\) In the later photograph that was taken by Captain Mohlaki there were a number of weapons next to his body; a

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\(^{837}\) Exhibit JJ29.230 - 231.
stick on the left side of the body and a spear, stick and rod on the right side of the body.\textsuperscript{838}

568 Thus, SAPS’ version that Mr Mkhonjwa was shot and killed because he was charging towards the police is inconsistent with the objective evidence and must be rejected.

569 The only reasonable inference from the evidence is that he was killed unlawfully.

**Mr Mpumza (Victim C)**

*Introduction*

570 While ordinarily we would begin by setting out the SAPS’ version as to how Mr Mpumza was killed, the various SAPS witnesses have unfortunately failed to provide a single, consistent account of the incident. The most that can be said is that the SAPS alleges that Mr Mpumza was killed in self-defence/private defence whilst he was attacking Constable Sebatjane, a member of the TRT.

\textsuperscript{838} Exhibit K, slides 8 - 9.
This version should be rejected for the following reasons:

571.1 It is inconsistent with the number and nature of the wounds that Mr Mpumza sustained;

571.2 It is inconsistent with the conduct of the SAPS’ officers who shot Mr Mpumza; and

571.3 It is inconsistent with the objective evidence and because of the inconsistencies in the SAPS’ version. In particular, Captain Greyling’s statement presents a version which is quite different from that of Constable Sebatjane.

*SAPS’ version is inconsistent with the injuries that Mr Mpumza sustained*

572 Mr Mpumza was shot approximately thirteen times. Most of these wounds appear to be high-velocity wounds. This is entirely inconsistent with SAPS’ version of self-defence.

573 Mr Mpumza sustained the following injuries:
573.1 A high-velocity gunshot entrance wound, left chest, 3cm away from midline.\textsuperscript{839}

573.2 A high-velocity gunshot entrance wound to the left armpit.\textsuperscript{840}

573.3 A gutter or grazing wound on the left side of the stomach.\textsuperscript{841}

573.4 An oval-shaped, penetrating gunshot wound on left side of stomach.\textsuperscript{842}

573.5 A superficially penetrating gunshot wound on the side of the stomach.\textsuperscript{843}

573.6 A gunshot entrance wound on the front of the left thigh.\textsuperscript{844}

573.7 A gunshot entrance wound on the right thigh.\textsuperscript{845}

\textsuperscript{839} Exhibit A, p.19 – 40, para.4.1
\textsuperscript{840} Exhibit A, p.19 – 40, para.4.2.
\textsuperscript{841} Exhibit A, p.19 – 40, para.4.3.
\textsuperscript{842} Exhibit A, p.19 – 40, para.4.4.
\textsuperscript{843} Exhibit A, p.19 – 40, para.4.5.
\textsuperscript{844} Exhibit A, p.19 – 40, para.4.6.
\textsuperscript{845} Exhibit A, p.19 – 40, para.4.7.
573.8 Through-and-through gunshot wounds of left forearm, front to back and downwards direction.\textsuperscript{846}

573.9 An exit wound on the right side of upper back.\textsuperscript{847}

573.10 An exit wound on the upper, left back.\textsuperscript{848}

573.11 Exit wounds on the bottom of the left buttock.\textsuperscript{849}

573.12 An entrance wound on the side of the left buttock.\textsuperscript{850}

573.13 An exit wound on the back of the left thigh.\textsuperscript{851}

573.14 An entrance wound on the back of the left thigh below the wound above.\textsuperscript{852}

\textsuperscript{846} Exhibit A, p.19 – 40, para.4.8.
\textsuperscript{847} Exhibit A, p.19 – 40, para.4.9.
\textsuperscript{848} Exhibit A, p.19 – 40, para.4.10.
\textsuperscript{849} Exhibit A, p.19 – 40, para.4.11.
\textsuperscript{850} Exhibit A, p.19 – 40, para.4.12.
\textsuperscript{851} Exhibit A, p.19 – 40, para.4.13.
\textsuperscript{852} Exhibit A, p.19 – 40, para.4.14.
573.15 An entrance wound on the back of left thigh opposite the wound described in paragraph 342.13.\textsuperscript{573}

573.16 An exit wound on the back, inner side of left thigh.\textsuperscript{574}

573.17 An entrance wound on the left inner thigh, 2 cm above the wound described above.\textsuperscript{575}

573.18 An entrance wound to the back of the right thigh.\textsuperscript{576}

573.19 Two bullet fragments were removed from the back of the right thigh where was an associated skin bruise.\textsuperscript{577}

573.20 An exit wound on the front of the right thigh.\textsuperscript{578}

573.21 A bullet was removed from the front of the left thigh.\textsuperscript{579}

\textsuperscript{573} Exhibit A, p.19 - 40, para.4.15.
\textsuperscript{574} Exhibit A, p.19 - 40, para.4.16.
\textsuperscript{575} Exhibit A, p.19 - 40, para.4.17.
\textsuperscript{576} Exhibit A, p.19 - 40, para.4.18.
\textsuperscript{577} Exhibit A, p.19 - 40, para.4.19.
\textsuperscript{578} Exhibit A, p.19 - 40, para.4.20.
\textsuperscript{579} Exhibit A, p.19 - 40, para.4.21.
The state post-mortem report states that most of the wounds were inflicted with a high-velocity firearm. Naidoo and Steyl concluded that Mr Mpumza had been shot more than ten times, which appear to be high-velocity gunshot wounds and shrapnel.

Thus, Mr Mpumza was literally riddled with bullet wounds, most of which appear to have been inflicted with a high-velocity firearm. This is entirely inconsistent with SAPS’ version of self-defence. As noted above, one R5 bullet to the lower leg would have stopped him from running further. At the very least, we submit, there needed to be a detailed account of why one gunshot wound to his lower leg was insufficient and why it was necessary to shoot at him multiple times. No such account has been given.

On this basis alone, the only reasonable conclusion is that Mr Mpumza was killed unlawfully.

_the conduct of the SAPS members who killed Mr Mpumza_

Captain Ryland’s cellphone footage captured the audio of Mr Mpumza being killed. On it, the SAPS members who killed Mr Mpumza can be
heard celebrating and bragging about having killed him. This is entirely inconsistent with SAPS’ version of self-defence.

578 The following utterance regarding the killing of Mr Mpumza was captured on Ryland’s cellphone footage:\textsuperscript{860}


579 The words and the tone are celebratory. The SAPS member is bragging out having killed Mr Mpumza and about the fact that his muti did not work; they had still killed him despite it.\textsuperscript{861}

580 This behaviour is entirely inconsistent with SAPS’ version of having killed Mr Mpumza in self-defence.

\textsuperscript{860} Exhibit OOO11, at p.6 (00:02:50).
\textsuperscript{861} Exhibit OOO11, Entry 16:21:02, Day 237, T. 29720, line 19 - T. 29723, line 9.
SAPS’ version is inconsistent with the objective evidence

581 The various versions of the SAPS’ witnesses are inconsistent with the objective evidence in a number of respects.

582 There are two versions regarding the direction in which Mr Mpumza ran when he ran out of Koppie 3:

582.1 Thus, Exhibit L alleges that he ran out in an easterly direction towards the NIU line. He then turned around and ran in a straight line in the opposite direction where he encountered Constable Sebatjane and Constable Buthelezi.\textsuperscript{862}

582.2 Captain Kidd’s version was different. His account was similar to that of Constable Sabatjane. Captain Kidd said that Mr Mpumza had run out from the rocks which are to the right of the two canters in the centre of the photograph on slide 6 of Exhibit TTT6.\textsuperscript{863}

582.3 Both versions are inconsistent with the objective evidence:

\textsuperscript{862} Exhibit L, slide 247.

\textsuperscript{863} Day 233, T. 29060, line 1 – 29061, line 3
582.3.1 Exhibit KKK17.1, which was also produced by SAPS, reveals that the position of Mr Mpumza’s body, as reflected on Exhibit L, slide 247, is not correct. Mr Mpumza’s body was 10 - 12 metres further towards the west than indicated on Exhibit L, slide 247.\(^{864}\)

582.3.2 The respective paths that Exhibit L, slide 247 and Captain Kidd and Constable Sebatjane have indicated as the direction in which Mr Mpumza ran is inconsistent with the objective evidence:\(^{865}\)

(a) On Exhibit I2 at 00:00:42 - 00:00:44, a figure can be seen running into the large bushes to the south of where Exhibit L, slide 247 places the body.

(b) This figure is most likely to be Mr Mpumza, given that shouts from the SAPS can be heard at

\(^{864}\) Exhibit KKK17.1, Exhibit TTT6, slides 4 - 6.

\(^{865}\) Exhibit TTT6, slides 7 - 8.
00:00:34 and 00:00:36 and shots ring out, for nine seconds, from 00:01:01 to 00:01:10.

(c) It is more probable than not that Mr Mpumza tried to hide in the large bushes (marked with a blue circle on Exhibit TTT6, slide 8) for approximately 10 - 12 seconds before attempting the dash that led to his death.

Therefore, we submit the paths indicated on Exhibit L, slide 247 and by Captain Kidd and Constable Sebatjane are incorrect. We submit that Exhibit TTT6, slides 9 and 10 indicate the more likely path and true position of Mr Mpumza’s body.

Importantly, on Exhibit I2:

584.1 Shots ring out for 9 seconds from 00:01:01 to 00:01:10;

584.2 At 00:01:01 someone can be heard shouting the word “fire”, at the moment the first shot sounds.
But there is no audible warning shout or warning shot before this.

It is at this moment that SAPS members in the vicinity of Captain Rylands all turn and look, obviously in the direction of the shouting and the shots.\footnote{See Exhibit TTT5, p.11.}

All of this is inconsistent with the allegations of the SAPS witnesses such as Constables Sebatjane and Buthelezi, who say that they shouted at Mr Mpumza repeatedly to stop and put down his weapons. This is simply not audible on Exhibit I2, even though the word “fire” can be heard shouted.

There are a number of material inconsistencies in the SAPS’ version.

There are a number of material inconsistencies in the SAPS version. For example, Captain Greyling has provided an account which is different from that of Col McIntosh. Col McIntosh’s version differs in certain respects from that Constable Sebatjane. Constable Sebatjane’s
account fails to mention a number of material facts. We deal with some of those inconsistencies below.

Captain Greyling was a member of the negotiation team. He was therefore a member of Papa 1 with Brigadier Calitz and Lieutenant-Colonel McIntosh.867

Captain Greyling’s version is that Mr Mpumza responded when police members chased him. In effect, Captain Greyling says that Mr Mpumza was trapped and lifted his spear in self-defence. He states further that Mr Mpumza was shot at from a distance of approximately 5 metres and died instantly and not that he was killed in a close-quarters, hand-to-hand fight, as Constable Sebatjane, in particular, has alleged.

Thus, Captain Greyling statement says the following:868

“During this incident I became aware of about four police officers chasing a striker with an “assegai”. Another Nyala blocked this striker from fleeing, which resulted in him (the striker) turning around and with the “assegai” above his

867 Exhibit TTT9, para.15.
868 Exhibit TTT9, para.27.
head, stormed the police officials who was chasing him. He was about five metres away from the nearest police official when this official opened fire on the striker, killing him almost instantly. Lt Col McIntosh tried to revive the striker but he was already dead.”

Some of Captain Greyling’s evidence is confirmed by the objective evidence:

590.1 On Exhibit OOO11, the following is recorded 31 seconds before Mr Mpumza was killed: “this side. Call the Nyala this side. Call the Nyala this side...call the Nyala this side.” This was just before the shots that killed Mr Mpumza ring out.

590.2 On Botha’s enhanced video, at approximately the time that Mr Mpumza was killed, a Nyala can be seen moving due south. It then turns east. It does a half u-turn and appears to stop

869 At 23:08.
870 At 23:17.
facing east. This was in the direction of Mr Mpumza’s position.

As noted above, Captain Greyling was one of the negotiators. He was in the same Nyala as Lieutenant-Colonel McIntosh. He was thus an important SAPS’ witness. He had no motive or reason to lie or to give evidence that is damaging for SAPS. In addition, SAPS at no stage sought to call him to enable them to cross-examine him on his version.

In his initial statement Constable Sebatjane did not mention the fact that anyone else fired at Mr Mpumza. It was only in his consolidated statement that he mentioned, for the first time, that it had later come to his attention that Constable Mabe had fired in defence of his life.

This is notable for two reasons.

First, it is implausible that Constable Sebatjane would not have known at the time if someone else, who was close to him (on his version Constable Mabe was three paces away), fired at Mr Mpumza with an R5 rifle.

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871 At 23:32.
Second, his evidence was that he learned in the evening of 16 August 2012 that Constable Mabe had also fired at Mr Mpumza. There is consequently no explanation for why this fact was omitted from Mr Mpumza’s warning statement.\textsuperscript{872}

Then, Exhibit L does not mention Constable Mabe at all. It only mentions Constables Sebatjane and Buthelezi.

Constable Buthelezi’s version differs from that of Constable Sebatjane. The former says he shouted at Mpumza to put his weapons down, and makes no mention of him actually doing so, as Constable Sebatjane testified.\textsuperscript{873}

Moreover, Constable Buthelezi’s statement says that he also shot at Mr Mpumza.\textsuperscript{874} Inexplicably, Constable Sebatjane makes no mention of this in either his statement or his evidence. In fact, he testified that it was only him and Constable Mabe who shot at Mr Mpumza. If Constable Buthelezi had shot at Mr Mpumza, Constable Sebatjane would plainly have been aware of it.

\textsuperscript{872} Exhibit TTT7.
\textsuperscript{873} Exhibit WWW6.2, para 5, compared to Exhibit TTT7, para 6
\textsuperscript{874} Exhibit WWW6.2, para 5.
Also relevant in this regard is Constable Sebatjane’s evidence regarding Exhibit OOO1. Constable Sebatjane denied that it was he who said these words. He testified that it was only him and Constable Mabe who shot at Sebatjane and that Constable Mabe could speak Afrikaans, which seems to imply that it must have been Constable Mabe.

He also denied recognising the voice of the person who was speaking. This is entirely implausible. He was there when the words were spoken. He would have known who said them. He was also with Constables Mabe and Buthelezi on the day. We submit that he should have been able to recognise their voices on the recording.

In addition, there are a number of inconsistencies in the SAPS’ version regarding the weapon/s that Mr Mpumza was carrying and the manner in which he allegedly charged:

In his statement, Captain Kidd stated that Mr Mpumza ran towards the police officers. He did not say anything about Mr

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875 At p.6 (00:02:50).
Mpumza putting his weapons down and picking them up again. His oral testimony was to the same effect.

In his statement, Lieutenant-Colonel McIntosh also said that Mr Mpumza ran towards the police officers. He did not say anything about Mr Mpumza putting his weapons down and picking them up again. However, in his oral testimony he changed this version. He testified that MrMpumza put his weapons down and then picked them up and ran towards the SAPS members.

Captain Kidd testified that Mr Mpumza had what looked like two spears, one in each hand. Lieutenant-Colonel McIntosh said that Mr Mpumza had a spear in his left hand.

There are consequently a number of material inconsistencies in the SAPS evidence regarding the killing of Mr Mpumza. These fall into four broad categories:

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876 Exhibit UUU2.

877 Day 231, T. 28667, line 19 - 28668, line 11.
600.1 The inconsistency between the SAPS’ version and Captain Greyling’s statement.

600.2 Inconsistencies between Exhibit L and the evidence of the respective witnesses;

600.3 Inconsistencies between statements of witnesses and their oral evidence; and

600.4 Inconsistencies between the evidence of the relevant witnesses.

601 With so many inconsistencies, coupled with what the objective evidence tells, we respectfully submit that the Commissioners ought to find that the story has very likely been made up and that they should, with respect, be inclined to reject the version that Mr Mpumza was charging at several heavily armed TRT members. It bears emphasis that:

601.1 Mr Mpumza was the last to be killed.

601.2 From approximately 16:07 until he was killed, the Koppie was effectively surrounded by various SAPS units;
There was firing into the Koppie from all directions;

16 people were dead or dying at that stage;

Many more had been wounded;

Mr Mpumza ran out of the Koppie shortly before he was shot;

He is very likely to have seen people killed or at least shot before doing so;

At the very least he would have heard the gunfire;

He must have been terrified; and

If he had any intention to attack a police officer, he could have easily attacked members of the NIU, POPS or K9 in the Koppie.

In these circumstances, the far more plausible explanation is that Mr Mpumza attempted to hide in the bushes depicted by the larger blue circle on slide 6 of Exhibit TTT6, saw or heard that members of the SAPS had seen him and were closing in and then tried to “make a run
for it” past Constables Sebatjane, Mabe and Buthelezi, who all opened fire at him for the nine seconds audible on Exhibit I2. This explanation is consistent with the objective evidence, including I2 and post-mortem results.

Even if it is accepted that Mr Mpumza did run towards Constable Sebatjane while brandishing his spear (which we deny), the SAPS’ response was clearly disproportionate. We submit that one well aimed bullet to the leg would have stopped him. It was, we submit, not necessary to fire at him 13 times, the majority of rounds being fired from an R5 rifle.

We submit that the killing of Mr Mpumza was therefore clearly unjustified.

Conclusion

We submit that the Commission must find that the killing of Mr Mpumza was unlawful.

878 As depicted on Exhibit WWW8 (his path is shown by the blue arrows).
879 It is also consistent with Greyling’s statement that he was being “chased” by SAPS members.
Mr Sagalala and Mr Ntsoele

Mr Sagalala and Mr Ntsoele were shot at scene 2 and died later in hospital. The SAPS has given no account of the circumstances in which they were shot; indeed, it is not even known where in Koppie 3 they were shot. The Commission must find therefore that they were killed unlawfully.

This is confirmed by the injuries that they sustained.

Thus, Mr Sagalala was shot multiple times including to his upper body. He sustained the following injuries:

A high-velocity gutter wound to the left upper arm. It was not possible to determine the direction.\(^{880}\)

A high-velocity, irregular gunshot entrance wound just above left nipple.\(^{881}\)

\(^{880}\) Exhibit A, p.702 – 721, para.4(b).

\(^{881}\) Exhibit A, p.702 – 721, para.4(c).
607.1.3 A second, regular entrance wound on the chest above the wound mentioned above (the state post-mortem report only mentions one entrance wound on the front of the chest although two are depicted on the diagram).

607.1.4 The exit wounds for the above-mentioned entrance were below the left armpit.\textsuperscript{882}

607.1.5 A high-velocity gunshot entrance wound on the back of the left shoulder. The direction was mainly from back to front and upwards towards the front.\textsuperscript{883}

607.1.6 A grazing wound to outer (ulnar) side of wrist.\textsuperscript{884}

607.1.7 An abrasion to left elbow.\textsuperscript{885}

607.1.8 A superficial abrasion.\textsuperscript{886}

\textsuperscript{882} Exhibit A, p.702 – 721, para.4(c).
\textsuperscript{883} Exhibit A, p.702 – 721, para.4(e).
\textsuperscript{884} Exhibit A, p.702 – 721, para.4(g).
\textsuperscript{885} Exhibit A, p.702 – 721, para.4(h).
607.1.9 A superficial abrasion to the front of the left shin.\(^{887}\)

607.1.10 A superficial abrasion to the right knee-cap.\(^{888}\)

607.1.11 The state and private pathologists agree that the main cause of death was.

607.2 Mr Ntsoele was shot in the back. He therefore sustained the following injuries:

607.2.1 A single fatal gunshot wound to the back.\(^{889}\)

607.2.2 Abrasions /rubber bullet injuries to left collar bone and left shoulder.\(^{890}\)

608 We therefore submit that the Commission must find that Mr Sagalala and Mr Ntsoele were shot and killed unlawfully.

\(^{886}\) Exhibit A, p.702 – 721, para.4(i).  
\(^{887}\) Exhibit A, p.702 – 721, para.4(k).  
\(^{888}\) Exhibit A, p.702 – 721, para.4(i).  
\(^{889}\) Exhibit A, p.722 – 739, para.4(a).  
\(^{890}\) Exhibit A, p. 722 – 739, para.4(a).
Conclusions

609 On the basis of the evidence set out above, we accordingly submit that the Commission should conclude that:

609.1 The SAPS commanders had ample opportunity to halt the operation after Scene 1. This was grossly negligent in the circumstances. SAPS is consequently liable for the killings at Scene 2 on this basis alone.

609.2 There was no attack by the strikers on the members of the SAPS at Scene 2;

609.3 The SAPS members did not act in self or private defence, and the SAPS members did not reasonably believe that their lives, or any of their colleagues lives, were in danger;

609.4 The response of the SAPS members was disproportionate to any perceived threat. Thus, their shooting exceeded the bounds of reasonable self / private defence.
Accordingly, SAPS members are *prima facie* guilty of murder, alternatively culpable homicide, attempted murder and/or assault with intent to do grievous bodily harm (and SAPS civilly liable) for the deaths of 17 people and injuries to others at scene 2.

In addition, for the reasons set out above, we request the Commission to recommend that the following SAPS’ members be investigated and prosecuted for the unlawful killings that took place at Scene 2:

610.1 The commanders in the JOCCOM and Brigadier Calitz who were responsible for failing to halt the operation after Scene 1;

610.2 The commanders who were responsible for the killings at Scene 2, including Major-General Naidoo, Colonel Modiba and Captain Kidd.

610.3 The individual shooters at Scene 2, including Constable Sebatjane, Constable Buthelezi, Constable Mabe, Constable Batsi, Constable Mahlatsi, Constable Palaelo and Constable Letswalo.
Part F – Lonmin’s responsibility

611 The Families submit that Lonmin is responsible for the deaths of their loved ones.

612 Lonmin’s responsibility is set out in full in AMCU’s heads of argument. We make common cause with those submissions and we do not think it necessary to repeat them in these already lengthy heads of argument.

613 However, we wish to submit that it is clear that Lonmin wanted SAPS to break the strike and lobbied and colluded with SAPS to achieve this. We set out the relevant evidence in this regard below.

614 Mr Jamieson and Mr Ramaphosa readily conceded that Lonmin lobbied government and the SAPS firstly to secure a massive police presence at Lonmin and secondly to characterise what was taking place as a criminal rather than an industrial relations event.

615 Mr Jamieson conceded the following:

“MS PILLAY: And the first reason is that it was necessary to
sustain your insistence that significant numbers of police and even the army needed to be deployed in Marikana – sorry in Lonmin, at Lonmin, to contain the situation.

MR JAMIESON: Yes.

MS PILLAY: And for that reason it was important for you to emphasise that the issue was a criminal issue and not a pure labour issue. That’s the one reason.

MR JAMIESON: Yes.”

616 Mr Ramaphosa conceded the following:

“MR NTSEBEZA SC: ....Now against that backdrop tis exchange of e-mails I suggest I put it to you you’re attempting to persuade Minister Shabangu to change her characterisation and characterise it as criminal. What do you say to that?

MR RAMAPHOSA: Well yes, we’re saying that people are getting killed in a criminal way, as you have admitted yourself, and we were saying we wanted the police to be brought on site to prevent further killings, further criminal activity where people are being killed in that way from taking place. So, yes that is the case.”

891 T, Day 287, 37337, lines 2 – 12.

892 T, Day 271, 34590, line 17 – 34591, line 3.
CHAIRPERSON: Did you in fact persuade her in any event to abandon the characterisation that it was just a wage dispute and to take a different view of the matter?

MR RAMAPHOSA: Yes –

CHAIRPERSON: As it were, withdraw her, correct her previous public statement –

MR RAMAPHOSA: Yes.

CHAIRPERSON: - that it was just a wage dispute, management and the workers must get together and sort the thing out.

MR RAMAPHOSA: Yes.”

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617 By 14 August 2012 Lonmin’s goal of securing a massive police presence at Lonmin had been accomplished.894

618 On the afternoon of 14 August 2012, Mr Mokwena met with General Mbombo. It is apparent from the transcript that Mr Mokwena was keen that the police operation be implemented as soon as possible and was concerned that Lonmin’s plans should dovetail with those of SAPS. General Mbombo was of the same mind and the two agreed that

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893 T, Day 271, 34593, line 17 – 34594, line 3.
894 T, Day 289, 37663, lines 3 – 7.
Lonmin would issue ultimatums the following morning and if the strikers failed to return to work the SAPS would commence their operation the following day, viz Wednesday 15 August 2012.

“MS BARNES: If I can take you to another aspect of your conversation with General Mbombo, its page 31 of the transcript at the bottom of the page. The Provincial Commissioner says ‘Hence I just told these guys that we need to act such that we kill this thing,’ and you then sat ‘Immediately, yes.’ The PC then says at the top of the next page, When tomorrow we have to move in, if today we don’t find co-operation with these people we need to move in such that we kill it because we need to protect the situation where any Jack and Jay from a political angle and then it tailors off. You see that?

MR MOKWENA: Yes.

MS BARNES: Then if we look at page 33. Halfway down the page you say the following. ‘So I agree with you, Commissioner, if we can arrest this thing tomorrow, because the longer it goes, its giving all the other opportunists to come in and cease the opportunity and then it gets out of control.’ The PC says, ‘That’s it.’ You then say ‘So I think yes let tomorrow be the D day where we issue the ultimatum and say if you don’t show up for work, sorry that’s it. So we’ll go tonight, go and print all those brochures in the languages that we want to use, use out choppers tomorrow,
drop them round at all the strategic places.’ And then finally if you can go to page 35, the Provincial Commissioner says about a third of the way down the page, I just need to read halfway through that paragraph, she says, ‘So I think that also I think the plan gels nicely. I support the idea that they must be given the notice tonight rather’ –

CHAIRPERSON: Not be given.

MS BARNES: Sorry. ‘not be given the notice tonight, rather in the early hours of tomorrow so that it works with our plans.’ So essentially reading all of this together you are agreeing with General Mbombo that what must happen is that ultimatums must be issued to the workers early the following morning and if they don’t adhere or obey the ultimatum and go back to work, the police will act on that day, on Wednesday 15 August 2012, correct? That’s what you agreed with her?

MR MOKWENA: That was my understanding, yes.”

At 6:23 pm on the evening of 14 August 2012, Mr Jamieson addressed an e-mail to Roger Phillimore, Simon Scott and Mahomed Seedat in which he stated *inter alia* the following:

“……. The police are commencing their operation as

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Note: The reference number 895 refers to page 291, line 2-10.
outlined to us earlier to try and break the back of the situation and I’ll get an update later this evening. Although we are glad about the police operation there is always the worry that it goes wrong. Spoke again to the DG this afternoon.”

On Wednesday 15 August 2012, Mr Jamieson and Mr Ramaphosa continued to lobby government, and Minister Shabangu in particular, to “re-characterise” the situation at Lonmin as a criminal rather than an industrial relations event. We submit however that at this stage an additional lobbying point arose. This was to get the SAPS, now that there were sufficient numbers on site, to take action to break the strike.

Thus, on Wednesday 15 August 2012 at 9:43 Mr Jamieson addressed an e-mail to Mr Ramaphosa in which he said *inter alia* the following:

“We are grateful the police now have c 800 on site. Out next challenge is sustaining this and ensuring that they remain and *take appropriate action so we can get people back to work.*” (emphasis added)

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896 Exhibit JJJJ1, p 24.
897 Exhibit JJJJ1, p 34.
Later that afternoon at 2:58pm Mr Ramaphosa sent an e-mail to Mr Jamieson and others in which he said *inter alia* the following:

“I have just had a discussion with Susan Shabangu in Cape Town.

1. She agrees that what we are going through is not a labour dispute but a criminal act. She will correct her characterisation of what we are experiencing.

2. She is going into Cabinet and will brief the President as well and get the Minister of Police Nathi Mthethwa to act in a more pointed way.

3. She will be in Johannesburg by 5pm and would be able to speak to Roger.

Let us keep the pressure on them to act correctly.”\(^{898}\) (emphasis added)

We submit that Mr Ramaphosa’s reference to “getting Minister Mthethwa to act in a more pointed way” was a direct response to Mr Jamieson’s plea that SAPS be urged to “take appropriate action to get people back to work.”

\(^{898}\) JJJJ1, p 47
We note that while this lobbying was going on Mr Mokwena and the two union Presidents were meeting with General Mpembe. During that meeting, Mr Mokwena said the following:

“MR MOKWENA: …..let me just remind everybody. We have asked the police to hold on their plans to execute. For in an interview this morning two presidents committing to come here. That zone is classified as a security zone. It is in the hands of the police. It is not Lonmin. So Lonmin has absolutely nothing to do. Meaning, you and us, so sitting here arguing will not help. We need to say to the man we are failing to give you a chance to solve the problem, now activate ….”

Lonmin’s attitude is clear from the above passage. It was obviously required to give the two union Presidents an opportunity to intervene, but as far as Lonmin was concerned it had no role whatsoever to play in terms of attempting to find an amicable solution to the impasse. If the union Presidents were unsuccessful in their efforts then Lonmin would simply tell the SAPS to “activate” their operation which as far as Lonmin is concerned was simply “on hold.”

In the evening of 15 August 2012 the National Management Forum (“NMF”) took, or at least endorsed, a decision that a SAPS operation

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899 Exhibit OO4, p 23, line 18 – p 24, line 6.
would be launched at Lonmin the following day in order to disperse and disarm the strikers.\textsuperscript{900}

It is clear that Lonmin was advised of this decision in advance of the operation. We submit that Lonmin was most likely advised after the NMF meeting on the evening of 15 August 2012. This is borne out by evidence of a phone call between General Mbombo and Mr Mokwena that evening.\textsuperscript{901} Somewhat predictably, Mr Mokwena claimed that he could not recall what he and General Mbombo had spoken about that evening but denied that she had told him about the SAPS plan for the following day.\textsuperscript{902} In any event it is clear that Lonmin knew about the SAPS decision to launch an operation at Lonmin on 16 August 2012 at the very latest by 6:29am that morning.\textsuperscript{903} It was on the basis of this information that Lonmin took a decision to issue an ultimatum on the morning of 16 August 2012 to require the strikers to return to work by 7:00am on Friday 17 August 2012.

\textsuperscript{900} Exhibit JJJ177. And T, Day 180, 21574, line 11 – 21576, line 20.

\textsuperscript{901} Exhibit WWWW4.

\textsuperscript{902} T, Day 292, 38188, line 13 – 38190, line 10.

\textsuperscript{903} T, Day 292, 38183, line 23 – 38185, line 1.
We submit that the above facts, taken together, demonstrate that Lonmin both lobbied SAPS (and government) and colluded with SAPS to break the strike. We point out that Lonmin did so in circumstances in which it foresaw that a police operation to break the strike might result in injury and even death.

Mr Jamieson’s e-mail of 14 August 2012 to Mr Phillimore, Mr Scott and Mr Seedat has been referred to above. In it Mr Jamieson said “although we are glad about the police operation, there is always the worry that it goes wrong.” Mr Jamieson was cross examined on this as follows:

“MR GOTZ: You say ‘Although we were glad about the police operation, there is always the worry that it goes wrong’ and what I want to put to you is that that reveals that you foresaw that something could go wrong and there might be injuries and possibly even deaths as a consequence of the police operation.

MR JAMIESON: Yes, well what Mark had said on the phone was, you know, we have to be worried here that this is, you know, maybe 2 or 3000 people who are armed, you’ve got a lot of police on site who are also armed and whilst there is a plan in place that the police have, which is the police’s call, its not ours, that sounds like a situation where things might go wrong where you’ve got an angry group of people who
are armed and one other group of people who are intent on taking the arms off them. It’s clearly a situation that has the potential to go wrong, but you would think that the police had covered those eventualities.”

630 We therefore submit that Lonmin is responsible for the deaths of our loved ones.

631 In addition, we refer to the interrogatories that were submitted to Lonmin and the response that was received on 24 October 2014. On the basis of this response, we submit the following:

631.1 The Families dispute that the only undertaking that was provided on 9 July 2013 was to find employment for one family member per family. An undertaking was made that the Families would not go hungry. The Families understood this to be an undertaking that Lonmin would assist them to put food on the table for their Families.

904 T, Day 289, 37677, lines 3 – 23.
631.2 Lonmin should assist those Families whose loved ones were in the process of building them houses by undertaking the expense of completing those houses.

631.3 Lonmin has delayed unduly in upholding its undertaking to ensure that one family member per family is given employment at Lonmin. It must honour its undertaking in this regard without any further delay.

631.4 Lonmin’s position of not providing any assistance to the Thelejane, Gwelani and Mpumza families on the basis that their loved ones were not Lonmin’s employees at the time that they were killed is cruel and arbitrary in the extreme. Lonmin should provide assistance to these families as it does to the other families.

632 We will make further submissions in this regard during oral argument.
Part G – Conclusion

For the reasons set out above, we submit that the Commission should find that the killings on 13 August 2012 and 16 August 2012 were unlawful.

We submit further that the Commission should make the findings and recommendations as submitted above.

Dumisa Ntsebeza SC

Tholoana Motloeny a

Nicole Lewis

Families’ Counsel
Chambers, 29 October 2014