## TABLE OF CONTENTS

### TO

#### HEADS OF ARGUMENT

**ON BEHALF OF INJURED AND ARRESTED PERSONS**

<table>
<thead>
<tr>
<th>Item number</th>
<th>Heading</th>
<th>Page Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>SECTION A</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>INTRODUCTION, THE ISSUES AND METHODOLOGY</td>
<td>7</td>
</tr>
<tr>
<td>A.1</td>
<td>Perspective</td>
<td>10</td>
</tr>
<tr>
<td>A.2</td>
<td>Witnesses</td>
<td>12</td>
</tr>
<tr>
<td>A.3</td>
<td>The issues</td>
<td>13</td>
</tr>
<tr>
<td>A.4</td>
<td>Unique contributions and areas of emphasis</td>
<td>19</td>
</tr>
<tr>
<td></td>
<td><strong>SECTION B</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>CONTEXT / BACKGROUND / CANVASS</td>
<td>20</td>
</tr>
<tr>
<td>B.1</td>
<td>The legal context</td>
<td>26</td>
</tr>
<tr>
<td>B.1.1</td>
<td>Constitutional provisions</td>
<td>20</td>
</tr>
<tr>
<td>B.1.2</td>
<td>Legislation</td>
<td>22</td>
</tr>
<tr>
<td>B.1.3</td>
<td>Common-law principles</td>
<td>23</td>
</tr>
<tr>
<td>B.1.4</td>
<td>Regulations, standing orders, etc</td>
<td>23</td>
</tr>
<tr>
<td>B.1.5</td>
<td>SAPS prescripts, regulations, etc</td>
<td>25</td>
</tr>
<tr>
<td>B.2</td>
<td>The historical context</td>
<td>26</td>
</tr>
<tr>
<td>B.3</td>
<td>The factual context and background (including the version of the Injured and Arrested)</td>
<td>31</td>
</tr>
<tr>
<td>B.3.1</td>
<td>Karee – 2011</td>
<td>32</td>
</tr>
<tr>
<td>B.3.2</td>
<td>June / July 2012 : Da Costa talks</td>
<td>33</td>
</tr>
<tr>
<td>B.3.3</td>
<td>Prelude – 6 to 9 August 2012</td>
<td>36</td>
</tr>
<tr>
<td>B.3.4</td>
<td>10 August 2012 – March to LPD</td>
<td>37</td>
</tr>
<tr>
<td>B.3.5</td>
<td>11 August 2012 – March to NUM offices</td>
<td>38</td>
</tr>
<tr>
<td>B.3.6</td>
<td>12 August 2012 – Death of two Lonmin security officers</td>
<td>41</td>
</tr>
<tr>
<td>B.3.7</td>
<td>Killing of Mr Mabebwe and Mr Langa</td>
<td>42</td>
</tr>
<tr>
<td>B.3.8</td>
<td>13 August 2012 – Incident involving killing of 3 strikers and 2 policemen</td>
<td>43</td>
</tr>
<tr>
<td>B.3.9</td>
<td>Death of Mr Twala</td>
<td>47</td>
</tr>
<tr>
<td>B.3.10</td>
<td>Annandale takeover</td>
<td>48</td>
</tr>
<tr>
<td>B.3.11</td>
<td>Aftermath</td>
<td>49</td>
</tr>
</tbody>
</table>

**SECTION C**

<p>| C.1 | ANALYSIS OF THE EVIDENCE IN RELATION TO THE TERMS OF REFERENCE | 51 |
| C.1.1 | Clause 1.1.1 of the TOR: Lonmin’s best endeavours | 136 |
| C.1.2 | Clause 1.1.2 of the TOR: Outbreak of violence | 56 |
| C.1.3 | Clause 1.1.3 of the TOR: Tension, unrest, disunity | 60 |
| C.1.4 | Clause 1.1.4 of the TOR: Safeguards and safety | 61 |
| C.1.5 | Clause 1.1.5 of the TOR: Policy, procedures conduct | 61 |
| C.1.6 | Clause 1.1.6 of the TOR: Loss of life or damage | 62 |
| C.2 | The conduct of SAPS | 63 |
| C.2.1 | Clause 1.2.1 of the TOR: Standing orders | 63 |
| C.2.2 | Clause 1.2.2 of the TOR: Use of force | 82 |
| C.2.2.1 | Self and private defence; putative self-defence; legal principles | 82 |
| C.2.2.2 | The attack | 94 |
| C.2.2.3 | The evidence of the strikers (re the “attack”) | 98 |
| C.2.2.4 | The objective evidence (re the “attack”) | 102 |
| C.2.2.5 | Was the force necessary? Did SAPS comply with the prescriptions for minimum force as required in the common law, the SAPS Act and Standing Order 262 | 104 |
| C.2.2.6 | Was the force used proportional to the threat? | 104 |
| C.2.3 | Clause 1.2.3 of the TOR: SAPS’ role in dealing with the incident | 108 |
| C.2.3.1 | The necessity of so many units | 108 |
| C.2.3.2 | The police leadership | 114 |
| C.2.3.3 | The National Commissioner | 114 |
| C.2.3.4 | Major General Annandale | 122 |
| C.2.3.5 | Brigadier WS Calitz | 142 |
| C.2.3.6 | General Naidoo | 181 |
| C.2.4 | Additional and general indications of SAPS’ culpability | 194 |
| C.2.4.1 | Exhibit L : (One of the police versions) | 195 |
| C.2.4.2 | Pulling the wool over the eyes of the Commission | 198 |
| C.2.4.3 | Tampering with evidence and concealment thereof | 199 |
| C.2.4.4 | SAPS giving false information to the local and international public | 200 |
| C.2.4.5 | Shifting responsibility for 13 August 2012 | 201 |
| C.2.4.6 | Foreseeability and actual foresight | 202 |
| C.2.4.7 | Utterances indicating a (collectively) guilty mind | 203 |</p>
<table>
<thead>
<tr>
<th>C.2.5</th>
<th>Clause 1.2.4 of the TOR: Self and private defence (justifiability); legal principles</th>
<th>204</th>
</tr>
</thead>
<tbody>
<tr>
<td>C.3</td>
<td>The conduct of AMCU, its members and officials</td>
<td>205</td>
</tr>
<tr>
<td>C.4</td>
<td>The conduct of NUM, its members and officials</td>
<td>208</td>
</tr>
<tr>
<td>C.5</td>
<td>The role played by Department of Mineral Resources</td>
<td>211</td>
</tr>
<tr>
<td>C.6</td>
<td>The conduct of individuals and loose groupings in fermenting and/or otherwise promoting a situation conflict</td>
<td>215</td>
</tr>
<tr>
<td><strong>SECTION D</strong></td>
<td><strong>ANALYSIS IN TERMS OF THEMES RAISED IN THE OPENING STATEMENT OF THE INJURED AND ARRESTED PERSONS</strong></td>
<td><strong>216</strong></td>
</tr>
<tr>
<td>D.1</td>
<td>The massacre could and should have been avoided</td>
<td>217</td>
</tr>
<tr>
<td>D.2</td>
<td>Toxic collusion</td>
<td>219</td>
</tr>
<tr>
<td>D.3</td>
<td>Murder of the poor</td>
<td>222</td>
</tr>
<tr>
<td>D.4</td>
<td>Self-defence claims are baseless</td>
<td>222</td>
</tr>
<tr>
<td>D.5</td>
<td>Scene 1: Murder</td>
<td>222</td>
</tr>
<tr>
<td>D.6</td>
<td>Scene 2: Cold blooded extrajudicial executions</td>
<td>222</td>
</tr>
<tr>
<td>D.7</td>
<td>Who gave the orders?</td>
<td>223</td>
</tr>
<tr>
<td>D.8</td>
<td>Police revenge / retaliation and malice</td>
<td>225</td>
</tr>
<tr>
<td>D.9</td>
<td>Deeper underlying (socio-economic) causes of the massacre</td>
<td>225</td>
</tr>
<tr>
<td>D.10</td>
<td>Arrest of and charges against protestors unjustifiable</td>
<td>225</td>
</tr>
<tr>
<td><strong>Section E</strong></td>
<td><strong>ANALYSIS IN TERMS OF THE IDENTIFIED GAME-CHANGERS : WHY THE MASSACRE AND RELATED EVENTS HAPPENED</strong></td>
<td><strong>226</strong></td>
</tr>
<tr>
<td>E.1</td>
<td>Game-changer One: The shooting of protestors by NUM members</td>
<td>227</td>
</tr>
<tr>
<td>E.2</td>
<td>Game-changer Two: The role played by the events of 13 August 2012 and the resultant revenge motive on the</td>
<td>231</td>
</tr>
<tr>
<td>Section</td>
<td>Title</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>E.3</td>
<td>Game-changer Three: The impact of political pressure</td>
<td>233</td>
</tr>
<tr>
<td>E.4</td>
<td>The interconnectedness of the Game-changers</td>
<td>242</td>
</tr>
<tr>
<td>E.5</td>
<td>SAPS’ explanation of why the massacre happened: muti/rituals, invisibility, etc</td>
<td>244</td>
</tr>
<tr>
<td>SECTION F</td>
<td>REINFORCEMENT: THE RELEVANT SUPPORTING EVIDENCE OF SELECTED WITNESSES, VIDEOS AND PHOTOGRAPHS</td>
<td>248</td>
</tr>
<tr>
<td>F.1</td>
<td>Mr X</td>
<td>248</td>
</tr>
<tr>
<td>F.2</td>
<td>General Annandale and General Mpembe</td>
<td>273</td>
</tr>
<tr>
<td>F.3</td>
<td>Da Costa, Jamieson and Mokwena</td>
<td>273</td>
</tr>
<tr>
<td>F.4</td>
<td>Mr Cyril Ramaphosa and Ms Susan Shabangu</td>
<td>273</td>
</tr>
<tr>
<td>F.5</td>
<td>The experts</td>
<td>286</td>
</tr>
<tr>
<td>F.6</td>
<td>Key Exhibits: Videos, photographs, etc</td>
<td>287</td>
</tr>
<tr>
<td>SECTION G</td>
<td>SUMMARY OF PROPOSED KEY FINDINGS</td>
<td>287</td>
</tr>
<tr>
<td>G.1</td>
<td>SAPS</td>
<td>288</td>
</tr>
<tr>
<td>G.2</td>
<td>Lonmin</td>
<td>292</td>
</tr>
<tr>
<td>G.3</td>
<td>NUM</td>
<td>293</td>
</tr>
<tr>
<td>G.4</td>
<td>AMCU</td>
<td>293</td>
</tr>
<tr>
<td>G.5</td>
<td>Workforce</td>
<td>293</td>
</tr>
<tr>
<td>G.6</td>
<td>Individuals</td>
<td>294</td>
</tr>
<tr>
<td>SECTION H</td>
<td>PROPOSED RECOMMENDATIONS</td>
<td>294</td>
</tr>
<tr>
<td>H.1</td>
<td>Recommendations (general)</td>
<td>294</td>
</tr>
<tr>
<td>H.2</td>
<td>Matters and persons to be referred for prosecution</td>
<td>295</td>
</tr>
<tr>
<td>H.3</td>
<td>Matters to be referred for further investigation</td>
<td>296</td>
</tr>
<tr>
<td>H.4</td>
<td>Matters to be referred for separate enquiry</td>
<td>298</td>
</tr>
<tr>
<td>SECTION I</td>
<td>DISCLAIMER AND RESERVATION OF RIGHTS</td>
<td>299</td>
</tr>
<tr>
<td>---------------</td>
<td>--------------------------------------</td>
<td>-----</td>
</tr>
<tr>
<td>SECTION J</td>
<td>CONCLUSION</td>
<td>301</td>
</tr>
<tr>
<td>ANNEXURE</td>
<td>TABLE OF CASES AND BIBLIOGRAPHY</td>
<td>304</td>
</tr>
</tbody>
</table>
SECTION A : INTRODUCTION, THE ISSUES AND METHODOLOGY

A.1 Perspective

1. The very first sentence and opening words of Thomas Piketty’s international bestseller, “Capital in the Twenty-First Century”, are:

“On August 16, 2012, the South African Police intervened in a labor conflict between workers at the Marikana Platinum mine near Johannesburg and the mine’s owners, the stockholders of Lonmin, Inc, based in London. Police fired on the strikers with live ammunition. Thirty-four miners were killed. As often in such strikes, the conflict primarily concerned wages: the miners had asked for a doubling of their wage from 500 to 1,000 euros a month. After the tragic loss of life, the company finally proposed a monthly raise of 75 euros.

This episode reminds us, if we need reminding, that the question of what share of output should go to wages and what share to profits – in other
words, how should income from production be divided between labor and capital? – has always been at the heart of distributional conflict.”

2. Further down, on the same page, Piketty poses a rhetorical question, again with reference to the Marikana massacre:

“The Marikana tragedy calls to earlier instances of violence. At Haymarket Square in Chicago on May 1, 1886, and then at Fourmies, in northern France on May 1, 1891, police fired on workers striking for higher wages. Does this kind of violent clash between labor and capital belong to the past, or will it be an integral part of twenty-first century history?”

3. Although some of the issues raised in this analysis ostensibly go beyond the scope of the Marikana Commission of Enquiry, particularly Phase One thereof, it best illustrates the fundamentals of the approach adopted in these submissions, as was more elaborately elucidated in the opening statement made to the Commission on 23 October 2012. Unfortunately, and due to considerations of time and money, Phase Two of the Commission was virtually non-existent. Nevertheless, we still favour a root cause analysis over a simple analysis of who pulled the trigger(s).

4. In a nutshell, the massacre was the outcome of the toxic collusion between Lonmin and the South African Police Service at face value but that collusion represented a wider politically and ideologically determined partnership between the state and capital and against labour. This collusion is typical of the historical development, not only of the mining industry since 1867 but of the foundations of the very country called South Africa.
5. Without this perspective, it is impossible to understand the events under investigation and put them in their true historical, political and socio-economic perspective and context. One will otherwise be left asking unanswerable questions, like: Why did Lonmin not simply engage with the workers as common sense would otherwise dictate? Why was the Lonmin leadership (shareholders, board members and top management) so obsessed with changing the characterisation of the conflict from a labour dispute to purely criminal activity which could only be resolved by the police or, worse still, the army? Why did Lonmin target politicians and ministers of state, rather than police leadership? Why did the National Commissioner of Police and Provincial Commissioner both go to such extraordinary lengths to conceal the involvement of the Minister of Police and senior politicians, such as Mr Ramaphosa, until the previously undisclosed police hard drives came to light almost a year after the massacre? Did the police really “forget” about their constitutional and legal duties, which are clearly set out in the applicable prescripts, or were these expediently “suspended” in response to the political pressure from above? The million dollar question is: Would the massacre still have occurred had it not been for the political pressure, the “suspension” of logic and law on the part of Lonmin and SAPS respectively – in short, the collusion between these two powerful forces? In our view, and given the evidence, the answer to this last question must be an unequivocal NO. Simply put, our approach will uniquely not be confined to the narrow questions of WHAT happened and HOW it happened but, more importantly, WHY it happened. This, after all, is the ultimate question which must be of paramount concern to the
victims, their families, the South African public and, as Piketty’s words illustrate, the international community and humanity as a whole.

6. These heads of argument constitute a summary of the submissions which will be made by us on behalf of the party commonly referred to as the Injured and Arrested Persons, a collective term including those victims of the Marikana massacre / tragedy who survived death and were either injured and/or arrested during the relevant period and mainly on 16 August 2012.

7. Numbers and wide range of injuries, examples (Mabuyakhulu, Phatsha, Magidiwana)

8. Naturally, the point of departure must be the Terms of Reference of the (Marikana) Commission of Inquiry (also known as “the Farlam Commission” or simply “the Commission”) issued in terms of Proclamation 50 of 2012 and gazetted on 12 September 2012.

9. Before dealing with the identities of the parties whose conduct is the subject of the prescribed investigation(s), it is important to take note of the preambular portions of the terms of reference, more specifically the following:

9.1. “The Commission is appointed to investigate matters of public, national and international concern arising out of events at the area commonly known as

---

1 Exhibit CCC1; D48 p 5300 l 20
2 Exhibit DDD5.1 to 5.3
3 Exhibit EEE15
the Marikana Mine in Rustenburg, North West province from Saturday 09 August – Thursday 16 August 2012, which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction to property ...”; and

9.2. “The Commission shall inquire into, make findings, report on and make recommendations concerning the following, taking into consideration the Constitution and other relevant legislation, policies and guidelines ...”.

10. The Terms of Reference then go on to specify certain parties whose conduct ought to be scrutinised in respect of issues clearly stipulated and circumscribed. These parties are, respectively:

10.1. Lonmin Plc (“Lonmin”);

10.2. The South African Police Services (“SAPS”);

10.3. The Association of Mineworkers and Construction Union (“AMCU”);

10.4. The National Union of Mineworkers (“NUM”)

10.5. The Department of Mineral Resources (“DMR”) or any other government department or agency; and

10.6. Any individuals or loose grouping (which may be found to have been) fermenting and/or otherwise promoting a situation of conflict and confrontation which may have given rise to the tragic incident, whether directly or indirectly (emphasis added).
11. Finally and importantly, the Commission is enjoined, where appropriate, to "refer any matter for prosecution, further investigation or the convening of a separate enquiry to the appropriate law enforcement agency, government department or regulator regarding the conduct of certain person(s)".

12. The Terms of Reference define and circumscribe the mandate of the Commission.

13. In discharging this mandate, the Commission sat for some 292 days in Rustenburg and Centurion and conducted a few inspections in loco.

14. With the exception of a singular witness, codenamed Mr X, the proceedings of the Commission were held in public and were open to the media.

A.2 Witnesses

15. A total of 56 witnesses gave oral evidence at the Commission. Of these, six were called on behalf of the Injured and Arrested Persons (Bishop Seoka and Messrs Mabuyakhulu, Phatsha, Magidiwana, Mtshamba and Nzuza).

16. With the exception of Bishop Seoka, these witnesses were carefully selected to provide a spread of evidence covering the vast majority of the main events under investigation by the Commission (notably 11, 13, 16 (both Scene 1 and Scene 2)). By and large, their evidence was consistent and mutually reinforcing the key issues, as will be discussed in more detail hereinbelow.
17. The transcript runs into approximately 40,000 pages, excluding several volumes of exhibits presented and including countless videos and photographs.

18. Given the sheer volume of evidence and the number of witnesses against the amount of time available, we will only deal with selected witnesses in an in-depth fashion and choose those witnesses who tend to cover a broad cross-section of the key issues.

A.3 The issues

19. The issues for investigation are clearly set out in the Terms of Reference, as already pointed out.

20. Based on the Terms of Reference, the Injured and Arrested Persons raised more specific issues in the Opening Statement. It may be worth setting out the 10 issues (or themes) listed therein, namely:

20.1. The massacre could and should have been avoided;

20.2. The toxic collusion between SAPS and Lonmin or the State and capital was causative of the massacre;

20.3. The massacre exhibited a situation of (the) premeditated murder of defenceless and powerless poor people;

---

4 Exhibit GGG18
20.4. The claims of self-defence are baseless;

20.5. What happened (at Scene 1) are instances of unjustifiable murder;

20.6. What happened (at Scene 2) are cold-blooded executions;

20.7. Who gave the orders, at all levels of government and the police chain of command?

20.8. The demeanor and behaviour of the police showed that they were, *inter alia*, motivated by revenge and malice;

20.9. The underlying causes go deeper than the immediate parties present in the Commission (see Phase Two);

20.10. The decision to charge the protestors with the murder of their fellow protestors under the so-called doctrine of common purpose was callous, insensitive and a form of using the poor as scape-goats.

21. Thirdly and in addition to the above, the Injured and Arrested Persons placed on the record the following events, which were identified as “game-changers” in the sequence of events which led to the massacre and/or other preceding injuries and fatalities:
21.1. The First Game-changer was identified as: the violence which was meted out by members of NUM on 11 August 2012, resulting in at least two serious injuries and the rumour of two killings;

21.2. The Second Game-changer: the violence which was unnecessarily sparked by the police on 13 August 2012, resulting in five deaths and other serious injuries, which fuelled anger and “high emotions” among the police and the search for vengeance, which must have played a causal and/or contributory role on 16 August 2012;

21.3. The Third Game-changer: the exertion of political pressure upon the government and SAPS to use violence

22. None of these yardsticks should be viewed in isolation, but an integrated and cumulative analysis thereof will be adopted.

23. A further tool of analysis which will be employed during oral argument involves what we will refer to as “mirroring” or counter-posing certain comparable situations. For example, it will be useful to counter-pose:

23.1. The (correct) approach taken by Da Costa against the (incorrect) approach taken by Mokwena;

23.2. The relative success of Xolani Gwala to catalyse a peace mission compared to the long lasting recalcitrance of Lonmin to do the same;
23.3. The consistent willingness of Mathunjwa to intervene compared to the refusal, reticence and dragging of feet by NUM whenever requested to do so;

23.4. The (correct) approach and exercise of discretion adopted by Mpembe on the 13th against the (incorrect) rigidity of Annandale and Calitz on the 16th August;

23.5. The (correct) reading of the mood and demeanour of the strikers by Julius Motlogeloa (and Mpembe) on the 13th against the (very incorrect) reading of the very same signs (eg singing, clicking of weapons, crouch-walking, etc) by Calitz and others on the 16th August; and

23.6. The (disastrous) failure of Calitz to communicate any warning or instructions to the strikers to disarm versus the 100% success rate achieved by Captain Kidd, who communicated his intentions.

A.4 Unique contributions and areas of emphasis

24. Having received the outlines of the forthcoming heads of argument of the various parties and due to the shortness of time, some areas will merely be touched upon and not elaborated in detail on the basis that one or more parties have indicated a specific focus thereon. We therefore reserve the right to cross-refer to the submissions and references of other likeminded parties on any specific point should the need arise.
25. Although the nature of the involvement of the Injured and Arrested Persons was all encompassing and covered all the events and days under investigation, we have chosen to place special focus and emphasis on selected areas only. In so doing, we also propose to dwell more on what we regard as unique contributions or angles, which might possibly not be capable of being similarly pursued by other parties. These will principally include:

25.1. a root cause analysis of the political factors at play, more particularly the deceased role played by the exertion of political pressure which was cascaded down to the shooters who pulled the trigger(s);

25.2. the unique position of the Injured and Arrested Persons as the only eye-witnesses to the event other than of course members of SAPS;

25.3. at all times presenting the answers to the important questions of WHAT and HOW in their own right but with the view to the bigger prize, namely WHY things happened as they did.

26. Our proposed Commission findings and recommendations will accordingly be based on an analysis premised on the aforesaid standards or yardsticks, bearing in mind the root and historical causal issues.

27. Further and also during the course of the hearings, the Injured and Arrested Persons indicated that recommendations for the criminal prosecution of certain individuals would be made, more specifically:
27.1. Mr Cyril Ramaphosa
27.2. Minister N Mthethwa and Shabangu
27.3. General R Phiyega
27.4. General Mbombo
27.5. Brigadier Calitz
27.6. General Annandale
27.7. Major-General Naidoo
27.8. The shooters
27.9. Some of the Lonmin executives.

28. A number of other miscellaneous recommendations will be prayed for in respect of individuals or entities, as well as a finding that the arrests of the relevant persons on 16 August 2012 were \textit{prima facie} unlawful, unnecessary and in the circumstances draconian. It may be noted that the civilian victims have already taken initial steps in the institution of civil proceedings for damages, the fate of which may well depend on the outcomes of the Commission.

29. Further and more specific recommendations will be made in respect of the suitability of certain individuals to hold and/or retain their positions and what steps ought to be recommended for their removal or investigation / proceedings related thereto.

30. Before dealing with these specific objectives or intended outcomes, we start with painting the legal, historical and factual context as the canvass on which the submissions are made.
SECTION B : CONTEXT / BACKGROUND / CANVASS

31. In a nutshell, the narrative which will be argued on behalf of the Injured and Arrested Persons can be summarised into the following précis: Viewed from a historical perspective, the massacre was a disaster waiting to happen. Viewed from a narrower perspective of Lonmin, the massacre and related events were predictable and were referred to by NUM as a “ticking time bomb” and could and would have been avoided had Lonmin not acted inappropriately at specific important junctures of the build-up. Viewed from a policing point of view, and given the current constitutional dispensatory, the calamity symbolised a complete failure on the part of SAPS to discharge their legal, moral and constitutional duties. Viewed from a trade union perspective, the NUM’s role was also largely contributory and may have very well ignited the ticking time bomb.

B.1 The legal context

32. Although it is principally a fact-finding tribunal, the Commission is bound to employ legal tools, analysis and reasoning in discharging its duties. This is clearly demonstrated by even a casual reading of the Terms of Reference, the Regulations, the quasi-adversarial nature of the proceedings and the fact that it was deliberately chaired by a retired judge plus two senior advocates. What follows are some of the legal instruments which are of direct relevance to this matter. In addition thereto, legal authorities, precedents and articles will be invoked.

5 Day 35 p 3809 ll 17-24; day 35 pp 3809 l 25 - 3810 l 1; Gcilithsana statement para 30.6 p 3812 ll 15 - 25
B.1.1 Constitutional provisions

33. The supremacy of the South African Constitution is clearly captured in section 2 thereof, which states that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

34. It is submitted that SAPS, the National Commissioner, the Provincial Commissioner and the Minister of Police (all being “organs of state”) breached the Constitution in numerous ways by either engaging in conduct (or omissions) which are inconsistent with the Constitution or the non-fulfilment of the obligations imposed by it.

35. Some of the key constitutional provisions which will be relied upon to justify an adverse findings under this heading are:

35.1. Section 10 of the Constitution, which guarantees the right to human dignity;

35.2. Section 11, which guarantees the right to life;

35.3. Section 12, which guarantees the right to freedom and security of the person, to be free from all forms of violence from either public or private sources, not to be tortured in any way;
35.4. Section 18, which guarantees the right of association;

35.5. Section 23, which guarantees the right to fair labour practices and to strike;

35.6. Section 26, which guarantees the right to have access to adequate housing;

35.7. Section 30, which guarantees the right to participate in the cultural life of one’s choice;

35.8. Section 31, which guarantees the right to enjoy a person’s culture, practise their religion and use their language;

35.9. Section 35, which guarantees the rights not to be compelled to make any confession or admission that could be used in evidence against that person;

35.10. Section 195(1), which provides that the public administration must be governed by the democratic values and principles enshrined in the Constitution, including a high standard of professional ethics;

• Impartiality;
• Responsiveness to people’s needs

35.11. Section 198, which provides that national security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life;
35.12. Section 199(5), which provides that the security services must act, and must teach and require their members to act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic;

35.13. Section 199(6), which prescribes that no member of any security service may obey a manifestly illegal order;

35.14. Section 199(7), which prescribes that neither the security services nor any of their members, may in the performance of their functions further, in a partisan manner, any interest of a political party;

35.15. Sections 205, 206 and 207, which provide for the objects or mandate of the police service and the separation of the political responsibility and functions of the police service from the control and management thereof.

B.1.2 Legislation

36. The following legislative enactments are of special relevance:

36.1. the SAPS Act;
36.2. the Prevention and Combating of Corrupt Activities Act 12 of 2004;
36.3. the Regulation of Gatherings Act;
36.4. the Labour Relations Act;
36.5. the Criminal Procedure and Evidence Act 51 of 1977, as amended;
36.6. International Law:
36.6.1. Universal Declaration of Human Rights;  
36.6.2. African Charter on Human and People’s Rights; and  
36.6.3. The ICC Statute, also known as The Rome Statute.

B.1.3 Common-law principles

37. Reference will also be made to breaches of the common law, more especially in relation to the common-law crimes of:

37.1. murder;  
37.2. attempted murder;  
37.3. accomplices and accessory to murder;  
37.4. assault;  
37.5. assault with intent to do grievous bodily harm;  
37.6. malicious damage to property; and  
37.7. arson.

B.1.4 Regulations, standing orders, etc

38. The backbone prescript against which the conduct of SAPS in the execution of the operation(s) which resulted in the relevant events and incidents under investigation is Standing Order (General) 262 headed “Crowd Management during Gatherings and Demonstrations”.

39. The relevant provisions of Standing Order 262, which will be relied upon, are:
39.1. clause 1.1 thereof, which states that the purpose of the Order is “to regulate crowd management during gatherings and demonstrations in accordance with the democratic principles of the Constitution and acceptable international standards”;

39.2. clause 2(d), defining crowd management as “the policing of assemblies, demonstrations and all gatherings as defined in the Act, whether recreational, peaceful or of an unrest nature”;

39.3. the definitions of “CJOC”, “defensive measures”, “JOC”, “JOCCOM”, “operational commander”;

39.4. clause 8, dealing with the appointment of the CJOC;

39.5. clause 10, dealing with the duties of the operational commander to give detailed briefings and effective communication;

39.6. most notably, clause 11 thereof, dealing with the execution of an operation and setting out step-by-step the procedures to be followed if negotiations fail and life or property is in danger, presenting minimum force and stating that “the success of the actions will be measured by the results of the operation in terms of cost, damage to property, injuries to people and loss of life” and that “all visible policing members deployed must be trained in the management of crowds”;
39.7. the implications of clause 11(7) thereof, which states that the common-law principles of self-defence or private defence are not affected by the Standing Order;

39.8. clause 12; and

39.9. clause 13, dealing with reporting and debriefings respectively;

39.10. clause 14, dealing with the duties of the first member, including the prohibition against the brandishing of firearms, firearms and against the use of any firearms against the demonstrators, except in the case of private defence should lives be in serious danger.

B.1.5 Other SAPS’ prescripts, regulations, etc

40. additional prescripts which govern policing, including:

40.1. Regulation 20 of the Regulations for the SAPS 2006 (“misconduct”) – Exhibit LLL;

40.2. Standing order 251 - Exhibit ZZZ8;

40.3. Standing order 259(1) - Exhibit OOO42;

40.4. Rules of engagement - Exhibit BBBB6;

40.5. Public Order Police - Policy document on crowd management - Exhibit FFF1

41. Various contraventions of these legal instruments will be demonstrated so as to base submissions in respect of specific recommendations prayed for. Reference
will also be made to the same legal instruments in answering the questions, whether and to what extent SAPS and others broke the law. Reference will also be made to the same legal instruments in answering the questions whether and to what extent SAPS and others broke the law.

**B.2 The historical context**

42. The issues which arise in this Commission are incapable of a proper analysis without first taking a long-range historical perspective so as to understand the conditions which set the stage for the drama which became the Marikana massacre. The Commission is necessarily enjoined to cast the net both retrospectively in order to understand the genesis of the problems as well as prospectively into the future in order to prevent repetition. Without this historical perspective, any hopes for a meaningful difference that can be made by this Commission’s report will evaporate into thin air.

43. There is a vast array of literature and common knowledge about the history of the mining industry, the dominant role it played in shaping the country, its repeated resort and reliance on naked and state sponsored violence to achieve its goals and more particularly to resist wage demands and so forth. Due to the pressures of time and for the sake of convenience, we will rely on the excellent work of Sampie Terreblanche entitled “A History of Inequality in South Africa”, 1652-2002.
44. The very thing called “South Africa” was born out of a union of four republics, which was in turn lubricated by the discovery of diamonds and gold in 1867 and 1886 respectively.

45. Between 1652 and the 1860s, violent conflict in the colonies was dominated by what were then the primary economic assets of land and livestock. After the discovery of precious minerals, the mining sector played a dominant role in shaping what was to become the Union of “South Africa”.

46. The relevant portion of this history, which is equally relevant to this Commission, is captured in the following passage of Terreblanche’s seminal work at page 246:

“In 1907 ‘responsible self-government’ was given to the Transvaal and OFS, with constitutions that excluded Africans and coloureds from the franchise. In March 1907 General Louis Botha’s ‘Het Volk’ (The Nation) party won the elections in the Transvaal with considerable support from English-speakers who were concerned about the encroachment of Africans. Within the first three months an important event occurred that was destined to force an alliance (or even a symbiosis) between the Afrikaner state and British capital. In May 1907 English-speaking (mainly British) miners staged the first major strike on the Witwatersrand gold fields in support of demands for higher wages. On 23 May General Jan Smuts, the minister responsible, called in British imperial troops (still stationed in the Transvaal) to restore order on the mines. This event forged a remarkably close and long-lasting alliance between the government (representing large Afrikaner landowners) and the gold mining industry (at that stage still very much under the control of British and Jewish magnates). In an apt phrase borrowed from the German ‘alliance of iron and rye’ in the 19th century, the new power elite has been described as ‘the alliance of gold and maize’.”
This new alliance between the Afrikaner elite and the mining elite gave rise to a policy of ‘reconciliation’ between an important section of the Afrikaner community and the British authorities and interests. On this basis, Afrikaans and English-speaking elites agreed to unify the four British colonies into the Union of South Africa. In the preceding negotiations parties easily agreed that white political power should be entrenched constitutionally.

The Act of Westminster of 1909 enabled white settlers – both Afrikaners and English-speakers – to take over the unified state. An act of the British parliament was therefore the bridgehead that enabled whites in South Africa to perpetuate, for 84 years, the power relations of European colonialism.6

(emphasis added)

47. In the pursuance of this “symbiotic relationship” between the state and mining capital, the police and army violently suppressed three significant wage strikes on behalf of the mining companies in 1913/4, 1920, 1922 and again in 1946. Hundreds of people were killed in these massacres. In fact, all the state sponsored massacres in South African history before and after apartheid were rooted in economic conflict of one kind or another. The Sharpeville massacre was about resistance to the dreaded pass laws or influx control of Africans, the Soweto massacre was about Bantu education and its obvious economic consequences, the Bisho massacre was about the effects of the homeland system, to mention but a few. (Even the post Marikana killing of four protestors in Mothutlung by the very same North West POP occurred during a march for the delivery of water.)

6 Terreblanche p 246
48. What followed in the 84 years of “white South Africa” (from 1910 to 1994) was an entrenchment of systemic violence to maintain the economic subjugation of African people by a combination of “legal” and violent methods in order to perpetuate abuses such as the migrant labour system, which is another core issue relevant to this Commission.

49. Most significantly and ironically, one of the victories of white workers following the Rand Revolt, which resulted in 200 casualties, was the banishment of African workers from collective bargaining by simply excluding them from the definition of an “employee” in the Industrial Conciliation Act of 1924. This endured for almost 60 years until 1981, following the recommendations of the Wiehahn Commission, whose report had been published in 1979.

50. Any hopes of addressing and once and for all reversing these historical shackles on the part of African mineworkers in post-apartheid South Africa dashed when, in 1993:

"the corporate sector and core ANC leaders reached a hugely important elite compromise. This happened before the transitional executive council accepted a secret $850 million loan from the IMF to help tide the country over balance of payments difficulties in November 1993. Before the TEC signed the loan agreement, the corporate sector and National Party government on the one hand the ANC leaders on the other signed a secret protocol on economic policy …"\(^7\)

---

\(^7\) Terreblanche p 96
“This elite compromise should be regarded as one of the most decisive ideological turning points in the ANC’s approach to economic issues. By agreeing to it, the ANC put in place the first cornerstone of the economic edifice of a post-apartheid South Africa. In effect, it agreed to an economic policy and system that would exclude the poorest half of the population from a ‘solution’ (ie a ‘50 per cent’ solution’) that was really aimed at resolving the corporate sector’s long-standing accumulation crisis.

As soon as the ANC’s leaders agreed to the statement, they were trapped in the formidable web of the domestic corporate sector and the international financial establishment, represented by the IMF and World Bank. The implications were far-reaching – not only for the ANC but also for the country at large.”

51. This is the context against which the events in Marikana in August 2012 must be seen and, more particularly, the symbiotic partnership between Lonmin, SAPS, the paramilitary forces and the military.

52. The figure of Cyril Ramaphosa looms large and features prominently in every facet of this historical analysis and context. The multiple conflicts of interests and alliances between Lonmin shareholders, board members, politically connected BEE partners, fellow ANC NEC members, rival unions, Ministers and operational commanders and deliberate pressure all combined towards the doomed-from-the-start operation and the pulling of triggers at 15h53 on 16 August 2012. It is his personal involvement, actions and words which set in motion the series of interdependent events which culminated in the 34 deaths on that day and it is his

---

8 Terreblanche p 98
omissions which spiraled into the 10 earlier deaths. Lonmin and Ramaphosa must be held responsible, albeit not solely, for all 44 deaths and all the injuries which took place.

53. Without an appreciation of these macro-level factors, which were at play and continue to exist, there can be no hope of understanding and diagnosing, let alone identifying what caused the massacre and what may prevent it from happening again.

54. Turning to the micro-level issues and on a more positive note, in October 2012, it was reported that two members of SAPS’s North West POP appeared in court facing criminal charges of murder, attempted murder and assault for their part in the most recent massacre of protestors in Mothutlung over the (economic) problem of lack of water.⁹ Following the Tatane and Macia prosecutions, it may well be that the era of no accountability and “nobody is to blame” is hopefully making way for the age of accountability. All eyes are now on this, the Marikana Commission, not only to break away from the “nobody is to blame” syndrome but to tell the world who is to blame and what should the law do with them.

B.3 The factual context and chronological background (including the version of the Injured and Arrested Persons)

55. The majority of the facts set out under this heading will be common cause facts which cannot be seriously disputed and/or, where applicable, facts which flow from

---

⁹ News report of News 24 dated 23 October 2014
common cause or otherwise well-established facts. Disputed facts will be so indicated where possible. However, the following exposition of the facts is primarily based on the undisputed portions of the version of the Injured and Arrested Persons as derived either from the undisputed evidence of the witnesses called by them, concessions made by other witnesses under cross-examination and/or the objective evidence from videos, photographs, maps, witness statements and/or other exhibits. Invariably, other factual expositions will also be done in respect of in-depth analyses of specific topics or incidents.

56. For the sake of convenience and no particular reason, we choose to start the broader factual analysis in and about the middle of 2011 when, it is common cause, some internal dispute arose among the membership of NUM, which was until then the undisputed majority union among the employee categories relevant to the Commission.\textsuperscript{10} To the extent possible, the information is presented chronologically.

\textbf{B.3.1 Karee 2011}

57. In short and according to the evidence, the then NUM branch secretary of NUM, the late Steven Khululekile and Daniel Mongwaketsi\textsuperscript{11} were suspended by the union for allegedly siding with the majority view of the workers that money apparently flowing from the liquidation of an employee share participation scheme entered into between Lonmin and a BEE company called Incwala, should be

\begin{flushleft}
\textsuperscript{10} Gcilithshana; day 35 and 37
\textsuperscript{11} Day 35 p 3791 ll 7 – 10; p 3971 ll 13 - 25
\end{flushleft}
distributed by way of issuing cheques to individual employees as opposed to being
sent to the union.\textsuperscript{12}

58. The suspension of Steven Khululekile resulted in his defection to AMCU followed
by a mass exodus of NUM members based at Karee to AMCU. This resulted in
AMCU gaining majority status at Karee.\textsuperscript{13}

59. Early in 2012, there was industrial unrest at Impala in the Platinum Belt. Violence
was prevalent and a number of strike related deaths resulted.

60. Among the reasons credited by SAPS in stabilising the situation and defusing it for
the better was the widely publicised intervention of Mr Julius Malema, who was
then an expelled former president of the ANC Youth League.

61. In the ensuing months, there were murmurs of discontent in respect of wages at
Lonmin. It was known among the Lonmin workforce that Impala had imposed a
unilateral wage increase for Rock Drill Operators (“\textit{RDOs}”) as a result of the strike.

62. It was also accepted that the arrival of AMCU into the union scene was an alleged
factor in the dynamics surrounding the strike and the increments.

\textbf{B.3.2 June / July 2012 : Da Costa talks}

63. In or about the end of June / early July 2012, the RDOs in Karee approached
Lonmin management in the person of Mr Michael Gomes Da Costa, who was the

\textsuperscript{12} Nzuza evidence
\textsuperscript{13} Day 35 p 3796 ll 21 – 25; day 35 p 3797 ll 1 - 3
vice president of Lonmin responsible for mining operations at Karee mine, with a demand for a wage increase to R12,500 basic pay after deductions. What followed are events which will play a very important role in the investigation of Lonmin’s role in conduct, by commission or omission, which it will be submitted was directly and causally connected to the events which led to the massacre.

64. In short:

64.1. Mr Da Costa engaged with the workers and entertained their wage demands in the course of two successive meetings held on 21 June 2012 and 2 July 2012;

64.2. he discussed the merits of the demand and commented on its reasonableness or otherwise;

64.3. he informed the employees that he would have to escalate their demand to central management or the Lonmin executive committee ("Exco"), which he duly did;

64.4. Exco considered the demand and reverted with an increment of R750, R500 and R250 for different categories of RDOs and RDO assistants;

---

14 Exhibit XXX2 p 1
15 Exhibit OO17 para 3
16 Exhibit OO17 para 3.1
17 Exhibit OO17 para 3.2.6
18 Exhibit OO17 para 3.25
64.5. Mr Da Costa communicated this “counter offer” to the workforce, who expressed their dissatisfaction with it;

64.6. Mr Da Costa took these steps because, inter alia:

64.6.1. it was in his view consistent with Lonmin’s open-door communication policy, known as the line-of-sight- strategy, “in terms of which management would, were possible, communicate directly with employees to improve the effectiveness of direct management communication and to identifying problems and issues quickly and to resolve them at the lowest possible level”;

64.6.2. the workers’ representatives were courteous and the discussions were very cordial, etc;

64.6.3. he wanted to prevent an unprotected strike;

64.6.4. from experience, he was aware that a wildcat or unprotected strike would most probably lead to violence;

64.6.5. he did not want to see a repetition of what had transpired at Impala; and

64.6.6. he was aware of the pay differential between Lonmin wages for RDOs and the comparable and higher wages paid by the neighbouring direct peers and competitors, namely Impala and Anglo Platinum and the

---

19 Exhibit OO17 para 3.35.4
need to bridge that gap to prevent a skills flight by RDOs to the said better paying competitors.

65. As a result of the intervention of Mr Da Costa, any imminent threat of an unprotected strike and related violence located at the Karee shaft was averted, albeit perhaps temporarily.

B.3.3 Prelude: 6 to 9 August 2012

66. On or about 6 August 2012, Lonmin management became aware that there was a looming strike by RDOs across the company.

67. The board of Lonmin had in the meantime resolved that it would be unwise or imprudent to engage with the RDOs “outside the current negotiation framework”, a euphemism for insisting on talking only to the NUM, mainly because this would open the doors for other categories of employees to make similar demands (this will be later referred to as “the floodgates” argument).20

68. Lonmin management made enquiries from both AMCU and NUM regarding their knowledge and/or involvement in the rumoured unprotected strike. Both denied any such knowledge or involvement. Lonmin management harboured a suspicion that AMCU was nevertheless behind the action.

69. When the work stoppage did indeed materialise on 10 August 2012, the management, including Barnard Mokoena and Albert Jameson, took a conscious

---

20 Exhibit JJJJ10
decision not to engage with, talk to or hold any direct discussions with the strikers / protestors.

**B.3.4  10 August 2012 : March to LPD**

70. On that day, a few thousand workers had marched to the LPD offices to make their wage demands.

71. By all accounts, the march was peaceful.\(^{21}\)

72. The workers, via a team / committee of five representatives, requested an audience with Lonmin management in connection with their wage demands.

73. As instructed by senior management, Mr Graeme Sinclair, the then security manager, informed the workers that:

73.1. senior management refused to engage or talk to them “outside the recognised structures” etc, ie without the agency of the NUM;

73.2. their strike was unlawful.

74. The strikers dispersed and proceeded to re-gather near the Wonderkop stadium, which is situated within Lonmin property.

75. As Lonmin had clearly indicated that their grievances would only be entertained via the agency of NUM, which the employees had specifically excluded, it was agreed

\(^{21}\) Exhibits W1 - 5
to march to the NUM offices on the following day, 11 August 2012. It was resolved to meet again outside the stadium early on the morning of the following day, ie 11 August 2012.

76. Lonmin, acting on the advice of SAPS, applied for an interdict in the Labour Court. In the court papers, they attached a list of their employees who were on strike.

B.3.5 11 August 2012: March to NUM offices

77. Indeed, on 11 August 2012 at about 08h00, 2,000 or so employees gathered outside the stadium and resolved to march to the NUM offices. The disputed but uncontradicted evidence of those present at the meeting is that the reasons for the march were:

77.1. Why the employer does not want to talk to the workers;\textsuperscript{22}

77.2. People being shot by NUM members from a Quantum;\textsuperscript{23}

78. As on the previous day, no dangerous weapons were in sight. The evidence of Mabuyakhulu is that the strikers were not armed with any dangerous weapons at that stage.

79. Meanwhile, the employer had received unsourced and unconfirmed "information" from their unnamed informants that the employees intended to burn the NUM offices and to harm the inhabitants thereof. Acting on this "information", members

\textsuperscript{22} Day 48 p 5267 ll 12 - 13

\textsuperscript{23} Day 48 p 5267 ll 3 - 6
of Lonmin security rushed to the NUM offices to plead with the persons they found there to vacate the offices for their own safety.

80. The NUM members, who were armed with dangerous weapons, refused to do so and elected instead to wait outside the offices in order to “defend” the office.24

81. It transpired shortly thereafter that the NUM members were also carrying firearms. It is common cause that the NUM members shot at and chased after the fleeing strikers, whom they followed in hot pursuit until near the stadium.25

82. In the ensuing commotion, two of the strikers were shot at the back and fell to the ground.

83. It was believed among the strikers and the police that two strikers / protestors had been killed.26 This turned out not to be the case, as both victims of the shooting were in actual fact taken to the nearby Andrew Saffy hospital and had survived the shooting albeit having suffered serious injuries for which they were admitted for long periods. At least one of them later underwent surgery.

84. As a result of the attack by members of NUM, the strikers decided:

---

24 Exhibit ZZ4 para 7; Exhibit ZZ3 paras 2.18 and 2.26; Exhibit YY1 paras 19 – 21; video CCC2
25 Day 264 p 33304 ll 14 - 23
26 Exhibit BBB3 para 24
84.1. no longer to gather near the stadium, which was Lonmin property, but to choose the nearby big koppie (Koppie 1) as their new gathering spot;\textsuperscript{27}

84.2. to encourage their members to arm themselves with traditional weapons so as to defend themselves from any further attacks.\textsuperscript{28}

85. Once gathered at the koppie, a decision was taken by a so-inclined section of the protestors to enlist the services of an inyanga to provide protection services and to strengthen themselves and to ward off bad luck.

86. Xolani Nzuza, among others, was tasked to fetch the inyanga, which he did. Rituals were performed upon a tiny minority of the strikers.\textsuperscript{29} The vast majority of the strikers were apparently adherents of the Christian faith and accordingly elected not to participate in the “protection” and “good luck” producing rituals.

87. The rituals were performed:

87.1. in full view and in front of the non-participating majority of the protestors;

87.2. in full view of the police negotiators and other interested onlookers;

87.3. in broad daylight; and

87.4. by only a handful of the 3000 strong crowd of protestors.

\textsuperscript{27} Exhibit HHH1 para 3
\textsuperscript{28} Exhibit BBB4 para 25
\textsuperscript{29} Exhibit PPPP1 para 4
88. The vast majority of the protestors, including those who subsequently lost their lives, left every early evening or late afternoon for their respective homes and returned on the following mornings to attend the daily gatherings at the koppie.\textsuperscript{31}

B.3.6 12 August 2012: Death of two Lonmin security officers

89. The inyangas and their entourage left the koppie in the company of Mr Nzuza at about 19h00 on 11 August 2012 to return on the following days until the 15\textsuperscript{th}, excluding the evenings.

90. On 12 August 2012, a section of the protestors, now armed with an assortment of sharp weapons, marched again towards the NUM offices. It is quite possible that the reason for this particular march was some form of intended revenge for the “killed” protestors. Indications are that the protestors exhibited signs of anger and aggressiveness. It was not possible to ascertain the motive for the march as no witness who participated therein testified.\textsuperscript{32}

91. There were two confrontational encounters with members of Lonmin Security who tried to deter the protestors from their intended path. The first group was made up of Dewald Louw and Martin Vorster travelling together in a single vehicle and

\textsuperscript{30} SAPS hard drive 2012-08-14 videos 029
\textsuperscript{31} Exhibit HHH21 para 11
\textsuperscript{32} Day 264 p 33269 ll 1 - 11
attempting to ward off a crowd of approximately 1,000 people.33 Predictably, their effort was unsuccessful and they fled after perceiving a physical threat from the approaching strikers.34

92. The next group of Lonmin security guards was also inadequately prepared but more in number and made up of ten members and five vehicles and located near the hostel, which is along the road towards the NUM offices.

93. The undisputable evidence is that this group also sought to prevent the strikers from reaching the NUM offices by lining up their vehicles on the way. The strikers did not turn back and the majority of Lonmin security members fled with the exception of Mr Hassan Fundi and Mr Mabelane, who were both hacked to death. Mr Mabelane’s body was found charred in one of the vehicles which was burnt down. Mr Fundi’s body was found outside the vehicles with severe facial injuries. Neither of the two suffered any gunshot wounds. These were the first two fatalities of the eventual 44 deaths under investigation.

B.3.7 Killing of Mr Mabebe and Mr Langa

94. It is common cause that in the early hours of 13 August 2012 till the morning, a break in and an attack was executed at Lonmin premises known as K3, where one Lonmin employee, Mr Mabebe, was killed and others escaped unharmed. There is no credible evidence as to the identities of the assailants and their identities are

---

33 Day 261 p 32987 ll 18 - 23
34 Day 261 p 32975 ll 7 - 14
accordingly unknown. The only evidence in respect thereof is that of a witness code-named Mr X, whose credibility will be discussed later in section F.1 below.

95. Similarly, Mr Langa was apparently killed by unknown persons in the early hours of 13 August 2012 who was apparently on his way to work.35

96. For the purposes of this matter and to avoid creating unnecessary disputes, it has been accepted on behalf of the Injured and Arrested Persons that both Messrs Mabebe and Langa must have been killed in connection with the strike, by persons who were in support of the strike and for the reason that they were defying the call to strike by being at work or going to work, respectively. It is also plausible that their deaths were intended to “make an example” and to deter and intimidate other would-be strike-breakers.

97. Mr Xolani Nzuza is on record as stating that their killers ought to be found, charged and, if convicted, sentenced to long imprisonment.36 He also expressed his sympathies and condolences to their families. This would naturally include those individuals on all sides who have been identified in the evidence as having been 
prima facie responsible for murder, arson, corruption, assault and the like.

B.3.8 13 August 2012 : Incident involving killing of 3 strikers and 2 policemen

98. A further five deaths would occur on 13 August 2012, to which we now turn.

---

35 Day 279 p 35855 ll 5 - 10
36 Day 279 p 35814 ll 9 - 15
99. Sometime during the course of the morning of 13 August 2012, a group of approximately 100 protestors left the koppie to appeal to fellow workers, who were reportedly working at K3, to join the strike and to ask management to close that shaft.

100. These persons included Mr Nzuza nd Mr Mgcineni Noki (“Mambush”), who were two of the most prominent “leaders” of the protestors, in that they were decision makers and respectively the *de facto* but unelected “second and first in command”, according to Mr Nzuza. (This statement was roundly misunderstood even though it is adequately and elaborately explained and qualified in paragraph 2 of Mr Nzuza’s supplementary statement,\textsuperscript{37} which was not disputed.)

101. Upon reaching a certain bridge near K3 and approximately 7 to 8km from the koppie, the protestors were confronted by a group of Lonmin security personnel led by Mr Julius Motlogeloa, who testified as a witness in the Commission to the effect that:

101.1. upon noticing them, the group sat down;\textsuperscript{38}

101.2. upon enquiry, the group explained to him that they were destined towards K3 to ask management to close the shaft;

101.3. Mr Noki spoke on behalf of the group of protestors;

\textsuperscript{37} Exhibit PPPP1
\textsuperscript{38} Day 264 p 33254 II 8 - 12
101.4. the group also told the Lonmin security personnel that they desired to talk to management about their wage demand;\(^{39}\)

101.5. Mr Motlogeloa informed them that there were in fact no people working at K3 and that he/they undertook to convey the message for engagement to Lonmin management. They further requested the group of strikers to return to the koppie and to use the same route which they had used to reach that point;

101.6. Mr Motlogeloa’s undisputed evidence is that the strikers complied with his request by turning around. Their demeanour was very respectful, very submissive and very co-operative.\(^{40}\) This is consistent with the objective video evidence of the scene.

102. At around the same time, the group was spotted by Mr Sinclair on CCTV cameras located at the Lonmin Joint Operation Centre (“JOC”). He pointed the group out to members of SAPS there present, including General Mpembe, who was the designated chief of the JOC.\(^{41}\)

103. A decision was taken to confront the returning protestors and to disarm them on the spot. No plan was devised for this operation.\(^{42}\)

---

\(^{39}\) Day 264 p 33316 ll 13 - 16
\(^{40}\) Day 264 p 33315 ll 25 - p 33316 ll 1 - 12
\(^{41}\) Day 188 p 22861; l 15 (??) Naidoo; Day 266 p 33691 ll 8 - 16 (Botes)
\(^{42}\) Day 188 p 22862 ll 19 - 25
Upon seeing the 70-person strong and armed police contingent, the strikers sat down.43

A discussion ensued between General Mpembe, on behalf of SAPS and three or so spokesmen for the strikers, including Mr Noki and Mr Nzuza.44

Essentially, General Mpembe was requesting the strikers to lay down their dangerous weapons and the strikers offered to do so once they reached the koppie and where the police could take all the weapons of the protestors.45

They cited fears of a further NUM attack and they repeated what they had told Lonmin Security, namely that their only desire was to talk to their employer.46

Reluctantly, a tacit agreement was reached between SAPS and the protestors that the police would escort them to the koppie where all the weapons would be surrendered (possibly with the hope that the police would also convince the employer to come and address the employees).47

About seven policemen, including armed members of POP, lined up in front of the strikers. The strikers assumed their familiar “crouch-walking” posture and proceeded towards the koppie, ad they were singing and clicking their weapons

---

43 Exhibit Z1
44 Exhibits Z1, QQ2, HHH17
45 Exhibits Z1, QQ2
46 Exhibit QQ2
47 Day 147 p 16248 ll 12 - 15
together rhythmically, all without posing any physical threat to the members of SAPS who were within two or three metres of them.48

110. This continued for some 300 to 500 metres until the police sparked a confrontation by throwing teargas and stun grenades at the marching protestors.49

111. In the ensuing confrontation, three strikers and two policemen were killed. The majority of the strikers can be seen fleeing in the direction of the koppie.50

112. In this incident, the five fatalities were on the strikers’ side Messrs Jokanisi, Mati and Sokhanyile on the SAPS’ side Warrant Officers Monene and Lepaaku. Lieutenant TS Baloyi was severely injured and his life was probably saved because he was immediately airlifted and taken to hospital.

113. This brought to nine the number of fatalities during the period under investigation.

B.3.9 Death of Mr Twala

114. On 14 August 2012, Mr Twala was found dead near the koppie and his body was airlifted by SAPS members. It is not known how, by whom and why he was killed and no direct evidence was led in respect thereof.

115. It is common cause that he was at some stage a part of the protestors.

---

48 Exhibits HHH17 at 2:50 to 3:18
49 Exhibit HHH17 at 2:50 to 4:30
50 4:40 to 6:12
116. His death brought the death toll to 10 as at 14 August 2012.

B.3.10 Annandale takeover

117. Meanwhile, General Annandale had taken over the leadership of the police forces without any invitation or being specifically assigned to do so by anybody. His role was undefined and unclear yet pivotal to the tragic outcomes. He was variously described as the non-existent positions of Chief of Staff, Deputy CJOC and Chairman of the JOC. In actual fact, he was the de facto CJOC following the sidelining of the relatively dovish General Mpembe.

118. He ordered the calling up of Lt Col Scott of the Special Task Force to draw up a plan of action.

119. He also caused the calling up of Lt Col McIntosh, a hostage situation negotiator to initiate negotiations with the strikers.

120. Ultimately, he gave the instruction for the carrying out of the fatal Phase 3 of the operation.

121. The detail of what followed on 16 August 2012 is a matter of public speculation and is dealt with in the rest of these submissions. Suffice for now to round the section up by stating that on that day, the police killed 34 of the strikers, injured about 100 and arrested about 270.
B.3.11 Aftermath

122. On the evening of 16 August 2012, the top leadership of SAPS prepared two briefing documents for the media and for the President of South Africa.

123. On 17 August 2012, the Minister of Police, the National Commissioner and the Provincial Commissioner, among others, attended a media briefing held at the Lonmin Game Farm, where an explanation was given of one of the SAPS versions of what had occurred. Briefly, it was explained that:

123.1. the underlying cause of the situation was union rivalry between AMCU and the NUM;
123.2. the police had been attacked by the strikers at both Scene 1 and Scene 2;
123.3. the police were forced to use maximum force; and
123.4. the protestors were killed in self-defence.

124. On 18 August 2012, the National Commissioner addressed the affected members of SAPS and told them that, inter alia, what they had done represented “the best of responsible policing” and thanked them for it.

125. On 18 August 2012, Brigadier Calitz addressed the same members and told them that they had 110% support and they had acted in self-defence.

126. The Sowetan newspaper under the heading “WE ARE NOT SORRY”, published an article stating that the National Commissioner of Police had stated that SAPS was not sorry for what had happened in Marikana. This article was never
challenged and/or refuted until March 2013 at the Commission, despite its obviously insensitive tone.

127. On 13 December 2012, the President was reported as having stated that the police had made “a mistake” in Marikana.51

128. In its media releases of August 2012, Lonmin still ascribed the massacre / tragedy to union rivalry.

129. On or about 20 August 2012, arrestees were charged with the murder of the 34 fellow strikers and this was revealed in the course of their bail application.

130. On or about 3 September 2012, more than two weeks after their arrest, the murder charges were withdrawn and the group was released on their own recognisances.

131. Having outlined the historical, legal and factual context, we now turn to address the specific issues / questions raised in the Terms of Reference.

132. In a nutshell and against the background mapped above, the methodology to be followed in presenting the core of the oral argument will be analysing the issues as arranged and ordered according to:

132.1. the Terms of Reference (section C);

132.2. the 10 themes identified in the Opening Statement (Section D);

51 Exhibit FFF30
132.3. the Game Changers (Section E);
132.4. other supporting evidence (Section F);
132.5. findings and recommendations which ought to be made (Section G);
132.6. reservation of rights (Section I); and
132.7. Conclusion (Section J).

SECTION C: ANALYSIS OF THE EVIDENCE IN RELATION TO THE TERMS OF REFERENCE

133. The first criterion or test for approaching the issues must naturally be the Terms of Reference. In this section, we will accordingly traverse each term of reference and offer a proposal as to how the questions posed therein ought to be answered by the Commission. The preamble thereto was referred to in the Introduction section above at paragraphs 9.1 and 9.2.

C.1: The conduct of Lonmin

134. It is now a matter of historical record, which is widely acknowledged, that Lonmin adopted a hardline and inflexible approach to the question of whether or not, despite having entered into a two-year wage agreement with NUM, it would nevertheless talk to, engage or negotiate with the RDOs initially and those of its workforce participating in the unprotected strike. The only remaining question is whether or not this stance was in the circumstances reasonable and/or justifiable. A second and key question is to what extent the massacre could have been averted had Lonmin adopted a more reasonable stance. These and other
pertinent questions are raised in the specific Terms of Reference directed at Lonmin, to which we now turn.

135. The Terms of Reference raise the following questions in relation to Lonmin, acting through the agency of its employees and corporate leadership.

C.1.1 Clause 1.1.1 of the Terms of Reference  “Whether Lonmin exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between Lonmin and its labour force on the one hand and among its labour force on the other.”

136. It is not seriously disputed that the root of the problem which led to the massacre / tragedy and related events was a wage dispute related to the demand for a salary increase to R12,500 across the board. The only witness who incredibly contested this obvious fact was General Phiyega. Her evidence is even contradicted by the police presentation, Exhibit L, wherein it is clearly stated that the SAPS’ view was that:

“(T)his was not only a security issue and the root of the conflict was outside the mandate of the police.”

137. It is also self-evident that this dispute later escalated into a “hybrid” situation of the persistent and unresolved labour dispute, as well as unrest and incidents of lawlessness and possibly criminal conduct. The majority of Lonmin witnesses correctly conceded this simple and obvious fact.

---

52 Exhibit L114
53 Day 287 p 37382 ll 6 - 12
138. Despite the aforesaid, the dispute never ceased to be rooted in the industrial relations wage dispute, which was its genesis. This too was largely not controversial.

139. There can be no doubt that in the period 6 – 10 August 2012 and possibly even earlier, Lonmin was aware that a wage dispute had “arisen between it and its labour force”. Lonmin had been aware of the said wage demand as early as June 2012, when it was raised by RDOs in Karee and escalated to management by Mr Da Costa.54

140. As a reference point, it is respectfully submitted that Da Costa exercised his best endeavours to resolve the Karee based dispute, in that he:

140.1. in line with the “Line of Sight” strategy, gave the employees a hearing;55 the same line of sight strategy had been alluded to by Mokwena, although he had failed to practise it;56

140.2. appreciated and accepted their stated desire not to involve any trade union in the matter, including the recognised NUM;

140.3. explained to the workers that their demand was “too high” and “unreasonable”, in his view. He conceded that he engaged with the workers and in his statement, it is clearly indicated that he was negotiating;

54 Day 270 p 37896 ll 21 – 25 to p 37895 ll 1 - 7
55 Day 239 p 30030 ll 21 – 25 to p 30031 ll 2 - 12
56 Day 290 p 37895 ll 7 - 8
140.4. undertook to escalate their demand to the higher level, which he did;\(^{57}\) and

140.5. reported back to the workers;

140.6. found their demeanour to have been cordial and respectful.

141. By way of contrast, Lonmin Exco (and board of directors):

141.1. adopted the stance that it would not engage with the workers, except via the NUM;\(^{58}\)

141.2. approached the Labour Court for an interdict, on the advice of SAPS;\(^{59}\)

141.3. adopted that position in the full knowledge that the RDOs did not want to involve any union;

141.4. was aware that the NUM had lost the confidence of the workers;\(^{60}\)

141.5. was aware of the wage differential between Lonmin workers and their Implats and Angloplats counterparts;\(^{61}\)

\(^{57}\) Day 239 p 30032 l 25
\(^{58}\) Day 231 p 30046 ll 18 – 25 to p 30047 ll 1 – 3; see also Mokwena supplementary statement p 185 of Exhibit WWWW1 paras 7 and 8; see also p 30133 – Da Costa cross-examination ll 12 – 20 (Day 239); see also Day 240 Da Costa evidence p 30134 ll 6 - 22
\(^{59}\) Day 290 p 37895 ll 16 – 25 to p 37896 ll 1 – 2; see also p 165 paras 4.5 and 4.6 of Exhibit WWWW1, Mokwena’s statement
\(^{60}\) Day 289 p 37254 ll 17 – 21; Jamieson testified that Lonmin was alive to the fact that NUM was losing members and that NUM might not have been the legitimate voice of the workers of Lonmin; see also Ramaphosa evidence: day 271 p 34454 ll 16 - 18
\(^{61}\) DAY 240, Da Costa evidence p 30130 ll 11 - 17
141.6. conceded that, but for the stance, the tragedy might not have eventuated and the 44 lives subsequently lost might have been saved;\(^{62}\)

141.7. even when confronted by members of SAPS (and after there had already been nine fatalities) insisted that the strikers were not their employees but “faceless people”, against overwhelming evidence to the contrary.

142. In the circumstances, it will be submitted that for various reasons, but even based on the aforestated alone, the question falling under this sub-clause must be answered in the negative. Lonmin most certainly did not employ its best endeavours to resolve the industrial dispute which had arisen between it and the relevant portion of its workforce. It clearly and negligently omitted to do so.

143. Insofar as the question pertains to any dispute which may have arisen among Lonmin’s labour force, it is common cause that there was some rivalry and competition for space and membership between AMCU and the NUM and also potential conflict between the NUM and the workforce insofar as there was evidence of a loss of confidence.\(^{63}\)

144. Knowing all this, Lonmin insisted, unreasonably, that the workforce could only engage with management via the agency of the NUM,\(^{64}\) as technically provided in

---

\(^{62}\) Day 287 p 37359 ll 12 - 17
\(^{63}\) Day 239 p 30038 Da Costa evidence ll 5 - 20
\(^{64}\) Day 239 p 30133 Da Costa’s evidence ll 12 - 20
the recognition agreement. Da Costa conceded, correctly, that this stance was illogical and unreasonable.

145. Such behaviour too on the part of Lonmin clearly could not be said to have passed the “best endeavours” test postulated in this question.

146. Accordingly, the Commission ought to find that Lonmin did not employ its best endeavours, as would reasonably be expected of an employer in the particular circumstances.

C.1.2 Clause 1.1.2 of the Terms of Reference “Whether Lonmin responded appropriately to the threat and outbreak of violence which occurred at its premises”

147. Lonmin was at all material times aware alternatively ought to have been aware that failure to address the wage demands would probably result in an unprotected strike which would most probably lead to violence.

148. This much was conceded by Da Costa, which concession was properly made in the light of what had just occurred at Impala and what experience had taught management in the mining environment in South Africa.

149. By its failure to act pre-emptively and preventatively, as Da Costa had done, Lonmin did not respond appropriately to this clearly perceived and foreseeable threat of violence.

65 Day 240 p 30133 ll 8 – 21 - Da Costa evidence
66 Day 292 p 38157 l 21 to p 38158 ll 1 - Day 240 p 30137 ll 19 – 25 to p 30138 l 1
150. After the events of 11, 12 and 13 August 2012, the erstwhile threat had clearly graduated into an actual outbreak of violence. Lonmin also responded inappropriately thereto, more particularly in that:

150.1. it continued to deploy inadequate numbers of security personnel and risking their injury and/or death;\textsuperscript{69}

150.2. it continued to refuse to talk to the protestors / strikers despite knowing that this was their desire;

150.3. it did so upon the flimsy “floodgates” argument. The floodgates argument is a polite euphemism for financial stinginess, as it is based on the fear that other workers may be encouraged to ask for more than their current slave wages and a better proportional share of the profits generated from the platinum they dig out of the earth;\textsuperscript{70}

150.4. it did so despite having created a precedent in Karee and being aware of the precedent created at Impala and the obvious resultant legitimate expectation on the part of the workforce;

150.5. it dug in its heels even after having been numerously warned by members of SAPS that there were possibilities of violence, a Tatane situation and the spilling of blood.

\textsuperscript{68} Day 240 p 30197 ll 6 – 10; Day 238 p 37360 ll 21 - 23
\textsuperscript{69} Day 263 p 33215 ll 10 – 23; Motlogeloa’s evidence; see also evidence that the only reason the other security escaped with their lives was purely because they ran away – p 33290 ll 9 - 14
\textsuperscript{70} See p 173 of Exhibit WWWW1 paras 7.10.1 to 7.10.4
151. Perhaps the most inadequate response of Lonmin to threats of violence was its conduct in cajoling SAPS to take action against the breakaway group on 13 August 2012.71

152. On this occasion, Lonmin management knew or ought properly to have known that its own security services had already intercepted the said group of strikers.72 Ably led by Mr Julius Motlogeloa, Lonmin security had not only succeeded to convince the strikers to go back to the koppie but had undertaken to convey the message to Lonmin that all they wanted was to talk to management.

153. More significantly, the reason that Lonmin had decided to leave the group alone must have been their demeanour, which Motlogeloa described as “very respectful, very submissive and very co-operative”.73

154. Contrary to what SAPS later described as signs of an attack, the strikers’ singing, crouching and clicking of weapons was seen by Motlogeloa and his group as non-threatening and certainly not inconsistent with the abovementioned description of the strikers’ demeanour. From this, it can be concluded that SAPS was clutching at straws, ex post facto, to justify shooting at the strikers by manufacturing a non-existent “attack”. This issue is further dealt with in the section dealing with the conduct of SAPS.74

71 Day 240 p 30187 Da Costa’s evidence ll 1 - 8
72 See Motlogeloa’s evidence on events of 13 August 2012 – Day 264 p 33316 ll 1 – 12 and p 33317 l 1
73 Day 264 p 33317 l 1
74 Exhibit TTT4 – miners shot down by Desai
155. Lonmin failed to inform SAPS that these strikers posed no threat to anyone. On the contrary, both Botes and Sinclair were instrumental in tracking the group whilst their fellow security officials were satisfied.

156. The dire consequences of these omissions or failures to act led directly to deaths and injuries, as well as the escalation of police deployments which ultimately resulted in the massacre.

157. It can hardly be contested that Lonmin’s conduct and utterances in refusing to engage with the workers, taken before and on 10 August 2012, was solely responsible for the fuelling of the animosity which developed between the NUM and the strikers and pitted the two groups on opposite sides of the unprotected industrial action. The strikers wanted to strengthen their strike and NUM was hell-bent on breaking the strike.

158. The evidence of Mabuyakhulu is that the ill-fated march on 11 August was intended to enquire from NUM why it had prevented the employer from engaging with them.

159. As we all now know, and with the benefit of hindsight, the events of 11 August sparked a series of events which culminated in all 44 deaths under investigation, as well as the related injuries and arrests.

160. Similarly, by Lonmin unreasonably and without any evidence simply assuming that AMCU was behind the strike, it generated unnecessary hostility between
itself and AMCU and NUM and AMCU, as displayed during the SAFM interview, in the Mpembe discussions and in Mokwena’s utterances in JJJ192.

161. The fact that Mokwena could not sustain such utterances and attitudes and eventually retracted them and belatedly apologised is nothing but an admission of guilt on the part of Lonmin in this respect.

162. The Commission will be left with no option but to find against Lonmin in relation to the questions posed in this term of reference.

163. Various grounds were put to the witness Zokwana as *indiciae* for the existence of an unholy alliance between Lonmin and NUM based on their common intention to break the strike.

164. In the premises, this question too must be answered against Lonmin.

**C.1.3 Clause 1.1.3 of the Terms of Reference** “Whether Lonmin by act or omission created an environment which was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct”

165. By its insistence that the RDOs could only communicate “via the existing structures”, a euphemism for NUM, well knowing that NUM had lost popularity, Lonmin created a hostile and tension-filled environment and disunity.

166. In ignoring AMCU’s pleas to help and harbouring the incorrect impression that AMCU was behind the strike, Lonmin similarly created a poisoned atmosphere.
167. In siding with NUM and dealing with their present and former leaders, to the exclusion of AMCU, Lonmin created a harmful atmosphere.

C.1.4 Clause 1.1.4 of the Terms of Reference  “Whether Lonmin employed sufficient safeguards and measures to ensure the safety of its employees, property and the prevention of violence between any parties”

168. Far from safeguarding the safety of its employees and other parties, Lonmin, as already spelt out above, actually caused harm, death and injury.

169. As will be demonstrated, Lonmin further endangered and jeopardised the lives and limbs of its own security personnel. 75

170. By failing to close down the shafts, Lonmin also risked and endangered the lives of its labourers, such as Mr Langa.

171. This question ought properly to be answered in the negative and a finding made against Lonmin.

C.1.5 Clause 1.1.5 of the Terms of Reference  “To examine generally its policy, procedure, practices and conduct relating to its employees and organised labour”

172. In behaving as it did, Lonmin breached:

172.1. its own line of sight strategy, which had been successfully adopted by Da Costa; 76 and

75 Day 263 p 33215 ll 10 – 13 of Motlogeloa’s evidence
172.2. its own policies governing how to deal with unprotected strikers.\textsuperscript{77}

C.1.6 Clause 1.1.6 of the Terms of Reference “Whether by act or omission Lonmin directly or indirectly caused loss of life or damage to persons or property”

173. It will be clearly demonstrated, and it was correctly conceded by Lonmin witnesses like Botes, that, but for the non-engagement and inflexible stance adopted by Lonmin, the 44 lives under investigation would probably have been saved.

174. It can be demonstrated that the collusion between Lonmin and SAPS was specifically responsible for the 39 deaths which occurred on 13 August and 16 August 2012.

175. More specifically, the re-characterisation of the problem as purely criminal conduct, which was actively and forcefully campaigned for by Lonmin,\textsuperscript{78} directly translated into the calls for the police and/or army to intervene.

176. Specifically, on 16 August, Lonmin’s omission to respond to the pleas of Mathunjwa and Bishop Seoka directly resulted in the loss of life and related calamities.

\textsuperscript{76} Day 287 p 37366 ll 22 - 25
\textsuperscript{77} Exhibit XXX8 clause 8.4; Day 287 p 37366 ll 22 - 25
\textsuperscript{78} Exhibit BBB4289E; Day 287 p 37370 ll 12 - 15
C.2 The conduct of SAPS

C.2.1 Clause 1.2.1 of the Terms of Reference “The nature, extent and application of any standing orders, policy considerations, legislation or other instructions in dealing with the situation which gave rise to (the) incident”

177. It is respectfully submitted that SAPS in one or the other are guilty of breaking and flouting all the aforesaid constitutional provisions. The specific respects in which this was done will be identified in the course of the discussions of the evidence hereinbelow.

178. It will be submitted and amply demonstrated that SAPS infringed the clear provision of Standing Order 262 and that a finding to this effect is inevitable. It will be demonstrated that the qualification raised in clause 11(7) of the Standing Order cannot, in the present circumstances, assist SAPS to escape the consequences of its failure to follow this prescript.

179. In addition, SAPS also flouted important provisions of the Constitution, as more elaborately discussed below.

Right to dignity

180. Section 10 of our Constitution entrenches the right of every person to dignity. Right to dignity has been defined as a first order rule, a value, a grundnorm informing the substantive content of many of the other rights in the Bill of Rights. It has been said that in giving content to the meaning of the right to dignity:
"It is permissible and indeed necessary to look at the ills of the past which the Constitution seeks to rectify and in this way try to establish what equality and dignity means? What lay at the heart of the Apartheid pathology was the extensive and sustained attempt to deny the majority of the South African population the right to self-identification and self-determination…who you were, where you could live, what schools and universities you could attend, what you could do and aspire to, and with whom you could form an intimate relationship was determined for you by the state…The state did its best to deny blacks that which is definitional to being human, namely the ability to understand or at least define oneself through one's own powers and to act freely as a moral agent pursuant to such understanding of self-definition. Blacks were treated as means to an end and hardly ever as an end in themselves: an almost complete reversal of the Kantian imperative and the concept of priceless inner worth and dignity."79

181. Respect for the intrinsic worth of others has been said to mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others. Dignity sets a floor below which ethical and legal behaviour may not fall. This floor creates a benchmark and entitlement of equal concern and equal respect. On this score, the Constitutional Court has constructed two tests which ensure that the law does not irrationally differentiate between classes of persons and that the law does not reflect the naked preferences of government.

182. These tests, namely, right to equality and the right to equal treatment, guarantee that individuals are not subject to unfair discrimination. "of this

---

79 Constitutional Law of South Africa Chapter 36 Dignity para 36.2: Definitions of Dignity
demand for equal concern and equal respect Justice Ackerman has written 'At the heart of the prohibition of unfair discrimination lies the recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is the goal of the Constitution should not be forgotten or overlooked.'

183. Dignity as illustrated in judgments of the Constitutional Court is that which binds us together as a community, and it occurs only under conditions of mutual recognition. As a result, the Constitutional Court in Port Elizabeth Municipality v Various Occupiers\(^8\) stated:

"It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation."

184. An understanding of dignity in this framework is necessarily one in which "wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole".\(^8\)

---

\(^8\) Id
\(^1\) 2005 (1) SA 217 (CC) at para [18]
\(^2\) See Khosa v The Minister of Social Development 2004 (6) SA 505 (CC) at para [74]
185. The notion or concept of dignity in our constitutional dispensation is a collective concern. It is a simple premise of a refusal to turn away from suffering marking the beginning of moral awareness but understands that others are not instruments for the realisation of personal desires but human beings who are ends in themselves. Thus, they are entitled to the same degree of concern and respect that we demand for ourselves because they, like us, are possessed of faculties which enable them to pursue ends which give meaning to their lives. Hence, the remark of the Constitutional Court in Government of the Republic of South Africa v Grootboom and Others\textsuperscript{83} that:

"The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings."

186. As a founding value in our Constitution, dignity is the cornerstone of our democracy and the Bill of Rights. It informs both our interpretation of the ambit of the provision in the Bill of Rights and it governs the behaviour of our courts and other tribunals which support our constitutional democracy. In the light of its pervasive effect, per O'Regan J, in Dawood and Another v The Minister of Home Affairs and Others\textsuperscript{84} found:

\textsuperscript{83} 2001 (1) SA 46 (CC) at para [83]
\textsuperscript{84} 2000 (3) SA 936 (CC) at para [35]
"Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."

187. In summary, the right to dignity is a grundnorm in our Constitution with the ability to give rise to enforceable claims.

188. The injured and arrested miners’ right to dignity was violated at all times material to the events this Commission has been called upon to investigate. They were disrespected and treated as dangerous criminals.

189. This treatment stemmed from the irrational differentiation between the protestors at the koppie and the management and shareholders of Lonmin. The latter’s will was enforced with a steel fist through the impartial and collusive activity between Lonmin, the DMR and the SAPS, to bring irrational force to bear on what would ordinarily, at worst for the strikers have amounted to an unlawful strike.
190. Instead the gathering was characterised as criminal in nature, and a group of disgruntled employees labelled and treated as dangerous convicts without the benefit of the due process of the law.

191. The state’s naked preference to Lonmin violated the protestors’ rights to equality and not to be unfairly discriminated against. The preference was an assault on our constitutional values, which demeaned South African society as a whole.

192. Dignity in our constitutional dispensation is the simple premise to turn away from suffering, not cause it. The incidents on 13 and 16 August were without foundation and caused extensive harm. The protestors were entitled to reasonable action by the police, with particular regard to their dignity.

193. They had an entitlement to be treated as human beings, but instead were assaulted, murdered by the issuing of unlawful commands and mercilessly executed. Amongst others there was a fundamental violation of their rights to bodily integrity.

The right to life and freedom and security of the person

194. Section 12(1) of the Constitution provides that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources and not to be tortured in any way.
195. In *Ferreira v Levine* it was found that the right to freedom and security of the person entails the protection of physical liberty and physical security of the individual.\textsuperscript{85}

196. Section 11 of the Constitution provides that everybody has the right to life. As a constitutional norm this entails more than the mere protection of biological or legal life. It demands respect for the protection of something altogether more encompassing. In recognition of this concept, the Constitutional Court, per O'Regan J, in *State v Makwanyane* wrote:

"The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society."\textsuperscript{86}

197. At the core of the right to life is an obligation to respect it. To kill or to condone the killing of a person is an infringement of the right to life. In this regard, the Constitutional Court has found that the State has a duty to promote respect for

\textsuperscript{85} *Ferreira v Levine NO and Others* 1996 (1) SA 984 (CC) at para [49]

\textsuperscript{86} See *Makwanyane supra* at para [326]
the right to life in everything that it does. The Constitutional Court per Kriegler J stated that the rights to life, dignity and bodily integrity were individually essential and collectively foundational to the value systems prescribed by the Constitution.

198. Insofar as protection of the right to life within the context of the use of force was concerned, the Supreme Court of Appeal, in Govender v The Minister of Safety and Security found that the State’s duty to protect the rights of citizens extended to fleeing subjects and that the legitimacy of the use of force in arrest would depend on the outcome of a proportionality enquiry. In such an enquiry, the interest served by such force would be weighed against the interests infringed thereby.

199. The court in Walters, drawing on the dictum in Govender found that weighty considerations had to be present before there could be a finding that it would be necessary to justify the taking of life, while this court stated that the question of how much force was permissible in an attempt to effect an arrest had to be answered in the right of the value our Constitution places on human life.

200. It is reiterated that the use of force in arrest would only be justified if deemed reasonably necessary in the circumstances, taking into account the seriousness of the offence allegedly committed by the suspect and the threat of violence.

---

87 See Ex parte Minister of Safety and Security: In re S v Walters 2002 (4) SA 613 (CC)
88 2001 (4) SA 273 (SCA) at paras [8], [13] and [19] - [22]
89 See Walters supra at para [53]
posed by the suspect to the arresting officer or others.\textsuperscript{90} It was in the light of the decision in \textit{Walters} that section 49(2) of the Criminal Procedure Act was amended to allow for the use of deadly force in circumstances where such force is immediately necessary to protect the arrestor or the third party, where delaying the arrest holds substantial risk of death or bodily harm to members of the public, and where the suspected offence is a serious one of a violent nature.

201. It is thus clear that the Constitution creates a negative obligation on the State to respect and not to interfere with the right to life. It also imposes a positive obligation on the State to protect the right to life.

202. In \textit{Rail Commuters Action Group v Transnet t/a Metro Rail}, the Cape High Court recognised that the State has a legal duty to protect the lives and property of members of the public who commute by rail, a finding informed by a purposive interpretation of the right to life and to freedom from violence.\textsuperscript{91}

203. In \textit{Makwanyane}, the Constitutional Court stated that it was incumbent on government to demonstrate respect for the right to life in everything that it does.\textsuperscript{92} The State is also under a duty to create positive conditions that will enable all persons to enjoy the right to life.\textsuperscript{93}

\textsuperscript{90} See \textit{Walters supra} at para [54]
\textsuperscript{91} 2003 (3) BCLR 288 (C) 352 C - D
\textsuperscript{92} See \textit{Makwanyane supra} at para [144]
\textsuperscript{93} See \textit{Makwanyane supra} at para [353]
204. The disproportionate use of force infringed the rights of the injured and arrested miners to life and bodily integrity.

205. It was tactically possible for the SAPS to retreat. Had they done so there would have been no bloodshed. There were divisions within the SAPS on the crowd management approach to be adopted. Those officers who sought to manage the gathering in a manner that respected and protected the right to life, such as General Mpembe were side-lined, and the unduly confrontational and violent approach of Major General Annandale preferred.

206. In adopting this disproportionate, violent stance, the State through the DMR and the SAPS condoned the murder of innocent workers who simply sought to engage their employer on their wage demands.

207. Any reasonable assessment into the state’s conduct must on the basis of the available evidence conclude that the collusive, impartial interests served by the disproportional use of force, has left our constitutional democracy poorer. Bodily integrity, dignity and the right to life are foundational to our constitutional value system. The Marikana massacre is a clear violation of these rights.

208. There are no weighty considerations of the kind required in Govender that could possibly justify the assaults, murders and executions meted out to the RDO’s who gathered in solidarity for a living wage. The infringement is not just tragic, it is criminal and violated also the RDO’s rights to freedom and security of the
person, which entails the protection of their physical liberty and personal security.

The right to language culture and religion

209. Section 30 of the Constitution confers on everyone the right to use the language and participate in the cultural life of their choice provided that these rights are not exercised in a manner inconsistent with the provisions of the Bill of Rights. The Constitutional Court has held in this regard that the State is required to protect the identity and the rights of persons to cultural autonomy and creating an environment where they enjoy and develop their culture and language and practice their religion, in community with other members of their group.

210. In Ex Parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995 the Constitutional Court, per Sachs J, conferred an interpretation of the right which barred the State from interfering with initiatives by a community to preserve its culture and required the State to provide material assistance to the particularly vulnerable, threatened or disadvantaged cultures. Sachs went on to state that:

"Equality does not presuppose suppression of difference. Equality does not imply homogenisation of behaviour. There are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly

---

94 1996 (3) SA 165 (CC) 70 and 90
phrased right to freedom of association contained in section 18. Taken together they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and I highlight the importance of individuals and communities being able to enjoy what has been called the right to be different. In each case, space has been found for members of communities to depart from a majoritarian norm.\textsuperscript{95}

211. Seeking to vilify those members of the crowd who exercised their rights to self-expression and cultural and religious beliefs, is a clear violation of this right. It was not the consultations and rituals with the traditional healers that resulted in the Marikana massacre. Suggestions to this effect are ill informed and discriminatory. The massacre was caused by the toxic collusion between Lonmin and the State, Lonmin’s inflexible attitude to not engage with the strikers, and treat its most valuable resource, i.e. its employees as faceless villains that amongst others created the environment for the massacre.

\textbf{Freedom of assembly}

212. The Constitution also guarantees the right to freedom of assembly. Freedom of assembly creates a space to speak and to be heard. Within the context of the South African democracy, a single voice is likely to be drowned out. As countless modern democracies demonstrate, the power in modern national states invariably concentrates in and around large social formations, meaningful

\textsuperscript{95} See \textit{Fourie v the Minister of Home Affairs} 2005 (3) SA 429 (SCA)
dialogue between these large social formations often requires the collective effects of the demonstrators, the picketers and the protestors.\textsuperscript{96}

213. It was the very failure to meaningfully engage with the group and verify the legitimacy of their concerns that not only rendered this right nugatory but also further created the environment in which the massacre occurred.

LABOUR RELATIONS

214. Section 23 of the Constitution guarantees to everybody the right to fair labour practices and the right to strike. The right to strike is regarded as a fundamental protection of workers' interests. Without it a worker's right to freedom of association and to collective bargaining are compromised. The right to strike includes the right to assemble and to picket peacefully. Picketing is a common activity engaged in by workers to obtain the support of other workers and the general public for their cause. So common is this right that it is recognised by the International Labour Organisation which holds that pickets may be prohibited only if they cease to be peaceful. The right to picket is expressly provided for also in section 17 of our Constitution.

\textsuperscript{96} See South African National Defence Union v The Minister of Defence 1999 (4) SA 469 (CC) at para [8] where the court held: "freedom of expression, freedom of belief and opinion, the right to dignity as well as the right to freedom of association, right to vote and stand for public office and the right to assembly taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial." See also National Education Health and Allied Workers Union v University of Cape Town 2003 (3) SA 1 (CC) and NUMSA v Baderbop (Pty) Ltd 2003 (3) SA 513 (CC)
215. Our Constitutional Court has also recognised the right to picket as being an integral part of section 23(2)(b) of the Constitution.

216. These rights were violated. Lonmin chose not to engage and the state chose to characterise, in the interests of political expediene and on the basis of toxic collusion, to characterise the gathering as criminal in nature and the strikers as convicted, dangerous criminals.

The right not to be compelled to make a confession or admission that court be used in evidence against that person

217. Section 35 of the Constitution provides that arrested, detained and accused persons have the right not to be compelled to make any confession or admission that could be used in evidence against that person. This is commonly referred to as the right against self-incrimination and exists within a pre-trial context as well.

218. In Ferreira v Levine, the subjection of company directors to which enquiry is conducted in the course of liquidations under the Companies Act provided no protection against the use of answers elicited in subsequent criminal proceedings was held to violate the right against self-incrimination. Incrimination, held the court, would render the envisaged subsequent criminal trial unfair.
219. The protection against self-incrimination is more necessary within the context of a massacre like Marikana. Here individuals were arrested without lawful basis, charged and forced to make confessions on the deaths of fellow protestors.\(^97\) Thus, compulsion to answer incriminating questions to be used in criminal proceedings against an accused is specifically outlawed by the Constitution.

**National security in the republic**

220. Section 198 of the Constitution sets out the governing principles on national security in the Republic. It provides that national security reflects the resolve of South Africans as individuals and as a nation to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life. It provides also that national security be conducted in a manner that gives effect to the resolve of South Africans to live in peace and harmony. It precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution and national legislation.

221. The Constitution then goes on to establish the security forces in terms of section 199(1). These consist of a single defence force, a single police force and any intelligence services established in terms of the Constitution.

222. The security services are constitutionally mandated to act, teach and require their members to act in accordance with the Constitution and the law. In

---

\(^97\) See also *Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) at para [60]*
compliance with this obligation, the Constitution instructs that no member of the force may obey a manifestly illegal order.

223. Section 205 of the Constitution then goes on to structure the police at the level of national, provincial and local government. In terms of section 205(3), the objects of the police at, amongst others, to maintain public order, protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.

224. Section 207 of the Constitution then makes provision for the control of the police service. It provides that the President as the head of the national executive appoints a national commissioner to exercise control over the police service. The national commissioner is then mandated, in terms of section 207(2), to assume control of the police in accordance with national policing policy and the direction of the cabinet member responsible for policing.

225. The police service itself is established in terms of section 5 of the South African Police Service Act to ensure the safety and security of all persons and property in the national territory and uphold and safeguard the fundamental rights of every person guaranteed in the Bill of Rights.

226. In terms of section 199(5), security services must act, and must teach and require their members to act in accordance with the Constitution and the law,
including customary international law and international agreements binding on the Republic.

227. Section 199(7) prescribes that neither the security services nor any of their members may, in the performance of their functions, further in a partisan manner any interest of a political party. This section was clearly violated.

Public administration

228. Chapter 10 of the Constitution sets out principles and objectives for public administration in South Africa’s constitutional democracy. To this end, section 195(1)(d) provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

"(d) Services must be provided impartially, fairly, equitably and without bias."

229. It is mandatory for South Africa’s public administration to implement these enumerated values and principles. It is trite that the State exercises legitimate but immense power and control over its citizenry. It is therefore duty bound to protect them and to provide them with an impartial and responsible public administration.
230. Van der Walt and Hembold in *The Constitution and a New Public Administration*\(^9\) state that public administration encompasses the delivery of public services to citizens in a manner that contributes to the country’s general survival and prosperity. Within this context it is imperative that the services are distributed without favour, fear or prejudice. It is imperative that the services are distributed in a non-partisan and impartial fashion.

231. Government is required to serve the public interest in a manner that gives effect to the objectives of the public administration set out in section 195 of the Constitution, and the incident at Marikana, when considered against the backdrop of the political interference that resulted in the deployment of the various SAPS units to the koppie is an indication that there was a clear violation of the Constitution.

232. It is trite also that the public administration wields enormous power. It has been said that:

"Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinth administrative regulations which

---

\(^9\) (1995) 1-2 - 6-7
amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability."\textsuperscript{99}

233. Organising the administration of the State around the values set out in section 195 is a major departure from the sinister manner in which many apartheid laws were executed. Thus, an impartial and responsible public administration is crucial to reinforce the fact that we have moved away from an apartheid state, both in theory and practice, to demonstrate that there is no longer a secret law-making and the discriminative policies of the pre-constitutional era. Section 195 and its prescripts of impartiality and responsiveness require transparency, accountability, openness and responsiveness to the public.\textsuperscript{100}

234. The deployment was partial to the interests of Lonmin and its shareholders. The result was an unethical and unaccountable use of resources. The collusion resulting in the deployment is equivalent to none other than the secretive and discriminatory law making policies that characterised our past. Marikana and the use of state resources at the koppie is a shameless indictment on the state and a criminal violation of constitutional rights.

\textsuperscript{99} President of the Republic of South Africa v South African Rugby Football Union 2001 (1) SA 1 (CC) at para [133]

\textsuperscript{100} See New Clicks at paras [620] - 623]
C.2.2 Clause 1.2.2 of the Terms of Reference “The precise facts and circumstances which gave rise to the use of all and any force and whether this was reasonable and justifiable in the particular circumstances”

C.2.2.1: Self and private defence; putative self-defence; legal principles

235. The issue of self and/or private defence lies at the heart of the issues to be investigated in respect of SAPS and the core business of the Commission. It is no exaggeration to say that this is the question which is of the utmost significance to the public concern.

236. The main defences proffered by the South African Police Services is that the members were acting in self-defence when they opened fire on the small crowd at Scene 1, and when they pursued retreating members of the crowd to Scene 2.

237. It is trite that self-defence or private defence negates the unlawfulness of an act which complies with the definitional elements of a particular crime. For the purposes of these particular heads, the police force members fired on the crowd at Scene 1 and who pursued the remaining crowd to Scene 2 would thus not be guilty of murder if they had acted in self-defence or private. In these circumstances, their conduct would be justified and therefore not unlawful. Unlawfulness is then excluded because of the presence of the ground of justification. This is so even though the definitional elements of the crime are present.
238. The *locus classicus* on establishing the justification of self-defence in *R v Attwood*.101

239. In *Attwood* the AD per Watermeyer CJ found that the person alleging self-defence would have to establish that:

239.1 he had been unlawfully attacked;

239.2 he had reasonable grounds for thinking that he was in danger of death or serious injury;

239.3 the means of self-defence which he used were not excessive in relation to the danger; and

239.4 the means used by him were the only, or the least dangerous means whereby he could have avoided the danger.102

240. These requirements were confirmed in the later decision of *R v Patel*103 where his Lordship Mr Justice Holmes, at page 123B-D, confirmed the requirements for the justification of self-defence as set out by Watermeyer CJ in the *Attwood* decision. The court in *Patel* warned of the danger of becoming an armchair critic and stated that the exigencies of the occasion must be taken into account and that

101 1946 AD 331
102 *Id* at 340
103 1959 (3) SA 121 (A)
"men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstance of their position".

241. The judge in Patel was also at pains to point out that "where a man can save himself by flight, he should rather flee than kill his assailant. … But no one can be expected to take flight to avoid an attack, if flight does not afford him a safe way of escape. A man is not bound to expose himself to the risk of a stab in the back, when by killing his assailant he can secure his own safety".

242. In the 2003 decision of State v Trainor the Supreme Court of Appeal, per Olivier JA, held that, in establishing whether the elements of self-defence were present, a conspectus of all the evidence was required. The court per Navsa JA held:

"Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety."
243. The court in upholding the conviction of a husband who had assaulted his wife found at para [12] that there must be a reasonable connection between an attack and a defensive act. Quoting CR Snyman in Criminal Law 4th ed, the court held:

"It is not feasible to formulate the nature of the relationship which must exist between the attack and the defence in precise, abstract terms. Whether this requirement for private defence has been complied with is in practice more a question of fact than of law."

244. The court at para [13] goes on to find that:

"It is submitted that the furthest one is entitled to generalise, is to require that there should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place. In order to decide whether there was such a relationship between attack and defence, the relative strength of the parties, their sex and age, the means they have at their disposal, the nature of the threat, the value of the interest threatened, and the persistence of the attack are all factors (among others) which must be taken into consideration. One must consider the possible means or methods which the defending party had at her disposal at the crucial moment. If she could have averted the attack by resorting to conduct which was less harmful than that actually employed by her, and if she inflicted injury or harm to the attacker which was unnecessary to overcome the threat, her conduct does not comply with this requirement for private defence."\textsuperscript{106}

\textsuperscript{106} Id at para 13
245. These requirements were further confirmed by the decision of the Supreme Court of Appeal in *Mugwena and Another v Minister of Safety and Security*\(^\text{107}\) where Ponnan JA, writing for the majority of the court, found at para [22] that:

"Homicide in self-defence is justified if the person concerned had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury, that the means he used were not excessive in relation to the danger, and that the means he used were the only or least dangerous whereby he could have avoided the danger."

246. The court went on to find that this is an objective test. The question has to be answered by looking at whether a reasonable person in the position of a person being attacked could have considered that there was a real risk that death or serious injury was imminent.

247. From the above it is apparent that there are separate requirements for the attack and separate requirements for the justification of self-defence. For self-defence to negate unlawfulness, the attack itself must therefore be unlawful, directed at an interest which legally deserves to be protected, and be imminent but not yet completed.\(^\text{108}\)

248. For the retaliation in self-defence to negate the requirement of unlawfulness it must be directed against the attacker, be necessary in order to protect the interests threatened, and be reasonable in relation to the attack.

\(^{107}\) 2006 (4) SA 150 (SCA)

\(^{108}\) See *Criminal Law* 5\(^{\text{th}}\) ed CR Snyman *Lexis Nexis* Chapter IV Unlawfulness (Justification) pp 104 - 105
249. Having elaborated the above principles, it is trite that the test of private defence is objective. In *Snyders v Louw*,\(^{109}\) the court per Steyn AJ held:

"[14] The conduct of the respondent must be judged by determining whether it fulfils the requirements of private or self-defence or of putative private or self-defence

[15] Private defence justifies the use of force if it is reasonably necessary to repel an unlawful invasion of a person, property or other legal interest, and the test of whether or not a person acts justifiably is an objective one. Private defence involves a choice between two evils, that is, the harm threatened by an attack upon the interests of a victim or potential victim, on the one hand, and the harm done to some legal interest of the attacker by the victim or would be victim, in the course of repelling the attack, on the other. In making the choice, the lesser of the two evils must generally be preferred, so that the victim or would be victim may usually not inflict greater harm than that threatened by the attacker. Where the harm caused by the defence is greater than the harm threatened by the attack, then the defence will generally not be justified.

250. The court went on to find that in a society which attaches great value to the sanctity of human life, private defence, which entails the taking of a life to protect a lesser interest, is generally not lawful. Quoting from the decision of the Constitutional Court in *S v Makwanyane*\(^{110}\) the court stated that the rights to life and dignity are the most important of all human rights and the source of all other personal rights in Chapter 3. (Now Chapter 2 of the Constitution) By committing ourselves to a society founded on the recognition of human rights, we are

---

\(^{109}\) 2009 (2) SACR 463 (C)  
\(^{110}\) 1995 (2) SACR 1 (CC) at para [144]
required to value these two rights above all others. Thus, the court went on to find that a person who is attacked should retreat, avoid, or flee from the attack, before resorting to legal force. A person can justify acting in self-defence only if the attack cannot be averted in another way. ¹¹¹

251. Although there is no absolute legal duty to retreat from an unlawful attack, this is indeed an important consideration to be taken into account in assessing whether a defender’s defensive act was allowed by the law.

Putative Self Defence

252. The objective evidence of the movement of the strikers and indeed the movement of the police and the vehicles demonstrates very clearly that none of the persons there present, be they police officers or even journalists, reasonably believed that the strikers had a collective intention to attack the police. On the contrary, it is unlikely that had that been the case, the TRT line would have run towards the attack and/or failed to retreat sufficiently so as to avoid it.

253. It would seem as if the SAPS members were under the impression that the strikers or the so-called militant group were supposed to be blocked by all means necessary from “escaping” to Nkaneng with their dangerous weapons. That would mean that they had disregarded the fact that according to Phase 6 of the plan, follow-up searches could be done. The TRT basic line can be seen at some stage practically closing and straddling across the road to Nkaneng.

¹¹¹ Snyders v Louw at para [17]
254. In cases of putative private defence there is a lack of intention on the part of the so-called attacker to harm the victim. The putative victim is thus one acting defensively in the honestly held but erroneous belief that his life or property was in danger. That this is the accepted test for putative self-defence was confirmed in *S v Pakane and Others*[^112]

255. The facts in this case are noteworthy. The appellants in *Pakane* were all police officers who appeared in the high court with charges relating to the death of one F, who had been shot twice at sufficiently close range to leave a contact wound. The second appellant, a sergeant, was convicted of murder and of defeating the ends of justice. The first and third appellants, both constables, were convicted of being accessories after the fact.

256. The thrust of the second appellant's defence at the trial had been that he shot at the deceased in the belief that his life and those of his colleagues were in danger. In essence, this was a defence of private defence, or, alternatively, putative private defence. The court confirmed, at para [19], that the use of force in private defence was justified if it was reasonably necessary to repel an unlawful invasion of person, property or other legal interest, and the test of whether an accused had acted justifiably was an objective one.

[^112]: 2008 (1) SACR 518 (SCA)
257. Putative private defence, on the other hand, held the court, could be raised successfully to show a lack of intention where an accused had acted defensively in the honest but erroneous belief that his life or property was in danger.\footnote{Id at para [19] at 527 C - E}

258. The court held that the justification of self-defence did not avail itself to the second appellant. This was because he had no reason to believe that his life and the lives of his colleagues were in danger. The circumstances of that particular case indicated that the deceased had been aware that the police had been summoned to the area and was most unlikely to act in an aggressive stance. Furthermore, the safety catch of his firearm was still on when his body was found, indicating that he had not been ready to shoot when he himself was shot. The ineluctable conclusion, held the court, was that the second appellant had fired shots at the deceased, when he posed no threat to him and his colleagues, without first ascertaining his identity and, most importantly, without issuing any warning. The infliction of the fatal wound by the second appellant was thus unlawful.

259. It is necessary to quote the decision of the court at paras [20] to [23]:

"[20] As the trial court found, I do not believe that the second appellant can rely on either defence in the circumstances of this case. I have extreme difficulty reconciling the appellants’ evidence (whichever of their contradictory versions is chosen), as to precisely what occurred when the deceased was shot, with the objective facts. The evidence shows clearly
that the deceased was aware that the police had been summoned by Lang and were, reportedly, on their way. It seems to me most unlikely that he would, with that knowledge, react by assuming an aggressive stance when warned of police presence as the second and third appellants would have it. This is particularly so if account is taken of the appellants’ version that warning shots were fired with the rifle. One would imagine that the most natural reaction for a person in that situation, aware that he is covered with a powerful automatic rifle whether by the police or impostors (a suggestion was made on the appellants’ behalf that the deceased may well have tried to defend himself because he did not believe that the appellants were in fact members of the police) would be to surrender or flee.

[21] The appellants’ version in this regard is further rendered more improbable by the fact that when the deceased was found the safety catch of his firearm was still on and he even held his torch in the other hand. Much was made by the appellants’ counsel of Beja’s evidence that he had seen a policeman from Mapusi police station removing bullets from the deceased’s firearm before the arrival of the Mthatha SVC unit. This, in his submission (made for the first time in this court) suggested that the scene was contaminated and the firearm tampered with before the SVC unit’s arrival. It was therefore possible to infer that the deceased was readying himself to discharge his firearm when he was shot, so went the argument. The defence counsel also emphasised in support of this argument that the entrance wound caused by the rifle bullet was on the chest, arguing that this supported the proposition that the deceased had turned to face the appellants on hearing their warning.

[22] There is simply no merit in these submissions. The uncontested evidence of Sergeant Paraffin stationed at Mapusi at the relevant time, who was the first and only officer to investigate the scene before handing it over to the SVC unit on their arrival, was that he found the scene guarded
and did not at any stage touch the deceased or his firearm. This testimony, viewed with Mithi’s explanation about the state in which he found the firearm, bearing in mind that both policemen were found satisfactory witnesses by the court below, puts paid to the suggestions made in this regard. The entrance wound on the chest takes the matter no further as it could as easily be inferred that he was already facing the appellants’ direction when they confronted him.

[23] It is undoubted on the evidence that the deceased was not ready to shoot when he was shot. Accordingly I infer, as did the court below, that he could not have assumed a threatening position as alleged by the second appellant. In the circumstances, the second appellant had no reason whatsoever to believe that his group’s lives were in danger and that it was necessary, in self-defence, to shoot the deceased. The ineluctable conclusion is that he deliberately fired shots at the deceased when he posed no threat to them, without first ascertaining his identity and issuing any warning. His infliction of the fatal wound was thus unlawful.

260. In relation to putative self-defence, Smalberger JS, as he then was, in *S v De Oliveira*¹⁴ held that it is not lawfulness that is in issue but culpability. The Appellate Division ruled:

"If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending on the precise circumstances) exclude dolus in which case liability for the person’s death based on intention will also be

---

¹⁴ 1993 (2) SACR 59 (A)
excluded: at worst for him he can then be convicted of culpable homicide."\(^{115}\)

261. These sentiments were echoed by Chaskalson P in *S v Makwanyane* where the learned judge ruled:

"Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. This is consistent with section 33(1). To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life. The same is true where lethal force is used against a hostage taker who threatens the life of the hostage. It is permissible to kill the hostage taker to save the life of the innocent hostage. But only if the hostage is in real danger. The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim, and favouring the life or lives of innocents over the life or lives of the guilty. But there are strict limits to the taking of life, even in the circumstances that have been described, and the law insists upon these limits being adhered to."\(^{116}\)

262. Thus, there is a distinction between private defence as a defence excluding unlawfulness and putative or supposed private defence which relates to the mental state of the accused person. Where putative self-defence is pleaded, the court examines whether the accused genuinely, albeit mistakenly, believed that she or he was acting in lawful private defence or whether this belief was also held on reasonable grounds.

\(^{115}\) *Id* at 63 I to 64 A

\(^{116}\) *Id* at para [138]
263. In summary, a person who acts in private defence acts lawfully provided, however, that the conduct satisfies the requirements self-defence which have been enumerated above and provided further that the defence does not exceed the bounds of lawfulness and proportionality. The test for private defence is objective with the question being asked whether a reasonable man in the position of the accused would have acted in the same way.

264. In putative defence, it is not lawfulness that is in question but culpability. If an accused honestly believed that his life or property was in danger but, objectively viewed, they were not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief, depending on whether or not it was reasonable in the circumstances, could operate to exclude his intention or his negligence. If his negligence is not excluded, at worst for him he can be convicted of culpable homicide.

265. The analysis in this section can conveniently be done by simply traversing the well-established legal requirements and elements of self defence which emanate from the legal definition of self defence, namely:

**C.2.2.2: The attack**

266. The logical first requirement for self defence is the existence of an attack upon the perpetrator. It stands to reason that there can be no talk of a “defence” in the absence of an “attack”.

267. The onus to establish the existence of an attack rests upon the party invoking self
defence, in this case SAPS. The only enquiry must therefore be whether SAPS
can be said to have discharged this onus.

268. Suggestions of an attack on the part of the strikers are at best vague, contrived,
contradictory and inconsistent with the objective and oral evidence of the victims.

269. Before analysing the weaknesses in the SAPS' evidence asserting an attack,
either standing alone or viewed in the context of the testimony of the victims
and/or the objective evidence, it will be appropriate to eliminate the applicability
of this defence in respect of the deaths and injuries which occurred at scenes
other than Scene 1.

270. There was no evidence or any serious suggestion of self defence in relation to:

270.1 the incident of 13 August 2012. On the contrary, the evidence clearly
suggests that it was the police who initiated an unprovoked attack upon
the strikers, who were proceeding on their way to the koppie as per
agreement with the police. It stands to reason that in relation to the three
civilian victims of 13 August and any person injured during that incident,
there being no credible defence put up by SAPS, it must be found that the
killings were unlawful; SAPS was responsible therefor and that, once
identified, the perpetrators ought properly to be referred for prosecution for
murder.
270.2 similarly and in relation to Scene 2, SAPS has not seriously asserted self or private defence, with one or two exceptions. The mere concession in the SAPS’ opening statement that the victims “may have been shot by friendly fire” from members of SAPS is sufficient, given the incidence of the onus, to justify a recommendation for the prosecution of SAPS members for murder, alternatively culpable homicide. The vicarious and other liability and responsibility of the Minister of Police follows automatically. The SAPS’ opening statement actually offers no cogent explanations for about 10 of the deaths at Scene 2.

271. In the result, it will be argued that in respect of 20 of the deaths and associated injuries which occurred on 13 August and on 16 August at Scene 2, the claim of self defence is not sustainable. SAPS’ causing of those killings was accordingly unlawful and should attract criminal (and civil) responsibility.

272. Turning back to Scene 1, the only claims of an attack were made by the following SAPS witnesses, who were present at that scene:

272.1 Brigadier Calitz
272.2 Captain Loest
272.3 Captain Thupe
272.4 Lieutenant Colonel Claassen
272.5 Colonel Modiba
273. Putting aside self and mutual contradictions and inconsistencies, the gist of their evidence and the SAPS' version can be summarised as follows:

273.1 The protestors (or the so-called militant group) attacked Nyala 4 just before it closed the gap between it and the small kraal.

273.2 That “attack” was thwarted by Nyala 4 when it closed the gap.

273.3 Realising this, the protestors decided to circumnavigate the kraal with the intention to execute the attack from the eastern side of the kraal.

273.4 In pursuance of the collective attack and in pursuance thereof, one of the deceased protestors fired one or two shots at the POP members, who were located between two nyalas and shooting rubber bullets at the protestors.

273.5 The protestors, in proceeding around the kraal and in the southern and/or south westerly direction, had the intention to attack the TRT line which had formed beyond the road running in front of the mouth of the kraal towards the informal settlement called Nkaneng.

273.6 Realising this imminent attack, with no other lawful alternative and perceiving either their own lives or that of the colleagues to be in immediate danger, the 50-odd members of the TRT fired their R5s in the direction of the oncoming protestors, killing and injuring those who died and/or sustained serious injury.
273.7 The nature of the attack was characterised by the fact that the protestors had been singing and clicking their weapons together rhythmically while "charging" towards the TRT line.

273.8 An hour later, ambulances and other medical assistance arrived to assist the injured.

C.2.2.3: The evidence of the strikers (re the “attack”)

274. Mr Mathunjwa warned the strikers that the police were preparing to kill them.

275. The strikers seemingly did not believe Mathunjwa. As soon as he left, the first nyala rolled out barbed wire. It became clearer that what Mathunjwa had said may have been true.\(^{117}\)

276. Some of the strikers walked / ran away using the road to Nkaneng which runs in front of the kraal.\(^{118}\)

277. Mr Noki informed the front group that since they had done nothing wrong, they should not run but rather walk towards Nkaneng, which they proceeded to do.\(^{119}\)

278. For several metres of that walk, there was no barrier between the walking strikers and members of SAPS. If the strikers' intention had indeed been to attack the police, then they would have used all these available and unimpeded

\(^{117}\) Day 58 p 6178 l 13 – p 6179 l 13  
\(^{118}\) Exhibits L191 and L193, Exhibit JJJ118.34  
\(^{119}\) Day 55 p 5935 l 15 – p 5936 l 4
opportunities. Instead, and as can clearly be seen in the visual evidence, they were intent on reaching the road to Nkaneng, which was being used by many other escapees ahead of them.

279. They walked towards the road to Nkaneng until they were blocked by Nyala 4, which closed off the road and the gap. This was preceded by a “race” against Nyala 4 for the gap, which race was “won” by Nyala 4.120

280. Since they could not walk through the kraal, the nearest way of re-accessing the road to Nkaneng was to circumnavigate the kraal and walk and turn left once they reached the road.

281. They were not aware of the TRT line, which must have formed whilst they were obscured by the kraal. It is therefore impossible that they negotiated the kraal with any intention to attack the TRT line – or any other person.

282. When they appeared on the eastern side of the kraal, they were met with gunfire from POP members, who were positioned between two stationary nyalas.

283. This prompted them to rush forward towards the road to avoid the firing line.

284. Within a few seconds but before reaching the road, the TRT line opened R5 fire towards the strikers as they were advancing to access the road, killing and injuring a number of them.

120 Day 55 p 5930 ll 21 - 25
285. The SAPS members expressed happiness and said “their boss is dead”.\footnote{Day 55 p 5956 l 2}

286. There was no attack imminent or otherwise and accordingly the claims of self or private defence are false. The evidence that the protestors were intending to go to Nkaneng is credible, corroborated in separate oral testimonies and supported by the objective evidence. It cannot be seriously challenged.

287. It was clear that the police had been targeting the lead group, which was singing.\footnote{Day 59 p 6238 ll 20 - 23}

288. No reasonable person there present could have genuinely believed that his or any other person’s life was under any imminent threat from the protestors. No reasonable person observing their movement and that of other strikers could conceivably believe that this was their intention. On the contrary, the pre-emptive movement of the TRT line to go and close the gap, long before any strikers emerged from around the kraal, is the clearest indication that the SAPS’ commanders did anticipate that the strikers would want to re-access the road which had been blocked by Nyala 4. According to Captain Loest, one of two of the protestors had actually made it through before Nyala 4 closed the gap and they had simply proceeded to Nkaneng without attacking anyone.

289. Should there have been doubt as to the intentions of the protestors, there was ample room to avoid any perceived attack by retreating away from the oncoming strikers, as indeed some members of POP did. Both Phatsha and Magidiwana
were adamant that they had harboured no intention to attack the police. This is objectively supported by the fact that Magidiwana was only carrying a stick on his left hand side when he is right-handed and holding it in the middle of its shaft.\textsuperscript{123}

290. The most telling sign that there was no attack is the fact that the relevant TRT members ran towards the “danger”, voluntarily assuming the risk of such an attack, formed the basic line and cocked their guns before the “attack” became imminent, as required by the law.

291. Secondly, the police failed to create enough space so as to be able to observe whether the strikers would attack them or follow the other strikers towards Nkaneng. As Magidiwana aptly put it:

\begin{quote}
“we never even reached the road. If the police then had shot us after in fact we had crossed, or passed that road, then I would say they are telling the truth.”
\end{quote}

292. In all the circumstances, the evidence does not support the self-defence theory advanced by SAPS.

293. The defence of self defence was not designed for that kind of situation.

\textsuperscript{123} Exhibit L206
C.2.2.4: The objective evidence (re the “attack”)

294. The key pointers which support the version of the protestors in relation to the non-existence of an attack are:

294.1 The front group indeed can be observed walking and not running towards the road in front of the kraal.

294.2 It is common cause that, having lost the “race” with Nyala 4, the road to Nkaneng was thereby blocked.

294.3 One or two protestors who made it through that gap did not attack anyone.

294.4 It is common cause that the strikers did not and could not have possibly seen the formation of the TRT basic line whilst they were obscured by the kraal.

294.5 At least one of the front strikers was only armed with a knobkerrie and no sharp weapon.

294.6 The strikers took no steps to “attack” the POP shooters. Instead, they can be observed taking evasive action to escape the police attack and bunching up against the kraal before accelerating up and literally running away from the gunfire along their originally intended path which was determined before they were even aware of the presence of the TRT basic line, which had not been formed when they last had visibility of the popular
road to Nkaneng. It is common cause that until shortly before the operation and for days, people had been using that road to go to and from Nkaneng without any objection from SAPS.

294.7 The strikers in front did not and could not have seen the man in the brown top firing one or two shots in the direction of the POP members. The TRT line could also not have seen this.

294.8 The surviving protestors turned away and around as soon as the firing ended, with none charging forward in pursuance of any alleged “attack”.

294.9 All the deceased and/or injured strikers had not readied and/or crossed the road to indicate an intention to attack the TRT line, as opposed to their stated intention to turn left towards Nkaneng.

294.10 The movements and actions of the lead group were exactly the same as on 13 August 2012, when a similar but smaller armed police line had made way and the strikers had continued on their intended path towards the koppie for another 300-500 metres and until teargas was fired at them.

294.11 Unlike their TRT counterparts who were supposed to be 100m away, the members of POP who had stood between the protestors and the road to Nkaneng simply retreated and would have given way to the strikers to proceed to Nkaneng were it not for the TRT, who opened fire. This action shows clearly that the option of taking evasive action was open to the TRT
members, who were even further away from the protestors than the retreating POP members, who sustained no harm at all. This point is better illustrated if one assumes for a minute that the strikers harboured an intention to attack members of SAPS (which is otherwise denied).

295. On a consideration of the evidence as a whole, it cannot be said that SAPS has established on a balance of probabilities or any other standard that there was an attack upon the TRT line. Absent an attack, the justification of self and/or private defence must fail. More importantly, and on the objective evidence, there were no grounds for a subjective belief of being under any attack. The voluntary and anticipatory movements of the TRT rule this possibility out completely.

C.2.2.5: Was the force necessary? Did SAPS comply with the prescriptions for minimum force as required in the common law, the SAPS Act and Standing Order 262?

296. According to the generals who briefed the National Commissioner and who were present at the scene, they were forced to use maximum force. This is the clearest indication that the rule of minimum or necessary force was breached. At no stage did any police witness interpret this to mean the rare theoretical "point of equilibrium" postulated by the Chairperson of the Commission.

C.2.2.6: Was the force used proportional to the threat?

297. If the common law rule of necessity is not clear enough, then the wording of section 13(b) of the SAPS Act could not be clearer:
“Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances.” (emphasis added)

298. Properly interpreted, this section achieves the remarkable feat of covering both the situations of self/private defence, as well as putative self-defence.

299. It has been clearly established that there was no attack and therefore the question of proportionality, strictly speaking, does not arise.

300. However, and in the event of the Commission finding either that there was an attack (which is denied) or that any of the shooters reasonably perceived an attack (see below), both of which are disputed, then it must be determined whether the response was proportional to the attack, actual or perceived. This section therefore proceeds on the assumption that there was such an attack, actual or reasonably perceived. There is of course an overlap between the requirements of necessary and proportionality.

301. The police witnesses claim that the attack commenced well before Nyala 4 closed the gap. Their version was that, but for Nyala 4 closing the gap, the protestors would have physically harmed and/or killed the SAPS members.

302. Assuming this to be true, it must then be accepted that this initial attack was mainly avoided and averted by the creation of a barbed wire barrier between the attackers and their intended victims. In police language, the attack was averted by a defensive and not an offensive method.
303. These defensive methods, having succeeded once before, it would have been prudent and proportional to use the same (defensive) method to ward off the attack which was materialising at a similar gap, by the selfsame attackers, on the other side of the kraal. It is common cause that the means and opportunity to close the second gap with Nyala 5 or 6 were available. The reason given for not doing so was that there were already policemen in the passage. This is a flimsy excuse, since those policemen could have climbed into the nyalas, which included the STF Scorpion and other armoured vehicles. There would have been no logical reason to "risk" the lives of the TRT line in order to "save" the lives of those who were in the passage and who, as it turned out, were not actually attacked, alternatively who successfully evaded the attack by retreating on foot.

304. In any event, it has been established that a conscious decision was taken to “man” the eastern side gap with the TRT line and their R5s. A series of instructions to this effect was given, starting with:

304.1 the instruction to run / rush towards the gap notably before the protestors emerged, indicating foresight that they would logically approach that gap to access the road;

304.2 the instruction to form a basic line;

304.3 the cocking of guns;

304.4 the instruction for the media to “go away”;
304.5 the instruction to “engage” (see below);

304.6 the instruction to cease fire;

305. In the circumstances, it must be clear that this was a situation covered by the provisions of Standing Order 262, clause 11.1 – 11.6, to the exclusion of clause 11.7.

306. Viewed either through the lens of the common-law requirement for necessary force, the statutory requirement for minimum force and/or the prescription of the Standing Order, there is no evidence to suggest that the force used was proportionate to the (perceived or real) attack.

307. To fire hundreds of live R5 rounds into a crowd made up of thousands of people without being reasonably certain of an attack cannot, by any stretch of the imagination, be held to have been a proportionate response.

308. In the circumstances, the justification of self or private defence must fail on this ground alone.

309. In this regard, it must also be taken into account that, according to the plan, the TRT line was supposed to have been 100 metres behind the POP line. It is common cause that, had this distance been kept or even half thereof, the attack would not have been imminent before the protestors had reached the road, in which case, there would have been no speculation as to whether, upon reaching
the road, they would have crossed in the pursuance of an attack or turned left towards Nkaneng, as the undisputed evidence overwhelmingly suggests.

310. In the totality of the circumstances, the claims of self or private defence must fail.

311. The contradictory and improbable evidence that warning shots were fired must be rejected, save to the extent that it indicates that there was an opportunity to do so, which was not taken and that shots could have been fired to the legs first, which was also not done. In these circumstances, there can be no talk of any proportionality.

C.2.3 Clause 1.2.3 of the Terms of Reference “To examine the role played by SAPS through its respective units, individually and collectively in dealing with this incident”

C.2.3.1 The necessity of so many units

312. The following SAPS units played a prominent role in the execution of the operation:

312.1 “The generals” or “the commanders” or “the police leadership”;
312.2 Public Order Policing (“POP”);
312.3 Tactical Response Team (“TRT”);
312.4 National Intervention Unit (“NIU”);
312.5 Special Task Force (“STF”);
312.6 Air Wing Unit (or “Eye-in-the-Sky”);
312.7 The negotiators;
312.8 The planning unit; and

312.9 The detectives.

313. Other units which were present and played a less prominent role were:

313.1 The canine or dog unit (“K9”);

313.2 The horse or mounted unit;

313.3 Medical personnel

313.4 LCRC;

313.5 Water cannon unit; and

313.6 Mortuary vans.

314. It can be safely assumed that this kind of show of force was unprecedented in South Africa and possibly the world over. No evidence was led of any potentially violent demonstration, strike or other gathering which was met with the deployment of approximately 15 different units all at the same time. This happened during a period when it is common cause the violence was actually on the wane and there was an unprecedented and the longest lull in violent incidents for a period of more than 48 hours since the discovery of Mr Twala’s body.

315. In simple terms, the de-escalation in violence was incredibly met with a massive escalation in the deployment of personnel, equipment, vehicles, armaments and ammunition. This is yet another sign of glaring disproportionality.
316. In particular, it was amply demonstrated that there was no need for the deployment of paramilitary units such as the STF and/or the NIU.

317. What is notable is that it had been agreed upfront that “the STF and NIU will respond to situations where lives are imminently threatened to assist or protect the police forces in the neutral area on command of (Brigadier Calitz)”. The STF and NIU never fired a single shot at Scene 1. It must follow that there was never a reasonable perception of imminent threats or putative self-defence. The TRT members knew or ought to have known that the NIU and STF had them covered in the case of imminent danger.

318. Major General Annandale was next questioned on the units mobilised at Marikana from the 13th of August onwards. He confirmed that all units deployed to Marikana, namely the STF, the NIU, the TRT the POP and the K9, are issued with standard sharp ammunition, which includes R5 assault rifles. He confirmed that this was standard issue.124

319. Annandale testified that as Head: Specialized Operations, he has the responsibility to command and coordinate the deployment of the NIU and STF members.125

320. When asked whether anyone gave him the responsibility to coordinate the NIU and the STF, or whether he once again deployed himself, his response was that the decision was made collectively as a team with the overall commander and

---

124 Day 88 p 9297 ll -25; 9298 ll1-12
125 Day 88 p 9298 ll 17 23
that both units, as well as the mobile operations, are national entities with national capacity and fall under his responsibility. As a result, he did indeed mobilise them. It was stated at the enquiry that since these matters fall under him, although nobody specifically assigned him the responsibility of coordinating the deployment of the STF and the NIU, it was not necessary for him to receive such an instruction. The deployment took place in his capacity as the component head of Specialised Operations. He said that this formed part of his function and responsibility, as set out in his job profile. He undertook to provide a copy of his job profile,\footnote{Day 88 p 9298 ll 24 -25; 9299 ll1 - 19} which was never done.

321. It was put to him under cross-examination that it was not necessary for the STF to be deployed to the koppie, even assuming that he may have had the right to do so.\footnote{Day 88 p 9302 ll 9 - 20} On this score he concedes that that the methods used by the STF are comparable to military methods, but technically they are not a paramilitary unit.\footnote{Day 88 p 9304 ll 1 -5} This is despite the police presentation itself defining the STF as a paramilitary unit.\footnote{Exhibit Q} The Commission can therefore accept, despite his denials, that the STF is a paramilitary unit.

322. He insisted that he had the necessary authority to deploy the STF and the NIU and that the circumstances were appropriate since these units existed to provide

\footnote{Day 88 p 9298 ll 24 -25; 9299 ll1 - 19\footnote{Day 88 p 9302 ll 9 - 20\footnote{Day 88 p 9304 ll 1 -5\footnote{Exhibit Q}}}
operational assistance to the SAPS for criminal related high risk operations where specialised skills and equipment were required.  

323. He was then asked on what specialised skills the STF brought to Marikana. He responded that they participated in intelligence driven operations and that they possessed the qualities necessary to go and arrest persons and also they had certain sharp-shooting capabilities - the term specifically used was sniper and counter-sniper. Further qualities that made them suitable for deployment was that they could be deployed from a helicopter using a rope ladder.

324. He denied that he had no authority to deploy the NIU and that this unit, as stipulated in Exhibit Q, could be deployed only by the Divisional Commissioner of Operational Response Services, Lieutenant Major General Mawela. He testified only that General Mawela was aware of the deployment. Despite the fact that Exhibit Q does not vest in him the power to deploy the STF and the TRT, he remained adamant that he could do so. This flies in the face of the principle of legality, according to which it is trite that a public functionary or entity can only exercise those powers conferred upon him, her or it.

325. The National Commissioner was, in terms of Exhibit Q, also entitled to do so should he or she so desire. Thus, the two people authorised to approve the deployment of the NIU to other provinces are either Lieutenant Major General

---

130 Day 88 p 9305 ll 9-21
131 Day 88 p 9306 ll 1-3
132 Day 88 p 9306 ll 4-25
133 Day 88 p 9309 ll 1-11
Mawela or the National Commissioner. He was not authorised to deploy the NIU. Without providing any further justification, his response was simply that he had the necessary delegation of authority to deploy the NIU. His evidence in this regard should be rejected out of hand, insofar as it contradicts what the SAPS prescripts provide in black and white. This is another case of clear breach of the applicable prescripts.

326. It was put to him and he conceded that he had requested Major General Mpembe and Major General Naidoo that, between them, they communicated with their counterparts in neighbouring provinces for additional POP personnel. The deployment of POP, it was put to him, is specifically dealt with under section 17 of the SAPS Act. Section 17 provides that it is only the National Commissioner and the President who are empowered to deploy the POP nationally. Major Generals Mpembe and Naidoo could not do so. They could not simply phone someone from a different province and request for POP people to come in. That was not how it worked. Thus, it was put to him that the National Commissioner had only deployed the further POP units on 15 August and therefore his instruction to Major Generals Mpembe and Naidoo on the 13th was unauthorised. As a result, those policemen who fired the specific shots on the 13th were there at the instance of his unlawful and unauthorised instruction. There can be no credible explanation for this clear breach of statute and this is undeniable in the circumstances.

---

134 Day 88 p 9309 ll 12 - 25
135 Day 88 p 9313 ll 16 -25; 9314 ll 1 - 17
C.2.3.2: The police leadership

327. Although, strictly speaking, the top leadership of the police, both in the management and the command structures, do not constitute a “unit” of the police, it is convenient to discuss their role, both individually and collectively, under this term of reference. Depending on the individual being discussed, this discussion will focus both on the political and operational leadership starting from the Minister, the National Commissioner downwards.

C.2.3.3: The National Commissioner and the Northwest Provincial Commissioner

328. In terms of section 207 of the Constitution:

“(1) The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service.

(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.”

329. At all relevant times to the Commission, the National Commissioner was General Riah Phiyega (“Phiyega”), who was duly appointed with effect from June 2012.

330. It is common cause that the first known involvement of the National Commissioner in the events under investigation happened on or about 13 August
2012, when she discussed the unrest which had flared up in the Marikana area with the Minister of Police ("Minister Mthethwa") telephonically.

331. It is also common cause that on 13 August 2012 and following the killings of the two policemen and three protestors referred to above, the National Commissioner saw it fit to fly to the Lonmin mine and held meetings with Lonmin management and the SAPS leadership there present, including the Provincial Commissioner, General Zukiswa Mboombo ("Mbombo").

332. Phiyega received separate briefings from the mine management and the police leadership before returning to Gauteng in the early hours of the morning [?].

333. She did not seek any audience with representatives of labour or the strikers.

334. The significance of her interactions on 13 August was not revealed until the undisclosed material surfaced. It would now seem that it was during her first visit to Marikana that she and Mbombo ominously agreed to take into account political considerations over and above the achievement of safety and security, which is their mandate.

335. On 15 August 2012, the National Commissioner presided over a meeting of the police National Management Forum ("NMF") held in Midrand, Gauteng. The NMF is a gathering of the top leadership of SAPS, including all Provincial Commissioners.

336. The issue of Marikana was raised in the meeting of the NMF.
337. After the end of the NMF meeting, an extraordinary sitting of the NMF was convened to discuss the situation in Marikana and this was chaired by the National Commissioner.

338. It was at this meeting that the decision was taken to proceed to “Stage 3 of the operation” or the tactical phase in the event that the anticipated negotiations would fail.

339. The National Commissioner did not disclose this crucial information in her statement(s) or in her evidence before the Commission until such time as the Evidence Leaders unearthed certain undisclosed SAPS hard drives and documentary evidence contained therein in September 2012.

340. The National Commissioner was also in telephonic contact with Minister Mthethwa regarding the situation in Marikana.

341. She informed the Minister that stage 3 of the operation would be implemented. This is according to her initial statement. She sought to change this evidence in a manner devoid of any credibility.

342. It is respectfully submitted that the Commission must disbelieve the evidence of the National Commissioner on this point and proceed from the point of view that she informed the Minister of the decision to implement stage 3 of the plan. This she must have been doing in the context of the Minister’s own enquiries and direct application of pressure exerted upon him, as is clearly set out in JJJ192.
343. On 16 August 2012 and shortly after the fatal shootings of that day, the National Commissioner again telephoned the Minister. There is another dispute as to whether or not the Minister instructed the National Commissioner to attend to the situation personally. Again, this was the initial statement of the National Commissioner which she later sought to amend. For the same reasons as above, these later alterations ought to be rejected by the Commission.

344. Later that evening, the National Commissioner was flown to the Lonmin premises in the Marikana area.

345. She was briefed by the top brass of SAPS about the events which led to the tragedy and the outcomes thereof.

346. She saw to it that two briefing documents were prepared – one for her to present at a media conference planned for the following morning and another for the President of South Africa, who was on a visit to Mozambique.

347. Indeed, on the following morning, the National Commissioner was flown back to the Marikana area for the media briefing, which was convened at the Lonmin Game Farm, where she and other police leaders gave a presentation justifying the killings of the 34 victims on 16 August, as well as the additional three victims on 13 August 2012.

348. Thereafter, on 17 August, the day after the massacre, she went on to address a parade of the SAPS members who had participated in the tragic operation to
thank them for what they had done, which she stated represented “the best of responsible policing”.

349. On 21 August 2012, she addressed the funeral service of one of the police victims, W/O Lepaaku, and reportedly stated that “we are not sorry” for what had happened in Marikana. Although no corroborating evidence was obtained for the making of this chilling statement, it is submitted that, on balance, her denials must be disbelieved mainly due to the fact that it would have been extremely abnormal behaviour for a public official not to refute such a prominent and negative report. The first denial of the statement came under cross-examination some six months after the publication of the article.

350. What followed was a series of statements made by the National Commissioner in preparation for the Commission, which can only be described as bizarre and dishonest. Under cross-examination, it can safely be said that her evidence on the evolution of the statements, the reason for the alterations and the involvement of Minister Mthethwa is untruthful and devoid of any credibility. The irresistible inference must be that she was, after the fact, leaned on to change her statement so as to deceive the Commission into believing that there was political pressure put to bear on the police leadership, which runs against the grain of the evidence.

351. A further reason why the Commission ought not to allow itself to be deceived in the aforesaid manner is the contrary evidence which came to light during the
previously undisclosed conversation between the Provincial Commissioner and Mr Mokwena. In a nutshell, it was revealed therein that:

351.1 the National Commissioner had referred to a politically high individual who was a Lonmin shareholder and who had reportedly been “pressurising” Minister Mthethwa; and

351.2 the Provincial Commissioner had said to the National Commissioner that the person was or must have been Cyril Ramaphosa, to which the National Commissioner responded that she “now got it”, because he (Ramaphosa) had presided over the ANC disciplinary process of Julius Malema, who should be prevented for political reasons from defusing the tense situation in Marikana, as he had done so before during the Impala unrest earlier in the year.

352. The revelation of this evidence must represent the single most important vindication of the version of the Injured and Arrested Persons, as presented in their opening statement, that the police were influenced by political motives and were in cahoots with Lonmin.

353. But, more significantly, the idea that two of the most senior police officers in South Africa could agree that a violent unrest situation, which had already resulted in loss of life, serious injury and destruction to property, should not be resolved or defused, purely to prevent a rival politician of the ruling party from taking the credibility, must be offensive even to the most neutral observer. This
attitude goes against everything enshrined in our Constitution and the applicable legal framework on policing locally and internationally. It is to be condemned and discouraged and punished. In short, it represents the worst of responsible policing.

354. Above all, this conversation opens the lid on the crucial question why the police behaved as they did. Once the top leadership had decided that there was a political imperative to act as soon as possible, the stage was being set for the half-baked and botched operation which resulted in the death and mayhem which eventuated.

355. The implication is therefore irresistible that, but for the unlawful actions and activities of the National Commissioner and the Provincial Commissioner, the massacre of 16 August 2012 would most definitely not have occurred.

356. It is clear that their articulated sentiments on urgency must have been carried through to the meeting of the National Management Forum. The two persons who were of the view that the operation had to be accelerated, for political reasons, were well placed to influence that meeting. The one was the boss and directing the meeting and the other was the affected Provincial Commissioner, having been on the ground. They were both aware of the pressure put on the Minister by Ramaphosa.

357. The importance of the NMF meeting could not be over-emphasised. Yet, both Phiyega and Mbombo did not disclose, both at Roots or in their statements to the
Commission, that a formal decision was taken at Roots to move to the crucial tactical stage. This was only admitted once the concealed information had been unearthed.

358. Had that information been successfully suppressed, then the Commission would have been none the wiser.

359. It is indeed so that the unlawful activities and utterances of the two commissioners were a response to the political pressure exerted by Ramaphosa via Minister Mthethwa as an unlawful conduit or conveyor belt thereof, but this cannot absolve the two top SAPS leaders of their own personal responsibility.

360. The SAPS Act clearly provides that any member has a right to disobey an unlawful order from above. This is what they should and could have done.

361. In view of the aforegoing, and to cut to the chase, it is subjected that a finding ought to be made that there was an actionable failure of leadership, which was causally connected to the deaths and injuries on the part of all four affected individuals and that they should all be charged with at least 34 counts of murder in the following order:

361.1 Cyril Ramaphosa as Accused Number 1;

361.2 Nathi Mthethwa as Accused Number 2;

361.3 Rhia Phiyega as Accused Number 3; and
361.4 Zukiswa Mbombo as Accused Number 4.

362. We now turn to the next level of SAPS leadership who should, for similar reasons of leadership failure and unlawful actions, face criminal charges for Murder.

C.2.3.4 Major General Annandale (Accused Number 5)

363. The next in line was General Annandale, who played a pivotal role. In his case, the breach of police procedures and prescripts seem to begin with his mere presence in and leadership of the operation. The idea of a senior officer inviting himself into such a major operation without any traceable authorisation from above is in itself troubling. The following are key aspects of his evidence and from which certain findings will be sought and which point towards both his culpability as well as his general failure as a (self-appointed) leader of the operation.

364. The cross examination of this witness was done against the backdrop of the Commissions Terms of Reference, insofar as it relates to the conduct of the South African Police Services, up to and including the massacre which occurred on 16 August 2012.
365. The cross examination was approached thematically. Evidence was elicited in terms of the 10 themes identified in the Opening Statement of the Injured and Arrested miners\textsuperscript{136}

366. Major General Annandale’s cross examination is relevant for its detail in relation to the following specific themes:

366.1 Who gave orders at all levels of government and the police chain of command;\textsuperscript{137}

366.2 The massacre could and should have been avoided;\textsuperscript{138}

366.3 The claims of self-defence are baseless;\textsuperscript{139}

366.4 The massacre exhibited a situation of premeditated murder of defenceless and powerless poor people;\textsuperscript{140}

366.5 What happened in front of Groot Koppie are instances of unjustifiable murder;\textsuperscript{141}

366.6 What happened at Klein Koppie are cold blooded executions;\textsuperscript{142} and

366.7 The demeanour and behaviour of the police showed that they were, \textit{inter alia}, motivated by revenge and malice.\textsuperscript{143}

\textsuperscript{136} The Opening Statement is Exhibit GGG18 of the record.
\textsuperscript{137} Id see theme 9.7 at page 6
\textsuperscript{138} Id see theme 9.1 at page 5
\textsuperscript{139} Id see theme 9.4 at page 5
\textsuperscript{140} Id see theme 9.3 at page 5
\textsuperscript{141} Id see theme 9.5 at page 5
\textsuperscript{142} Id see theme 9.6 at page 5
\textsuperscript{143} Id see theme 9.8 at page 5
On the question of authorisation to be at Marikana

367. Under cross-examination, Major General Annandale testified that he had not received specific instructions from anybody within the South African Police Services to attend at Marikana.\(^\text{144}\) It was his view, and he testified that he did not require anybody’s authority to attend at Marikana\(^\text{145}\) and he had a professional obligation in the light of the unrest at Marikana to attend. This was so also because the National Intelligence Unit, which he oversees, was deployed to attend at Marikana.

368. He did not dispute the fact that his arrival at Marikana on 13 August 2012 was on his own initiative. However, he insisted that his presence at Marikana was not unauthorised. Without producing any authority it was his bald assertion that his presence at Marikana fell within his job description, as well as the necessary “delegation of authority”.\(^\text{146}\)

The decision on what time Phase 3 would be implemented and the premature deployment of the barbed wire

369. On his version the decision to commence implementation of phase 3 to disperse the protestors at 15:30 on 16 August 2012, was taken collectively by the

---

\(^{143}\) Id see theme 9.8 at page 6
\(^{144}\) Day 87 p 19158 ll 21 – 25; p 19160 ll 2 - 6
\(^{145}\) Day 87 p 19162 ll 20 - 23
\(^{146}\) Day 87 p 19163 ll 6 - 9
JOCCOM. He could not however dispute that the proposal to commence Phase 3 at 15:30 was his.\textsuperscript{147}

370. He conceded that:

370.1 the decision to implement Phase 3 was delayed because AMCU’s President, Mr Mathunjwa was addressing the crowd;\textsuperscript{148}

370.2 if Mr Mathunjwa’s plea that the crowd leave the koppie was successful, the operation to disarm and arrest the protestors would not have taken place.\textsuperscript{149}

370.3 the implementation of phase 3, which began with the deployment of the barbed wire took place approximately three minutes after Mr Mathunjwa’s second address to the crowd;\textsuperscript{150}

370.4 a number of protestors had started to depart from the koppie after Mr Mathunjwa’s address.\textsuperscript{151}

371. He also did not dispute the evidence of Mr Magidiwana that Mr Mathunjwa’s second address had the desired effect of dispersing the crowd because a large percentage left the koppie after Mr Mathunjwa’s second address.\textsuperscript{152}

\textsuperscript{147} Day 87 p 19166 ll 1 - 20
\textsuperscript{148} Day 87 p 19167 ll 21 - 25
\textsuperscript{149} Day 87 p 19168 ll 1 - 23
\textsuperscript{150} Day 87 p 19177 ll 10 - 16
\textsuperscript{151} Day 87 p 19170 ll 21 - 25; p 19171 ll 1 - 9
\textsuperscript{152} Day 87 p 19170 ll 20 - 25
372. Thus, it was put to him that had he suggested that the operation be carried out an hour later, at 16:30 instead of 15:30 some of those people who were departing may very well have left the scene and made it home.\textsuperscript{153}

373. As a result, it was put to him, and he could not dispute, that some of the injured or arrested persons were trapped on the wrong side of the barbed wire because it was rolled out at a time which prevented them from going home.\textsuperscript{154}

374. Had the barbed wire been rolled out at a later stage, these persons would have been home and would not have been killed, injured or arrested. In essence, Major General Annandale was unable, under cross-examination, to dispute the fact that had the barbed wire been deployed at a later stage, many more protestors, including the so-called warrior group, may have left the scene. The upshot of Major General Annandale’s inability to dispute this evidence is that the protesting group was effectively trapped less than three minutes after Mr Mathunjwa’s address and that by the due exercise of responsible leadership by SAPS, the massacre would have been avoided by, for example, merely delaying the deployment of the wire for a period long enough simply to work out what impact Mathunjwa’s pleas had had on the strikers or the majority thereof.

\textsuperscript{153} Day 87 p 19175 ll 10 - 17

\textsuperscript{154} Day 87 p 19175 ll 20 - 25
The timing of the operation

375. In the broader sense of the date or day of the operation, it was directly related to the political pressure and related considerations.

376. In the narrower sense: was determined by Annandale, who had hijacked the operation

377. When one considers the undisputed evidence of Magidiwana corroborated by Nzuza, as testified to by Xolani Nzuza, that the front group of protestors who were perceived to be leading the crowd, had been told by Mr Noki, the so-called leader of the group of protestors, to disperse, the only reasonable inference that can be drawn is that the barbed wire was deployed prematurely with the purpose of trapping the protestors so as to disarm and arrest them. It is only because the protestors were trapped by the premature deployment of the barbed wire that they could not freely leave the koppie. Had they been allowed to leave, the unavoidable inference is that there would not have been such a severe and extensive loss of life. This is made clear by even a cursory look at the objective evidence of the movement of the strikers in the period between 15h43 and 15h52.

378. Major General Annandale was also questioned on the special JOCCOM meeting chaired by him on 16 August 2012 at 13:30. The minutes of this meeting in effect

155 Day 87 p 19183 ll 16 – 20; p 19184 ll 18 – 24; p 19185 ll 12 - 23
guided the operational plan insofar as disarming and arresting the protestors was concerned.\textsuperscript{156} He conceded that:

378.1 Exhibit EE, the minutes of the meeting, are a fair reflection of what occurred at the meeting;

378.2 the minutes correctly reflected that it was he who instructed Brigadier Pretorius and Lieutenant Colonel Scott to report back at the JOC at 15:15 because he wanted the operation to commence at 15:30.

379. The operation, he testified commenced approximately three minutes after Mr Mathunjwa had addressed the crowd and left. Mr Mathunjwa’s departure coincided with the granting of the order by Brigadier Calitz, the Operational Commander, that the barbed wire be deployed. The clear inference here is that Mr Mathunjwa’s effort to disperse the crowd was not given any chance by the police.\textsuperscript{157}

380. The barbed wire was deployed simultaneously with Mr Mathunjwa’s departure. Annandale was unable to give any clear evidence on why it was not possible to wait at least 15 or 30 minutes after Mr Mathunjwa’s address to deploy the barbed wire. At least, this would have given the police an opportunity to ascertain whether Mr Mathunjwa’s plea was going to be acceded to.\textsuperscript{158} Nor would another 15 minutes have negatively affected the availability of sunlight if the operation

\textsuperscript{156} Day 87 p 19194 ll 1 - 25
\textsuperscript{157} Day 87 pp 19195 - 19196
\textsuperscript{158} Day 87 p 19196 ll 10 – 18; p 19199 ll 8 - 14
was started at, say, 16h00. This kind of consideration would pale into insignificance weighed against the possible saving of lives; moreso if one considers that Phase 6 could be carried out later.

381. Instead, he testified only that the decision when to deploy the barbed wire would have been left by the JOCCOM to the discretion of the operational commander on the field, Brigadier Calitz. His only answer what that Brigadier Calitz was best placed to answer why the barbed wire was deployed so soon after Mr Mathunjwa’s departure.159

382. This was so because, in addition, Brigadier Calitz was both informed of the plan and aware thereof.

383. He was aware that Mr Mathunjwa had returned to the koppie for a second address. He knew this because Mr Mathunjwa had sent him an sms to that effect. The sms was then also communicated to the operational commander. He conceded that on receipt of the sms, he responded to Mr Mathunjwa by telling him that he is available at the JOC and that Mr Mathunjwa could well have returned to the JOC. Despite the fact that Mr Mathunjwa could well have returned to the JOC, placing an entire different spin on the facts as they may have unfolded, he nevertheless simply assumed that Mr Mathunjwa had completely withdrawn from assisting the police and that he was not going to

---

159 Day 87 p 19200 ll 15 – 25; p 19201 l 1
return to the JOC. With the benefit of hindsight, we now know that even if Mathunjwa had chosen to return to the JOC, the operation would have still been carried out immediately after his departure.

384. However, well before he had any indication on what Mr Mathunjwa intended to do in response to his sms, that he remained available at the JOC, the order was given to deploy the barbed wire. He confirmed that an instruction to this effect was given at 15:40. This was exactly at the time of Mathunjwa’s departure.

385. It was put to him that at least some of the people who had gathered on the koppie were there because Mr Mathunjwa had indicated the previous day that he was going to come back with feedback from the employer on the 16th. He accepted this contention.

386. He was also not able to refute that in the preceding five days, the crowd’s pattern of behaviour was to disperse at six in the evening and return home, and further that most people had gathered at the koppie on the 16th to hear Mr Mathunjwa’s feedback on his discussions with the employer. In the light of these facts, he refused to accede that it was reasonable to assume that since most people had specifically come to hear Mr Mathunjwa’s feedback on his discussion with Lonmin, the crowd would have dispersed after his address. Further, they may

---

160 Day 87 p 19202 ll 22 – 25; p 19203
161 Day 87 p 19208 ll 1 - 14
162 Day 87 p 19211 ll 20 – 25; p 19212 ll 1 - 17
163 Day 87 p
have also dispersed at six in the evening as had been the practice in the preceding five days. He could not refute these contentions.  

387. What is clear and undeniable is that a sizeable number of people began to disperse and leave the gathering immediately after Mathunjwa’s address. Although there was no direct evidence on the reasons for these departures, it can be safely speculated by the Commission that they did so either because:

387.1 it was clear that Mathunjwa had failed to resolve the impasse;

387.2 some believed Mathunjwa’s warnings that the police were planning to kill them and were obeying his pleas for them to disperse; and/or

387.3 the actions of the police in clearly preparing for “something” and rolling out the first wired nyala, convinced even the doubters that Mathunjwa had been right; and/or

387.4 they were scared and confused as they did not know whether the intentions of the police were to arrest, assault or kill them. (This confusion was directly a result of SAPS’ self-confessed failure to communicate a warning, as prescribed in law.)

388. The point is simply that whichever reason was dominant, even if it was a combination of the above, SAPS had a duty to give a few minutes for the voluntary dispersees to leave the scene before embarking on a potentially fatal

\[^{164}\text{Day 87 p 19213 ll 16 – 25; p 19214 ll 10 - 18}\]
operation. Ironically, this would have made their task easier as they would only have had to deal with a residual “intransigent” group, if any, thus minimising both the risk of unnecessary death and injury, as well as acting against innocent people. This talks to the common law requirement of using only such force as would be necessary.

389. Without providing any justification, Annandale vaguely answered that the other alternative was that they had different intentions and those intentions would have motivated them to stay on the koppie.¹⁶⁵ No material evidence to this effect was presented. He argued only that the crowd represented a high risk and it was his experience that this was so because of the fact that they were an armed group. This is contradictory to the latest police version that only about 10% (ie 300 out of 3,000) of the crowd was armed and dangerous.

390. He relied on generalised examples of experience in other public order policing scenarios, such as Sasolburg and Zamdela, but could not refute that the systematic pattern of the crowd between 11 and 15 August was to leave the koppie at approximately 6 o’clock every evening and return on the following day. He could further not refute the fact that most people may indeed have left the koppie after Mr Mathunjwa’s address. In essence, he could not materially dispute the fact that given the pattern of events reflected from the 11th to the 15th, the crowd could very well have departed as they had before at about 6 o’clock.¹⁶⁶

¹⁶⁵ Day 87 p 19214 ll 10 - 13
¹⁶⁶ Day 87 p 19215 ll 4 - 14
391. On this score, he simply indicated that the context was such that the 16th represented a total higher risk and that the police believed, in the light of this risk, that the main militant group would not disperse in the same manner that they had done the previous two days and that instead they would become violent and harm the community and property. He provided no support for this assertion and indicated simply that it was their reasonable belief that the smaller group would disperse.  

167 It was put to him that even if that was true, i.e. the belief that the larger group would disperse in an hour or two but the smaller group would remain, that possibility was not given a chance because of the premature deployment of the barbed wire, and, had it been given a chance, indeed some lives may have been spared and some injuries not sustained.  

392. The objective evidence is totally against any suggestion of any new danger which prevailed on the 16th. On the contrary, the evidence is that this was the most peaceful and eventless two days in the relevant period, relatively speaking of course. Accordingly, there is no suggestion that in the 2½ hour period between 15h30 and the usual dispersal time of 18h00 or so, any new danger would have been posed by the crowd.

393. He simply responded that he had explained the plan and the reasoning why the plan was to be carried out at 15:30. The police service did not have the opportunity to implement the plan other than the way in which it was

167 Day 87 p 19216 ll 16 – 21; p 19217 ll 1 - 12
168 Day 87 p 19217 ll 14 - 21
implemented. Without providing any justification or substance to his answer, he simply indicated that the alternative was also possible and he believed that behaviour of the police was suited to the circumstances. The police were forced, in the light of the experience and the circumstances known to them at the time, to make a decision.\(^{169}\)

394. The real issue which was put to him was that he had arrived at Marikana without the necessary authority to do so and within 72 hours of his arrival, he had made a suggestion in respect of the time at which the operation was to be carried out and because of the suggestion, many lives were lost. He could not dispute this assertion. Thus the direct causal link between his actions and the 34 deaths was established. He answered only that his presence at Marikana was authorised and reasonable. He was there representing the interests of the Provincial Commissioner, who certainly, he contended, had the prerogative to ask him to leave and to deploy his members only. He contended further that the suggestion to commence the operation at 15:30 made by the JOC sitting collectively, but could not deny the fact that he was he who suggested that the operation commence at half past three. However, he stated that one of nine people present at the meeting could have made the suggestion but could not dispute when it was put to him by the Chairperson that it was he who wanted Scott to report back at the JOC at quarter past three, because he wanted the operation to commence at half past three.\(^{170}\)

\(^{169}\) Day 87 p 19217 ll 22 – 25; p 19218 ll 1 - 4
\(^{170}\) Day 87 p 19223 ll 1 – 8; ll 16 – 25; p 19224 ll 1 - 7
395. Overall, Major General Annandale could not in cross-examination dispute the following key factors:

395.1 That the operation commenced at 15h30 exclusively on his suggestion;

395.2 As a result of this proposal, Mr Mathunjwa’s plea for the miners at the koppie to disperse was not given an opportunity to play itself out, in spite of the objective indications that the crowd wanted to disperse, either as a result of Mthunjwa’s warnings or the deployment of the wire by Nyala 1 or both;

395.3 That insufficient time was given for the briefing of members on the ground who were going to implement the operation, with the result that some of them were briefed for only ten minutes;

395.4 That the failure to give a warning as prescribed would have left the strikers not knowing what the intentions of SAPS were and, more importantly, what was expected of them.

396. The overall effect is that the evidence showed and Major General Annandale could not concretely dispute that the deployment of the barbed wire at 15:30 was premature, and that this premature deployment directly resulted in needless injuries, death and arrests. His suggestion that the implementation of Phase 3 commence at 15:30 was one of the central reasons why the massacre occurred. In this sense he was directly responsible for the deaths and injuries of the specific victims who may have survived, escaped or gone home if the operation
had commenced later, or earlier for that matter. This can be simply illustrated by removing his 15h30 instruction and postulating what would have happened. Alternatively, one can postulate what would have happened had the operation been postponed for 30 minutes.

**The briefing time was insufficient**

397. Major General Annandale was also extensively cross-examined on the briefing time required at all levels for the proper implementation of the operation. On this score, he testified that briefing took place at three levels. First, the leadership was briefed on the situation developing at the koppie. Second, the overall commanders were briefed on the proposed implementation of the plan to be carried out on 16 August and third, commanders were then expected to brief the individual members of the police force who would be on the ground carrying out the operation, the so-called “foot soldiers”.

398. He conceded also that this was one of the biggest operations of its kind involving a violent protest and was certainly one of the biggest protests that he had scene in his 30 years of experience. The briefing of the leadership happened at the JOCCOM at 13:30.

399. The second briefing that took place was to notify the commanders and the third level was the briefing of members who reported to those commanders.

---

171 Day 87 p 19234 ll 3 - 16
172 Day 87 p 19233 ll 20 – 25; p 19234 ll 1 - 2
conceded that this was in fact so but that the first information session had in fact already begun on Tuesday 14 August. The levels of information sharing were such that the overall commander would inform the operational commander, who alternatively would see to it that the operational commander is properly briefed. The operational commander would then brief the various commanders, who would in turn brief the individual members. He conceded under cross-examination that all of this was to happen in a two hour period. He is aware that the briefings carried out by Lieutenant Colonel Scott, following the JOCCOM meeting at 13:30 lasted until at least 15:15. As a result, it was put to him that this left only 15 minutes for the third level briefings to be carried out.173

400. In line with what had been earlier discussed, it was put to him that had he hypothetically set the operation to commence at half past four, there would have been more time to brief the third level tier. In response, he confirmed that Colonel Scott had briefed Brigadier Calitz and he does not know exactly how long this took. He confirmed further that Colonel Scott did in fact return to the JOC at 15:15 as instructed by him.174

401. When questioned on the appropriate amount of time necessary for the relevant briefings to be given, he responded that, in his opinion, a total of one hour would have been sufficient to brief both the commanders and further for the commanders to brief the members who reported to them. On this score, he

173 Day 87 p 19234 ll 18 – 25; p 19234 l 25 – p 19235 l 10; ll 21 – 25; p 19236 ll 1 - 13
174 Day 87 p 19236 ll 14 - 25
testified that it had to be accepted that the operational commander, Brigadier Calitz, and the other member were experienced and trained and that they were relaying the very same information to the other commanders, who would in turn relay the very same information to their members. 175

402. He denied that it would take more time to brief the troops on the ground than it would take to brief the commanders. He testified that it should take longer to brief the commanders because they were briefed on the operation in its entirety and the same applied to the operational commander since the latter was responsible for the implementation of the entire operation. Then, individual members would then be briefed on specific aspects of their role in the operation. 176

403. As an example, he mentioned that Brigadier Calitz would then brief Colonel Makhubela on the deployment of the barbed wire since this was the latter’s responsibility. He conceded that it would have been preferable if the briefings, particularly those to the foot soldiers, were given adequate time so that they could get the full details in relation to the critical aspects associated with an operation of this size. This is why, had the operation commenced later, not only would it have been an opportunity to test whether Mr Mathunjwa’s plea was successful, but also it would have given the police themselves a chance to properly and comprehensively brief all those involved in the operation. He

175 Day 87 p 19236 ll 23 – 25; p 19237 ll 1 - 16
176 Day 87 p 19238 ll 2 - 9
denied this, contending that an hour was sufficient to do the required briefings but could provide no justification for this assertion and could also not provide any explanation as to why one hour was sufficient time to communicate what had taken place in the 13:30 meeting.\footnote{Day 87 p 19239 ll 6 – 25; p 19240 ll 1 – 9; ll 17 - 20}

404. The Commission ought to reject the suggestion that the briefing time was in the circumstances sufficient, for three main reasons. Firstly, Annandale’s own version is that there was no precedence for an operation of this size, so his estimate is at best an \textit{ex post facto} thumb-suck. Secondly, the Commission is in a good position, purely out of common sense, to find that the briefing of almost a thousand people on a potentially dangerous enterprise would ordinarily need to be done over a much longer period of time and repeatedly to eliminate the margins of error. Thirdly, Standing Order 262 and other related prescripts make it abundantly clear that internal communication is essential in the carrying out of such an operation. This much was correctly conceded by Brigadier Calitz.

405. It was put to him that the commencement of the operation at 15:30 resulted in a reduction of the available time for briefings and that a briefing of ten minutes was not adequate for an operation of this nature. His comment in that respect was simply that Colonel Scott was back at the JOC by 15:15 and at that stage, he had already briefed the commanders present at the koppie. As a result, he contended that it took more than ten minutes for Colonel Scott to brief the commanders and the instruction to roll out the barbed wire was only given at
15h40. He cautioned the Commission to remember that the members who had to be debriefed were with their leaders and suggested, without any concrete evidence to this effect, that there may have been a simultaneous briefing. As it turned out, there was additional reserve time. It was his view that the additional briefing time dealt away but the causal connection between the inadequate briefing time and the implementation of the operation as it transpired. He could provide no justification for this standpoint. 178

406. He did not concede that ten minutes was insufficient time to brief those tasked with the responsibility of carrying out the operation and contended rather that information sessions were conducted at various stages and that, even if briefing sessions were ten minutes, this may have been sufficient. 179 This kind of intransigence, with respect, flies in the face of common sense logic, the spirit of the prescripts and the objective reality of so many policemen from various provinces, the majority of whom were clearly unfamiliar with the terrain or the mood of the protestors, except through the exaggerated warnings of people like Captain Kidd that they were all “dangerous”. It is common cause, for example, that members of the NIU and STF were only briefed at 15h20 for an operation which was scheduled to commence at 15h30. 180

407. He denied that there was a frenzy and that any paramilitary unit was deployed to Marikana. He simply travelled to Marikana to familiarise himself with the

178 Day 87 p 19242 ll 19 – 25; p 19243 ll 1 - 21
179 Day 87 p 19243
180 Exhibit L183
circumstances relevant to the assistance that was required.\textsuperscript{181} It was his intention to return to Pretoria on the evening of 13 August after he had consulted with the Provincial Commissioner and the overall Commander. However, the Provincial Commissioner had requested that he stay.\textsuperscript{182} Further, the National Commissioner confirmed that he was required to assist the province, that his presence there was authorised and based on her instruction.\textsuperscript{183} The death of the two policemen was as a result of the escalation of deaths and the death of five persons as well as the other injuries that were inflicted on the day, ie 13 August 2012. He implied that he was requested by the National and Provincial Commissioners to continue rendering assistance because of the death of all five people, not simply because of the death of the two police officers.

408. It was put to him that this was not so because, in his initial statement, he said that he was called by Major General Naidoo and informed that two police officers had been killed and a third officer seriously injured when a group of striking workers working at Lonmin, Marikana, near Rustenburg, attacked them during a protest march. As a result, the province required additional personnel to be deployed and he left Pretoria.

409. In his latest statement,\textsuperscript{184} he also mentioned that he was requested by the Provincial Commissioner to remain at Marikana because some of the protestors were killed in subsequent police action. The first statement was dated 15

\textsuperscript{181} Day 88 p 9328 ll 21 -25
\textsuperscript{182} Day 88 p 9328 ll 21 – 25; 9329 ll 1 - 9
\textsuperscript{183} Day 88 p 9329 ll 10 - 13
\textsuperscript{184} Exhibit GGG1 to the record
October and the second 12 November 2012. It is in the second statement that the reference to the three civilians who were killed is suddenly mentioned. The only explanation that he was able to furnish is that the statements were designed and prepared for two different purposes. The statement dated 15 October 2012 was prepared for IPID, whereas the statement marked GGG1 and dated 12 November 2012 was prepared for the Commission. It was his case under cross-examination that the reason why additional personnel was required was because of the escalation in deaths and because of the request of Major General Naidoo at the time.\textsuperscript{185}

410. All in all, and in view of the aforegoing analysis of Annandale’s evidence, it cannot be gainsaid that:

410.1 his actions were indicative of the systematic failure of leadership on the part of SAPS;

410.2 his actions and/or omissions directly caused the loss of 34 lives and the related injuries and arrests which took place on 16 August 2012; and

410.3 a \textit{prima facie} case of 34 counts of murder has been made against him, hence the recommendation that he be listed as Accused Number 5.

\textbf{C.2.3.5 Brigadier WS Calitz}

411. Brigadier Calitz was the designated Operational Commander.

\textsuperscript{185} Day 88 p 9330 ll 20 – 25; 9331 ll 6 - 14
412. The events of the 13\textsuperscript{th} significantly impacted on the operations of 16 August 2013. There was a heightened sense of caution, which Brigadier Calitz conceded affected the mood of the members deployed at the koppie and was integral to the development of strategy for the 16\textsuperscript{th}.

413. In this sense, it is the case of those miners injured and arrested on the 16\textsuperscript{th} of August that the 13\textsuperscript{th} was what has been referred to as a second game-changer. It changed the trajectory of events by directly influencing the psyche of those deployed to the koppie. The perception was that a gruesome incident had transpired, and that this incident was to be borne in mind at all times when dealing with the protestors on 16 August. It was specifically understood by those deployed to the koppie that the crowd they had been called upon to manage were armed and dangerous and that the incident which transpired on the 13\textsuperscript{th} was not to be repeated.

414. It has been shown that the incident on the 13\textsuperscript{th} was an integral factor to the decision to use force on 16 August. The evidence related to this incident must be contextually examined with a view to determining whether the decision to use force was, in the circumstances, reasonable and justifiable.

415. The available evidence demonstrates that the heightened sense of awareness, the presumption that the crowd was constituted of a group of violent, dangerous protestors and the its influence on the manner in which the crowd were to be dispersed, resulted in a disproportionate use of force and a lack of restraint on the part of the SAPS members in managing the gathering on 16 August 2014.
Below is a summary of the evidence of Brigadier Calitz demonstrating the following key evidentiary issues:

415.1 The 13th constituted a game changer as pleaded in the opening statement of those injured and arrested;

415.2 The unrestrained and disproportionate use of force shows that the force used on 16 August was unreasonable and unjustifiable; and

415.3 With reasonable restraint the massacre would have been avoided. Thus, the massacre could and should have been avoided.

416. Brigadier Calitz could not dispute that the 13th impacted upon and directly influenced the strategy of the operation on 16 August. This influence extended to the crafting of the movements on the 16th August. There was a perception that the crowd was dangerous and this perception was phased into planning the operation on the 16th of August.

417. He was further unable to dispute that some police officers were indeed affected by the incident that occurred on the 13th August and were not removed from Marikana and stationed elsewhere.186 He was able to say only that Colonel Merafe was excused from the operation because some of the members who

---

186 Day 170 p 19938; p 19939
passed on reported to him and he (Merafe) left Marikana to assist with the planning of the memorial service and funerals.\(^{187}\)

418. What emerged uncontested in his cross examination was that there was a direct connection between the events of the 13\(^{th}\) and the mood of the deployed members on the 16\(^{th}\). To that extent the 13\(^{th}\) constituted a game changer resulting in conduct of some members on the 16\(^{th}\), who may have been affected by the events of the 13\(^{th}\). Despite the fact that the SAPS may have removed those members alleged to have been affected by the incidents of the 13\(^{th}\). He could not dispute that some members may still have been affected, and these affected members deployed to the koppie on 16 August.\(^{188}\)

419. It was shown and he conceded that the second way in which the events of the 13\(^{th}\) impacted on the 16\(^{th}\) was in the planning of the operation on 16 August. Numerous statements in the exhibits demonstrate this. He responded simply that he would agree that exhibit “L” referred to the 13\(^{th}\) as well as the 16\(^{th}\).\(^{189}\)

420. He was however pressed by the commission and conceded that after the events of the 13\(^{th}\) the planners took into account the behaviour of some of the strikers. In doing so they tried to ensure that there would not be a repetition of what happened on the 13\(^{th}\). The simple fact that on the 16\(^{th}\) the police perceived the incident on the 13\(^{th}\) as an attack by the strikers with gruesome consequences,

\(^{187}\) Day 170 p 19941 ll 16 - 25.  
\(^{188}\) Day 170 p 19942 ll 2-20.  
\(^{189}\) Day 170 p 19943 ll 1 - 14
could not be disputed by him. That perception was then included in the planning. The result was that the plan was devised in such a manner so as to prevent the incident which transpired on the 13th from occurring again.  

421. It was put to Brigadier Calitz that one of the group commanders, Captain Kidd had said to his members that they must bear in mind the events of the 13th. Thus the indisputable conclusion was that the 13th had a very direct impact on the mood of the members as well as the plan itself. The mechanics of the plan were based on what happened on the 13th. If the 13th had not happened the 16th may not even have happened or would have happened differently. Hence, it is correctly labelled a game-changer or sine qua non. 

422. The evidence given by General Calitz regarding the events on 16 August prove the sub themes that the massacre could and should have been avoided; the claims of self defence were baseless; and that what unfolded at Scene 1 were instances of unjustifiable murder. 

423. When regard is had to the terms of reference, Brigadier Calitz’ evidence shows that the conduct of the SAPS in blocking the road to Nkaneng, and channelling the miners to what was effectively their death by not physically closing the open space between the Nyala 4 and the kraal, directly and indirectly caused loss of life. 

---

190 Day 170 p 19943 ll 18 - 25; p 1994 ll 1 - 10
191 Day 170 p 19946 ll 16 - 26
192 Day 170 p 19948 ll 11 - 18
424. It shows further that the force continuum principles were not applied. The basic line used live ammunition as a first resort. Thus there was a clear violation of legislation and policy. Further, maximum force was applied by the TRT line at the outset and in some instances members shot without command, and in circumstances where they were not acting in self defence.

425. The level of force used by the basic line at scene 1 was unreasonable. There was no intention on the part of the small group to attack the basic line. They intended simply to access the road to Nkaneng, which had been blocked off by Nyala 4.

426. The evidence revealed that there were three categories of officer on the day, the first being those who shot on command, the second those who allegedly acted in self defence and the third, those who tactically retreated. The first group acted in terms of an unlawful instruction, the second cannot use the justification of self defence because they voluntarily assumed the risk by placing themselves in the line of fire, and the third adopted the correct approach.

427. What importantly appears from his evidence is that the basic line was operationally planned at being 100 metres away from Nyala 4. However, it moved closer to about 12-18 meters away. The gap was thus substantially closed. In these circumstances TRT members in the basic line voluntarily placed themselves in the line of fire, and the justification of self defence does not avail itself to them.
428. It was also unreasonable for the TRT line to shoot and to hold the belief that the protestors were planning to attack them and not to turn left on the road to Nkaneng. Mr Magidiwana’s evidence shows that the protestors had every intent to detour into Nkaneng, but could not do so because the road was blocked by Nyala 4. They were thus forced to circumnavigate the kraal and the circumnavigation took place before the formation of the TRT line. Calitz conceded that the TRT basic line had not been formed when the smaller group went around the kraal. What this demonstrates is that there was no intent on their part to attack the TRT line. They did not even know that it had been formed. The only other motive for the circumnavigation, as demonstrated by the evidence was to access what Calitz himself conceded to be the shortest route to Nkaneng. All this must have been known both to the person who ordered the TRT members to run towards the gap and to the TRT members themselves.

429. The only difference between the larger and the smaller group was that the former could access the path and the latter could not because on their arrival it was blocked by Nyala 4.

430. Even if the smaller group had met up with Nyalas and Casspirs in Nkaneng or on whilst on their way, it was still a remarkably different situation from meeting up with the live ammunition of the TRT basic line. This is so because in terms of the force continuum these vehicles used only water cannons, tear gas and stun grenades.

431. Further the road to Nkaneng was blocked on the strength of speculation.
Another material failure or omission was that the opening between the kraal and Nyala 4 was not closed off. This is where the deaths at scene 1 occurred, effectively channelling people to their deaths. Calitz conceded that it was physically possible to close the gap, but gave no plausible explanation why it was not done.

All the above show that there was no intention to attack, but rather just to go home to Nkaneng. The command to shoot was thus unlawful. Self defence is not available to those in the basic line, and the actions by the police at scene 1 show a violation of protocol and an unrestrained and unreasonable

Brigadier Calitz agreed that the manner in which the plan was implemented was an integral part of the plan itself. In a further briefing on 18 August 2012 he is recorded as saying that the implementation of the plan to disperse and disarm the crowd was 110% successful from planning to execution. He stated under cross examination, that he still held this view.

He testified further that at that particular briefing he was congratulating the Papa Nyala’s for holding a basic line, whilst the operation moved forward. However, it was shown during cross examination that the only unit which formed a basic line was the TRT. The only plausible interpretation was that he was congratulating
the TRT for what transpired at Scene 1.\textsuperscript{195} He could produce no material justification in support of his assertion that he was congratulating the POP line.

436. It was further put to him by the Commission that it was always understood that his congratulatory remarks were addressed to the TRT because the line that was held and referred to was essentially the TRT line.\textsuperscript{196} His only response was that he was referring to the POP line kept whilst they were moving forward, until they reached the area where they regrouped. He stated that at a later stage in that same discussion, he referred to the TRT basic line and the command given in respect thereof.\textsuperscript{197}

437. Brigadier Calitz conceded that at the briefing on 18 August he said that when some members came under attack, they were given the command to shoot and that those not so commanded acted in self defence. This is why exhibit JJJ82 records him as saying that some members acted in self defence and others on command.\textsuperscript{198} There were on his version three categories of members on the basic line, those who acted on command, those who acted in self defence and those who did not act at all and did not use weapons.\textsuperscript{199}.

438. The basic line he testified was a very important instruction. It was then put to him that the geographical location of the basic line was one the direct contributory

---

\textsuperscript{195} Day 170 p 19665 ll 17 - 22
\textsuperscript{196} Day 170 p 19966 ll 21 – 25; p 19967 ll 1 - 2
\textsuperscript{197} Day 170 p 19667 ll 3 - 4
\textsuperscript{198} Day 170 p 19971 ll 14 - 25
\textsuperscript{199} Day 170 p 19972 ll 6 - 13
factors to the death of the persons shot at Scene 1.\textsuperscript{200} The outcome of scene 1 was dependent on the distance between the TRT line and the strikers. The location of the basic line had an important bearing on what happened. If the line had been 20 or 50 metres behind the POP, the result would have been different.\textsuperscript{201}

439. His only response was that the TRT line was there to support the POP and their actions were in reaction to the situation they were faced with. As a result, he was pressed by the Commission to proffer an answer on the impact of the line relative to the deaths of those at Scene 1. Using Google Earth the commission estimated that the distance between the head of the TRT line, Warrant Officer Kuhn, and the protestors was some 12 metres, and the distance between the line itself and the protestors was some 18 metres.\textsuperscript{202} When questioned by the Commission, on whether, if the line been some 50 metres away, the result might well have been very different,\textsuperscript{203} he incredibly testified that there would still have been tragic consequences\textsuperscript{204}. This evidence must be rejected.

440. He accepted that the version of some officers was that they acted in self defence. It was put to him that one of the key issues that had to be examined on this score is whether when the protestors reached the road in front of the kraal, they would have turned left to Nkaneng, or crossed the road and attempted to kill the TRT

\textsuperscript{200} Day 170 p 19971 ll 18 - 22; p 19775 ll 17 - 24
\textsuperscript{201} Day 170 p 19967 ll 9 - 20
\textsuperscript{202} Day 170 p 19978 ll 2 - 16
\textsuperscript{203} Day 170 p 19979 ll 7- 20
\textsuperscript{204} Day 170 p 19980 ll 1 -9
officers.\(^{205}\) A further issue that arose from this was whether if the police reasonably believed that the protestors were not going to turn left to Nkaneng, they had further reason to believe that the protestors were advancing toward them with the intention of implementing the alleged threats.\(^{206}\)

441. On this score there was undisputed evidence from Mr Magidiwana that on reaching the road, it was the intention of the strikers to turn left to Nkaneng. He testified further that Mr Noki had specifically said to them that they should walk not run to Nkaneng because they had done nothing wrong.\(^{207}\) Even Mr X stated that they were moving towards Nkaneng.

442. The issue that arose from this and the geographical location of the basic line was that if the basic line were 40 or even 20 metres further behind where it actually was, the point at which the police perceived their lives to be in danger would have been different. He could not dispute this arguing simply that even if the line were 50 meters behind its determined geographical location, with the benefit of hindsight the incident at Scene 1 would still constitute self defence.\(^{208}\)

443. It was put to him further that there was no evidence in the Commission that those in the basic line had seen any firearms in the protestor’s possession. There was evidence only that the threat posed was by the pangas, spears and other traditional weapons, and thus the existence and degree of the threat would be

\(^{205}\) Day 170 p 19981 ll 10- 17
\(^{206}\) Day 170 p 19981 ll 21 – 25; p 19982 ll 1- 6
\(^{207}\) Day 170 p 19982 ll 23 – 25; p 19983 ll 1- 5
\(^{208}\) Day 170 p 19984 ll 2- 14
determined by the distance between the TRT line and the person holding the panga.\textsuperscript{209}

444. Alternatively, even if it could be said that some members saw protestors armed with guns, the primary identified source of danger was the pangas.\textsuperscript{210} He conceded the possibility that it well have been instructed that the use of live ammunition should be confined to when lives are at risk.\textsuperscript{211} He conceded later that on 16 August it was the attitude of the police that live ammunition should only be used when lives were at risk.\textsuperscript{212} He assumes that something must have been said about self defence, but he does not exactly know what was said.\textsuperscript{213}

445. It was put to him however that the law would not protect those who voluntarily assumed a risk. On this score, it was further put to him that the TRT had voluntarily placed themselves in the position where they were forced to use live ammunition and the justification of self defence did not avail itself to them.\textsuperscript{214} He could not deny this, stating only that the members were experienced and reacted to the situation they were faced with.\textsuperscript{215}

446. There were those members who chose not to assume this risk and voluntarily retreated. He contended that when he referred to police officers not being able to withstand being attacked with a panga or spear, he was referring to the POP, and

\textsuperscript{209} Day 170 p 19984 ll 15 – 25; p 19985 l 1
\textsuperscript{210} Day 170 p 19986 ll 12 - 20
\textsuperscript{211} Day 170 p 19987 ll 13 - 15
\textsuperscript{212} Day 170 p 19990 ll 1 - 13
\textsuperscript{213} Day 170 p 19987 ll 19 - 23
\textsuperscript{214} Day 170 p 19990 ll 1 - 10
\textsuperscript{215} Day 170 p 19990 ll 11 - 15
his latter remarks, where he refers to the second phase were addressed to the TRT and the NIU. In his address he meant that the POP had wisely retreated. He was not referring to the TRT or the NIU because they did not retreat, and further the option of retreating in a Nyala was available only to the POP officers.\footnote{Day 170 p 19991; p 19992 ll 1 - 19}

447. However, this still left the question whether the policemen in the basic line reasonably perceived a threat to exist, and the answer to this question depended also on the voluntary assumption of that risk.\footnote{Day 170 p 19993 ll18 – 25; p 19994 l 1}

448. He conceded that the TRT basic line must have on instruction run to the spot which placed them closer to the protestors.\footnote{Day 170 p 19996 ll18 - 21} He conceded further that the TRT officers were commanded to form a basic line and that this command included preparing themselves tactically for any scene they faced.\footnote{Day 170 p 19997 ll 6 -10; 14 - 21} In essence the instruction to cock your gun is subsumed in the instruction to form a basic line.\footnote{Day 170 p 19997 ll 22 - 25}

449. He conceded further that the basic line was formed before the protestors emerged from around the kraal and that at the stage when Nyala 4 blocked off the access road to Nkaneng there was no basic line.\footnote{Day 170 p 19998 ll 20 -25; p 19999 ll 12 – 23} It could thus not be disputed that because Nyala 4 had not closed off the road to Nkaneng before the arrival of the TRT, the protestors, were correct in their version that they intended
to seek refuge at Nkaneng. They certainly were not accessing the road to go to the basic line, because at this stage the basic line had not been formed. Were it not for Nyala 4 blocking the road, they would have continued to Nkaneng.\textsuperscript{222}

450. The larger group, what he termed more peaceful group’s earlier arrival at the footpath was not coincidental. The smaller, what he termed more militant group chose to stay behind, whereas the larger group decided before the time to move. They were allowed to freely move into Nkaneng. This dispersal action was then aimed at the smaller more militant group\textsuperscript{223}

451. He was unable to contest further that the larger group of people who dispersed after Mr Mathunjwa’s address arrived in Nkaneng using the footpath blocked by Nyala 4 prior to its arrival.\textsuperscript{224} From his evidence it was shown that the only difference between the larger and smaller group of protestors was that the former arrived at the footpath before the latter, were allowed to move freely and could gain access to Nkaneng via the footpath because it was not blocked.\textsuperscript{225} It was established as a fact in his cross examination that it was the larger group who first went to Nkaneng using the footpath, and the smaller group who could not.\textsuperscript{226}

452. It was conceded that even if the smaller group had moved into Nkaneng they would still have met up with the POP and the TRT. There were four further Nyalas and a Casspir in the direction they were heading. There would still have

\textsuperscript{222} Day 170 p 20000 ll 1 - 15  
\textsuperscript{223} Day 170 p 20007 ll 14 – 19  
\textsuperscript{224} Day 170 p 20004 ll 1 – 25  
\textsuperscript{225} Day 170 p 20007 ll 13 – 25; p 20008 ll 1 – 5  
\textsuperscript{226} Day 170 p 20009 ll 4 – 9; See also exhibit L191 and L193
been a confrontation, but indeed the nature thereof may have been entirely different from the situation where they faced the basic line armed with R5 assault rifles.  

453. He agreed that one of the reasons for deploying the barbed wire was to prevent the protestors from getting to Nkaneng so as not to endanger the residents of Nkaneng, if the situation became confrontational.  

454. It was demonstrated during his cross examination that one of the reasons for the deployment of the barbed wire was entirely speculative in nature. The police deployed the barbed wire to block entrance to Nkaneng because they suspected something might happen and wanted to prevent it. They did not do it to stop a confrontation that was on the verge of taking place happening. They guessed that the confrontation might well take place and took preventative action to make sure it didn’t.  

455. It was put to him that the only reason the so-called militant group was forced to go around the kraal was because Nyala 4 did not leave a gap and of course they could not forge their way through the barbed wire without facing certain injury. It was the closing of the path that resulted in the group going around the kraal because they could no longer proceed through the closed path to Nkaneng.  

He conceded that the path was indeed closed up to the kraal and they had to

---

227 Day 170 p 20010; p 20011; p 20012  
228 Day 170 p 20013 ll 16 – 21; p 20014 ll 4 – 14  
229 Day 170 p 20014 ll 13 – 23; p 20016 ll 19 – 25; p 20017 ll 1 - 9  
230 Day 170 p 20017 ll 13 - 24  
231 Day 170 p 20018 ll 1 - 11
move around the kraal. The only intervening cause for the movement around the kraal was the closure of the gap by Nyala 4.

456. He conceded further that the time it took for the protestors to go around the kraal allowed for the formation of the basic line. Personally he did not see any protestors armed with firearms.

457. He was instructed that the TRT line should be at least 100 metres behind the Nyalas. In fact exhibit L191 showed that they were indeed, at least initially, 100 metres behind the sedans and the negotiation Nyalas. Thus, it must be so that when they moved from there to where the basic line formed, they reduced the 100 metre distance. He agreed that this was so because if they were to provide support to the POP then they would automatically have to come closer. He accepted that the distance was thus reduced.

458. He testified further that behind the TRT line, i.e. the so-called basic line and behind it a NIU line was forming up. The purpose of this formation, according to the instructions given was that the NIU together with the STF would assist in dispersing the crowd in a north west direction, and if this was successful then those persons would be requested to leave their weapons at the koppie. It was the NIU’s task to come afterward to conduct sweeping action at the big koppie.

---

232 Day 170 p 20019 ll 10 – 13
233 Day 170 p 20021 ll 15 - 20
234 Day 170 p 20022 ll 1 - 18
235 Day 170 p 20024 ll 1 - 25
236 Day 170 p 20025 ll 6 - 8
237 Day 170 p 20028 ll 2 – 4
with the STF vehicles and the TRT would then implement sweeping action at koppie 2. 238

459. He confirmed that the original task of the TRT, STF and NIU was to conduct sweeping action at koppie 2. The TRT had the additional task of providing support to the POP because if they dispersed the crowd it was envisaged that arrests would be carried out too, and the TRT was required to support and protect the POP in dispersing and arresting the crowd. The NIU was just responsible for sweeping action at koppie 1.239

460. He confirmed that in terms of the original plan, the first tactical line was the POP officers who were going to use less lethal force and move forward to disperse the crowd with water cannons, stun grenades and teargas. Behind them were the TRT people who were there partly to protect and partly to assist as well as the STF.240 So the first line was the POP line, and fairly close behind it was the TRT line, and behind the TRT line the NIU line. 241

461. In terms of the original plan a distance of 100 metres was envisaged between the POP nyalas and the TRT line. On the commencement of the plan, before it was disrupted the distances were going to be shorter and would be reduced to a few metres. They had to be close to arrest on the crowd being dispersed. Thus they

238 Day 170 p 20028 II 5 - 16
239 Day 170 p 20028 I 25; p 20029 II 1 – 6
240 Day 170 p 20032 II 13 – 25
241 Day 170 p 20034 II 1 - -14
had to be in a close contact position.\textsuperscript{242} The NIU was however not tasked with dispersing and arresting the crowd. In the event of the crowd being successfully dispersed their job was to move to koppie 1 where they would search the persons found there. They were not take part in dispersing the crowd but were stationed about 10 metres behind the TRT.\textsuperscript{243} Thus the overall distances were shorter. It was put to him that this was not placed on the record before and that Colonel Scott had conceded that the distance was meant to be 100 metres because the range of the R5’s would have been sufficient at this distance.\textsuperscript{244} He testified however that this plan, which was devised on the Tuesday and this assertion was abandoned. Whatever the devised plan it could not be implemented because of the disruption.\textsuperscript{245}

462. He testified further that even if Nyala 4 had been somehow indisposed the path to Nkaneng would still have been blocked off. Missing the point, he answered that the road would have been blocked by other Nyalas heading in that direction.\textsuperscript{246} He was then asked why these Nyalas were not used to block the gap where several of the protestors were killed t scene 1, i.e. why through the failure to close the gap were the protestors channelled to their death.\textsuperscript{247} The

\textsuperscript{242} Day 170 p 20035 ll 8 -23; p 20036
\textsuperscript{243} Day 170 p 20036
\textsuperscript{244} Day 170 p 20038 ll 22 – 25; p2 0039 ll 1- 2
\textsuperscript{245} Day 170 p 20040 ll 3 – 10
\textsuperscript{246} Day 170 p 20045 ll 1 – 17
\textsuperscript{247} Day 170 p 20045 ll 19 - 22
commission phrased the question pertinently as why was scene 1 left open on the other side of the kraal where the shooting took place.\textsuperscript{248}

463. The evidence showed, and he testified that it was always to be left open since it was envisaged that the dispersal and disarmament would begin here.\textsuperscript{249} On this score he was asked why when the police saw the people coming around the kraal, they could not arrange a physical block by deploying a Nyala to the gap. He stated that Nyalas 5 and 6 could not be deployed there because they were deploying wire. When asked why other Nyalas, which did not have any wire at all could not physically block the gap where the deaths at scene 1 transpired, and in circumstances where it was physically possible to block the space, he conceded that it was physically possible for the area to be blocked.\textsuperscript{250}

464. He could not answer why as Operational Commander he did not just take the nyalas, park them next to each other and block physically the area where scene 1 transpired.\textsuperscript{251}

465. He stated only that his instructions were to continue dispersing and form a block formation, and when one examined the manner in which the nyalas were parked from a 45 degree angle there was a total block. With the benefit of hindsight it was possible to park the nyalas next to each other. It was thus not impossible to

\textsuperscript{248} Day 170 p 20046 ll 15 – 16
\textsuperscript{249} Day 170 p 20047 ll 13 – 20
\textsuperscript{250} Day 170 p 20050 ll 11 – 25; p 20051 ll 1 – 18
\textsuperscript{251} Day 170 p 20054 ll 20 – 23
block off the open path where scene 1 occurred.\textsuperscript{252} He conceded that there was a space left open between the nyalas and the kraal.\textsuperscript{253} He did not reckon that he should not leave the space open and with the benefit of hindsight concedes that closing it off was indeed a possibility.\textsuperscript{254} His omission to exercise his wide discretion as the Operational Commander to do so must attract some responsibility.

466. He was referred to exhibit L193 where the smaller path joined with the large path to Nkaneng, in a Y formation. It was put to him that Mr Magidiwana had testified that when they arrived at the smaller road which met up with the larger road, their intention was to go to Nkaneng. They could not do so because their path was blocked by Nyala 4.\textsuperscript{255}

467. It was put to him further that Mr Magidiwana had testified that Nyala 4 blocked the road and they were forced to go around the kraal so that they could access that very same road.\textsuperscript{256} There were thus two obstacles blocking the road to Nkaneng, the first being Nyala 4 and the second, the kraal. They went around the kraal because they could not go through it and they were shot before they reached the road. That was the evidence on record.\textsuperscript{257}

\textsuperscript{252} Day 170 p 20056 ll 14 – 25; p 20057 ll 1 – 4
\textsuperscript{253} Day 170 p 20059 ll 13 -16
\textsuperscript{254} Day 170 p 20060 ll 11- 13
\textsuperscript{255} Day 170 p 20062 ll 14 - 20
\textsuperscript{256} Day 170 p 20064 ll 7 – 16
\textsuperscript{257} Day 170 p 20064 ll 17 -25; p 20065 ll 1 – 9
468. He implausibly responded that at this point it was not their intention to go to Nkaneng. If they wanted to go to Nkaneng there was indeed an alternate path open to them to do so. Their intention when they circumnavigated the kraal was not to go to Nkaneng. It was to make good on the threats they had made against the SAPS earlier on.258

469. He could not deny however that the quickest route to Nkaneng on the arrival of Nyala 4 was to go around the kraal, and that if they wanted to use this path, it was not available to them because it was closed.259

470. He could not dispute that there was no difference between the larger group that had managed to run away uninjured and the smaller group other than they did not run, they walked after being told to do so by Mr Noki because they felt they had done nothing wrong. Both groups had the same intent, to go home. Some ran and the rest took Mr Noki’s advice and walked. What was clear is that they were all accessing the same path to go home to Nkaneng.260

471. Thus the only relevant group were those who had failed to use the path. On this score he accepted that the path was the quickest way to Nkaneng.261

472. It was put to him that Mr Magidiwana’s evidence showed that he did not want to attack anyone. When he circumnavigated the kraal he did not know there was a TRT line and his view was blocked by the kraal. Further, as Calitz himself

258 Day 170 p 20066 ll 1 - 12
259 Day 179 p 20066 ll 18 -25; p 20067 17 – 25; p 20068 ll 1 -9
260 Day 179 p 20069; p 20070 ll 1 – 4
261 Day 179 p 20071 ll 12- 13
conceded there was no TRT line when Nyala 4 blocked the path. Thus it could simply not be said that the group went around the kraal for the purpose of attacking TRT officers. Since they did not know of the TRT basic line it was simply not possible to contend that they intended to attack that of which they were unaware.

473. It was put to him that the evidence would further show that had they reinforced and closed the open gap with four or five nyalas, they would not have boxed the group in, as demonstrated in the Al Jazeera video clip. The protestors were also clearly not aware of the existence of the TRT line because their view was obscured by the nyalas in front of them, which subsequently made way for the basic line to shoot at them. There was further evidence to show that the protestors were shot as they came off the back of one nyala. This nyala had further obscured the TRT line from the strikers, more particularly taking into account Magidiwana’s evidence that their attention had also been distracted by the POP shooters. This version is supported by the objective photographic and video evidence.

474. Brigadier Calitz had testified about alleged threats the protestors had made against the police. He said it was not the strikers who made these threats but Mr Noki when he approached Nyala 6. He conceded that he could not testify on

---

262 Day 170 p 20071 ll 18 – 25; p 20072 ll 1 – 5
263 Day 170 p 20072 ll 10 – 18
264 Day 170 p 20077 ll 15 -22
265 Day 170 p 20078 ll 1 – 9 ; p 20082 ll 9 – 20; See also exhibit AAA9 and AAA6
266 Day 170 p 20084 ll 4 – 6
what Mr Noki said, but could only give evidence on what he remembered the
interpreter to have said. What Mr Noki said was carried over to him by Colonel
McIntosh, who also relied on the interpreter. 267

475. It was put to him further that there were to versions of what was said by Mr Noki
and that each carried completely different implications. The first version was that
Mr Noki had said the police are going to die, and the second version was that he
had said, the strikers had accepted that they were going to die or be killed. 268.

476. The question which arose was which version was correct. On this score it was
common cause that Mr Mathunjwa who had addressed the crowd, just before the
alleged threat was made by Mr Noki, told the crowd that they were going to be
killed 269. He accepted that this was so. 270 This was further demonstrated by
exhibit L189 where it was stated that “The President of AMCU and
representatives of AMCU prepared to leave the scene, Mr Joseph Mathunjwa
remarked to the protestors that they would die that day if they continued with their
course of action, to which they responded that they were prepared to die there
that day”. 271

477. It was put to him further that it was improbable that Mr Noki said that the police
were going to die. Rather, it was more probable that he said the strikers were

---

267 Day 170 p 20099 ll 1 - 19
268 Day 170 p 20099 ll 20 -25
269 Day 170 p 20101 ll 16 - 21
270 Day 170 p 20102 ll 11 - 20
271 Day 170 p 20104 ll 10 -22
willing to die.272 That this was indeed the more probable version is supported by exhibit L189 as quoted above, the testimony of Mr Magidiwana that after Mr Mathunjwa’s address the response of the workers was that if they are going to kill us they must do so and the SAPS own version273, as reflected in slide 31 of JJJ34 that “[a]t 15:37 the leader of the militant group approached the Police armored vehicle line telling Brig Calitz “The protestors have made a contract that they would not lay down their arms and were willing to die there that day, there was no turning back”.

478. He could also not give evidence on what Mr Noki said when he approached the negotiation Nyala because this statement was translated from Fanagalo and he received it via the medium of an interpreter.275 Further, the interpreter had communicated with Colonel McIntosh what Mr Noki had said who in turn communicated what was said to him.276 There was thus no evidence to support the assertion that Mr Noki threatened to kill the police.

479. Further, it was not the translation of the interpreter that Mr Noki said that the police were going to be killed.277 To the extent that reliance was placed on the evidence of the Lonmin interpreter, who had chosen to remain anonymous and could not be cross examined, he simply stated that “Two people came forward and they said to us, today there will be a fight. They said the police and the

272 Day 171 p 20107 ll 19 - 23
273 Day 171 p 20111 ll 11- -25; p 20112 ll 1 – 8
274 Day 171 p 20112 ll 18 – 25; p 20113 ll 1 – 17. See also exhibit JJJ34 slide 31
275 Day 171 p 20116 ll 6 -11
276 Day 171 p 20120 ll 6 – 8
277 Day 171 p 20119 ll 19 – 25; p 20120 ll 1 – 5
strikers must sign a paper that there will be fight but there is no piece of paper. They started threatening us. They said the police will run away by foot today. They told us the police would leave the Nyalas there, the police would run away on foot.”

480. Brigadier Calitz agreed that even when postulated at the highest level, nowhere does the interpreter say in his address to him [Brigadier Calitz], that Mr Noki said they were going to kill him.

481. Integral to his cross examination was the fact that the earlier version of what Mr Noki said, as reflected in slide 31 of exhibit JJJ34, differed materially from what was recorded in exhibit L189. He testified that the information gathered in exhibit JJJ34 was based on input he received. He denied having communicated he threats of the protestors at the Roots meeting as reflected in the wording of slide 31 of JJJ34. Slide 31 was a summary of the input received but not in those specific words. He conceded that such input could come only from the people in Nyala 1.

482. The misrepresentation of what was said by Mr Noki, if deliberate indicated that the police were prepared to go to any length, even lie to portray the strikers as belligerent and to support their theory that they were being attacked. He testified
only that he could not comment on the difference between L189 and slide 34 of JJJ34 and whether the misrepresentation was deliberate.\textsuperscript{285} He could not in essence say why the alleged threat as reflected in slide 31 was removed from what eventually became exhibit L189.\textsuperscript{286}

483. Although one Joseph Skosana had given a statement that “\textit{around 15:30 three guys came towards the Nyala. One of them who was wearing a green blanket came to the Nyala and ordered that all the Nyals and vehicles must leave that place, if not all the police are going to die}”\textsuperscript{287}, it was never established whether the was merely reporting from what the interpreter had said, or whether this was his personal account based on his understanding of one of the vernacular languages used.

484. Thus, his earlier evidence that Mr Noki said he was going to kill, when he may have said that they, he strikers are prepared to die, was a deliberate distortion on his part to create the impression that life threatening statements were made with the ultimate aim of justifying the false claims of self defence.\textsuperscript{288} The police placed a lot of reliance on these alleged threats and if indeed they were not made, as it seems, this further weakens their theory of belligerent protestors. In any event, that theory is contradicted by the objective evidence, which shows the strikers not attacking or even threatening to attack the police at times when there

\textsuperscript{285} Day 171 p 20123 ll 20 – 23
\textsuperscript{286} Day 171 p 20124 ll 1 – 9
\textsuperscript{287} Day 171 p 20141 ll 6 - 12
\textsuperscript{288} Day 171 p 20127 ll 12 – 20
was no barrier. On the contrary, the strikers are seen looking and moving away from the police members.

485. It was further evident that as part of the leadership of the police, he would stop at nothing to protect, that which could not even be protected. This is apparent from the flimsy justification given by him for the kicking or placing of a boot on a miner who had just been shot by a member of the SAPS near the kraal. He stated simply that he did not use the word kick. The placing of the foot on the miner was tactically correct for an officer armed with a R5 because it would have been inappropriate to use his hands and leave the weapon next to him. This was the only manner to keep the person on the ground stable until such time as support arrived from other colleagues. This was done he said in an orderly and disciplined manner. After watching the relevant video, his interpretation was that the person lying on the ground was not shot. He testified further that the reason for keeping a person stable in this fashion was because they could be armed.

486. This explanation however applied to the approximately 20 -30 people lying on the ground, and failed to shed light on why this particular individual was the unfortunate one who was kicked.

---

289 Day 171 p 20128 ll -24 – 25
290 Day 171 p 20128 ll 16 – 23
291 Day 171 p 20129 ll 1- 15
292 Day 171 p 20129 ll 22 – 25
293 Day 171 p 20130 ll 14 – 17
294 Day 171 p 20130 ll 18 – 22
487. Despite the fact that he was not there, as conceded by him he was prepared to justify the incident without any factual basis. He was not aware whether the officer depicted in the video was indeed armed with a R5, he knew nothing of the circumstances surrounding the arrest, and he did not witness the incident. Although he initially believed that the officer as in possession of a R5, he could not later confirm this.295

488. Notwithstanding these misgivings he admitted to he still sought to persuade the Commission that there was no culpability on the part of the SAPS. This indicates that the leadership of the SAPS was prepared to go to absurd lengths to justify and protect members of the police, even when the action was patently unjustifiable.296 He was not in a position to make a general statement that it would have been inappropriate for the member to lay down his R5, because he was not even aware whether the member was in fact in possession of a gun.297

489. The demeanour and malicious conduct of SAPS members shortly after the shootings demonstrates clearly which party was the aggressor and which the victim.

490. The execution of the plan formed part of its planning. If the plan was well executed, the outcome too would be good.298 However, the plan was ill fated from the start. At its very outset stage 3 was not implemented as envisaged by

---

295 Day 171 p 20130 ll 14 – 25; p 20131; p 20132 ll 1 - 14
296 Day 171 p 20133 ll 1 – 17
297 Day 171 p 20136 ll 15 – 25; p 20139; p 20140 ll 1 – 3
298 Day 171 p 20152 ll 18-22.
Colonel Scott, who prepared the plan. Scott intended for the barbed to be simultaneously deployed. Calitz decided that this was too dangerous and instructed that the barbed wire be consecutively deployed. He had never before seen nor implemented a simultaneous deployment and he and Scott differed in respect of the manner in which the barbed wire was to be deployed.299

491. It was also his view that simultaneous deployment was operationally impossible300 and also dangerous. Any openings or gaps in the barrier would pose a danger to the neutral zone. Any breach of the barrier would have led to confrontation. 301

492. The decision to consecutively deploy the wire barrier was a material deviation from the logistics of implementing stage 3. Deploying the barbed wire simultaneously would have taken approximately two minutes, whereas the consecutive deployment took approximately 12 to 18 minutes. It took six times longer than anticipated to deploy the barrier. There was thus an approximate delay of ten minutes between the actual amount of time it took to deploy the barrier, and the initial period envisaged. 302

493. It was illogical during this time to expect that a group of people who the police had anticipated to be violent and had categorised as belligerent, was going to

---

299 Day 171 p 20155 ll 17-25.
300 Day 171 p 20168 ll 19-24; p 20169 ll 9-14
301 Day 171 p 20171 ll 1-25
302 Day 171 p 20175 ll 19-25; p 20176 ll 1-7.
stand by and do nothing whilst the wire barrier was being deployed.\textsuperscript{303} Calitz testimony to this effect was logically unsustainable.

494. He did not exercise leadership in the implementation of the operation. He failed to make provision for what would happen whilst the barrier was being deployed and what would eventually transpire on its deployment.\textsuperscript{304}

495. When the barrier was up, the police were approached by Mr. Noki who questioned its purpose, and expressed dissatisfaction about its deployment. Calitz testified that it was at this stage that Mr Noki allegedly began threatening the police, but that he had expected the crowd to exercise more restraint on the deployment of the barrier. It was clear however that this expectation was frustrated, because Mr Noki returned and complained to Calitz, in what he alleges to be an aggressive tone about the deployment of the wire.

496. His expectations of restraint did not materialise, and in response to Noki’s alleged threats, it was decided to again address the crowd over the public address system. This address did not have the desired impact. At this stage Mr Noki simply became dismissive and he walked away. He was and unhappy, and at that stage the more militant group gathered together and began moving together.\textsuperscript{305}

\textsuperscript{303} Day 171 p 20181 ll 6-16.
\textsuperscript{304} Day 171 p 20182 ll 1-25.
\textsuperscript{305} Day 171 p 20183 ll 15-25; p 20184 ll 1-25; p 20185 ll 1-11
497. After explaining to Noki the reason for the deployment, he expected that Noki would than return to his group and give them the message that the wire was not being deployed against them. He thought they would behave. He expected that Mr Noki would perhaps relay the message to the strikers and that the mood of the crowd would change.306

498. He confirmed his evidence that at no stage during the negotiating process did he get the impression that the crowd was willing to listen to reason and lay down their weapons. Instead it was his conclusion that they would not surrender their weapons and that they were prepared to fight the police and die.307 This was notwithstanding the fact that the protestors had been asked a few times to lay down their weapons. However, the mood changed and the environment became more threatening.

499. The protestors were informed on several occasions that the wire was not being deployed against them.308 The police had also addressed them over the public address system and stated they had no intention to fight. The matter could be resolved by talking. They had also requested them to disarm.309

500. What is clear from his evidence is that it was his failure to deal with dissatisfaction of the crowd on the deployment of the, and his unreasonable expectation that the crowd would sit for eighteen minutes whilst the wire was
being deployed and peacefully watched the scenario unfold around them, that contributed to the disastrous consequences of the operation.\textsuperscript{310}

501. It was established in his cross examination that it took at least eighteen minutes to uncoil the wire, and a further thirty minutes for two separate warnings to be issued to the strikers. Overall before the rest of stage 3 could be finally implemented at least forty eight to fifty minutes had elapsed.\textsuperscript{311}

502. It was absurd in these circumstances to assume that a crowd identified by the police as being one armed group with one intention who were not willing to listen to the police and who were prepared to die would simply watch as the wire was uncoiled and the warnings were issued.\textsuperscript{312} The assertion was so absurd that it was indeed false.

503. He could not dispute this fact and simply contended that it has never been his experience that when a defensive line is setup the crowd then attacks the police.\textsuperscript{313} The usual reaction is that the crowd begins to disperse and also moves to a safe place. Thereafter arrests are made, but it had never been his experience that any group decided after a defensive line has been established to attack the police. This was the first such experience he has had.\textsuperscript{314} The illogical sequencing of the deployment on 16 August clearly contributed to the chaos and confusion which ensued.

\textsuperscript{310} Day 171 p 20196 ll 8-22; p 20197 ll 1-4
\textsuperscript{311} Day 171 p 20212 ll 1-11
\textsuperscript{312} Day 171 p 20213 ll 9-18
\textsuperscript{313} Day 171 p 20213 ll 19-25; p 20214 ll 1-2
\textsuperscript{314} Day 171 p 20215 ll 1-7
504. Later, he testified that he had never in the history of his service with the police experienced a case such as the present, where the crowd being managed was not only armed with dangerous weapons and aggressive and hostile towards the police, but had in addition undergone rituals which to his knowledge made them believe that they were invisible.\(^{315}\)

505. The information that these rituals had been carried out was indeed made available to him before the 16\(^{th}\) August and he was asked what a reasonable operational Commander with extensive POP experience would have expected in these circumstances once the wire was uncoiled and after having witnessed that the protestors were clearly aggressive and against the deployment.\(^{316}\) He conceded that he anticipated an attack after the Nyala uncoiled the wire\(^{317}\). It was put to him further that in the light of these six factors which they had identified as being characteristic of the crowd, a reasonable Commander ought to and he said he did indeed foresee an attack.\(^{318}\) However, he unreasonably placed his faith in the show of force, and thought that combined with the force continuum, which was a slow build up using less lethal force, the police would be effective in achieving their goal. When asked whether he thought that the persons against whom the show of force and the force continuum would be directed were reasonable, he responded that they were well aware at that stage that persons had died and that there were factions within the crowd.\(^{319}\)

\(^{315}\) Day 171 p 20216 ll 20-25; p 20217 ll 1-10 see also exhibit L/85
\(^{316}\) Day 171 p 20219 ll 14 20; p 20220 ll 13-25; p 20221 ll 10-15
\(^{317}\) Day 171 p 20222 ll 6-19; p 20223 ll 1-2
\(^{318}\) Day 171 p 20223 ll 7-13; p 20224 ll 20-25; p 20225 ll 1-5
\(^{319}\) Day 171 p 20226
was thus in these circumstances unreasonable for him to assume that the force continuum would deal with the developing situation.

506. A further factor that doomed the implementation of phase 3 was that he only received instruction to go ahead at 14:30, just a little over an hour before the plan was implemented. Calitz conceded that the effect of this rather late notification was to leave limited time for debriefings, yet somewhat illogically contends that the briefings were adequate. Although he may very well have handled the situation differently and although he was fully aware of the six factors identified on the mood and characterisation of the crowd, it was put to him, that he was not in a position to do anything other than act on the instruction that the operation go ahead because a high level, probably political decision had been made that 16 August was D – day.\footnote{Day 171 p 20231, 20232 ll 10-17} He could not argue, saying only that the instruction to proceed with the dispersion and disarming of the crowd was because the gathering was illegal and could no longer be tolerated.\footnote{Day 171 p 20233 ll 8-10}

507. What his evidence demonstrates is that as a result of the D – day rush the briefing time was limited and could not take place in accordance with the pre-scripts of Standing Order 262. In some instances the briefing had to be done in ten minutes and he was accordingly constrained in the manner that he would have ideally implemented the operation because of the instruction that the 16\textsuperscript{th} August was D – day.\footnote{Day 171 p 20233 ll 17-25; p 20235 ll 1-13} The improper implementation of the plan with the
resultant 10 minute differential provoked of very thing the police sought to prevent.323

508. His evidence demonstrates further that the minimum standards that the citizenry can expect from the police was violated. The violation arose from the fact that the bodies at scene 1 were dragged about in an undignified manner and, police officers laughed around the dead bodies.324

509. Although Brigadier Calitz took the view that there were special circumstances justifying the removal of the bodies from a particular scene he could not demonstrate that it was necessary to move the bodies at scene 1. He could furthermore also not dispute that the inhuman dragging of the bodies violated the minimum standards that society was entitled to expect from the SAPS.325

510. He testified that his minimum standards were captured in Standing Order 262 which stated that the use of force had to be implemented cautiously and with the highest degree of tolerance.326 This is what he described as the level of the duty owed by the police to the public. He agreed that on the face of it would be unacceptable from a human perspective to move bodies around and that this exception can only be departed from an exceptional circumstances like the fear that there is a weapon under the body. 327

323 Day 171 p 20245 ll 14-25; p 20246 ll 1-13
324 Day 171 p 20254 ll 9-13; p 20255 ll 20-25; p 20256 ll 1-10
325 Day 171 p 20252 ll 5-9; ll 20-25
326 Day 171 p 20254 ll 1-4
327 Day 171 p 20258 ll 1-12; ll 21 23
511. It was his testimony that he was not aware that protestors have been beaten up by members of the police and that if this were indeed so it would have been unlawful.\textsuperscript{328}

512. His evidence is relevant for illustrating further that protestors were killed at scene 1 at a time when free and unrestricted movement was allowed between the kraal and the path leading to Nkaneng.

513. Just before the implementation of stage 3, the police identified neutral and safe areas at the koppie. The neutral area was the area cordoned off by the police with the barbed wire. It included the area North West of the wire where the public could move freely. The safe area was located behind the negotiation nyalas. This was a more controlled area in which the public could not move around freely.\textsuperscript{329} He confirmed that members of the public including the protestors had free access to and could move freely in the neutral area. He conceded that the public, including the protestors in fact moved freely in this area everyday.\textsuperscript{330}

514. He was unable to dispute that there was free movement in the neutral area and further that the persons who could be seen in Exhibit L191 moving in the neutral area, were in fact moving North West towards Nkaneng.\textsuperscript{331}

515. He could further not dispute that those persons seen in Exhibit L191 walking towards Nkaneng, were not moving in the prohibited area or safe zone. He

\textsuperscript{328} Day 171 p 20261 ll 10-18
\textsuperscript{329} Day 171 p 20268 ll 1-14
\textsuperscript{330} Day 171 p 20269 ll 12-16
\textsuperscript{331} Day 171 p 20270; 20271
simply stated that at that stage these people were instructed to walk in the neutral area and stated differently, this was the area where persons could freely access Nkaneng.\textsuperscript{332}

516. Although he sought to dispute the fact that at the time of the shooting at Scene 1 was a neutral area, he was unable to show in his testimony that it was a safe area. Thus he was unable to show that the road to Nkaneng was at all times material to the shooting at scene 1 an area where movement was not restricted or forbidden. \textsuperscript{333}On the score his evidence demonstrates that the safe area was behind the negotiation line formed by the papa Nyala’s and in front of the TRT vehicles. That was a limited area and it was not opened to the public.\textsuperscript{334}

517. His evidence demonstrates tangibly that people were killed at scene 1 whilst they were still in the free area or the non-prohibited area, which they had at all material times been using, as reflected in Exhibit L191.\textsuperscript{335} He was only able to say in this respect that neutral area would change and that this change was dependent on the phase that the operation was moving in or towards. Thus when the operation moved into phase 3, the area closed by Nyala 4 was no longer a neutral area. The neutral area then became those areas where the protestors

\textsuperscript{332} Day 171 p 20272 ll 1
\textsuperscript{333} Day 171 p 20271, 20272 ll 9-16
\textsuperscript{334} Day 171 p 20272 ll 20-25; p 20273 ll 1-2
\textsuperscript{335} Day 171 p 20273 ll 22-25; p 20274 ll 1-4
could still come and go freely. As they moved the safe area expanded and the neutral area became smaller.  

518. He conceded and his evidence was clearly demonstrated that the protestors were allowed to move freely for the whole day in accordance with the picture in exhibit L191 the whole day in the neutral area. He confirmed that this was indeed so. They continued to move freely in the neutral area until such time as the instruction was given to close it off by deploying the barbed wire, at which stage phase 3 of the operation began. On this call he testified specifically that the area was scolded off for the protestors. Thus, protestors were free to move in the neutral area until Nyala 4 closed the gap.

519. The Nyala closest to the kraal was Nyala 6 and the people walking on either side thereof were not prohibited from accessing the road. This was at 15:40. His evidence shows further that the order was given to Colonel Makhubela, for the wire to be uncoiled at 15h42 and that some strikers were still allowed to proceed undisturbed at this point in time.

520. At some point it was explained to the media that the operation was moving to a tactical phase, and that it would be safer for them to remain behind the police line. However, as the police moved towards the koppie the media moved with

336 Day 171 p 20274 ll 17-25; p 20275 ll 1
337 Day 171 p 20275 ll 18-24
338 Day 171 p 20276 ll 2-6
339 Day 171 p 20283 ll 13 - 22
them, creating a moving boundary.\textsuperscript{340} The evidence demonstrates that members of the SAPS issued three instructions, saying ‘\textit{media go away}', as to why the protestors were not given the same warning.\textsuperscript{341} No explanation was forthcoming why the same warning was not issued to the strikers, either to not proceed further or to stop. The fact that it was possible to issue the warning, together with the fact that the road to Nkaneng was accessible to the protestors the entire day, necessitated that before the road was closed and effectively became a safe zone, means that the police were duty bound to inform the protestors that they could no longer use the road. This is so because it was assumed by the crowd that there was no prohibition on the use of the road to Nkaneng.\textsuperscript{342}

521. The time when the neutral area leading to Nkaneng, became a safe area, there was no announcement to that effect.

522. In the totality, it can be concluded that:

522.1 Calitz failed in the execution of his leadership role of Operational Commander;

522.2 his actions and omissions were unlawful and directly caused the deaths, injuries and arrests of 16 August. He acted with both intention and negligence, like the others; and

\textsuperscript{340} Day 171 p 20284 ll 14 - 20  
\textsuperscript{341} Day 171 p 20285; p 20286  
\textsuperscript{342} Day 171 p 20287; p 20288 ll 1-6
522.3 a *prima facie* case of 34 counts of murder has been made against him, hence the recommendation that he be listed as Accused Number 6.

### C.2.3.6 General Naidoo

523. General Naidoo made statements on 7 November 2012 and 6 September 2013 respectively, which were handed in as exhibits in the Commission and marked Exhibits DD and JJJ108 respectively;  

524. During his years of service, he stated that he was involved in multi-disciplinary forces operations where violence and death resulted but not at the large scale as at Marikana;  

525. His involvement in the Marikana operation started on 11 August 2012 after being called by Gen Mpembe, Deputy Commissioner NW (who was at the time on leave) who reported on the unrest situation at Marikana.  

526. He later received a second call from PC reporting that the situation had escalated, that two people were injured (presumably relating to the NUM shooting incident) and the death of two security officers (presumably the death of Mr Frans Mabelane and Mr Fundi).  

---

343 Day 188 p 22823 I 8  
344 Day 188 p 22829 to p 22830  
345 Day 188 p 22849 II 1 - 7  
346 Day 188 p 22852 II 2 - 20
468. That on 13 August at about 07h30 he, together with Gen Mpembe, reported at Marikana to assess the situation.\textsuperscript{347}

469. On arrival, he met with Bernard Mokwena, Vice President of Lonmin Human Capital, in which they were amongst others briefed that:

469.1. the conflict as a result of rivalry between NUM and AMCU;\textsuperscript{348}
469.2. it is the RDO strikers, who were agitated;\textsuperscript{349}
469.3. and that they were being led by unknown faceless people;\textsuperscript{350}
469.4. that there was a two year wage agreement which they did not want to interfere with.\textsuperscript{351}

470. The assertion that the strikers were faceless was challenged by him as being senseless because the strikers are Lonmin employees.\textsuperscript{352}

471. After briefing by Lonmin, he went to the mini JOC, which was a room that was being utilised by Lonmin security officials to monitor CCTV and to receive radio communications.\textsuperscript{353}

472. That on Brig Calitz's arrival, he posted a SAPS representative at the mini JOC, thereby initiating the joint operation.\textsuperscript{354}

\textsuperscript{347} Day 188 p 22855 ll 15 - 22
\textsuperscript{348} Day 188 p 22856 l 14
\textsuperscript{349} Day 188 p 22856 l 18
\textsuperscript{350} Day 188 p 22856 l 19
\textsuperscript{351} Day 188 p 22857 l 3; Day 188 p 22858 l 1
\textsuperscript{352} Day 188 p 22858 l 13
\textsuperscript{353} Day 188 p 22860 ll 8 - 15
\textsuperscript{354} Day 188 p 22860 l 12
473. Whilst at the mini JOC, through CCTV, their attention was drawn to the group of about 3,000 plus people and on another screen a smaller group of armed miners who were gathered near a mineshaft, which group was of concern to them (Lonmin).\textsuperscript{355}

474. The information was telephonically communicated to Provincial Commissioner who instructed Maj Gen Mpembe to attend to the situation (ie to disarm the protestors).\textsuperscript{356} The Provincial Commissioner was wrong in instructing Maj Gen Mpembe to disarm the protestors. She could have, at the very least, instructed him to intercept them and apply the principle of situational appropriateness.

475. At the time, he was on his way together with Provincial Commissioner to Potchefstroom.

476. At the time, due to the urgency of the matter, there was no time to do formal exercise. The attending officer had to assess the scene and activate existing standard relating to operational procedures when responding to a situation.\textsuperscript{357}

477. Later, Gen Annandale reported two deaths of policemen and removal of SAPS R5, shotguns, two pistols and radio police, and solicited additional resources.\textsuperscript{358}

\textsuperscript{355} Day 188 p 22861 ll 9 - 16
\textsuperscript{356} Day 188 p 22860 l 13; p 22862 l 13
\textsuperscript{357} Day 188 p 22863 l 7
\textsuperscript{358} Day 188 p 22864 l 21; p [??] l 15; p 22866 l 4
478. As a consequence of the deaths, particularly of the two policemen, the Provincial Commissioner convened a JOC\textsuperscript{359} and at that time included Gen Annandale.

479. After around 20h00 the National Commissioner arrived at the JOC\textsuperscript{360} in the company of Gauteng Provincial Commissioner Maj Gen Petros.

480. A briefing session was held with the police and later with Lonmin.

481. The incident on the 13\textsuperscript{th} was referred to by Maj Gen Naidoo as the attack on Gen Mpembe’s group.\textsuperscript{361}

482. The Provincial Commissioner tried to establish why the protestors were being labelled as faceless people. Photographs of protestors downloaded from CCTV could be used to identify the protestors and to reclassify them from faceless people to Lonmin employees.\textsuperscript{362}

483. The Provincial Commissioner urged Lonmin to use photographs to identify the protestors and to engage them so that the situation can be defused\textsuperscript{363} to avert further loss of life.

484. On 14\textsuperscript{th} August, the resources started arriving at Marikana, including the NIU.

\textsuperscript{359} Day 188 p 22868 l 2
\textsuperscript{360} Day 188 p 22868 l 11; p 22869 l 6
\textsuperscript{361} Day 188 p 22870 l 23
\textsuperscript{362} Day 188 p 22870 l 21
\textsuperscript{363} Day 188 p 22871 l 4
A decision was taken to negotiate with the strikers to lay down their weapons to disperse peacefully and if such efforts failed, then the SAPS will have to disperse them.364.

The mobilisation of tactical unit was to support the investigations of crime, possible identification of suspects and their arrest. Otherwise there was no tactical option on the table.

Under his command at FHA1, he has the following units:

487.1. Special Task Force,
487.2. National Intervention Unit,
487.3. POP,
487.4. K9,
487.5. Mounted Unit,
487.6. Detective,

FAH1 was reserve personnel. The idea being not to commit all forces366.

With regard to the training and operational mandate, such units should not have been deployed not at least the number in which they were deployed367 at Marikana.

---

364 Day 188 p22874 l13-17
365 Day 188 JJJ 108 para 37
366 Day 188 p 22876 l12
367 Day 188 JJJ 108 para 37
Deployed of certain units and in particular, the STF, NIU, TRT and possibly the K9 was unjustified, we submit.

Major General Naidoo testified that they regarding the purpose of the deployment of various unit.\textsuperscript{368}

Later, they noticed use of rituals behind the koppie.\textsuperscript{369} It could not have been behind the koppie. Objective evidence proves beyond reasonable doubt that such was conducted in full view of the public in SAPS.\textsuperscript{370}

15\textsuperscript{th} August 201, he was deployed the same way as on the 14\textsuperscript{th} same units, with the same resources.

Unions were escorted to the Koppie NUM was not welcomed by the protesters while AMCU was reportedly received well\textsuperscript{371}. SAPS should have taken advantage of the reception AMCU received to help in engagement with the protesters.

Mathunjwa indicated that there will be joy or happiness, the next day \textsuperscript{372} that he will engage Lonmin management \textsuperscript{373} according to him, reintegration process.

\textsuperscript{367} Day 188, Exhibit Q, slide 4,5,12,13,15,16,18,19
\textsuperscript{368} Day 188 p 22877 l5-18 to p 22878 l 1.
\textsuperscript{369}
\textsuperscript{370}
\textsuperscript{371} Day 189 p 22890 l1 l 6, l 13
\textsuperscript{372} Day 189 p 22890 l 25
\textsuperscript{373} Day 189 p 22891 l 2
On 16th August 2012 arrived at the JOC in the morning for briefing session and Lieutenant Colonel Scott was presenting an operational plan, taking into account the undertaking by AMCU that the protesters will (voluntarily) lay down their weapons and disperse.\textsuperscript{374}

If that was the case, then why, the deployment of more of the Specialised Unit than POP? The deployment of the units were as follows:

503.1 20 GTF
503.2 25 NIU
503.3 21 TRT
503.4 23 K9
503.5 14 Mounted Unit
503.6 8 POP
503.7 3 Detectives

General Naidoo could not dispute that even in the light of the incident on 13 August, it was unusual to deploy the K9, TRT, NIU and STF. They were not primary investigative units.\textsuperscript{375}

He was unable also to dispute the distinct possibility that the officers killed on 13 August 2012 may very well have been murdered by the police.\textsuperscript{376} He responded only that he was not aware of who could possibly have killed the officers and that

\textsuperscript{374} Day 189 p 22892 l 7-13  
\textsuperscript{375} Day 202 p24725 ll 15 – 25  
\textsuperscript{376} Day 202 p24727 ll 16 – 19
the matter was being handled by IPID.\textsuperscript{377}

\textbf{506} In his original statement he alleged that the murders referred to were perpetrated by the strikers.\textsuperscript{378} He testified that his intention was to indicate that several deaths had transpired, which included the death of miners and mine security officials.\textsuperscript{379}

\textbf{507} It was pointed out that there was a discrepancy between his earlier and later statements. In the earlier statement he recorded only that the escalation in police resources was necessary to stabilise the public order situation and to facilitate the investigation of the murders of the police officers.\textsuperscript{380} In his later statement the miners were included. Although it was established that his initial concern and the escalation of the resources was because police officers were killed, he continued to deny this. He denied also that he had tailored his evidence in this regard.

\textbf{508} He was unable in his testimony to say why the escalation was necessary, if it had not been established whether the reasons for the deaths prior to 16 August were attributable to the strikers or the police. Certainly of they were attributable to the conduct of the police deploying more members would simply have inflamed an already volatile situation.\textsuperscript{381} He simply stated that they arrived at the required resources by looking at the intelligence received in terms of crowd

\textsuperscript{377} Day 202 p p24727 ll 20 – 24
\textsuperscript{378} Day 202 p24736 ll 8 – 13
\textsuperscript{379} Day 202 p24736 ll 14 – 19
\textsuperscript{380} Day 202 p24740 ll 1 – 2
\textsuperscript{381} Day 202 p24743 ll 22 – 25, p24744 ll 1 – 6
management.\textsuperscript{382} It must e remembered however that this intelligence was incorrect.

509 Thus one of the factors contributing directly to the massacre was his instruction for the drastic escalation of the forces in circumstances where this was not necessary.\textsuperscript{383} He conceded that when discussions were had on the resources required it was not minuted, which extra resources were required, what they were needed for and how the reinforcements required were ultimately arrived at.\textsuperscript{384} It was in essence a rough estimate based on the needs of the investigative team and the crowd management prerogatives.

510 He conceded that there was a frenzy and a lot of activity to upscale the operation on the death of the police officers. Thus, it could not be said that there was no relationship between the killing of the policemen and the potential for the massacre. He could not dispute that there was a foreseeable connection between the killing of the policemen and the heightened emotions of the members.\textsuperscript{385} He simply stated that there were heightened emotions on both sides. \textsuperscript{386}

511 He could not deny that there was thus a duty on the leaders of the police, such as himself to ensure that those with heightened emotions did not intend to mete

\textsuperscript{382} Day 202 p24744 ll 13 – 18
\textsuperscript{383} Day 202 p24745 ll 11 – 25
\textsuperscript{384} Day 202 p24747 ll 9 – 19
\textsuperscript{385} Day 202 p24752 ll 7 – 16
\textsuperscript{386} Day 202 p24753 ll 1 – 20
out revenge for the death of their colleagues. He simply stated that this was looked at by giving people the option to withdraw. This was not sufficient. It was out to him and he could not dispute that people should not have been left to self-diagnose on the extent of their trauma. It was the obligation of the SAPS to remove these people from Marikana. He argued only that they were assisted by psychologists, social workers and chaplains.

It was out to him that these people, which included Captain Kidd who reminded his unit that the protestors had killed a policeman, ignited emotions. He answered only that it depended on the context.

He conceded being aware that Captain Kidd was one of the commanders of the TRT. When asked whether he knew that this unit massacred the protestors at Scene 1, he said that the strikers advanced towards the TRT line and were shot by them.

It was put to him that even though he testified that General Annandale considered it his duty to report to Marikana, he could not dispute that there was no available evidence demonstrating that he was authorised to be there.

He conceded that he was fired upon and had to return fire. He had never in the
history of his career had to discharge his firearm. He testified that the possibility that he may have killed someone in discharging his firearm at Marikana weighed heavily on him.\textsuperscript{392} At the time the only option he had was to either get shot or run in the opposite direction. If he had thought that not discharging his firearm was the better option, he would not have done so. If there was an opportunity to evade the danger in some other way he would have.\textsuperscript{393} What is indisputable is that he discharged his firearm and may seriously have injured or killed someone on the 13\textsuperscript{th}. This must be submitted for further investigation.

516 He conceded that one of the key players in the saga was Lonmin.\textsuperscript{394} He conceded further that Lonmin informed the police that the strike was being carried out by faceless people.\textsuperscript{395} He conceded further that this was proven to be incorrect.\textsuperscript{396} He testified that although he is not aware whether Lonmin skewed information in their favour, he understood what was meant when it was put to him that they had an interest in doing so.\textsuperscript{397}

517 He conceded further that Lonmin informed the SAPS that the root of the problem was the disharmony between NUM and AMCU.\textsuperscript{398} He could not deny that although this information was not entirely correct, the SAPS proceeded on this basis. The Commission put to him that this was demonstrated by the fact that

\textsuperscript{392} Day 202 p24778 ll 8 – 11
\textsuperscript{393} Day 202 p24779
\textsuperscript{394} Day 202 p24782 ll 21
\textsuperscript{395} Day 202 p24783 ll 9
\textsuperscript{396} Day 202 p24785 ll 1 – 10
\textsuperscript{397} Day 202 p24787 ll 2 – 16
\textsuperscript{398} Day 202 p24784 ll 17 – 19
may of the documents seen, even the relatively ones and the Roots documents, talk about rivalry between NUM and AMCU.\textsuperscript{399} This was one of the primary motivating factors. This was also one of the primary reasons why Mr Mathunjwa’s undertaking that the strikers would disperse at 9:00 the following morning was given a high degree of credibility.\textsuperscript{400} He could not deny this and stated simply that there were other factors as well.

In the light of the above, it could not be disputed that misinformation furnished by Lonmin found its way into police intelligence. This included information to the effect that AMCU supporters would also target employees who supported NUM in the area of Nkaneng.\textsuperscript{401} It was noted by the Commission that this was certainly what Lonmin told the police and that the information was incorrect.\textsuperscript{402} Thus in the light of this false intelligence it would have made sense to anyone who was operating under the false belief that at the root of this conflict was rivalry between AMCU and NUM.\textsuperscript{403} He conceded this.\textsuperscript{404} Accepting this incorrect intelligence as the correct basic information had disastrous consequences. His cross examination also demonstrates that the further false intelligence received was that the protesters were armed when they marched to NUM’s offices on 11 August. He was not able to dispute this.\textsuperscript{405}
He conceded that some of the intelligence received was not verified. As a result it was put to him that it was unreliable.\textsuperscript{406}  The unreliable intelligence was one of the key factors motivating the implementation of phase 3. This decision was made by the Provincial Commissioner.\textsuperscript{407} Because the operation was based on some information that was in many respects false, it was planned and based on a false premise.\textsuperscript{408}

His testimony that the information was not false, but just not detailed enough was disproved by Exhibit TT4, the minutes of a meeting. The minutes record that according to information received the group will (not would have) decline to surrender their dangerous weapons to the police, not leave the koppie and fight if their demand are not met. The intelligence set out what would happen. The argument that it was not detailed enough was simply unsustainable.\textsuperscript{409}

As a result of what he conceded was sub-quality intelligence reports\textsuperscript{410} which were too broad and not specific, the operation was improperly planned.

He conceded that the peaceful dispersal of the crowd was dependant on a few issued being dealt with and the giving of feedback to the group by Mr

\textsuperscript{406} Day 202 p24799 ll 10 – 15
\textsuperscript{407} Day 202 p24800 ll 18 – 21
\textsuperscript{408} Day 202 p24804 ll 15 – 21
\textsuperscript{409} Day 202 p24806
\textsuperscript{410} Day 202 p24807 ll 14 – 18
Mathunjwa.\textsuperscript{411} On the happening of these events there would be a voluntary disarmament.\textsuperscript{412}

523. A holistic assessment of the top five SAPS leaders who were active either during the relevant period and more specifically on the 16\textsuperscript{th} paints a picture of a total collapse in leadership, dereliction of duty and sheer criminality. Ramaphosa and Mthethwa, by virtue of their positions on the chain of pressure, top the list.

C.2.4: Additional and general indications of SAPS’ culpability

524. As indicated in the introduction, it is not practicable to analyse all the police witnesses to the same level of detail. However, and in addition to the aforegoing, there is a plethora of signals and \textit{indiciae} which point to the culpability of SAPS for the tragic events under investigation, some of the more prominent such signals include:

524.1. The tampering with evidence at the crime scene(s);

524.2. Giving misleading evidence to the public;

524.3. Blatant and deliberate efforts to pull the wool over the eyes of the Commission;

524.4. Utterances made before, during and after the fact;

524.5. \textit{Unlawful} / unjustified arrests, malicious prosecutions and torture.

\textsuperscript{411} Day 202 p24817 ll 1 – 13
\textsuperscript{412} Day 202 p24819 ll 1 – 6
C.2.4.1: Exhibit L: One of the SAPS’ versions

525. In addition to the above, the following false information is contained in Exhibit L (the list is not exhaustive):

525.1. The violent nature and aggression of the protestors were a reflection of public violence that was experienced at other mines earlier in the year.\(^{413}\)

525.2. The unrest was based on rivalry between the NUM and AMCU.\(^{414}\)

525.3. Workers involved in the unrest at other mines ended up joining the unrest at Lonmin.\(^{415}\)

525.4. On 13 August, (r)epresentatives (of) the protestors informed Mpembe that their fight was not with the police but with the Lonmin mine.\(^{416}\)

525.5. There was an informal settlement to the left of the protestors’ route to the koppie.\(^{417}\)

525.6. On their way to the koppie, some protestors changed direction towards the village.\(^{418}\)
525.7. To prevent them from entering the village, the police used teargas and stun-grenades.\(^{419}\)

525.8. With their dangerous weapons, a group of protestors turned around and charged at the members behind them.

525.9. In order to defend themselves against the imminent attack, members of the police started retreating and fired at the protestors with live ammunition.

525.10. When the members of the police tried to stop the protestors from entering an informal settlement, the protestors attacked the police.

525.11. The deliberate omission of the name of Dirk Botes from slide L68.

525.12. On 15 August 2012, there was a commitment that protestors would surrender their weapons. This commitment was given in the presence of Mpembe and Annandale (note that both Annandale and Mpembe denied that such a commitment was given). \(^{420}\)

525.13. On 16 August, "the Chairperson" (ie Annandale) called a special JOCCOM meeting to evaluate the current strategy and the possible implementation of Stage 3 (a decision had already been taken). \(^{421}\)
525.14. Slide L198 was taken at 15h47 on 16 August 2012.

525.15. There were three incidents of attack by the protestors towards the police, starting near the mast.\textsuperscript{422}

525.16. Canters were deployed to the second scene where 259 attackers were disarmed and arrested.

525.17. Three firearms were confiscated from the (Scene 2) attackers.

525.18. The change in behaviour of the protestors and the fact that they did not surrender their weapons at 09h00, as promised, led the police management to implement Stage 3 of the operational plan.

525.19. Most of the protestors were shot inside the neutral area where they had moved past the POP line of defence.

525.20. When attacked, they (protestors) regrouped again at Koppie 3.

526. Each of the above propositions was made to the Commission knowing it to be false, ie with the intention to decide and mislead.

527. This is not behaviour consistent with a party which believes itself to be innocent and intends to play open cards with the law, as it is obligated to do.

\textsuperscript{422} L196-L204
C.2.4.2: Pulling the wool over the eyes of the Commission

528. It is blatantly clear that as soon as it was announced that a commission would be instituted, SAPS embarked on a prolonged process aimed at deliberate distortion, concealment and manipulation of information aimed at misleading the Commission and the public.

529. Brigadier Calitz embarked on a course of action aimed at schooling, participating SAPS members on the backbone of the police version of self-defence.

530. This was also consistent with the addresses to the members made by the National Commissioner, both during the parade of 20 August 2012 and at the funeral of W/O Lepaaku.

531. But perhaps the largest enterprise in this deception effort was carried out at the nine day meeting held at Roots in Potchefstroom between 27 August and 6 September 2012.

532. The product of the Roots meeting was Exhibit L, which was presented to the Commission over four days as the basis of the SAPS version to the Commission. Indeed, the Roots conference was convened with the specific aim of preparing for the Commission so that any deliberate distortions and falsification of information must have been directly aimed at influencing the Commission and for no other reason.
533. A thorough and full analysis and exposition of this section is not possible, but it would have to involve:

533.1. the available snippets of some of the conversations held at Roots;

533.2. the contents of Exhibit L;

533.3. the contents of the previously undisclosed evidence subsequently found in the SAPS hard drive;

533.4. the contradicting evidence of some of the witnesses;

533.5. the fundamental breaches by SAPS of and departures from the plans as outlined in their own Exhibit L.

**C.2.4.3: Tampering with evidence and concealment thereof**

534. It was well established and ultimately conceded that:

534.1. there was wrongful interference with the crime scene at both Scene 1 and more particularly at Scene 2;

534.2. dead bodies of deceased protestors appeared in the early evening, with weapons which had not been next to them during the day;
534.3. the impression which sought to be conveyed to the Commission in relation to the position of weapons was probably inaccurate, to the knowledge of SAPS;

534.4. the excuse given to the effect that the weapons had been removed at the request of medical personnel could not hold water in relation to Scene 1 and was accordingly also false in relation to Scene 2;

534.5. in any event, even if there had been a legitimate reason for the removal of the weapons, their replacement was a totally unacceptable practice and could not be justified or accounted for;

534.6. the portrayal of the deceased as having been carrying weapons was at best insensitive and contrary to the principles of Ubuntu and the common law. A case of interfering with a body ought to be investigated.

535. It is respectfully submitted that the Commission ought to make a finding against the aforesaid practices and any other manipulation of a murder crime scene in which the police are directly implicated.

C.2.4.4: SAPS giving false information to the local and international public

536. The information given to the public by SAPS and other government agencies on 17 August 2012 at the international media briefing was, to their knowledge, false in the following respects:
536.1. “the violence emanated from union rivalry between NUM and AMCU”;

536.2. the police were forced to use maximum force; and

536.3. see FFF4/5.

C.2.4.5: Shifting responsibility for 13 August 2012

537. The best example of these are the conversations subsequently revealed involving the question as to who gave the instructions to fire the teargas which obviously sparked and caused the violence, deaths and injuries of 13 August 2012.

538. At best, any investigations into the incident would have revealed that the violence was initiated by members of SAPS, the only question being which specific member gave the instruction.

539. Yet, all this was concealed and not raised in Exhibit L and only surfaced during the cross-examination of General Mpembe and the subsequent revelation of the hidden hard drive. This omission must have been deliberate. So was the omission of any reference to the death threats made against Mpembe.

540. To add insult to injury, the Commission was given the false version that the protestors had “changed direction towards the village”. This reason was clearly false and was shown to be so on the objective video evidence. More importantly, it must have been known to be false.
C.2.4.6: Foreseeability and actual foresight

541. It is respectfully submitted that what makes the conduct of SAPS aggravated is the fact that, on their own version, and on an analysis of the objective evidence, the tragedy and flow of blood were not only foreseeable but actually foreseen. Examples which support this conclusion are to be found, among others, in Exhibit L, notably:

541.1. The first sign of this is the fact that the initial operational strategy was (correctly) to prevent the protestors from coming to the koppie armed by deploying a filtering police line to search those approaching the koppie - to encircle and arrest them.423

541.2. It is stated that this strategy was not implemented because forces from distant locations had not yet arrived or been sufficiently orientated.

541.3. Firstly, this shows that it was at that stage clearly foreseen that to try and disarm 3,000 people would be dangerous and it was preferable to disarm 50 or so.

541.4. Secondly, no explanation was ever given why this sensible strategy was abandoned even after the distant forces had arrived, if their non-arrival was the reason for its non-implementation.

423 L63
541.5. The next sign of actual foresight is to be found in slide L139, wherein it is stated that “the northern Nyala was to angle slightly towards the west to assist in protecting a possible advance towards the informal settlement.” This shows very clearly that the police knew that the protestors would escape towards Nkaneng, as they actually did, and that the allegations that they were advancing to attack the TRT line are contrived and knowingly false.

542. The inscriptions on certain slides had been progressively altered in order to accord with the SAPS version (eg JJJ118.34). The failure to mention the requisitioning and bringing of mortuary vans was clearly intended to obviate the logical interference pointing to foreseen fatalities.

C.2.4.7: Utterances indicating a (collectively) guilty mind

543. Utterances made by some of the role players indicated both the requisite foresight and the intent to kill or the appreciation of the risk thereof, coupled with the reconciliation with that eventuality, for example:

543.1. Mpembe referred repeatedly to the Tatane situation;

543.2. Mbombo stated that it would be “blood”; 

543.3. Kidd told the troops that the protestors were “dangerous”; 

543.4. Mbombo also referred to Tatane;
543.5. Mbombo complained that the Constitution was a constant;

543.6. President Zuma intimated that the massacre was caused by a mistake. As he was not present, he could only have reached that conclusion following an official briefing by some of the role-players;

543.7. The attitude and objectionable behaviour of individual members of SAPS in dragging, kicking and insulting the protestors, as well as laughing among the dead bodies and bragging about the shootings as they were happening.

C.2.5 Clause 1.2.4 of the Terms of Reference “Whether by act or omission (SAPS) directly or indirectly caused loss of life or harm to persons or property”

544. With respect, this ought to be the shortest section in these submissions. This is so because it was never seriously disputed (except by the incredible National Commissioner) that members of SAPS caused the deaths, injuries and arrests of the relevant victims. All that SAPS has sought to contest is the unlawfulness of their actions in causing these calamities.

545. In the premises, and in the light of that concession, which was correctly made, it would serve no useful purpose to open up a whole discussion on the legal niceties presented by any discussion on causation, the sine qua non test, like distinction between factual and legal causation and so on.
546. Suffice to state that the Commission ought to make a finding in relation to this question in the Terms of Reference that SAPS did indeed directly cause such deaths and injuries as were not attributable to the protestors or other civilians. This would exclude the deaths of Messrs Fundi, Mabelane, Langa and Mabebe and of course Mr Twala. The remaining 39 deaths were caused by SAPS, 37 directly and the two policemen, indirectly.

547. As to the indirect causation of those excluded deaths, it will be submitted that both SAPS and Lonmin were broadly and indirectly responsible for all the mayhem and destruction which occurred during the relevant period, including the destruction of property and serious injuries and unlawful arrests.

C.3 : The conduct of AMCU, its members and officials

548. In respect of AMCU, it would be convenient to consider the three terms of reference all at once. These are:

- “whether AMCU had exercised its best endeavours to resolve any disputes which may have arisen between itself and Lonmin or NUM or any other parties;

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

- Whether by act or omission it directly or indirectly caused loss of life or damage to persons or property.”
549. In short, we respectfully submit that no useful purpose can be served by over-analysing this section. Our bold assertion is that on a proper evaluation of the evidence, AMCU is the only party of those fingered in the Terms of Reference which can be exonerated from any wrongdoing without any further ado. There was simply no credible evidence whatsoever which implicated AMCU in any of the activities which were causally connected to the events under investigation.

550. On the contrary, the Commission must find that AMCU and its leadership acted in an exemplary fashion and went beyond the call of duty in its endeavours to avert bloodshed.

551. The highlights of their punitive actions included:

551.1. The AMCU letter dated 10 August 2012 calling for the convening of all the major unions and stakeholders;

551.2. Numerous follow-up telephone calls and appeals to Lonmin management;

551.3. The attitude displayed by Mathunjwa during the SAFM Xolani Gwala interview, more specifically his readiness to go to Marikana and participate in the resolution of the impasse;

551.4. The similar attitude displayed by Mathunjwa during the meeting between the unions, management and Mpembe on 15 August 2012;
551.5. The requests made by Mathunjwa to Lonmin and SAPS to assist in creating the conditions for him to propose a compromise to the workers by putting something on the table;

551.6. His preparedness to go and address the workers for the first time despite the lack of co-operation from SAPS and Lonmin and their noticeable change of attitude from the previous night, most probably due to their knowledge of the outcomes of the NMF meeting;

551.7. Mathunjwa’s perseverance and culminating in his second visit, during which it is common cause that he literally went on his knees pleading with the strikers to vacate the koppie in view of his having read the signs to indicate that they were about to be killed, which is exactly what happened;

551.8. In particular, his step in going without a police escort on the second trip;

551.9. The masterful and diplomatic and carefully-worded tone of his addresses which was bound to win the workers over had there been reciprocity on the part of Lonmin; and

551.10. The tone and contents of his sms messages to the police leadership, which were not acted upon according to the exigencies of the situation.

552. The vindication of Mathunjwa’s approach came from the fact that in September, and sadly after the fact, Lonmin came around to implement his suggestions and that is how the strike was resolved.
553. It is indeed so that AMCU members were participating in the strike, but there is no evidence to suggest that the AMCU leadership was privy to the planning and execution of the strike. On the contrary, the opposite seems to be true, regard being had to:

553.1. the contents of the AMCU letter dated 10 August 2012; and

553.2. the common cause fact that the strikers had expressly excluded any possible involvement of any trade unions in their wage struggle.

C.4: The conduct of the NUM, its members and officials

554. The three terms of reference pertaining to the NUM are, mutatis mutandis, identical to those of AMCU and need not be repeated here. The activities of NUM are seemingly to be dealt with in greater detail by other parties. Accordingly, we only highlight those which are prominent and of direct relevance to the version of the Injured and Arrested Persons:

555. The NUM:

555.1. wrongly and opportunistically supported the attitude of Lonmin by using it (the NUM) as a gatekeeper and a scapegoat for the refusal to engage with the workers;
although the NUM later and rightfully stated that, but for Lonmin’s inflexible approach, the massacre would have been avoided, the objective truth is that the NUM had been a supporter of that inflexible approach;

far from exercising control over its members (excluding those who went on strike in defiance of the union, for which the NUM cannot be blamed directly), encouraged its active members to take the law into their own hands by going around at night in the Quantum vehicle ferrying panga-wielding members to force or “encourage” workers to break the strike. Any trade union would know that this course of action was bound to create conflict;

sent emails in the pursuance of its unholy alliance with Lonmin, pledging to work together with the employer to break the strike;

unreasonably refused to vacate their offices when requested to do so by Lonmin security;

were possibly the first party to arm themselves with dangerous weapons and firearms, which they used to shoot, severely injure and chase some of the strikers on 11 August;

thereby sparked a series of events which led to the deaths of 44 people and related events;
555.8. via its President, collaborated with a board member to “advise” them what to do about the strike;

555.9. was embroiled in the multiple conflicts of interest surrounding Ramaphosa;

555.10. was unwilling to get involved in the proposed peace mission of Gwala and Mpembe, respectively;

555.11. exposed its members to physical danger by actively calling upon them to break the strike;

555.12. colluded with Lonmin in making a similar call for the deployment of the police, army and/or the Special Task Force against employees, including its own members; and

555.13. failed some of its long-standing members like Mr Phatsha, who had been an NUM member for 30 years paying 1% of his annual earnings to NUM each year only to be rewarded with betrayal and calls for violent state action.

556. In acting as aforesaid, the NUM certainly contributed both directly and indirectly, in causing loss of life and limb.

557. In actual fact, one of its leaders, acting officially, the late Mr Setelele (or “Mr Brown”) was identified along with seven other persons as the assailants who
caused the severe injuries to Mr Mabuyakhulu and others and yet no state action or even disciplinary action has ever been taken against them to date.

558. In the premises, it will be argued that on the basis, *inter alia*, of the aforesaid considerations, the Commission ought to make findings against the NUM in respect of all the issues posed in the relevant terms of reference. In support of this conclusion, reference will be made to the evidence of the NUM witnesses, in particular its former President Zokwana, as well as the objective and other undisputed evidence.

**C.5 : The role played by the Department of Mineral Resources**

559. The DMR was represented by its then Minister Susan Shabangu, who testified in the Commission.

560. She was a hopeless, untruthful and recalcitrant witness who should have been reprimanded or otherwise censured.

561. She lied to the Commission with a straight face.

562. In breach of her oath of office and her constitutional obligations, she allowed herself to be unduly influenced by Ramaphosa.

563. Although she denied what Ramaphosa had said that she changed her characterisation of the strike, she only impliedly suggested that he must have been lying when he said that she did. She was only prepared to state that he
must have been the one under pressure because “he had to find a way of making sure that his colleagues feel he is doing well.”

564. It is likely that the full and devastating implications of that answer were lost to Shabangu, namely that:

564.1. Ramaphosa must have been acting consciously, deliberately and in a calculated way when he lied about her acceptance of the re-characterisation, assuming that she indeed never accepted it; or

564.2. Ramaphosa was telling the truth and Shabangu herself was lying (or, as charitably proposed by the Chair, she or he were “mistaken”, which was not the evidence); and

564.3. Most importantly, he must have at least tried to transmit the pressure put on him by his “colleagues” to her (unsuccessfully, if one reads JJJ192).

565. Either way, there can be no better proof that Ramaphosa is guilty of:

565.1. murder or incitement to murder;
565.2. corruption; and/or
565.3. perjury.

566. The involvement of the Minister in any of these sordid matters should at least attract an adverse finding against her as an individual or her department or a

---

424 Day 278 p 35595 ll 1 - 3
referral for the investigation of her conduct by the Ethics Committee of Parliament and/or the Public Protector. This is in view of the dire consequences of her alleged conduct.

567. She also lied to the Commission, under oath, when she testified that:

567.1. her references to a “sinister force determined to remove (NUM) from the face of the earth” was not a reference to AMCU but to Lonmin;425

567.2. Lonmin, on the above logic, was determined to drive the AMCU from power (despite its association with the Deputy President of the ANC and its having contributed to the ANC’s formulation of its stance on nationalisation!)

567.3. she did not understand English, when the absurdity of her false statements were demonstrated; and that

567.4. she had never heard of AMCU before August 2012 (despite having presided over stakeholder meetings when AMCU was cited in respect of the trouble at Impala earlier in the year).

568. Shabangu achieved the previously impossible feat of challenging Mr X for the prize of being the worst and most untruthful witness in the long life of the Marikana Commission. In doing so, she breached both her oath of office and the oath she took at the commencement of her evidence before the Commission.

425 Exhibit QQQQ17 para 1
569. At a broader level and as the Member of Cabinet responsible for the MPRDA, she and the Department failed to supervise the labour and other licence conditions applicable to Lonmin.

570. She denied that she had undertaken to take the matter to the Minister of Police and the Cabinet, as stated under oath by Ramaphosa.426 Later she conceded that she wanted to raise the matter with the Cabinet and thereby to the attention of the President and the Minister of Police.427

571. She refused to answer the question that the obsession to characterise the events was directly related to her and Minister Mthethwa’s well publicised utterances to the effect that “criminals” who threatened the community must be killed with no warning shots but with one shot, a kill shot!

572. In all her actions, she must be found to have failed to discharge her duty to advance the lot of the historically disadvantaged South Africans for, given the history of South Africa, there can be none so historically disadvantaged as the mineworkers.

426 Day 278 p 35576 ll 11 - 13
427 Day 278 p 35583 ll 5 - 15
C.6 : The conduct of individuals and loose groupings in fermenting and/or otherwise promoting a situation conflict

573. In line with the evidence of Mr Nzuza, it must be stated upfront that under this category must fall those of the strikers or strike sympathisers who were most probably responsible for the loss of life of:

573.1. Mr Fundi and Mr Mabelane on 12 August 2012;
573.2. Mr Langa and Mr Mabebe on 13 August;
573.3. W/O Lepaaku and W/O Monene on 13 August; and
573.4. Mr Twala on 14 August.

574. It must be stressed that although the killers of the above remain unknown, the Injured and Arrested Persons placed on record that, for the sake of progress and in the pursuance of the spirit of reconciliation, no useful purpose can be served by denying that these people were killed in the course of the strike and possibly by strikers.

575. Apart from publicly expressing his condolences to their loved ones, Mr Nzuza expressed the desire that, when properly identified, the perpetrators of those acts ought to be tried and, if convicted, jailed.

576. It is respectfully submitted that the Commission ought to make a finding in line with these sentiments expressed by Mr Nzuza and on behalf of the Injured and Arrested by their counsel in open Commission.
It would be appropriate to quote in full what Mr Nzuza said in his statement:

“18. Those strikers who are properly identified on the basis of credible evidence must be charged, tried and, if convicted in a court of law for any serious crimes, such as murder or arson, must be punished appropriately.

19. Similarly, those in the government and the company who are seemingly liable and responsible for the murder of human beings must similarly be charged, tried and, if convicted, punished in local and international courts.”

This then brings us to the equally felt desire of the Injured and Arrested that those who killed strikers, injured and (unlawfully) arrested them should equally, where identified, be prosecuted and, if convicted, jailed.

Once again, the Commission will have failed in its duty if it does not so recommend in the case of identified and identifiable alleged perpetrators.

The other individuals have been identified elsewhere in these submissions.

SECTION D : ANALYSIS IN TERMS OF THEMES RAISED IN THE OPENING STATEMENT OF THE INJURED AND ARRESTED PERSONS

Ad clause 9.1 of the Opening Statement

In its opening statement, the Injured and Arrested Persons party unpacked the questions to be addressed by the Commission into 10 separate sub-themes. Since those sub-themes were derived from the Terms of Reference, they do not really present new issues but a simplified or alternative methodology for looking
at the issues. Hence, in this section, unnecessary repetition of those headings which have effectively already been dealt with in section C will be carefully avoided.

582. The convenience of including this section stems *inter alia* from the fact that the Injured and Arrested Persons party largely modelled its questioning of witnesses with the views to addressing the issues in the format presented in its opening statement.

**D.1: The massacre could and should have been avoided**

583. This question has been extensively covered in the discussions under the conduct of Lonmin and SAPS, as well as other role-players, such as NUM and certain individuals like Mr Ramaphosa, which will not be repeated here.

584. By the elimination of all the major causal commissions and omissions of those parties, the massacre would have been easily avoided. The majority of those elements of conduct were predicated on legal and constitutional obligations and others are based on legitimate expectations, simple logic and moral values, such as ubuntu. More elaboration on these different standards will be referred to during the presentation of oral argument.

585. The central argument here is that the eventuation of the massacre was a result of human and institutional failures and neither inevitable, beyond control or an act of
God. It is submitted that the following non-exhaustive list provides an illustration of golden opportunities not taken, which may have served to avoid the massacre:

585.1. Had Lonmin not adopted its no-talks stance on 10 August 2012;

585.2. Had the NUM officials and office occupants heeded the advice of Lonmin security;

585.3. Had Lonmin not decided to deploy its security in an unprepared state on 12 August;

585.4. Had the protestors not attacked Lonmin security;

585.5. Had Lonmin not pointed out the breakaway group to SAPS (at a stage when the group posed no danger to anyone or at the least no greater or new danger than the much larger group on the koppie;

585.6. Had members of SAPS not interrupted the escorting of the breakaway group towards the koppie by throwing teargas and stun-grenades for no apparent reason;

585.7. Had the operation on 13 August 2012 been done according to the prerequisites of planning and/or situational appropriateness;

585.8. Had Mr Xolani Gwala and Gen Mpembe’s efforts at giving peace a chance been heeded and/or taken full advantage of;
585.9. Had the warm reception given to Mr Mathunjwa by the protestors been exploited to the full or at all;

585.10. Had the God-given opportunity presented by Bishop Seoka to both Lonmin and SAPS been utilised.

586. Many other examples in this vein will be raised during oral argument.

D.2: Toxic collusion

587. This is an extremely important topic in that it was amply demonstrated and at times conceded that the operation which led to the massacre was in effect a joint operation between Lonmin and SAPS. The co-operation, partnership and collusion between these two entities went far beyond the acceptable legal limits and was in itself causal of the massacre and unlawful. That the participants in the collusion were fully aware of the impropriety of their conduct is confirmed by the lengths they went to to conceal key aspects thereof. We now go on to deal with some of the indiciae.

588. The setting up of the JOC at the Lonmin premises was probably the scene-setter for the collusive actions of the two players. The JOC ought properly to have been set up at the Marikana Police Station or another suitable and neutral venue.

589. When it was clear that the violent conflict and/or potential conflict involved employers and employees on the one hand and the NUM and the workforce on the other, it was clearly inappropriate for a supposedly impartial police service or
government agency to identify itself so clearly with one of the key parties thereto. The absurdity of this situation can be illustrated by postulating the unlikely scenarios where the police would have set up shop at the NUM offices or at the koppie, to the complete exclusion of Lonmin.

590. The collapsing of the Lonmin JOC into the SAPS JOC was the consummation of the collusive relationship, which also manifested itself in many other ways, including:

590.1. SAPS using the surveillance equipment set up by Lonmin and their telephone lines and other equipment and resources;

590.2. Transferring Lonmin’s own “concerns”, for example about the breakaway group on 13 August, to the police and effectively egging them on to intercept the group when it was both unnecessary and inopportune to do so;

590.3. Participating directly in devising the plan and laying a decisive and essential role therein. It was conceded that Sinclair played a vital role in the production of the ultimate police plan;

590.4. The use of the Lonmin chopper by SAPS;

590.5. Sinclair and Botes pairing up with SAPS members to hunt down the breakaway group on 13 August;
590.6. Botes being posted permanently at the JOC with an alternate when he went home;

590.7. The sharing of radios and information as indicated by Amanda van der Merwe;

590.8. The best evidence of the collusion between SAPS and Lonmin and the full extent of its toxicity is best demonstrated by a reading and careful analysis of JJJ192, dealing with the synchronisation of the planning of the two entities, as well as the Ramaphosa emails, Exhibit BBB4.

591. The following witnesses gave important evidence and discussions in relation to the alleged toxic collusion:

591.1. Annandale;

591.2. Mbombo

591.3. Ramaphosa

591.4. Botes;

591.5. Sinclair;

591.6. Mokwena.

592. The collusion in itself may have been acceptable or neutral at face value. The toxicity thereof stems from the fact that it was intended to and did result in the massacre / tragedy.
D.3 : Murder of the poor

593. The simple proposition here is that whenever the justifications of self, private and/or putative self-defence are shown to be inapplicable, then and at the lowest a *prima facie* case of murder will have been shown, sufficient for the Commission to recommend prosecutions.

D.4: Self-defence claims are baseless

594. This topic is covered exhaustively under section C.2.2.1 hereinabove.

D.5 : Scene 1 : Murder

595. As has been mentioned in the introduction, Scene 1 is the only scene where the self-defence in all its manifestations was invoked in such a way as to require further enquiry and not merely in a bare and undefined form, albeit on closer inspection, without any basis.

D.6 : Cold-blooded extrajudicial executions

596. There are sufficient indications that the murder and maiming of the victims was not only foreseeable and foreseen, as previously indicated, but that it was premeditated ad calculated. Some of the *indiciae* in this respect include evidence to the effect that:
596.1. the utterances allegedly heard by W/O Myburgh that the strikers “deserved to die”;

596.2. the roundly denied but objectively established use of banned pellets at Scene 2;

596.3. the strong evidence of Mtshamba, corroborated by many others, that people were shot while surrendering in the Killing Zone;

596.4. Sebatjane’s boastful comments about emptying a gun on one of the strikers, including vulgar language;

597. It is anticipated that a more detailed analysis of this aspect will be presented on behalf of the Deceased Families.

D.7: Who gave the orders?

598. Given the chain of political pressure demonstrated elsewhere herein, it is respectfully submitted that the following people gave the order(s) for the killings:

598.1. Ramaphosa, who abused his political power to insist on a false and opportunistic re-characterisation of the problem so as to fit the call for political intervention, the police and/or the army, concomitant action and acting “in a more pointed way”;

598.2. Minister Mthethwa, who breached his constitutional duties by transmitting the pressure received from Ramaphosa downwards, most probably to both Phiyega and Mbombo;

598.3. Phiyega, who entertained the pressure and discussed its content and urgent implementation with Mbombo, in breach of her own constitutional and statutory duties;

598.4. Mbombo, who admitted to issuing the order after the NMF meeting;

598.5. Annandale, who received the order from Mbombo and perfected it by assigning a specific time to its execution; and

598.6. Calitz, who ordered the roll-out of the barbed wire (the trigger-event), brought the TRT to Scene 1 and instructed the TRT members to “engage” the strikers with live ammunition for no lawful reason.

599. At Scene 2, the orders were given by the various senior SAPS officers there present but that operation was merely a continuation of what happened at Scene 1 on the orders of Calitz. The chain is accordingly the same as Scene 1.

600. On 13 August 2012, it is not clear who gave the orders except to say it is whichever member of SAPS ordered the firing of the teargas and stun-grenades. In this case, the chain started with Mbombo, who ordered an unplanned yet predictably dangerous disarming operation.
D.8 : Police revenge / retaliation and malice

601. The conduct of the police, which is observable on the video evidence and which is referred to elsewhere in these submissions, including instances of body-dragging, kicking on the neck, laughter, vulgar language and more importantly the failure to call for medical help (which is a contravention of UN Conventions), will all be invoked as *indiciae* of malice and vengeance on the part of members of SAPS.

602. In the same vein, it is submitted that the senseless arrests of the arrested persons for arbitrary “crimes”, including the murder of their comrades, were further signs of the malicious victimisation of defenceless human beings and an abuse of state power.

D.9 : Deeper underlying (socio-economic) causes of the massacre

603. Historical and socio-economic analysis

604. Phase 2

D.10 : Arrests and charges against protestors unjustifiable

605. Internal provisional withdrawals

606. Final withdrawals

607. Mr X (remaining charges)
Ad clauses 9.2 – 9.10 of the Opening Statement

608.

SECTION E: ANALYSIS IN TERMS OF THE IDENTIFIED GAME-CHANGERS: WHY THE MASSACRE AND RELATED EVENTS HAPPENED

609. In this section, we deal with what we regard as the second unique contribution of the Injured and Arrested Persons, namely why the events under investigation happened.

610. It is all very well and necessary to enquire in sufficient detail as to what happened, how it happened and even when it happened, as has been extensively covered hereinabove. However, if indeed one of the key objectives of the Commission is to prevent a recurrence of the tragedy, then the root causes must be explored and exposed. This can best be achieved by interrogating the question why the events happened.

611. It is proposed to do this by the exploration of the three Game-changers identified and canvassed with various witnesses called by SAPS and Lonmin.

612. It cannot be over-emphasised that these Game-changers are all interrelated and mutually reinforcing and accordingly cannot be examined in isolation. Their interrelatedness will be further discussed at the end of this section.
613. The causal effect and contributory impact of each Game-changer can be demonstrated by a process of elimination or a version of the but-for test. That is, one would have to postulate how things might have turned out had the specific Game-changer under discussion not occurred.

E.1 Game-changer One: The shooting of protestors by NUM members

614. The impact of this event cannot be overestimated. It is no exaggeration to say that, but for the NUM attack:

614.1. the protestors would not have used the koppie(s) as their daily meeting place; and

614.2. the decision to arm themselves with dangerous weapons would not have been taken.

615. These two conclusions were repeatedly affirmed in evidence and were never challenged or gainsaid. To be sure, no other credible reasons were advanced why else the protestors changed their usual meeting place outside the stadium and why, having not carried dangerous weapons on 9, 10 and the morning of 11 of August, they had suddenly resorted to carrying dangerous weapons.

616. The consistent evidence of the protestors was that these two important decisions were taken as a direct result and solely because of the NUM attack.
617. In summary, therefore, it must be accepted that the NUM attack provided us with both the terrain (the koppie) and the main motive (or excuse) for the massacre, ie the disarming or removal of dangerous weapons. These are two defining features for the eventuation of the massacre. The third is the timing, which is dealt with elsewhere.

618. At a broader level, the NUM attack must have contributed in further poisoning the atmosphere and was the first sign of violence directed at the strikers as a whole. The evidence of one of the two wounded victims of the NUM attack, Mr Mabuyakhulu, that the strikers including himself were largely unarmed or armed with sticks, in the same way as the peaceful march of 10 August, was not successfully disputed or shaken.

619. There can be little doubt that the NUM attack was unlawful and unjustifiable. The common cause version of the affected NUM officials and the Lonmin security personnel was that:

619.1. an unsourced and unconfirmed report from an unnamed informant suggested that the protestors were planning to attack the NUM office with an intention to burn it;

619.2. upon hearing this, Lonmin security decided to preempt things by going to forewarn the occupants of the NUM office and specifically to request them to vacate the office in order to save life and limb;
619.3. the NUM officials refused and instead vowed to “defend” the office;

619.4. meanwhile, the protestors had indeed resolved to march to the NUM office, not to attack it, on their version, but mainly in order to enquire why NUM had prevented the employer from talking directly with the strikers

619.5. whatever their motives, the protestors indeed marched to the NUM offices. They were unarmed and some were carrying traditional sticks, as they did on 10 August 2012 in the march to LPD, roundly described as peaceful;

619.6. the NUM officials shot at the oncoming protestors and the latter fled back in the direction of the stadium through the hostel;

619.7. two of the protestors, namely the witness Mr Mabuyakhulu and Mr Ngema, were both shot in the back and fell down;

619.8. the two casualties were believed to have been killed, by both their fellow strikers and the police. This fortunately turned out not to be the case;

619.9. there is objective evidence of the NUM members being armed with dangerous weapons and it is common cause that they were also armed with guns;

619.10. although eight members of NUM were identified as the assailants or attempted murderers, including Mr Brown (or Mr Setelele), to date they
have not been prosecuted. As a result of this, no credible justification has ever been presented for the NUM attack on the strikers;

619.11. the strikers repeatedly cited the NUM attack as the reason for carrying their dangerous weapons and their motives of using the weapons only as a means of collective defence against any similar attacks.

620. It will be submitted that the Commission should make findings to the effect that:

620.1. the NUM attack was *prima facie* unjustified and could and should have been avoided by simply following the advice of the Lonmin security personnel. The stubborn refusal to do so on the part of NUM was unreasonable in the extreme;

620.2. the protestors were not armed and there is no credible evidence that they were coming with belligerent intentions;

620.3. after the shooting, the protestors fled and the NUM members followed them in hot pursuit;

620.4. the decisions to gather at the koppie and to arm themselves with dangerous weapons were taken as a direct result of the NUM attack;

620.5. these two decisions literally set the stage for the massacre in that, without their having been taken, the massacre, as we know it, would definitely not have occurred.
E.2 Game-changer Two: The role played by the events of 13 August 2012 and the resultant revenge motive on the part of members of SAPS

621. The events of 13 August 2012 have been discussed elsewhere and it is common cause that the violence was sparked by the unprovoked attack upon the protestors by the police in throwing teargas and stun-grenades at the crowd of protestors for no apparent reason or any credible reason offered by SAPS.

622. In this section, it is not intended to revisit the merits of what happened on the 13th but rather to investigate what overall impact it had on the events which ultimately led to the further 34 deaths on 16 August 2012.

623. There is evidence that the images of the dead policemen went viral and was accessible to other SAPS members. In any event, these images were widely published in the mass media and the news of the police killings dominated the news.

624. In any event, it is well-known worldwide that the police do not take kindly to “cop-killers”. It can therefore be accepted that this news sent shockwaves and widespread anger in the ranks of SAPS.

625. The killings of police officers, as would be expected, caused a frenzy of activity, including:
625.1. the unsolicited journey made by General Annandale in travelling all the way from Pretoria to the Marikana area. He later gave the instruction to move to Stage 3 and determined the 15h30 time;

625.2. the visit of the National Commissioner;

625.3. the calling up of Lieutenant Colonel Scott, who later played an important role in devising the plan which underlay the abortive operation;

625.4. very foreseeably, it was responsible for raising emotions on the part of SAPS members or even “on both sides”. Similarly, it could foreseeably have resulted in “blood” and the killing of 20 people, which would have been a version of the massacre, according to General Mbombo;

625.5. from the utterances of both General Mbombo and Bernard Mokwena, the causal relationship between the police killings and the possibility of a bloodbath was not only foreseeable but actually foreseen by both organisations.

626. In essence, the deaths of the two policemen which were caused by SAPS had ignited a series of events which heightened tensions and contributed to the occurrence of the massacre on the 16th.

627. In addition, the utterances of Captain Kidd to members of the TRT on 16 August 2012 seemed to reinforce and to remind them that the protestors were to be treated as “dangerous”, inter alia, because they had killed “two policemen and
eight other innocent people”. This was said despite the fact that it later turned out that the events of the 13th were sparked by the police themselves and, more importantly, that it was only a group of 100 plus, out of the 3,000 strong crowd, who had even been involved in the events of the 13th.

628. The plan which was finally approved was premised, inter alia, on the events of the 13th. This is the clearest indication of the causal impact of those events on the outcomes of 16 August. Simply put, but for the events of the 13th, it is inconceivable that the plan of 16 August would have come into existence and been implemented with the now known results, which were the massacre of 34 people, hence the tag of Game-changer.

E.3 Game-changer Three : The impact of political pressure

629. It is respectfully submitted that, but for the political interference and pressure exerted by the likes of Mr Cyril Ramaphosa and/or Minister Mthethwa, the massacre would not have happened, alternatively would not have happened as it did, and that the particular persons who died therein would probably be alive today. What follows is a clear analysis to support this conclusion.

630. The Injured and Arrested Persons brought this subject up literally at the very beginning and during the presentations of the opening statements. This attracted a lot of castigation, fake surprise and accusations of clutching at straws, etc. There were even suggestions that the emails had been “manufactured”. 
631. It was possibly only after the revelation of JJJ192 that the conversation between Mbombo and Mokwena, in which both identified Ramaphosa as the “politically high individual” who had pressurised Minister Mthethwa, that Ramaphosa’s role could no longer be denied or easily dismissed and it became clear that he could not avoid testifying at the Commission.

632. To cut a long story short, by the end of the Commission hearings, it had been correctly conceded that:

632.1. Ramaphosa had initiated a series of telephone calls related to the bringing about of political power or pressure to bear upon the situation in Marikana;

632.2. as a result thereof, the Minister had informed the National Commissioner of political pressure from a politically high individual, who was a shareholder of Lonmin. The (political) nature and source of the pressure and the (shareholder) capacity in which it was exerted were therefore clearly understood by all the players, including the leadership of both SAPS and Lonmin;

632.3. if there is still any lingering doubt about the overtly political nature of the pressure and how it was universally understood as such, then one only has to read what most arguably be the most chilling and shocking passage in the entire evidence, in respect of which justice can only be done, by quoting in full:
“SAPS COMMISSIONER : Sending that message
MR MOKOENA ; Yes, They will expect .. (INAUDIBLE)
so what are you doing now
SAPS COMMISSIONER : You see I want us to – you remember last night ABIE I raised this thing that when we were dealing with IMPALA we had a lot of allegations and rumours and some of these allegations they were pointing to the management that the management is colluding with AMCU and so on and so forth. And at some point – at some point ourselves we were asking ourselves questions to say but these rumours that we are getting, these issues that are being said, they might find truth somehow because we looking at how the management was moving forward in terms of taking action, in terms of you know, because what we believe is, is that whether there is this unrest now this unrest does not withdraw out policy, our policies are still intact, they need to be implemented in the best way and the unrest situations then should take its own form. But like I said yesterday that once we are on site as the cops then we take control of the security issue, but the administrative issues should also take their own life. So at the end of the day when we were dealing with these issues we ended up ourselves not being comfortable in terms of understanding whether the IMPALA mine management really is colluding with the mine. But also remember from a political point of view there was even this feeling that you know, the mining sector wants to replace NUM, you know, with a new face and maybe that is why these things are erupting. So I think yesterday, ABIE will recall – you will recall when this discussions with the NATIONAL COMMISSIONER came, she also from the discussion that she raised with you and, you know, and some of these questions that she raised, you remember I raised them in the morning in our meeting, and she also felt that you know, it is difficult to separate management from giving these people a leeway, and if management gave these people this type of a leeway how do we separate them now from an allegation that can come and say but they are
supporting them. So I want us to, when you said people must be arrested, I want us to be very clear that any information that we get we should get so that we arrest people. That is our interest, because yourselves here as management you will clear yourselves from this …

MR MOKOENA : Perception

SAPS COMMISSIONER : Perception, you know

MR KWADI : Yes

SAPS COMMISSIONER : You will clear yourself by ensuring that you de-fuse, you give out information that is related to this thing and we are able to actually act on that information. Because I think even when we were trying to talk about it last night, she asked me a question that says you know – well, this one I am not sure, because the LONMIN shareholders I do not know much about them

MR MOKOENA : Yes

SAPS COMMISSIONER : But when I was speaking to MINISTER MTHETHU he mentioned a name to me that is also calling him, that is pressurising him, unfortunately it is a politically high …

MR MOKOENA : It is CYRIL

SAPS COMMISSIONER : CYRIL RAMAPHOSA, yet. Now remember now when I was talking to the NATIONAL COMMISSIONER last night she says to me, look GENERAL who are the shareholders here, so I said I do not know the shareholders but I know that when I spoke to the MINISTER he mentioned CYRIL. And then she says, now I got it. You know why she says she got it? Remember CYRIL was in the appeal committee of MALEMA, remember?

MR MOKOENA : Yes

SAPS COMMISSIONER : And he was very strong in terms of the decision that was made
MR MOKKOENA : Yes

SAPS COMMISSIONER : And remember that in IMPALA, MALEMA came with our PREMIER and spoke to those people about that they should make their demands but in a way that – and after that we ourselves as the police we managed to, you know, manage the situation after MALEMA came. Now our discussion with the NATIONAL COMMISSIONER was around this thing now happening such that again MALEMA come and de-fuse this thing, so that it becomes as if MALEMA has taken charge of the mining – the mine

MR MOKKOENA : Yes

SAPS COMMISSIONER : Once again remember MALEMA’s view that the mine should be …

MR MOKKOENA : Nationalised

SAPS COMMISSIONER : Nationalised and all of that. So it has got a serious political connotation that we need to take into account, but which we need to find a way of de-fusing. Hence I just told these guys that we need to act such that we kill this thing

MR MOKKOENA : Immediately, yes

SAPS COMMISSIONER : When tomorrow we have to move in, if today we do not find co-operation I these people we need to move in such that we kill it. Because we need to protect a situation where any jick-and-jiff from a political area …”428 (emphasis added)

633. From the above, it is undeniable that both SAPS and Lonmin conspired in, and at best were both aware of, the linkage between the operation and political considerations.

428 Exhibit JJJ192
634. Of all the utterances made, nothing could be more depressing and legally reprehensible than the consensus which had been reached between the National and Provincial Commissioners that an opportunity to defuse the tensions and avoid further violence ought to be avoided, or presented purely and simply because, apart from resolving the violence (as had happened before), it would result in political credit going to a rival politician to the ruling ANC, Mr Julius Malema.

635. That conversation must represent the lowest point in the history of SAPS, taking place as it did between two of the highest ranking police officials in the country. It is nothing short of despicable, downright illegal and a breach of everything enshrined in our Constitution.

636. In the context of the Game-changers, what is clear out of the aforesaid conversation is that the crucial matter of the TIMING of the operation was decided on the basis of the mentioned political considerations.

637. Simply put, it can be deduced that, but for the political pressure and the resultant political considerations, the urgency and the need to “kill this thing” before any “political jack-and-jill” could take advantage of it (even if it meant resolving the impasse), the operation either would not have taken place or, at best, would not have taken place within a day or two of the airing of the views expressed in the conversion of the generals and the conversation in JJJ192.
638. It does not take much imagination to realise that had the TIMING of the operation been different, then the specific deceased victims who perished would probably be alive today. This point cannot be better illustrated than referring to a victim like Mr Gwelani, who was killed on his way from the koppie and who must have been at the wrong place at the wrong time.

639. The political pressure was directly and causally connected to the 34 deaths, the injuries and arrests of the specific victims who suffered these calamities on 16 August 2012. A finding to this effect is, with respect, unavoidable.

640. In addition, it is respectfully submitted that Ramaphosa exerted the political pressure knowingly, consciously and in a calculated manner, with the intention that a violent solution should be preferred over and above and to the exclusion of a peacefully negotiated resolution of the labour of wage dispute.

641. Under cross-examination, he conceded that:

641.1. the matter remained a labour dispute and at best a “hybrid” but never an exclusively “criminal” matter, as clearly and incorrectly agreed between him and Jamieson;

641.2. there was nothing “damaging” about stating the truth that the dispute had to be resolved by management and labour sitting down around the table;

641.3. it was wrong to categorise the dispute as one which could not be resolved without political intervention;
641.4. it was inappropriate and unlawful for SAPS to elevate political considerations above those of safety and security;

641.5. more significantly, Ramaphosa accepted his share of the responsibility for the massacre. It only remains to scrutinise the true nature of his personal responsibility.

Conflicts of interest

642. It is respectfully submitted that the Ramaphosa's intervention was infested with a litany of conflicts of interest.

643. More particularly, and as a shareholder and director, his interests and those of the strikers and the unions were diametrically opposed. His partisan liaisons with the NUM must also be seen in this light. The NUM had pitted itself against the strikers.

644. His failure to reach out to AMCU, fuelled by his incorrect belief that AMCU was behind the violent strike, also speaks volumes about the true intentions of his involvement.

645. He also was an indirect part of government insofar as he was a high ranking member of the National Executive Commission (NEC) of the ruling African National Congress (ANC).
It was in this connection that he sought to involve Mr Gwede Mantashe, the ANC Secretary General, in the strike. Ramaphosa’s dishonest attempt to minimise the importance of this conflict by attempting to say that Mantashe was being involved as a former official of the NUM was proved to be a lie when the actual contents of his relevant email were read out to him, namely:

“I will be speaking to Gwede Mantashe the ANC Secretary General and suggest that the ANC should intervene.”

He was forced to concede that this was untoward.

Criminal responsibility

Murder

Go back to TIMING (date)

cf Terrain and TIMING (time)

Accomplice

Corruption

Phone calls

Mthethwa
653. Reasons for characterisation

E.4 The interconnectedness of the Game-changers

654. There is an incremental and symbiotic relationship between all three Game-changers and it can be summarised as follows:

654.1. But for the NUM attack, the terrain of the massacre (ie the koppies) would have been different.

654.2. But for the NUM attack, the protestors would not have acquired dangerous weapons.

654.3. But for the acquisition and possession of dangerous weapons, as was made plainly clear by General Mpembe, the police would not have intercepted the group of 100 plus on 13 August 2012 and therefore the five persons who died in that clash, including the two policemen, would be alive today.

654.4. But for the police killings, the high emotions of the police would have been a factor or a point of “warning” to the would-be shooters about how “dangerous” the protestors were and how they had killed two policemen and eight other innocent people, which must have played a role in the mindset of the shooters and contributed to the possibility of vengeance and retaliation.
654.5. But for that history, the mood of the individual policemen would have been different.

654.6. But for the killings, the label of “criminals” and the re-characterisation of the situation (an important topic on its own) would most likely have not been successfully achieved and no calls of “concomitant action” would have been justifiably made. Ramaphosa made it clear that his comments were premised on “the brutal murders of six employees, two Lonmin security personnel and two police officers”.429

654.7. But for the possession of dangerous weapons and the escalation of violence and especially the police killings, neither Gen Annandale nor Lt Col Scott, both of whom played a pivotal role, would probably have even featured in Marikana. This would have disposed of both the plan and the decision to commence the operation at 15h30 on 16 August 2012. Nor would the deployment of the NIU and STF probably have occurred.

654.8. But for the political pressure and the elevation of the political considerations the TIMING of the operation would probably not have been carried out or have been more realistically carried out by the end of the week, alternatively interventions, such as those of Mr Mathunjwa, General Mpmbe and Bishop Seoka, may have been given an ear and may have prevailed or caused a decisive delay of implementation.

429 Exhibit FFF32 para 13.2
654.9. But for the political considerations, the SAPS leadership would have considered other interventions, which would have defused the situation exactly because they had recently worked in a similar situation even by conceivably asking for Malema’s intervention instead of shunning and fearing it for party political reasons.

The simple point made in this section is that the identified game-changers piggy-backed on each other and culminated in the massacre.

E.5 : SAPS’ explanation of why the massacre happened: muti/rituals, invisibility

655. The lowest point in this saga must surely be the allegations that the strikers were possessed by muti and maddened to the extent of walking into automatic machine-gun fire in the belief that bullets would not penetrate them and/or that they were invisible. SAPS was scraping the bottom of the barrel.

656. No credible evidence was presented to support this theory. The only witness who supported this fantastic theory was Mr X, who was totally discredited. Nothing that Mr X has testified about, which is not supported by objective evidence or which is contradicted by other witnesses, can be accepted. His muti theories were contradicted, challenged and denied by numerous witnesses.

657. What is not denied is that a few individuals may well have and did use intelezi for protective reasons and, according to their minority belief, that it would protect them from danger. This was accompanied with evidence that other people did
the same by relying on prayer rather than intelezi, also in the belief that such prayer would operate to protect them. There is no evidence whatsoever that those who used intelezi or prayer for spiritual protection did not indeed escape danger. This is so because not a single individual who resorted to either spiritual method was identified. It also seems likely that those who believed in intelezi also underwent ritual cuttings, either at the mountain or at home, although no reliable evidence was led as to where and when this might have been done or how fresh the cuttings might have been in each case. The sangomas were also not called by SAPS to corroborate their conjectural theories.

658. What is also indisputable is that those who participated in the rituals constituted a tiny minority of the 3,000 strong crowd. SAPS’s own version as contained in Exhibit L put the number at no more than 50 out of 3,000 or so. The photographic evidence also accords with this number.

659. It is also indisputable that, unlike the impression sought to be concocted by SAPS, these spiritual rituals were not performed in secret or in darkness but in broad daylight and in the full glare of the crowd, in front of the populated koppies and in full view and near proximity of the police and their cameras, as well as the media. SAPS never made any heavy weather about such traditional practices, probably because such beliefs are not strange among rural and some urban people.

660. By resorting to this kind of unsubstantiated drivel, SAPS, even by their own modest standards, reached a new low by succumbing to the temptation to invoke
racial and ethnic stereotypes, which often depart from the premise of the barbaric and stupid African.

661. On an inspection of the evidence and an unjaundiced interpretation thereof, including the objective video evidence of the movement of the strikes, the muti theory ought to be roundly rejected. Some of the rhetorical questions which may well be asked in this connection include:

661.1. How does SAPS reconcile the seemingly mutually exclusive theories that the strikes believed themselves to be invisible with the belief that bullets would not penetrate them, like the experimental tin box of Mr X fame?

661.2. How does SAPS reconcile the theory of impenetrability with their other theory that the strikers wore heaving clothing so as to protect themselves from rubber bullets?

661.3. Why did the strikers say they were prepared to die for their R12,500 demand if they believed themselves to be immortal?

661.4. Why did the strikers take evasive action against and run away from the POP members who were shooting at them near the kraal a few seconds before the volley of TRT gunfire? A photograph of a screaming or crying Magidiwana is sufficient testimony of the reaction to that shooting.

661.5. Why would strikers who were not fearful of bullets cover their heads as they were running towards the road to Nkaneng?
661.6. Does it make sense that people not fearful of bullets could be successfully repelled with water?

661.7. If indeed one of the key prescriptions for the muti was no changing of clothes, then how come:

661.7.1. Mr Noki and Mr Nzuza, who were leaders of the strike, changed their clothing more than once and seemingly went home to do so? (The evidence of Nzuza that he never slept at the koppie was never challenged. This was supposedly yet another prescription which was therefore not followed)

661.7.2.

661.8. If the strikers were in their belief invisible, then how did they manage:

661.8.1. to have discussions with the Motlogeloa group?

661.8.2. To have discussions with the Mpembe group?

661.8.3. To conduct negotiations with the McIntosh group?

662. In the totality of the circumstances, and in the absence of any supporting evidence of the muti theory, it behoves the Commission to roundly reject it and to condemn its opportunistic invocation.
SECTION F : REINFORCEMENT : THE RELEVANT SUPPORTING EVIDENCE OF SELECTED WITNESSES, VIDEOS AND PHOTOGRAPHS

663. In the context of the 3-stage analysis provided above and against that background, we now proceed to reinforce the conclusions contended for by reference to a batch of selected witnesses, whose evidence will be focused upon to provide such reinforcement. Ideally, all the witnesses would be dealt with in this way but considerations of time and practicality dictate against this. The selected witness list is made according to relative importance and witnesses called by the Injured and Arrested Persons or at their instance or request (eg Ramaphosa and Phiyega recall). Only the evidence relevant to the abovementioned discussion will be highlighted, hence the appellation of “reinforcement”. Special care will be taken to avoid repetition of evidence already referred to in different contexts.

F.1 : Mr X

678. His evidence lacks credibility and must be disregarded in its entirety.\(^{430}\) Whatever truth may lie in the various versions proffered by him, it is so embroiled in layers of fabrication that no credible version can be extracted from his evidence.\(^{431}\) He was motivated to give evidence before this Commission in the hope that he will

---

\(^{430}\) Day 259 p 32661 ll 14-20
\(^{431}\) Day 259 p 32662 ll 3-7
be exempted from criminal prosecution. His statements were contrived and designed to bolster the SAPS’ case of self-defence.

679. He testified that he was a member of the Committee of 15, whereas the objective evidence demonstrated that he was not. He testified further that he was part of the group of five who was elected to speak to management on 10 August 2012 about the wage demands. He was not so elected. He further testified, in direct contrast to the objective available evidence that Mr. Mathunjwa was at the Koppie on 14 August 2012. This evidence was contrived to create fabricated allegations that the protestors were forced to join AMCU. The objective evidence, as well as the testimony of Mr Magidiwana demonstrate that Mr Mathunjwa first appearance at the koppie to address the protestors was on 15 August 2012. His evidence that he joined AMCU on the mountain on 14 August 2012 by completing forms is also a delusional fabrication. The evidence demonstrated that he joined AMCU in September 2012, and re-joined NUM in December of that same year.

680. It was his evidence that whilst there were initially problems in the preparation of his second statement, the problem was resolved when the Shangaan interpreter was replaced with an interpreter who was conversant in his mother

---

432 Day 259 p 32663 ll 22 - 25
433 Day 259 p 32666 ll 19-23
434 Day 259 p 32667 ll 1-5
435 Day 259 p 32667 ll 14-17
436 See Mr Magidiwana’s evidence in chief, Day 55 p 5921 ll 1 – 11; see also Day 54 p 5866 ll 12 - 20
437 Day 259 p 32667 ll 20-25
438 See Exhibit AAA8
tongue, isiXhosa.\textsuperscript{439} The statement complied with the assistance of the Shangaan interpreter was incorrect in two respects. Firstly, it refers to goats and not sheep and second it says that ashes were taken from the security official whose chin and tongue were cut out, and who was killed on Saturday morning.\textsuperscript{440} The statement is incorrect because this is not what happened to Mr. Fundi. His response was that he did not know the names of the security officials killed. He is aware that one was moved from the car and the other not, and no ashes were taken.\textsuperscript{441}

681. The statements given on his score are contradictory. In the one he talks of ashes, in the other he does not.\textsuperscript{442} The contradiction was not cured or explained away even on the resolution of the language barrier. The fact that his statement was initially taken by a Shangaan speaking interpreter cannot and certainly did not explain the stark contradictions contained therein insofar as it relates to his actions and those of the other protestors on the scene. It was demonstrated that his evidence on this issue is unreliable because even once the language barrier was resolved the implausible contradictions were not erased.\textsuperscript{443}

682. He further contradicted himself about what happened to the flesh and blood of the victim. When asked whether he personally witnessed the human tissue being mixed with the muti, \textit{“with his own two eyes”}, he was evasive and recalcitrant. He

\begin{flushleft}
\textsuperscript{439} Day 259 p 32676 ll 2 - 4
\textsuperscript{440} Day 259 p 32677 ll 1 - 14
\textsuperscript{441} Day 259 p 32677 ll 22 - 25
\textsuperscript{442} Day 259 p 32678 ll 22 – 25; p 32679 ll 1 - 3
\textsuperscript{443} Day 259 p 32679 ll 13 - 16
\end{flushleft}
did not answer the question. He said only the bottles were there and they were mixed. Only when pressed for an answer by the Commission does he commit to answer, saying “Yes I saw it with my own two eyes”. His reluctance to initially answer the question is a demonstration of the fabrication of his final answer. His answer is also not supported by paragraph 13 of his statement, where he said Bhele handed one of the Sangomas the human tissue. Afterward he said that on arrival at the mountain Xolani and Mambush gave the Sangomas the human tissue. In yet a further contradiction he testified that the packet containing the human tissue was left on the ground. Nobody handed it to the Sangoma. The Sangoma took the packet. The evidence shows that he recorded in his statement, inconsistently with the evidence given at the Commission that the human tissue was handed over to the Sangoma, and named the person who so handed it over.

683. His delusion even extends to his ability to speak the truth. Although somewhat generalised and derogatory he suggests that because he is a Xhosa person he will deny something that he knows. On this basis alone his evidence falls to be rejected as the delusional fabrication of an individual who is unable, alternatively unwilling to shed light on the events between 9 – 16 August so as to constructively and meaningfully assist this Commission.

444 Day 259 p 32680 ll 1 - 13
445 Day 259 p 32680 l 20
446 Exhibit AAA 1.2
447 Day 259 p 32681 ll 13 - 15
448 Day 59 p 32683 ll 1 – 10, 18 - 25
449 Day 259 p 32684 ll 6 - 14
450 Day 259 p 32685 - 32686
684. His testimony that he witnessed the preparation of the muti “with his own eyes” is contradicted by two of his statements.\textsuperscript{451} In one statement he records, that “we were told that the human tissues and blood are going to be mixed together to make a much stronger muti by the sangoma.”\textsuperscript{452} In the next he goes on to say that there “was the mention that these things would be mixed so we don’t have to turn back.”\textsuperscript{453} His allegedly correct statement recorded with the interpreter who was conversant in isiXhosa, was that these things were said after the muti was mixed.\textsuperscript{454} He says lastly that the man was mutilated and pieces of his flesh eaten by the people.\textsuperscript{455} The extent of his evidence on the handling and preparation of muti is inconsistent, unreliable and of no evidentiary value.

685. He further contradicted his statement at Para 7 of Exhibit AAAA8 where he said that “the flesh and blood were mixed with muti and we all licked it. This happened every time when a person is attacked and killed whereby his blood was collected and mixed with muti and licked”\textsuperscript{456} He stated simply that this was yet another error in the statement, but was unable to explain why it was not corrected after the Shangaan interpreter was replaced.\textsuperscript{457}

\textsuperscript{451} AAAA8 and AAAA12  
\textsuperscript{452} Day 259 p 32689 ll 16-24  
\textsuperscript{453} Day 259 p 32689 ll 7-9  
\textsuperscript{454} Day 259 p 32689 ll 13-14  
\textsuperscript{455} Day 259 p 32690 ll 10-14  
\textsuperscript{456} Day 259 p 32693 ll 1-6  
\textsuperscript{457} Day 259 p 32695 ll 19-25
686. He stated further in AAAA8 at Para 6 that he ("we all") believed that the muti works. He testified further and recorded in his statements his belief that the muti indeed works if one follows the instructions correctly.\textsuperscript{458} In the light of his belief in the efficacy of the muti he voluntarily participated in the rituals.\textsuperscript{459} In a complete about turn he then testifies and that he underwent the rituals because he was afraid for his life.\textsuperscript{460} This is simply irreconcilable. He participated voluntarily because his belief system accommodated the use of and effect of the muti. His allegation that he was forced is also inconsistent with his earlier recorded statements where he says that people who did not believe in muti did not enlist and did not form part of the group on whom the rituals were performed and were apparently free to abstain from participation.

687. On his prior version this constituted the majority of the group, and people who participated or volunteered to be part of the ritual.\textsuperscript{461} He conceded further that those who took part in the ritual did so voluntarily on their own, after they realised that the muti does indeed work.\textsuperscript{462} His evidence on this score was simply nonsensical. It is devoid at any evidentiary value. It was his assertion that the ritual was voluntary for everyone, yet he feared for his life and that is why he participated. This is contradictory and implausible. He says he would have died,
never mind that there were approximately 2500 other individuals who did not participate in the exercise.463

688. He was evasive and recalcitrant in acknowledging that at Para 9 of his statement464 he said that not everybody performed the rituals because some did not make use of it465. The very fact that people chose to participate in the ritual when they witnessed it, or believed it to be working, demonstrates that everybody at the koppie, including Mr X, was vested with a choice whether or not to participate in the rituals. It is further proof that it his evidence that he was forced to participate for fear of his life was a fabrication aimed at casting the strikers in a bad light. The fact that everybody was vested with a choice on the use of the muti and the participation in the rituals, was further proof that it was voluntary and people decided according to their belief whether to participate.466

689. There is further no evidence to suggest as stated by him in paragraph 8 of Exhibit AAAA8 that everyone was forced to join the strike, and somewhat broadly and ambiguously that this was decided at the meeting.467 He says this despite having conceded that that everybody including him participated in the strike because they were interested in money and went to the koppie468. The allegation that the protestors were forced to join is and support everything decided is false and contradictory.

463 Day 259 p 32701 ll 1-9
464 See Exhibit AAAA 1.2
465 Day 259 p 32704 ll 19-22
466 Day 259 32705 ll 1-6
467 Day 259 p 32706 ll 1-4
468 Day 259 p 32705 ll 17-22
690. His evidence has been a waste of the Commission’s time. Mr X has contributed nothing of evidentiary value is the questions this Commission has been called upon to answer. He was clearly not present when the relevant events happened and he cannot be believed at all. He agreed further that he was unable to offer any assistance in respect of what happened at scene 2.

691. He testified that on Mr. Mathunjwa’s departure, the police arrived and uncoiled barbed wire. Mr. Noki then went and asked them what they were doing. Mr. Noki also on his version said you cannot keep two bulls in one kraal. An RDO from Rowland Shaft, Mr Kaizer, said those police that are coming from the Eastern Cape will be left there. After Mathunjwa left strikers were singing up and down in from of the koppie. He testified further that after the singing the Nyalas started to uncoil the barbed wire from the side of the electric pylons moving towards the kraals. However, his version is implausible. At that stage, the exhibit demonstrated the wire was still coiled. What this demonstrates clearly is that he was not there. The objective evidence presented in the animated video also demonstrates that there was no question of any up and down singing movement of the crowd. The evidence of police witnesses there present, such as Calitz also does not indicate such. Nor was this put to any of the witnesses of the Injured and Arrested Persons who were eye witnesses.
692. He was asked by Commissioner Hemraj to identify on the picture i.e. exhibit L 198 and he could not locate himself in the picture.\textsuperscript{475}

693. He had not on his version reached the kraal when the people were gunned down at scene 1. He turned around and fled. He testified that had he reached the kraal he would have suffered the same fate as those lying there.\textsuperscript{476} Since he had not reached the kraal, he was not in a position to give evidence on what happened at Scene 1.\textsuperscript{477} His evidence that those who were shot were trying to get in front of Nyala 4 is thus without foundation.\textsuperscript{478}

694. His further evidence, which contradicts the above that they were passing the Nyala and going towards the police to attend there\textsuperscript{479} is also not plausible. He cannot give a direct account. If he was there at all, then he simply did not witness the shooting, having turned around and deciding to run away when he heard the valley of shots. His version that the protestors who circumnavigated the kraal were going to attack the police when he simply was not even there must be rejected. It is contrived.

695. His answer that “we are attacking, killing them there; I need to be as clear as night and day. and the police were defending themselves”; is designed to assist the SAPS in developing their justification of self-defence. As the record and evidence show, the group was trying to seek refuge in Nkaneng. They were

\textsuperscript{475} Day 259 p 32750
\textsuperscript{476} Day 259 p 32752 ll 1-6, ll 9-15
\textsuperscript{477} Day 259 p 32752 ll 20-25; p 32753 ll 1-3
\textsuperscript{478} Day 259 p 32753 ll 12-20
\textsuperscript{479} Day 259 p 32754 ll 2-5
mercilessly shot by TRT basic line when Nyala 4 blocked the road and they circumnavigated the kraal logically to access the quickest route home. Mr X’s evidence to the contrary is a blatant lie. It is simply just not corroborated by the record and the evidence of the witnesses who in fact were there and fled from the shots of the TRT basic line. He has no knowledge of the events that unfolded at Scene 1. His contrived evidence, devoid as it is of fact and truth is designed to assist the police in their bid to convince this Commission that they were acting in self-defence. This is the clearest sign that the claims of self-defence are baseless and this transparent attempt to get Mr X to manufacture the defence actually backfired on whomsoever had hatched it.

In addition his evidence demonstrates that he is unfamiliar with what happened on 16 August. This is because he was simply not present at the times material to the events this Commission is called upon to decide.

The shooting which he described and which resulted in him running away from the scene happened in front of the kraal, when people were trying to outpace Nyala 4. Once people were shot he ran away and did not see what happened thereafter. When he ran away that was his last involvement and observation of what happened at the scene. He conceded this and testified that he only heard from people the following morning that people were shot and killed. It was, on his version, just too hard to be there.

\[480\]

\[480\] Day 259 p32757 ll 5 - 22
698. Although it was his evidence that he saw the Nyalas uncoiling the barbed wire and that the Nyala that was uncoiling the wire was going towards the kraal, and the people who passed it were going towards the police, this evidence cannot be accepted. He later says this was when he ran away. Once again, he was simply not there when the incident unfolded and his evidence on this event is irrelevant, and even if relevant, not factually sustainable. It flies in the face of the objective video and photographic evidence.

699. It was further demonstrated in this Commission that Mr. X was not a member of the committee of 15. He could not with any degree of certainty identify who was part of the Committee and which shafts they represented. His constant fall back when the deficiences in his evidence was identified was an illogical response that they were there for Lonmin.

700. Further, he was not even present amongst the leaders of the protestors when they held their meetings. It was demonstrated that the person who he claimed was him in the photographs was in fact Mr Madumbe. He alleged that he was person number 4 in the Marinovich picture. It was established that this was not so. The person labelled number 4 attended at the Commission. He was demonstrated to be one Mr. Madumbe who attended at the Commission and verified by affidavit that it was indeed him and not Mr. X who, carried “label 4” in

---

481 Day 259 p32759 ll 4 - 8
482 Day 259 p32759 ll 12 - 16
483 See exhibit AAAA34
exhibit AAAA34 Remarkably, Mr Madumbe was wearing the same jersey or top which he was wearing on the Daily Maverick picture!

DAY 260

701. He was further not at the incident that occurred on 13 August 2012. Thus he has nothing to offer the Commission. On his own evidence he was not at scene 2, and he admitted that he could not assist.

702. The march on the 10th was peaceful. He confirmed that Lonmin would not speak to the RDO’s. He confirmed that on Friday, 10th August 2012, all the RDO’s weren’t to Lonmin’s offices to ask for more wages. They did not ask NUM. They went themselves. In fact he stated at Para 4 of exhibit LLL26 that the RDO’s did not accept NUM’s explanation that they could not negotiate on increase because of the two year agreement and believed that NUM was in cahoots with the employer. He then goes on to fabricate evidence that on this occasion he was elected as one of 5 delegates to present the group’s demands to Lonmin management. However, Exhibit AAAA1.2 at para 5 demonstrates that this is not so.

---

484 Day 259 p 32767, 32768, 32769
485 Day 260 p 32777 ll 1-3
486 Day 260 p 32781 ll 4-10
488 Day 260 p 32785 ll 19-20
489 Day 260 p 32787 ll 6-13
490 Day 260 p 32794 ll 22-25
703. He did not in his statement say he was one of those delegates. He implied throughout that he formed part of the group waiting for the five to return to receive feedback. He stuck somewhat inexplicably to his version that he was a delegate of the elected 5. Para 8 of Exhibit AAAA 1.2 also demonstrates that he was not in the Lonmin building with the elected 5. He was outside waiting and getting impatient with the rest of the group for their leaders to return.

DAY 269

704. His uncorroborated evidence on day 269 that the protestors handed in a document setting out their demands on 10 August, must be rejected as implausible. The correct evidence is that the crowd informed management that they were not educated and could not hand in a document.

705. This version is supported by Mr Sinclair who says at Para 23 of Exhibit FFF1 that the demands were requested in writing, and the protestors responded they were illiterate and could not write down their demands. In the absence of any corroboration and several witnesses contradicting his assertion, his evidence that the demand of the protestors were reduced to writing must be rejected as a fabrication and further proof of his preparedness to perjure himself.

---

491 Day 260 p 32796 ll 1
492 Day 260 p 32796, 32797 ll 1-10
493 Day 269 p 34162 ll 1-10
494 Day 269 p 34162 ll 9-10
706. In his statement he recorded that the committee of 15 constituted 5 representatives from each of Lonmin’s three shafts, Eastern Western and Karee.\textsuperscript{495} He could not however in oral testimony identify with accuracy that all the committee members were and overall gave incorrect evidence on who represented which shaft. He said that Bhele represented Karee, but testified that he was based at Rowland.\textsuperscript{496} He simply could not explain the contradiction and gave three mutually destructive versions. He said Bhele represented Karee, and then he said he represented Karee and Eastern and yet later said he represented the whole of Lonmin.\textsuperscript{497} He testified that Bhayi was representing Western but he worked at Eastern and was transferred to Karee.\textsuperscript{498} His continuous fallback was that they were representing Lonmin and that all Lonmin RDO’s were involved in this matter\textsuperscript{499}. He could not give credible concrete evidence on the constitution represented which shaft. This is demonstrable evidence that he was never part of the committee if 15, and further that he was told by a third party what to record in his statement. In his written statement, there is no hesitation or ambiguity about who supposedly represented which shaft.

707. He could not give consistent evidence on who fetched the sangoma. He stated initially that it was Kaiser and Xolani\textsuperscript{500}. He did not mention Mr. Tholagele

\textsuperscript{495} Day 269 p34174 ll 19-23, p 34175 ll 1-3  
\textsuperscript{496} Day 269 p34166 ll 1-11  
\textsuperscript{497} Day 269 p34174 ll 11-15  
\textsuperscript{498} Day 269 p 34175 ll 23-25, p 34176ll 1  
\textsuperscript{499} Day 269 p 34176 ll 5-9  
\textsuperscript{500} Day 269 p 34180 ll 19
(Dhunga) who he is recorded as saying in his statement also fetched the sangoma.\footnote{Day 269 p 34180 ll 21-23, p 34181 ll 1-2}

708. It is deeply significant that he acknowledged in his testimony that Bhayi Mehlomkomo may have been killed because of the testimony he, Mr X, gave at the Commission.\footnote{Day 269 p 34184 ll 1-17} The significance of this concession stems from the fact that he had earlier fabricated evidence about the late Mr. Mehlomkomo at the Commission before he was killed.\footnote{Day 269 p 34184 ll 18-21} This demonstrated the dangers of having allowed Mr X to give evidence threatening the rights and lives of people without referring him for mental observation. His hallucinatory evidence may well have been believed by the assassins, as Mr X himself attested.

709. He recorded in all his statements that Mr Mehlomkomo was armed on 12 August, shot at Lonmin’s two security guards and specifically that he shot Mr. Fundi on 12 August 2012. He stuck this version in his testimony.\footnote{Day 269 p 34187 ll 1-8}

710. However, the objective evidence showed that Fundi was not shot.\footnote{Day 269 p 34189 ll 20-25; see also Mr Fundi’s post-mortem report Exhibit A755 and the affidavit of Mr. Fundi’s older brother who prepared his body for burial. There is no evidence to show that Mr. Fundi was shot by anybody, let alone the late Mr Mehlomkomo.} His evidence that Mr Mehlomkomo shot Mr. Fundi once is a fabrication.\footnote{Day 269 p 34193 ll 21-25} Page 74 of Exhibit A755\footnote{Mr. Fundi’s post mortem report} does not show any gunshot.\footnote{Day 269 p 34194 ll 21-25} His artificial and contradictory response...
under cross-examination was that Mr. Mehlomkomo had a gun and he fired it.\textsuperscript{509} This is in stark contradiction to his initial evidence that the late Mr. Mehlomkomo shot the late Mr. Fundi. In fact, two weeks before his death Mr Mehlomkomo had told counsel that he denied the allegations made by Mr. X against him as it related to Mr. Fundi\textsuperscript{510}

711. All the evidence implicating others given by Mr X is a fabrication, including the evidence on Mr. Mathunjwa’s presence at the koppie on 14 August 2012 as well as the evidence given in respect of Messrs Noki and Magubane.

712. He testified that when he left home on the morning of 11 August he was where was wearing green jeans. In his bag he allegedly carried a pair of white overalls. He recalled taking a pink blanket with a pattern with him to the mountain. He could not answer how long he owned the blanket and could also not identify it with accuracy.\textsuperscript{511} However the evidence demonstrates that the, person Mr. X identified as himself (which turned out in fact to be Mr Madumbe) was not wearing a green jeans.\textsuperscript{512}

713. His further evidence that he bought his traditional weapons from Ntshebe’s place was demonstrated to be a fabrication. The owner of the establishment Mr Ntshebe gave affidavit evidence to this Commission that people had never

\textsuperscript{508} Day 269 p 34193 ll 21-25
\textsuperscript{509} Day 269 p 34194 ll 2-4
\textsuperscript{510} Day 269 p 34194 ll 13-19
\textsuperscript{511} Day 269 p 34179, 34199 and 34200
\textsuperscript{512} Day 259 p 34202 ll 5-6
bought arms from his place. Ntshebe placed on record that he is licensed only to sell liquor and that on that particular day, he attended at his shop and nobody came to purchase arms.\textsuperscript{513}

714. His evidence that there was a break in the meeting on 11\textsuperscript{th} August so that people could go an arm themselves was a further fabrication. It was designed to suggest that when people marched to NUM on 11\textsuperscript{th} August they were armed, which as the evidence demonstrates and is simply not true. Whilst a decision was taken to arm available evidence demonstrates that it was taken on 11\textsuperscript{th} August. It was taken when the people fled to the mountain after the NUM march.\textsuperscript{514}

715. Mr. X was intent on absolving NUM. It was common cause at this Commission that the protestors were shot by NUM officials, yet he fabricated evidence that protestors were shot by the security guards and not by NUM. He fabricated having heard for the first time in the Commission that NUM shot at protestors on the 11\textsuperscript{th}. This is in direct contradiction with Exhibit LLL26 where he states at Para 12 “at the Koppie they further said that he should take of the dresses and put on trousers- to intensify our action in order to achieve our goals. Bhele reported that two of the strikers were shot dead as a result of the attack that was launched from the inside NUM’s offices by person who was dressed in clothes embrodied with the name NUM”.\textsuperscript{515}

\textsuperscript{513} Day 259 p 34207, 34208  
\textsuperscript{514} Day 259 p 34206 ll 10-18  
\textsuperscript{515} Day 259 p 34214 ll 10-18 See Exhibit LLL26 at Para12
716. He was unable to dispute that the intelezi used at the mountain as administered by the Sangoma was for the purposes of protection only. His evidence in this regard was erratic and nonsensical and not corroborated by any of the other witnesses who came to testify on what the purpose of the intelezi was.

717. He gave implausible evidence on having witnessed people being shot and bullets floating on their clothing.\(^{516}\) He could not however give any concrete evidence on how many were shot but the bullets instead of penetrating just got stuck into the clothing or on their skin. He chose rather to laugh.\(^{517}\) Realising that his evidence could not be corroborated he chose to rely on one of the deceased victims, Bhayi, who was one of the persons who was shot and to whom no harm came. As indicated above he was unable to dispute that the intelezi was used for general protection and safety in the same manner as some people use prayer. He could not dispute that he himself, as appears from Para 15 of LLL26 believed that intelezi when properly used was protective in nature.

718. He testified having used intelezi at a faction fight in 1999 between the Mpondo’s and Mbana’s. It was his version that the rivals lost the battle and could not harm him because of the intelezi used.\(^{518}\) The evidence clearly demonstrate that the intelezi was used for protective reasons and lives evidence about it being mixed

\(^{516}\) Day 259 p 34218 ll 8-9, 21
\(^{517}\) Day 259 p 34218 ll 22-25, p 34219 ll 1-13
\(^{518}\) Day 259 p 34236
with the blood of the black sheep as well as human tissue for the purposes of rendering the crowd invisible is a fabrication.\textsuperscript{519}

719. He could not testify why despite his assertion that they were instructed by the Sangoma not to wash and not to change their clothing over a 7 day period, the leaders of the strike Mr. Noki and Mr. Nzuza who had according to him participated in these rituals were seeing wearing different clothing on different days.\textsuperscript{520} The actions of the leaders of the strike where thus clearly inconsistent with his evidence. This is a further reflection of the fact that the evidence he gave at this Commission in relation to the use of the intelezi and his participation in the rituals are fabrication and an attempt falsely to implicate innocent people.

720. Whilst he agreed that the experience of eating ashes from the dead body of one of the security guards was a striking experience, and was something quite unusual that he would not easily forget, he could not describe why he had not cared to mention this in his first statement which has been exhibited as AAAA1.\textsuperscript{2521} He simply stated that he forgot and this is an implausible explanation. What this demonstrates is that the eating of flesh was another hallucination and a fabrication of fact before this Commission\textsuperscript{522}

\textsuperscript{519} Day 259 p 34241
\textsuperscript{520} Day 259 p 34243 ll 1-6
\textsuperscript{521} Day 259 p 34244; p 34245; p 34246 ll 5-10
\textsuperscript{522} Day 259 p 34249 ll 15-19
721. The evidence further demonstrates that the only person who cut Mr. Fundi on 12th August 2012 was Mr. X. There is nothing to corroborate his version that Mr. Fundi was cut by Mr. Bhele. If one has regard to the post-mortem report\textsuperscript{523} it is clear that Mr Fundi was cut on his mouth, tongue and larynx. He had a laceration of 10cm by 5mm on his lower lip and part of his lower left nostril was injured. These injuries are consistent with his evidence that he, Mr X hacked Mr. Fundi on his face.\textsuperscript{524} There is no corroborative evidence to demonstrate that Mr. Fundi was murdered by Mr. Bhele, as alleged by Mr. X. He was the only person who visited Mr. Fundi with the heavy blow resulting in his death. His evidence that after he hacked Mr. Fundi he was cut by Bhele and thereafter hacked with a panga by Anele on the face, is implausible and is not demonstrated in the post-mortem report.\textsuperscript{525}

722. His further statement as to what transpired when Mr. Fundi’s body was removed from the vehicle is inconsistent and unreliable. He was unable to identify any degree of certainty who dragged Mr Fundi’s body from the car. He initially testified that it was Bhele and Bhayi. Thereafter he testified that it was him and Bhele. It is clear that not only is this witness delusional in the extreme but also that the bulk of his testimony must be rejected as implausible, whether because he is a compulsive liar or possibly a clinical case of schizophrenia.\textsuperscript{526}

\textsuperscript{523} see Exhibit A745, See exhibit L30
\textsuperscript{524} Day 259 p 34253 ll 4-12
\textsuperscript{525} Day 259 p 34255 ll 13-21
\textsuperscript{526} Day 259 p 34256; 34257’ 34258
723. Evidence was put to him and it was demonstrated that his allegation that he joined AMCU on the mountain when Mr Mathunjwa arrived on 14 August and told everyone to join AMCU, is false. Mr Mathunjwa was not at the koppie on 14 August. Even when confronted with objective evidence to the contrary, he stuck to his story that Mathunjwa was at the koppie on 14 August to the bitter end.

724. Three stop order forms were presented at this Commission with the AMCU logo. They are dated 19 September 2012, 14 December 2012, and 3 May 2012. They show Mr X joined AMCU on the 19th September 2012. The stop order facilities according to Lonmin records commenced in October and November and he revoked his membership with AMCU and rejoined NUM is December 2012. He further states that Lonmin must resume his AMCU deductions from the 1st October 2012.

725. Although he testified having united the protestors after the massacre on the 16th August, by allegedly saying they must not return to work until all the problems were resolved. This is a lie. Lonmin records demonstrate that Mr X reported for duty less than 24 hrs after the massacre. It shows him as clocking in on 17th August 2012 at 06h39 and knocking off at 10h55. His evidence that he was

---

527 see exhibit AAAA 46.1, 2 and 3
528 Day 259 p 34262 ll 14-18
529 Day 259 p 34262 ll 14-25; p 34263 ll 1-10
530 Day 259 p 34266 ll 21-25,
531 Day 259 p 34267 ll 21-24
532 Day 259 p 32470 ll 1-2
convincing people not to return to work is also patently unreliable and false.\textsuperscript{533} Alternatively, he was not genuine in so doing and was a planted spy. The evidence further demonstrates that contrary to what alleged by him, he was at work on the 17\textsuperscript{th} of August. His evidence that he left his clock card in shaft and that it was used by somebody else is implausible. He acknowledged that on arrival at work and on living work he used his clock card.\textsuperscript{534} It was thus implausible that he could have left his clock card at the shaft because without it he would not be able to exit the premises. He could not dispute this evidence and stated simply that he may have been using somebody else’s clock card. What this demonstrates is that his evidence that somebody else used his clock card because he left it at the shaft is implausible and must be dismissed as fabrications.

\textbf{726.} His further evidence that a hole was dug for the purposes of burying a black or white sheep as part of preparation of the muti is also a fabrication. He could not dispute the evidence that the hole to which he referred was dug as early as 2011 as reflected in exhibit AAAA 48.\textsuperscript{535} The hole was not dug on the 11\textsuperscript{th} of August as alleged by him.

\textbf{727.} In his first statement he told the Commission that on the 10\textsuperscript{th} January 2013, he was confronted by Bhala Nkonyana and Nzama and they had said to him that he knows all the secrets and as a result they would kill him. It was then that he

\textsuperscript{533} see also exit AAAA47
\textsuperscript{534} Day 259 p 34278 ll 2-4
\textsuperscript{535} Day 259 p 34281 ll 17-25; p 34282 ll 1-15
decided to report the matter at NUM offices and the statement was taken by the Lonmin security officials whereafter he was taken to the police station and a case was opened.\textsuperscript{536}

728. He then returned to NUM after lodging the statement and then stayed at Lonmin premises for a week because he was afraid of going to jail.\textsuperscript{537} He simply did not and still does want to take responsibility for his actions. He came here to escape prosecution, but in seeking to do so has been untruthful, deceptive and insulting to all those who have a material interest in the outcome of this Commission's finding. He stated as much in exhibit AAAA 1.2 where he said at Para 30 "during December 2012 I then decided to go back to NUM when I completed the application form. The reason for me to go back to NUM was that I was following the proceedings of the Marikana Commission and I realised who concluded on my own that after the Commission, many people will go to jail for a long time". This is the very reason why he returned to NUM and also why he thought it prudent to deliver false evidence at this Commission, in the hope that he would get out of jail for the crimes he committed.\textsuperscript{538}

729. It is not possible nor with respect necessary to list all the inherent contradictions in Mr X's evidence. In a nutshell, the following findings ought properly to be made:

\begin{thebibliography}{9}
\bibitem{536} Day 259 p 34285 ll 6-17
\bibitem{537} Day 259 p 34286
\bibitem{538} Day 259 34288 ll 1-7
\end{thebibliography}
729.1. Mr X’s evidence is rejected as a whole;

729.2. It is not reasonably possible to differentiate between fact and fiction in his evidence.

729.3. Mr X was not part of any committee and he falsely sought to exaggerate his own importance.

729.4. His evidence in respect of the events of 11 and 12 August must be rejected as a whole.

729.5. Mr X was not one of the 100-plus people who broke away on 13 August 2012. The person he identified in the still photograph as himself is clearly not him, regard being had to the observable facial features of the two.

729.6. Mr Mathunjwa was nowhere near the koppie at any time on 14 August 2012.

729.7. Mr X either was not present on 16 August and if he was, he did not and could not have witnessed either the alleged “attack” nor the shootings at Scene 1.

729.8. On his own evidence, Mr X is a self-confessed multiple murderer and/or assailant and ought to be charged with murder, attempted murder and assault with intent to do grievous bodily harm.
729.9. He ought to be further charged with perjury.

729.10. Mr X ought to be sent for mental observation so as to ascertain whether his problem is not clinical and perhaps curable.

730. Whatever Mr X’s own problems are, the most disturbing feature of his evidence is that he was clearly fed with information which he himself could not even remember, such as the names of the Committee of 15 and their shafts, with the intention of feeding the Commission with lies and to bolster the version of the police. The implication is irresistible that SAPS, realising the inherent weaknesses of its version(s), manufactured an “eye witness” for events such as those of the 12th and 13th not to mention the aborted muti and “invisibility” theory. The implications of such conduct are far-reaching.

731. The second significant implication of Mr X’s false testimony is that it was candidly stated by the prosecutor, Mr Carpenter, in the Garankuwa Magistrates Court that the majority of the murder charges levelled against the persons named by Mr X were drawn up solely on the basis of Mr X’s “evidence”. The prosecutor accordingly told the court that the withdrawal of those charges depended on the evaluation of Mr X’s credibility as a witness. This is but one demonstration of the harm caused by Mr X on top of his self-confessed possibly causing of the murder of Mr Mehlonkomo.
732. It is respectfully submitted that it is incumbent upon the Commission to stop the rot by declaring Mr X the compulsive and irredeemable liar he is and thereby pave the way for justice on the part of Mr X's surviving victims.

F.2 General Annandale and General Mpembe

733. The contrasting styles of these two, who assumed the roles of *de facto* and *de jure* CJOC respectively, have been referred to elsewhere and will be contrasted in oral argument.

F.3 Da Costa, Jamieson and Mokwena

734. The evidence of these three members of Lonmin senior management will be relied upon in analysing the findings sought to be made against Lonmin.

F.4 Mr Cyril Ramaphosa

735. Mr Cyril Ramaphosa (“Ramaphosa”) gave evidence in the Marikana Commission from 11 to 12 August 2014 and his witness statement was made on 30 May 2013.\(^{539}\) He is the Deputy President of the Republic of South Africa and the Deputy President of the African National Congress (ANC).\(^{540}\)

736. He is the founder and Chairman of the Shanduka Group, a black-owned investment holding company, which acquired an interest in Lonmin subsidiaries. Shanduka Group invested in the Platinum sector through Incwala Resources and

---

\(^{539}\) Exhibit FFF32

\(^{540}\) Day 271 p 34404
has representation in the Lonmin executive committee. He was the chairman of the Shanduka Group and has since resigned on being appointed as the Deputy President of the ANC. He was a non-executive director on the board of Lonmin in July 2010, which position he held until 31 July 2013.\textsuperscript{541}

737. Ramaphosa served on the transformation committee of the board,\textsuperscript{542} which was tasked with looking into all the transformation activities of the company to see the extent to which the company could transform issues of housing, the employment equity and taking care of the mining labour plan filed with the Department of Minerals and Resources.\textsuperscript{543}

738. Ramaphosa’s evidence is crucial in the Marikana Commission of Enquiry. He claims to have learned of the events occurring in the mine through the Transformation Manager of Shanduka who sits as their representative on the Lonmin Executive Committee.\textsuperscript{544} The email conveyed the message that the RDOs have embarked on an illegal strike and that the matter was on the table with Management. The Commission is tasked with the responsibility of investigating the circumstances in which 44 people lost their lives at the Lonmin Marikana mine in Rustenburg during August 2012.\textsuperscript{545}

739. In his own article, Ramaphosa stated that the events at Marikana present probably the lowest moment in the short history of the democratic South Africa -

\textsuperscript{541} Exhibit FFF32 l 7
\textsuperscript{542} Day 271 p 34455 l 18
\textsuperscript{543} Day 271 p 34406 ll 3-9
\textsuperscript{544} JJJ1
\textsuperscript{545} Exhibit FFF32 l 8
the scene reminiscent of an age we thought had long been left behind. Much has been said about the circumstances that led to the death of the 44 people!\textsuperscript{546} He further stated that we need to attend both to the mechanisms through which we resolve conflict, the broader question as to how those in positions of responsibility interact with and are guided by the needs and interests of the working people and communities.\textsuperscript{547} The democratic dispensation in which we live today requires that the companies ought to be more engaged with the communities in which they operate.

740. Ramaphosa holds the view that the tragedy that occurred at Marikana has to be approached as a collective failure by many of the players and many stakeholders.\textsuperscript{548} He conceded that he personally had some responsibility for what has happened.\textsuperscript{549} He claimed to have been concerned about the differential in pay rates between RDOs at Lonmin and other mines and viewed the situation as “grave situation”.\textsuperscript{550} The inference that could be drawn from his attitude was that he failed to recognise the legitimacy of the workers demands.

741. Ramaphosa conceded that he had responsibility at the board level as a non-executive director of Lonmin and he should have sought to find out more closely the actual process of negotiating with the union. He further conceded that he should have probed and should have looked more closely at the consequences

\textsuperscript{546} Day 272 p 34644 ll 14 - 25 \\
\textsuperscript{547} Day 272 p 34645 ll 21 - 25 \\
\textsuperscript{548} Day 272 p 34648 ll 6 - 8 \\
\textsuperscript{549} Day 272 p 34650 ll 9 - 16 \\
\textsuperscript{550} Day 271 p 34413 all 3-4
that flowed from paying workers less than a living wage. He has accepted the responsibility of the appalling and inhumane living conditions that the workers are exposed to and that the board should have paid closer attention to such living conditions.  

742. Ramaphosa conceded that he has failed in his responsibility as a board member and to the extent that Lonmin has failed to exercise its best endeavours to resolve any dispute which may have arisen between them and its workforce. He conceded that it was possible that if Lonmin had taken a more flexible stance or engaged the workers, the further deaths on 16 August might have been avoided.

743. Ramaphosa’s concessions bolster our sub-theme that, had Lonmin exercised their responsibility, the massacre could and should have been avoided. He holds the view that the labour instability in the mining industry/areas is caused by the collective failure of various stakeholders to address the key problems that confront working people in the mining areas.

744. Ramaphosa’s concession that they have failed as a company to have looked more closely at the living conditions of workers relates to the term of reference “whether the company by act or omission created an environment which was conducive to the creation of tension among its employees”.

551 Day 272 p 34651 ll 11 - 25
552 Terms of Reference
553 Day 271 p 34454 ll 19-25
745. He stated that the inability or failure to provide proper housing to employees was a major contributing factor to the labour instability. He conceded that there was a clear under-achievement in the housing delivery and claims to have been let down by management.554

746. During his cross-examination, Ramaphosa did not deny his various associations with Lonmin management, the board, that he is a shareholder, the association with NUM, that he had dealings with SAPS and his involvement with government.555 He however indicated that he was not in government at the time but conceded that the ANC was the governing party.

747. Ramaphosa conceded that unions are supposed to be truly independent and act independently. The state should keep its hands off and not favour one union over another.556 He further conceded that if political considerations played a role or was one of the motives driving the decisions taken by SAPS, it would have been an inappropriate move.

748. The evidence of Ramaphosa seeks to support our second point which was alluded to, that at the heart of this was toxic collusion between SAPS and Lonmin at the direct level, at a much higher level, it can be called collusion between state and capital.

554 Day 271 p 34534 ll 10 - 24
555 Day 272 p 34652 ll 8 - 12
556 Day 271 p 34455 l 25 – p 34456 l 1
749. During his examination in chief, he agreed that he exchanged various telephonic calls with the relevant stakeholders who played a direct role in the Marikana tragedy.

**Toxic collusion**

750. Ramaphosa served the mine workers well in the past by establishing the National Union of Mine Workers.\(^{557}\) He conceded that he had a meeting with the NUM leadership and has failed or did not make an attempt to contact AMCU. He indicated that he only engaged the NUM leadership since he knew them. It was accepted that the arrival of AMCU in the union arena was an alleged factor in the dynamics surrounding the strike and the increments. He believed the rumour that AMCU was behind the strike and the violence which rumour was later found to be incorrect when evidence was led in the Commission. The discussions between Ramaphosa and Zokwana clearly indicated that there was indeed collusion since no invitation was extended to the AMCU President. He was convinced that NUM had held a successful meeting, where some 500 – 700 workers had stated that they wanted to work. Given his extensive experience, he should have realised that the majority of the workforce of Lonmin had failed to attend the so-called successful meeting arranged by NUM. It was noted that the leadership of NUM wanted to meet him to discuss the way forward, even though he was a board member and an owner of the company.

---

557 Day 271 p 34455 ll 17 - 19
751. He conceded that the suggestion that Lonmin had told the workers that they can only communicate through NUM was an empty offer. He was aware that the workers have lost confidence in NUM.\textsuperscript{558} Notwithstanding all these facts, he proceeded to engage with the leadership of NUM excluding AMCU and not even bothered to invite them. Given his expertise in the labour industry, he conceded that the quickest and most amicable way to have brought the strike to an end would have been for Lonmin management to have engaged the strikers.

752. Mr Zokwana the former President of NUM had agreed, during his cross-examination, that where there is a labour dispute between an employer and its workforce, it is not appropriate for the state to intervene by taking sides.\textsuperscript{559} Zokwana conceded that there was a concerted effort to influence the key stakeholders, including his union and the government, to act in a particular way.\textsuperscript{560} He conceded that calling for the intervention of both the police and army in an industrial dispute was not necessary. The police and the army do not negotiate. The coincidence of this call, by both NUM and Ramaphosa / Jamieson, suggests further collusion. It must be noted that Ramaphosa and Zokwana called Ramaphosa called within minutes of each other, which can certainly be no coincidence.

753. Given his past direct leadership with National Union of Mineworkers, the various telephonic discussions referred to in the emails with Mr. Zokwana and other

\textsuperscript{558} Day 44 p 4761 ll 16 - 25
\textsuperscript{559} Day 44 p 4756 ll 5 - 13
\textsuperscript{560} Day 44 p 4756 l 17 - p 4757 l 2
officials of NUM to which he has conceded, Mr Ramaphosa was indeed conflicted. Viewed from a trade union’s perspective, the role played by NUM was largely contributory to these conflicts.

754. It was established during his cross examination that his conduct of engaging the one union leaving out the other showed favouritism. NUM, its members and its officials allowed themselves to be co-opted. He accepted that being a seasoned unionist the interest of management and the union do not coincide. His conduct was biased in failing to engage AMCU. Even though NUM was the recognised union, AMCU was de facto the majority union, which he should have engaged.

755. Ramaphosa initiated a series of telephone calls related to bring about political power of pressure to bear upon the situation in Marikana. He exchanged various calls with the high profile government officials because he had “access” to them.

756. In his e-mail dated 15 August 2012 addressed to Mr Roger Phillimore, he indicated that he will be speaking to Gwede Mantashe the ANC Secretary General and suggest that the ANC should intervene. During the cross-examination he was asked to elaborate on the type of intervention requested, when he said that it was the discretion of the Secretary General of the ANC to

---

561 Day 222 pg 34460 lines 1-3
BBB (289(a))
562 Day 272 pg 34680 lines 17-32
563 BBB4. 289(a) line 3
exercise.\textsuperscript{564} He conceded that the ANC would then have been a player of some sort.\textsuperscript{565} In one of the trails of emails of 15 August 2012, Ramaphosa reported that “\textit{I have just had a discussion with Minister Shabangu in Cape Town. She is going to brief the Cabinet, will brief the President as well and get Minister of the Police, Nathi Mthetwa to act in a more pointed way}”. He concluded by telling the Lonmin management to “\textit{keep pressure on them to act correctly}”.\textsuperscript{566}

757. Having undertaken to speak to government\textsuperscript{567} he succeeded in roping in Mr Gwede Mantashe, the Secretary-General of the ANC, in the matter taking into account that the ANC is the ruling party and had some interest. He conceded that Mr Gwede Mantashe was the former Secretary General of the NUM and Mr James Motlatsi is the former President of NUM. The role played by ANC Secretary General, his involvement in the matter, his conduct and participation was inappropriate and inconsistent with their duties and obligations according to the law.

758. On 12 August 2012, Ramaphosa made a call to the Minister of Police, Mr Mthethwa. Ramaphosa conceded that Minister Mthethwa would not have known whether he was calling him as a shareholder of Lonmin or whether he was called as a fellow member of the National Executive\textsuperscript{568}.

\textsuperscript{564} Day 272 pg 34674 line 4-9
\textsuperscript{565} Day 272 pg 34675 line 7-10
\textsuperscript{566} BBB 4.6 Lines 1-3
\textsuperscript{567} FFF 32 par. 13.3 line 1
\textsuperscript{568} Day 272 pg 34679 lines 1-20
It would have been difficult for the Minister to know which cap he wore, since they were both in the National Executive Committee. Ramaphosa obliquely conceded during his cross-examination that the e-mails and the calls made to Minister Mthethwa were made purely to protect his financial interest in the company. In this statement he indicated that in his discussion with the Minister of Police, he was calling for SAPS to take appropriate steps to protect life, property and to arrest the perpetrators. It was put to him during cross-examination that the call to Minister Mthetwa was not just to protect life but the company in which he had financial interest. His conduct and actions were clearly primarily motivated by his own financial interest, it is respectfully submitted.

He played a major role in pressurising the Minister of Police in changing the characterisation of the entire labour dispute. Both the National Commissioner of Police and the Provincial Commissioner of the Police tried to conceal the involvement of the Minister of Police in amending the relevant paragraphs in their respective statements filed with the Commission.

In his e-mail dated 15 August 2012, Mr Ramaphosa indicated that the events in Marikana could not be described as a labour dispute. He said they are *plainly dastardly criminal and must be characterised as such*. He said in line with this

---

569 Day 272 pg 34667 lines 21-23
570 Day 272 pg 34728 , lines 7-8 &34729 line 7
571 FF32 par 13.4
572 Day 272 pg 34728 lines 5-8
573 FFE2, GGG5
characterisation there needs to be “concomitant action” to address the situation. He held the view that “the Minister and all the government officials need to understand that they are essentially dealing with a criminal act”. During his cross-examination Minister Mthethwa agreed that the theory of fight fire with fire, use of maximum force and “kill the bastards” was directed only to criminals.

During Ramaphosa’s cross-examination it was put to him that having used the terminology “dastardly criminals” he wanted to persuade the police to act in the way they would be exhorted to act. Reference was made to the e-mail from Mr Albert Jamieson wherein Mr Ramphosa’s assistance was acknowledged by the Chief Commercial Officer of Lonmin. Reference was made in the document that “the Minister was on the radio saying she has been briefed that this was a wage dispute and that management and the unions should sit down and sort it”.

It was said that the comment to “sit and sort the dispute”, although not too damaging was also not so helpful. He conceded that it was wrong to say it was not too damaging. Reference was further made that the dispute could not be resolved “without political intervention” and needs the situation to be stabilised by the police or army.

---

574 BBB 289 C 4
575 Day 272 pg 34736 lines 22-25 and pg 34737 lines 1-5
576 Day 272 page 34739 lines 20-25
577 BBB4.2 289(b)
578 BBB 4.2
764. The political pressure was demonstrated during cross examination of the Provincial Commissioner. It was noted that she spoke to Minister Mthethwa when he said that he was being pressurised by Mr Ramaphosa who was a politically high individual. Even though the Provincial Commissioner tried to down play the pressure it was properly illustrated during their discussions with the Lonmin Official, Mr Mokwena when their conversations were recorded.

765. It was further recorded as follows “When I was talking to the National Commissioner last night, she said ‘General, who are the shareholders here?’ but I know that when I spoke to the Minister he mentioned Cyril, remember Cyril was in the Appeal Committee of Malema”. Ramaphosa agreed that this was an inappropriate consideration of SAPS to take into account in making policing decisions.

**Characterisation**

766. Ramaphosa was obsessed with changing the characterisation of the conflict from a labour dispute to a purely criminal activity which could only be resolved by police or army. Reference is made to his statement filed with the Commission particularly wherein he confirmed that he did characterise the unrest as criminal and that he stands by that characterisation. In his statement, he sought to introduce a slight nuanced variation by saying it was not “only” a labour dispute.

---

579 Day 272 pg 34808 lines 20-23
580 JJ 192
581 FFF32 Par 13.6
767. He advised that he discussed the matter with the Minister of Minerals and Resources in his email dated 15 August 2012 wherein he said “I called her and told her that her silence and inaction about what was happening at Lonmin was bad for her and government.”

768. She said that she was going to issue a statement.\(^5\)\(^6\)\(^2\) From the email sent by the Chief Commercial Officer of Lonmin, it was noted that the Minister characterised the dispute as a labour or wage dispute and further suggested that management and the unions must sit down and sort it out.\(^5\)\(^8\)\(^3\)

769. Mr Albert Jamieson indicated that he has discussed the matter with the DG and in each case have characterised the matter “NOT” as a labour matter but a criminal issue that cannot be resolved without political intervention and the situation must be stabilised by police or army.\(^5\)\(^8\)\(^4\) Ramaphosa was tasked to talk to the Minister and influence and “encourage” her to review her position.

770. He advised Albert Jamieson that he was in Cape Town and that he would have a discussion with the Minister. Once again he thanked Mr Jamieson for the manner in which he characterised the situation. He indicated that he would stress that Minister Shabangu should have a discussion with Mr Phillemore. Ramaphosa informed Lonmin that he had a discussion with the Minister in Cape Town. She has now agreed that “what they are going through is not a labour dispute but a criminal act”. She would correct her characterisation of what they are

---

\(^5\)\(^8\)\(^2\) BBB 4.1 Par 1
\(^5\)\(^8\)\(^3\) BBB 4.2 Par 2
\(^5\)\(^8\)\(^4\) BBB 4.2 Par3-4
experiencing. In re characterising the dispute, he persuaded the police to act in the way they would be exhorted to act. During cross examination, it was put to Ramaphosa that it is wrong to identify the dispute as an act of pure criminality but rather say it is of a hybrid nature, to which he agreed.

771. Unpacking the expressions used in the emails of Mr Ramaphosa in line with his characterisation, demonstrated that all the parties involved had a direct bearing on the tragic outcome of the events on 16 August 2012.

772. As discussed elsewhere, a proper analysis of the evidence of Ramaphosa clearly reveals that it was his unlawful intervention which triggered a series of events which determined the timing of the massacre. He knew exactly what he was doing and he is the cause of the Marikana massacre, as we know it. It was demonstrated that he has a case to answer on 34 counts of murder and many counts of attempted murder, as well as intent to do grievous bodily harm.

F.5 The experts

773. Due to time pressures, we have not yet been able to analyse the evidence of the experts in any detail. Save to state that we accept and adopt their recommendations. Certain specific aspects of their evidence will be referred to during oral argument.
F.6 Key Exhibits: Videos, photographs, etc

774. The most important video material which will not only be referred to but probably replayed during argument will include:

774.1. EEE16
774.2. CALS Animated Video showing movement of strikers
774.3. Exhibit Z1
774.4. UU3
774.5. AAA7-15

SECTION G : SUMMARY OF PROPOSED KEY FINDINGS

775. What follows is a non-exhaustive list of some of the key findings, which it will be submitted are competent from an analysis of the evidence. Other proposed findings are to be found in the body of the heads and will be highlighted during oral argument. The prominent or anchor or broad-brush findings will be grouped according to the parties against whom they will be directed. Embedded with each such broad required finding are a number of ancillary and/or interdependent proposed findings which will not be specified. Some of these will be found in the section dealing with each of the investigated parties in the section dealing with the terms of reference (Section C) above.
G.1 SAPS

776. During the relevant period, SAPS committed a long list of constitutional, statutory, regulatory, moral and ethical breaches. Both the letter and spirit of these legal instruments were flouted.

777. More particularly, the SAPS leadership from the Minister and/or the National Commissioner down to the shooters broke the law.

778. The conduct of the persons referred to in the preceding paragraph, by which they caused the deaths and injuries of the affected protestors, was _prima facie_ unlawful (unjustifiable) and intentional.

779. SAPS and its members failed to act impartially in accordance with their legal, professional and constitutional duties.

780. The “partnership” and co-operation between Lonmin and SAPS went far beyond acceptable limits and amounted to collusion without which the massacre would not have occurred or would have occurred differently.

781. The operation on 13 August should never have been undertaken without proper planning and situational appropriateness.

782. But for the irresponsible and unnecessary act of firing teargas and stun-grenades, the violence of 13 August 2012 would not have taken place, including the resultant five deaths and injuries.
783. The order to fire teargas was unlawfully given by a member of SAPS.

784. SAPS deliberately deceived the Commission in presenting its version of the events of 13 August 2012. Similarly, SAPS deliberately deceived the local and international publics in that respect. There is, for example, no informal settlement to the left of the strikers as they were moving towards the koppie, as suggested in L46.

785. SAPS failed to take reasonable steps to ensure that members who had been traumatised by the events of 13 August did not participate in the operation on 16 August.

786. Lt-Col Scott was not the right person to plan the operation in that he was not suitably qualified to do so.

787. Lt-Col McIntosh was not the right person to call as the lead negotiator given his qualifications and lack of suitable experience.

788. The failure to call the heads of Intelligence and Detectives should attract universal inferences against SAPS, as both would have shed light in respect of the poor quality of intelligence, as well as in the investigations related to the identification of the killers of victims such as Langa, Mabebe, Fundi, Mabelane, Lepaaku, Monene and Twala. As matters stand, the Commission is in no position to finger any specific individuals for these deaths save to draw the
inferences that these were perpetrated by one or more of the strikers, acting on their own accord.

789. The police ought not to have held twice-a-day meetings with NUM leaders to the exclusion of AMCU (even if they genuinely believed the Lonmin propaganda that the strike was a result of rivalry between NUM and ANCU).

790. SAPS should have taken prompt steps to arrest the known shooters and attackers of the protestors during the march to NUM offices on 11 August 2012.

791. The units from other provinces were not called in compliance with the applicable prescripts.

792. The sidelining of Mpembe played a major role in changing the approach of SAPS.

793. The interference of Minister Mthethwa was unconstitutional, unlawful and improper.

794. Phiyega and Mbombo failed in their duties in the conversation with Mokwena and Sinclair, transcribed in JJJ192.

795. The encirclement plan when there were fewer strikers read with road blocks to prevent the gathering was a better and safer plan which should never have been abandoned in favour of the plan actually executed.
796. The members of POP were ill-equipped.

797. The deployment of so many members of the police, the various units and amount of armoury were excessive.

798. In the absence of any escalation in the violence or unrest, the decision to implement the tactical phase was irresponsible and unnecessary.

799. The imposition of the 15h30 commencement time was in the circumstances unreasonable and dangerous.

800. Calitz gave the orders for the TRT to advance towards the road and to “engage” or shoot the protestors.

801. Calitz must have known about the killings at Scene 1 and his evidence in this regard was deliberately untruthful.

802. The failure timeously to provide medical assistance to those injured at Scene 1 was malicious and may have caused deaths and severe injuries.

803. The behaviour and demeanour of the police after the shootings was inconsistent with self-defence but consistent with retaliation and revenge.

804. The statements of Calitz and Phiyega days after the massacre were callous.
G.2 Lonmin

805. Lonmin’s failure to talk to the strikers was unreasonable in the circumstances.

806. Mokwena’s conversation with Mbombo was improper.

807. Ramaphosa’s role was improper and unlawful.

808. Jamieson’s role was improper and unlawful.

809. But for the significant failures and/or omissions of Lonmin, the 44 people who died during the relevant period would most probably be alive today.

810. The utterances and conduct of Mokwena were improper and unlawful and were calculated to bring about violence.

811. Lonmin breached its own policies and all rules of decency and common sense.

812. Lonmin’s insistence that the strikers should communicate via NUM was unreasonable and irresponsible in the circumstances.

813. Lonmin could and should have made a financial offer to the workforce.

814. The “floodgates” argument was not sufficient to risk a bloodbath in order to save or hoard money.
815. Lonmin ought to have put the skills of Ramaphosa to better use than to use him to instigate violence, bloodshed and criminality.

816. Lonmin ought properly to have utilised the services of Mathunjwa and Bishop Seoka to broker peace.

817. Lonmin ought not to have exposed their security personnel and their non-striking workers to the foreseeable risks of death and injury.

818. Lonmin acted unlawfully in directing, influencing and participating in a police operation against its own employees.

G.3 NUM

819. Refer to section C.4 above.

G.4 AMCU

820. No adverse findings ought to be made against AMCU (see section C.3 above).

G.5 Workforce

821. It is clear that the majority of the workforce had embarked on a legitimate exercise of their right to withdraw their labour. The fact that a strike is unprotected does not render it “illegal”, as it was sometimes incorrectly stated.
G.6 Individuals

822. In this regard, the approach proposed by Nzuza ought to be adopted and read with what is stated in section C.6 above.

SECTION H : PROPOSED RECOMMENDATIONS

823. As with the findings, some of the recommendations will be distilled from the body of these submissions and they will flow from the findings proposed in respect of each of the investigated parties.

824. Due to the shortness of time and the difficulty in holding all the necessary consultations, this section has not been finalised in time for a comprehensive presentation of all the proposed recommendations. A broad outline will be presented hereunder and supplemented before the presentation of oral argument should leave to do so be granted. What needs to be noted is that, for the reasons mentioned, the list of recommendations specified in this document is not exhaustive.

H.1 Recommendations (general)

825. Some of the recommendations emanate from matters not necessarily discussed herein, such as the need for delimitarisation.

826. The recommendations of the experts are adopted and it is anticipated that these will be elaborated upon by the parties who called them.
H.2 Matters and persons to be referred for prosecution

827. The list of accused persons is referred to hereinabove and includes the following categories of persons: the politicians, SAPS top leadership and the shooters and certain members of Lonmin management:

827.1. Accused No 1: Mr Cyril Ramaphosa (Murder, Corruption and Perjury);
827.2. Accused No 2: Mr Nathi Mthethwa (Murder, Corruption);
827.3. Accused No 3: General Ria Phiyega (Murder);
827.4. Accused No 4: General Z Mbombo (Murder, Attempted Murder);
827.5. Accused No 5: General Annandale (Murder, Attempted Murder)
827.6. Accused No 6: Brigadier Calitz (Murder, Attempted Murder)
827.7. Accursed No 7: General Naidoo (Murder, Attempted Murder, Assault GBH)
827.8. Accursed No 8: Susan Shabangu (Corruption, Perjury);
827.9. Accused No 9: Bernard Mokwena (Murder, Corruption);
827.10. Accused No 10: Albert Jamieson (Murder, Corruption);
827.11. Accused No 11 et seq: The Shooters: Names outstanding (Murder, Attempted Murder, Assault GBH)

828. It is respectfully submitted that the above matters be referred to the National Public Prosecutions for charges to be proffered, failing which, where applicable, the matters will be referred for international investigations and/or charges will nevertheless be laid in the domestic law enforcement institutions.
H.3 Matters to be referred for further investigation

829. In addition to the proposed prosecutions, it is respectfully submitted that the following matters ought properly to be referred for further enquiry:

829.1. The President ought to refer the National Commissioner to an enquiry into the allegations of misconduct referred to herein and, more specifically, arising out of JJJ192. Such enquiry ought to also deal with and make recommendations in relation to her fitness for office and/or capacity for executing her duties efficiently. Timelines should be recommended.

829.2. A similar referral ought to be recommended in respect of the Provincial Commissioner of the North West.

829.3. The alleged instances of misconduct in relation to other senior officers ought to be referred to the HR department of SAPS.

829.4. The allegations of misconduct on the part of more junior officers which falls outside of the sphere of criminal prosecutions ought also to be referred to SAPS HR.

829.5. The allegations of multiple conflicts of interest and breaches of fiduciary duties on the part of any director of Lonmin ought to be referred to the Johannesburg Stock Exchange.
829.6. The allegations of lying under oath, breach of oath of office and unethical conduct ought to be, on the part of Ramaphosa, Mthethwa and Shabangu, referred to parliament for further investigation.

830. Finally and insofar as the domestic institutions may be conflicted or disenabled or disinclined to proceed against the affected members of the Executive, then the matter may be referred to the International Criminal Court for investigation and possible prosecution.

831. In this regard, it must be borne in mind that there is an allegation that the matter was escalated right up to the President, although there is no evidence directly implicating him.

832. The President is on record as having stated that the events resulted from a “mistake” on the part of one or other government functionaries. Assuming this view to have come from a briefing he received, since it is common cause that he was not present, it must be accepted that somebody had concluded that such a mistake was committed. This aspect ought to be investigated or clarified by means of a sworn statement as it may obviously shed some more light on the truth of what actually happened. This aspect could be included in the ICC investigation and/or prosecutions.

833. Accordingly and upon the exhaustion of the remedies provided by our domestic tribunals, and there being no satisfactory outcome, it is the case of the injured
and arrested miners that the Marikana massacre was a crime against humanity for the purposes of the Rome Statute.

834. The ICC will have jurisdiction in this matter because the Marikana massacre was self-evidently a systematic attack resulting in the murder of a civilian population; people were tortured whilst arrested and whilst in the custody of the police; other inhumane acts of a similar character intentionally causing them great suffering, and serious injuries to their mental and physical health were perpetrated against them.

835. These acts were committed in pursuance of a secretive collusive policy between Lonmin (a multinational British company) and the South African state itself, represented by members of the cabinet possibly, with the knowledge of the entire Executive leadership of the country.

836. Although he was a civilian at the time of the commission of the alleged atrocities, one of the accused in the ICC case will be a person currently serving as the Deputy President of South Africa. Precedent strongly suggests that there is at the least a propensity and/or a real possibility that the domestic prosecutorial institutions lack the requisite degree of independence in matters involving such a high ranking government official.

837. Thus, in the light of the above, should the adjudication process in the domestic legal system be exhausted and the injured and arrested miners still not be afforded appropriate redress for the massacre, then it is submitted this matter is
one that must be referred for adjudication to the International Criminal Court under the Rome Statute.

H.4 Matters to be referred for a separate enquiry

838. With the greatest respect, and through no fault on the part of the Commissioners, no justice was done to the important underlying issues raised in Phase Two of the Commission. For a party which is committed to asking the broader questions, this was regrettably to the Injured and Arrested Persons.

839. It is indeed so that some good came out of even the perfunctory coverage of Phase Two issues with witnesses such as Ramaphosa and Seedat. However, our submission in this regard is that the Phase Two issues ought to be referred to a different kind of commission, not dominated by lawyers, to go to the root of those important issues. The stance of the Injured and Arrested in this regard was articulated in more detail before the Commission.

840. What the commission can possibly do in this regard is to recommend a reasonable period within which such a separate enquiry ought to be instituted with due regard to the achievement of the goals of truth, justice and restoration.

SECTION I: DISCLAIMER AND RESERVATION OF RIGHTS

841. With the leave of the Commission, some of the outstanding material will be dealt with in the replying submissions, particularly where the contents hereof are
contested by any party. The outstanding references will also be distributed where necessary with the replying submissions.

842. The Injured and Arrested Persons, on too numerous occasions to count, indicated objections in respect of certain rulings made during the course of the hearings. Notable among these were:

842.1. The ruling made to exclude the death of Councillor Paulina Masuhlo from the Commission’s investigations, much to the grief of her family, who thereafter discontinued their attendance when the Commission was still sitting in Rustenburg;

842.2. The authorisation of the issuing of subpoenas against six of the survivors despite objections based on unnecessary exposure of such persons to danger. This notably included Mr Lungile Mabutyana, who subsequently committed suicide for as yet unknown reasons although a connection to the Commission and/or the events giving rise thereto can obviously not be ruled out;

842.3. The refusal of a postponement in September 2013 on the grounds that the Commission had to finish its work on 31 October 2013, when this was clearly not going to happen, given the number of witnesses and parties still to testify;
842.4. The introduction of and the manner of implementation of the accelerated procedure wherein some of the cross-examination was unfairly restricted. Examples which illustrate this include the refusal to give an extra 10 minutes for the completion of the cross-examination of Col Modiba and then adjourning the proceedings at lunchtime on the same day. Also the granting of a grossly inadequate cross-examination period for the cross-examination of such a key witness in Mr Bernard Mokwena and the refusal to recall him to finish the cross-examination, even when it became clear that an extra half-day sitting was inevitable. The other half of the day on 29 September 2014 should have been used to give an opportunity to finish Mokwena’s cross-examination;

842.5. Last but not least, the clients were mostly aggrieved by the rulings pertaining to Mr X, namely:

842.5.1. the granting of the application for him to give evidence in camera; and

842.5.2. the refusal of the application to have him medically examined for mental fitness, which may well have saved at least one life and/or saved about 10 days of Commission time, which could have led to a fairer presentation of the relevant evidence and/or witnesses.

843. It is not intended to raise these matters for debate during oral argument but only to place them on the record broadly and with the intention to reserve the rights of the aggrieved parties to pursue these matters in the appropriate forum and
should the need arise. In other words, these matters are merely mentioned to indicate that no rights in respect thereof have been abandoned by silence, waiver or acquiescence.

SECTION J : CONCLUSION

844. At the hearing, a summarised and tabulated list of specific recommendations proposed in respect of each party will be distilled from this document for ease of reference. This will include the experts' recommendations plus such recommendations, as will be made by like-minded parties and after consultation with the clients, will be adopted and/or supported.

DC MPOFU SC
MA QOFA
R TULK
Counsel for the
Injured and Arrested Persons
Sandton
27 October 2014
# TABLE OF CASES AND BIBLIOGRAPHY

## Cases

1. *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC)
2. *Criminal Law* 5th ed CR Snyman *Lexis Nexis* Chapter IV Unlawfulness (Justification)
3. *Dawood and Another v The Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para [35]
5. *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC)
6. *Ferreira v Levine NO and Others* 1996 (1) SA 984 (CC) at para [49]
7. *Fourie v the Minister of Home Affairs* 2005 (3) SA 429 (SCA)
10. *Khosa v The Minister of Social Development* 2004 (6) SA 505 (CC)
11. *Mugwena and Another v Minister of Safety and Security* 2006 (4) SA 150 (SCA)
12. *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC)
13. *New Clicks* [Reghana you didn’t give me a reference for this one]
14. *NUMSA v Baderbop (Pty) Ltd* 2003 (3) SA 513 (CC)
15. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para [18]
16. *President of the Republic of South Africa v South African Rugby Football Union* 2001 (1) SA 1 (CC)
17. *R v Attwood* 1946 AD 331
18. *R v Patel* 1959 (3) SA 121 (A)
19. *Rail Commuters Action Group v Transnet t/a Metro Rail* 2003 (3) BCLR 288 (C) 352 C – D
20. *S v De Oliveira* 1993 (2) SACR 59 (A)
21. *S v Makwanyane* 1995 (2) SACR 1 (CC)
23. *Snyders v Louw* 2009 (2) SACR 463 (C)
24. *State v Trainor* 2003 (1) SACR 35 (SCA)

**Books**