THE MARIKANA COMMISSION OF ENQUIRY

SUBMISSIONS ON BEHALF OF THE FAMILY
OF THE LATE WARRANT OFFICER SELLO
RONNIE LEPPAAKU AND LEUTENANT
SHITUMO SOLOMON BALOYI

By Louis Gumbi on the instruction of Mofomme Attorneys and the Legal Aid Board of South Africa

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INTRODUCTION

1. The Farlam Commission of Enquiry (hereafter referred to as the "Commission") was appointed by the President of the Republic of South Africa (hereafter referred to as the "President") to investigate matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West Province which took place on about Saturday 11 August to Thursday 16 August, 2012 which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested. The Commission was mandated to compile a report and submit to the President for consideration.

2. The Commission was mandated to inquire into, make findings, report on and make recommendations concerning the following, taking into consideration the Constitution and other relevant legislation, policies and guidelines,

2.1. The conduct of Lonmin Plc (Lonmin),
2.2. The conduct of the South African Police Services (SAPS),
2.3. The conduct of the Association of Mineworkers and construction Union (AMCU), its members and officials,
2.4. The conduct of the National Union of Mineworkers (NUM) its members and officials,
2.5. The role played by the Department of Mineral Resources or any other government department or agency in relation to the incident and
whether this was appropriate in the circumstances and consistent with their duties and obligations according to law.

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

3. The family of the late Warrant Officer Ronnie Lepaaku (herein after referred to as W/O Lepaaku) who was killed by Lonmin strikers on 13th August 2012 and Lt Solomon Shitumo Baloyi (hereinafter referred to as “Lt Baloyi”) who was severely injured on that day were represented in this Commission since its inception until its conclusion.

4. In these heads of argument/submissions, we deal in turn with:

4.1. The brief factual matrix of the incident of 13th August 2012 near the railway line;

4.2. Testimony of witnesses about the incident of 13th August 2012;

4.3. Brief testimony of Maj-Gen Mpembe.

4.4. Submission on the evaluation of Maj-Gen Mpembe’s testimony.

4.5. Presence of corroboration.

4.6. Absence of contradictions and inconsistencies on evidence tendered before the Commission.

4.7. Failure to brief and orientate members mobilised outside of Marikana before deployment.
4.8. Failure to share criminal intelligence information with members before confronting strikers near the railway line.

4.9. Lack of communication between Maj-Gen Mpembe and various police units near the railway line.

4.10. Failure to produce debriefing reports before the Commission.

4.11. Failure to initiate internal inquiry about the incident of 13 August 2012.


4.14. Evidence of Capt Thupe

4.15. Evidence of Lt-Gen Mbombo

4.16. Evidence of the National Commissioner of Police Riah Phiyega.

4.17. Evidence of Mr “X”.

4.18. Evidence of Mr Xolani Nzuza

4.19. Evidence of Lt Baloyi.

4.20. Evidence of Mr Gary White.


4.22. Conclusion and recommendations

4.23. Recommendation on the conduct of SAPS near the railway line.
4.24. Recommendation on the conduct of strikers near the railway line

4.25. Recommendation on the conduct of the Association of Mineworkers and construction Union (AMCU) the National Union of Mineworkers (NUM) its members and officials.


THE BRIEF FACTUAL MATRIX OF THE INCIDENT OF 13TH AUGUST 2013 NEAR THE RAILWAYLINE

5. On 13th August 2012, the late W/O Lepaaku and Lt Baloyi both of them were members of Public Order Policing (hereafter referred to as “POP”) were deployed to Marikana, North West Province to maintain law and order.\(^1\) Lt Baloyi was deployed under the command of Lt-Col Seloane and the late W/O Lepaaku was deployed under the command of Lt Kutu.\(^2\)

6. When they arrived at Marikana, they were deployed to attend to armed strikers near the railway line who were marching from Karee Mine to the koppie.\(^3\) Major-Gen Mpembe who was a Deputy Provincial Commissioner North West Province was appointed by Maj-Gen Mbombo as an overall

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\(^1\) W/O Lepaaku was stationed at Phokeng Police Station, North West Province and Lt Baloyi was stationed at Pretoria Rosslyn, Gauteng Province.

\(^2\) Record: SAP 15 Reports by Commanders of 13th August 2012.

\(^3\) Record: Evidence in Chief of Maj-Gen Mpembe, 07 June 2013, Day 103, page 11084, lines 1-25.
Commander of that operation. The strikers were in possession of dangerous weapons; they were singing and moving in the crouching position.

7. Maj-Gen Mpembe confronted armed strikers near the railway line and pleaded with them to hand over their dangerous weapons to the police. The strikers refused to hand over their dangerous weapons to Maj-Gen Mpembe at railway line and promised him to handover their dangerous weapon at the koppie. The strikers disobeyed the instructions of Maj-Gen Mpembe to hand over dangerous weapon to the police and proceeded with their march to the koppie. He instructed members of various police units to form a police line behind the strikers and follow them on their way to the koppie.

While following the strikers the teargas and stun grenade was fired to disperse armed strikers and W/O Lepaaku was attacked and killed by armed strikers and W/O Baloyi was severely injured. The police were robbed of their service fire-arms and police radio.

TESTIMONY OF WITNESSES ABOUT THE INCIDENT OF 13TH AUGUST 2012

8. The following witnesses testified before the Commission about the incident of 13th August 2012 near the railway line:

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4 Record: ibid at page 11802, lines 1-25.

5 Record: ibid at page 11110, lines 6-11.

6 Record: “Exhibit HHH 16.1 and 16.2,” the police line formed behind the strikers near the railway line on 13 August 2012.
BRIEF TESTIMONY OF MAJ-GEN MPEMBE

9. Maj-Gen Mpembé was appointed as an overall commander of the POP operation near the railway line by Lt-Gen Mbombo. When he confronted the strikers near the railway line he was in company of Lt-Col Merafe, Brig Calitz, Lt-Col Tsiloane, and other police units (Technical Response Unit, National Intervention Unit, and POP Units) When he intercepted armed strikers near the railway line, he did not have a plan to disperse and disarm the protesters and he relied on his experience.

10. He pleaded with the strikers to handover their dangerous weapons to the police and the strikers refused to comply with his request. He gave strikers ultimatum warning to hand over their dangerous weapons and the strikers ignored him and continued with their march to the koppie. He applied situational appropriateness and decided to escort them from the railway line to the koppie. While escorting the strikers near the railway line, the strikers decided to divert from their intended path to the nearby informal settlement.

7 Record: Ibid at page 11080 lines 9-14 and page 11082 lines 3-8.
8 Record: Ibid at page 11083 lines 14-19.
9 Record: Ibid at page 11121 lines 22-25 and see page 11125 lines 1-10 and page 11123 lines 7-17.
10 Record: Evidence in Chief of Maj-Gen Mpembé, 10 June 2013, Day 104 lines 17-19.
11 Record: Evidence in chief of Maj-Gen Mpembé, Day 108, Page 11559 lines 11-14
11. Tear gas and stun grenade were fired by the police and the strikers attacked and killed W/O Lepaaku and severely injured Lt Baloyi and 3 (three) strikers were killed by the police in self-defence. After the incident members blamed him and threatened to kill him. He was removed from the scene and later on that day he had a briefing with Lonmin and briefed the National Commissioner Riah Phiyega about the incident. When he testified before the Commission, Maj-Gen Mpembe denied that, on that day he issued a command to fire tear gas and stun grenade near the railway line. At the Root meeting in preparation for the Commission, he was accused by Capt Thupe of having issued a command on that day.

12. Maj-Gen Mpembe was cross-examined on behalf of the late W/O Lepaaku and Lt Baloyi on his contention that, he did not issue a command to fire tear gas and stun grenades near the railway line. The following written statements from the members who were involved in the POP operation of 13th August 2012 was used to cross-examine and confront Maj-Gen Mpembe:

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13 Record: Evidence in Chief of Maj-Gen Mpembe, 10 June 2013, Day 104, page 11171 lines 16-20, furthermore see Lt-Gen Mbombo's supplementary affidavit (“Exhibit HHH3”) confirming the meeting with the National Commissioner and Brig Calitz, furthermore see “Exhibit FFF 2” the statement of the National Commissioner at paragraph 14, page 5.

14 Record: ibid at page 11896, lines 20-22.

15 Record: Evidence in Chief of Maj-Gen Mpembe, 10 June 2013, Day 104, page 11167, lines 1-9 and page 11168 lines 5-17.
12.1. Statement of Capt Thupe confirming that instructions were issued.\(^{16}\)

12.2. Statement of Const Katlego Joseph Sekgweleya, Rustenburg TRT confirming that instruction was issued.\(^{17}\)

12.3. Statement of Const Nkosana Shepeko Mguye of Rustenburg TRT confirming that instructions were issued on that day.\(^{18}\)

12.4. Statement of Const Mahume,\(^{19}\) pointing Maj-Gen Mpembe as the person who issued instruction on that day.

12.5. Statement of W/O Mkhabela\(^{20}\) pointing Maj-Gen Mpembe as a person who issued instruction on that day.

12.6. Statement of Const MJ Tawana pointing Maj-Gen Mpembe as a person who issued instruction on that day.\(^{21}\)

12.7. Exhibit" L" presented before the Commission on behalf of SAPS.\(^{22}\)

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\(^{16}\) Record: “Exhibit HHH 15.1”, para 3, this exhibit was used to confront him during his cross-examination on behalf of W/O Lepaaku and Lt Baloyi.

\(^{17}\) Record: See, paragraph 5 of his statement which confirmed that a command was issued on that day although he did not mention Maj-Gen Mpembe as a person who issued instruction on that day.

\(^{18}\) Record: “Exhibit HHH 30.”

\(^{19}\) Record: “Exhibit HHH 31.”

\(^{20}\) Record: “Exhibit HHH 33”.

\(^{21}\) Record: “Exhibit HHH 37”.

\(^{22}\) Record: See slides 47 of Exhibits "L" “To prevent them from entering the village the police
12.8. Debriefing reports produced after Root Meetings leading to the production of exhibit L presented before the Commission.\textsuperscript{23}

**SUBMISSIONS ON THE EVALUATION OF MAJ-GEN MPEMBE’S TESTIMONY**

13. It is submitted that in determining whether a command to fire teargas and stun grenade was issued by Maj-Gen Mpembe near the railway line, the Commission must weighed the evidence of the 13\textsuperscript{th} August 2012 in its totality (not in the piece meal fashion)\textsuperscript{24} and distinguish probabilities from ‘conjecture’ and ‘speculation’.\textsuperscript{25}

14. It is therefore submitted that the Commission must take into consideration the following factors briefly discussed herein under:

**PRESENCE OF CORROBORATION**

14.1. It is submitted that the evidence about issuing of a command to fire teargas and stun grenade is not just a stand-alone evidence, but it is corroborated by statements and pocket books of members from various police units who were involved in the POP operation near the railway line.\textsuperscript{26} In *DPP v Kilbourne*,\textsuperscript{27} Lord Hailsham described the word used teargas and stun grenade to disperse the protesters, discouraging them from their intended path.

\textsuperscript{23} **Record:** “Exhibit JJ 156”, Page 18, par 3 dealing with the incident of the 13th August 2012.

\textsuperscript{24} See, *S v Sacco 1958 2 SA 349(N)* and see Schwikkard and *Van der Merwe*, 1968 1PHH 170 (A)

\textsuperscript{25} See *S v M 2006 1 SACR 135 (SCA)*

\textsuperscript{26} *S v Bergh* 1976 4 SA 857 (A) and *S v Khumalo* 1991 4 SA 310 (A)
'corroboration’ as follow: ‘Corroboration is therefore nothing other than evidence which ‘confirms’ or ‘supports’ or strengthen other evidence…..It is, in short evidence which renders other evidence more probable. If so, there is no essential difference between, on the one hand, corroboration, and, on the other, supporting evidence…..’

14.2. It is therefore submitted that the statements and pockets books presented during the cross-examination of Maj-Gen Mpembe confirmed or supported and strengthened the contention that, a command to fire teargas and stun grenade was issued by Maj-Gen Mpembe near the railway line on 13 August 2012.28

ABSENCE OF CONTRADICTIONS AND INCONSISTENCES ON EVIDENCE TENDERED BEFORE THE COMMISSION

14.3. It is submitted that there is no factual evidence which contradicts or inconsistence with statements and pockets books presented before the Commission save to say that, Maj-Gen Mpembe denied that he issued a command to fire teargas and stun grenade near the railway line.

14.4. It is further submitted that the testimony about how the incident of the 13th August 2012 unfolded is consistence with statements, pockets

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27 1973 1 ALL ER 440; (1973) AC 720 ALL ER 440:447H and see Schmidt and Rademeyer they defined corroboration as ‘corroborative evidential material outside the evidence which is corroborated.'

28 See, S v Gentle 2005 (1) SACR 420 (SCA) the court held that corroboration must come from an independent source.
books and other evidence presented before the Commission briefly articulated *infra*.

**14.5.** In the absence of contradictions and inconsistencies, it is submitted that the Commission must, accept the evidence tendered before the Commission that on the 13\textsuperscript{th} August 2012, a command was issued to fire teargas and stun grenade to disperse the crowd without prioritising safety of members as a result of that conduct W/O Lepaaku was hacked to death by strikers and Lt Baloyi was severely injured.

**FAILURE TO BRIEF AND ORIENTATE MEMBERS MOBILISED OUTSIDE OF MARIKANA BEFORE DEPLOYMENT**

**15.** Brig Mkhwanazi a POP trainer in the SAPS, testified that, units mobilised from other provinces like the Pretoria POP and Kwamhlanga POP must be properly briefed and oriented regarding the terrain before any deployment and the senior officer, the operational Commander must brief the unit as to where they’re going to operate and what is expected from them so that when they are called to do something, they do not waste time.

**16.** The cross-examination of Maj-Gen Mpembe on this aspect revealed that, on that day members mobilised outside of North West Province were never briefed or oriented by Maj-Gen Mpembe before they were deployed to intercept strikers near the railway line.\textsuperscript{29} Maj-Gen Mpembe testified that, he

\textsuperscript{29} *Record*: Cross examination of Maj-Gen Mpembe, 20 August 2013, Day 120, page 12349, lines 1-16, It was put to him that, information about orientation and briefing of members is not captured by Exhibit *FFF 25* (the occurrence book of 13 August 2012)
expected Lt-Col Merafe to brief and orientate members mobilised outside of North West Province.\(^{30}\)

17. It is submitted that the mere fact that the SAP JOC OB (occurrence book)(12 August-18 August 2012) ("Exhibit FFF 25") does not reflect this information, the Commission must conclude that indeed on that day, police units mobilised outside of North West Province were never briefed and orientated before being deployed to intercept armed strikers near the railway line.

FAILURE TO SHARE CRIMINAL INTELLIGENCE INFORMATION WITH MEMBERS BEFORE CONFRONTING STRIKERS NEAR THE RAILWAYLINE

18. Maj-Gen Mpembe testified that, he had criminal intelligence information at his disposal about plans of the group and that the group had performed certain rituals on the previous day. Maj-Gen Mpembe was cross-examined on this aspect of sharing of criminal intelligence information with members before confronting strikers near the railway line and he conceded that, he did not share this criminal intelligence information with his subordinate commanders and other police units.\(^{31}\)

19. We submit that public order policing requires good criminal intelligent information gathering. We submit that, according to SO 262 read with other POP policy documents require POP operation to be based on pro-active conflict resolution, pre-planning, execution, reporting, and record keeping.

\(^{30}\) Record: See ibid page 12351, lines 1-13.

\(^{31}\) Record: Cross-examination of Maj-Gen Mpembe,20 August 2013,Day 120, page 12319, lines 1-15 and see page 12361,lines 1-14 and "Exhibit TT 5",Criminal intelligence information Lonmin Platinum Mine: Marikana Labour Unrest.
20. We submit that on 13 August 2012, there was no threat assessment of armed strikers before POP deployment even though it was a spontaneous gathering.

21. It is submitted that Maj-Gen Mpembe’s failure to share this crucial intelligence information with his subordinate commanders from various units is inconsistency with Standing order 262 (“Exhibit SS 2”) and SAPS POP Policies.

22. We submit that Maj-Gen Mpembe should have factored crime intelligence information when applying the principle of situational appropriateness and when he made a decision to escort strikers to the koppie.

23. It is therefore submitted that the POP operation near the railway line did not factor crime intelligence information gathered before confronting the strikers near the railway line.

24. We further submit that even the operational plans produced after police attack and killing did not factor crime intelligence information gathered by the police.

We submit that, the operational plans did not factor threat assessment on possible police attack and killing.

25. It is therefore submitted that if crime intelligence information was shared among various units and commanders, the POP operation of 13 August 2012, would have been handled differently and loss of life would have been prevented. In that regard we submit that, there was a lack of on-going planning before and after police attack and killing.
LACK OF COMMUNICATION BETWEEN MAJ-GEN MPEMBE AND VARIOUS POLICE UNITS NEAR THE RAILWAY LINE.

26. During the cross examination of Maj-Gen Mpembe, the line of command between Maj-Gen Mpembe and various police units near the railway line was probed on behalf of W/O Lepaaku and Lt Baloyi. It was put to Maj-Gen Mpembe, that as an operational commander, he was supposed to be in charge of direct communication with members and he opted to communicate with members via subordinate commanders and he was expecting subordinate commanders to relay his instruction to members of various units.\(^{32}\)

27. It is further submitted that even when he took a decision to escort strikers, his line of communication with members, and other commanders was flawed. In his cross-examination, he conceded that he did not personally brief his members about the decision to escort and he did not observe the commanders briefing their members.\(^{33}\)

28. He further conceded that he did not explain to his members of the plan to escort.\(^{34}\) He did not inform/instruct commanders where to position their armoured vehicles while escorting the strikers.\(^{35}\) He further conceded that he

\(^{32}\) Record: Cross-examination of Maj-Gen Mpembe, 20 August 2013, Day 120, page 12353, lines 14-25 and page 12351, lines 1-13.

\(^{33}\) Record: Cross-examination of Maj-Gen Mpembe, 22 August 2013, Day 121, page 12433, lines 1-15.

\(^{34}\) Record: Ibid at page 12432 lines 2-6.

\(^{35}\) Record: Ibid lines 19-25.
did not even inform the strikers that they were being escorted by the police to the koppie.\textsuperscript{36} Furthermore, he never used loudhailers to relay his decision to escort to strikers to the koppie.\textsuperscript{37} He further denied that, he issued instruction to block strikers from heading towards an informal settlement.\textsuperscript{38}

29. It is submitted that delegation of communication to subordinates commanders is inconsistence with Standing Order 262 and other SAPS Public Order Policies.

30. We further submit that if the line of command and control between Maj-Gen Mpembe and various units was handled properly, loss of life could have been prevented on that day.

**FAILURE TO PRODUCE DEBRIEFING REPORTS BEFORE THE COMMISSION**

31. Maj-Gen Mpembe testified that after the incident there was a debriefing of members conducted by Employee Health and Wellness staff and there were debriefings of commanders and the record of those debriefings are nowhere to be found.\textsuperscript{39}

\textsuperscript{36} \textit{Record}: ibid at page 12440, lines 4-18.

\textsuperscript{37} \textit{Record}: Ibid lines 19-25 and page 12441 lines 1-6.

\textsuperscript{38} \textit{Record}: Cross examination of Maj-Gen Mpembe, 23 August 2013, Day 122, page 12553 lines 19-25.

\textsuperscript{39} \textit{Record}: Evidence in Chief of Maj-Gen Mpembe, 10 June 2013, Day 104, page 11165 lines 4-11 and see Evidence in Chief, 18 June 2013, day 108 page 11560 lines 22-25.
32. He testified that after police attack and killings, he instructed Lt-Col Merafe and Lt-Col Scott to compile the operational plan and update it. He instructed them that, the plan must take into account the incidence of 13 August 2012 and Lt-Col Merafe as a unit commander of Rustenburg must ensure that, experiences of 13 August 2012 was factored on the plan.40

33. He further testified that on 14 August 2012 Lt-Col Scott presented the plan in the form of slides in the JOCCOM. Brig Seboloke took the minutes of the meeting and the minutes of that meeting are nowhere to be found.41

34. It is submitted that failure to produce debriefing reports after police attack and killing is in contravention SAO POP policy document titled “Crowd Management For Platoon Commanders: Briefing And Debriefing” and Policy document on Crowd Management and Standing Order 262.42

35. It is further submitted that failure to produce debriefing report is the long overdue challenge that was raised by the Independent Police Investigative Directorate (IPID) before the Portfolio Committee on Police.43 The challenge identified by IPID is that, the SAPS is lacking to produce post-

40 Record: See evidence in chief of Maj-Gen Mpembe of 10th June 2013, page 11172 and 11173, lines 1-4.

41 Record: Ibid page 11192 lines 2-5.

42 Record: See “Exhibit SS 2 read with Exhibit FFF 1” Policy document on Crowd Management, par 6 deals with debriefings that must take place after public order operation, this include spontaneous gathering and see Exhibit GGG25. Furthermore, see Section 13 of Standing Order 262.

43 See, IPID Presentation before the Parliament titled “Briefing On Crowd Control” at page 27.
events/protest/strike reports and recommended that, the commanders must be responsible for preparing detailed post-crowd control reports, which must be made available to the IPID for investigation purpose.

36. We submit that in terms section 29 of the Independent Police Investigative Directorate Act, 2011 (Act 1 of 2011) the SAPS has a reporting obligation to notify the Directorate and submit a written report within 24 hours as soon as they became aware that certain members fired without command as result of that, W/O Lepaaku was killed by protesters and Lt Baloyi was severely injured.44

37. We submit that debriefing reports from the commanders of various police units would have assisted the police to compile and submit debriefing reports to IPID in compliance with IPID Act and present those reports before the Commission.

38. We submit that even the minutes of the meeting of 14 August 2012 would have assisted the SAPS to plan its operation building to the 16th of August 2012 and would have assisted the SAPS to compile debriefing reports to be submitted to the IPID within 24 hours in terms of IPID Act.

39. We submit that debriefing reports from commanders of various police units would have shared some lights as to what transpired before the killing of W/O Lepaaku and injury of Lt Baloyi.

44 In terms of Section 28 (b) and (c) of the IPID Act, the IPID is empowered to investigate deaths as a result of police actions and any complaint relating to the discharge of an official firearm by any police officer.
FAILURE TO INITIATE INTERNAL INQUIRY ABOUT THE INCIDENT OF 13 AUGUST 2012

40. Maj-Gen Mpembe further testified that W/O Kuhn who fired without command near the railways should be disciplined for having not acted within the content of Standing Order 262 and he promised the Commission that after his testimony, he would ensure that disciplinary steps are taken against W/O Kuhn.45

41. We submit that in terms of Section 34.1 of the Police Service Act 68 199546 as amended read with Regulation 20 of the Police Service Act, 47 the National Commissioner of Police is empowered to initiate enquiry on the death and injury of the member during the course and the scope of employment. It is submitted that, evidence ventilated before the Commission can be used to initiate an internal enquiry to ascertain whether indeed members fired without


46 Section 34 (1) provides that: "The National Commissioner may designate a member, a category of members or any other person or category of persons who may, in general or in a specific case, inquire into—(f) an injury alleged to have been sustained by a member or other employee of the Service in an accident arising out of or in the course of his or her duty, or a disease or indisposition alleged to have been contracted in the course of his or her duty, or any subsequent incapacitation alleged to be due to the same injury, disease or indisposition, or an indisposition alleged to have resulted from vaccination in accordance with this Act."

47 Regulation 20 provides that: "An employee will be guilty of misconduct if he or she, among other things, (e) endangers the lives of others by disregarding safety rules or regulations; (i) fails to carry out a lawful order or routine instruction without just or reasonable cause, (p) while on duty, conducts herself or himself in an improper, disgraceful and unacceptable manner (q) contravenes any prescribed Code of Conduct for the Service or the Public Service, whichever may be applicable to him or her."
a command of Maj-Gen Mpembe as a result of that conduct police were attacked and killed.

42. We therefore submit that the Commission should make a recommendation and call upon the National Commissioner to initiate inquiry in terms Section 34.1 of the Police Service Act 68 of 1995 as amended read with Regulation 20 of the Police Service Act 68 of 1995.

EVIDENCE OF LT-COL MERAFE

43. Lt-Col Merafe who is an experienced POP Commander was at the scene near the railway line when the police were attacked and killed by armed strikers. He testified before the Commission and was cross examined on behalf of W/O Lepaaku and Lt Baloyi. His cross-examinations revealed the following crucial aspects:

43.1. The crime intelligence information was never shared with him as an experienced POP Commander and other police units before intercepting strikers near the railway line.\(^{48}\)

43.2. He agreed with the version of Lt Baloyi put to him that, Maj-Gen Mpembe ought to have relayed/shared crime intelligence information with members before confronting the strikers near the railway line.\(^{49}\)


\(^{49}\) *Record*: Ibid at lines 14-24.
43.3. He further agreed with Lt Baloyi that, even though it was a spontaneous gathering, Maj-Gen Mpembe ought to have convened an emergency parade and share crime intelligence information with members before intercepting strikers near the railway line.\footnote{Record: ibid page 27200 lines 1-4.}

43.4. The operation of the 13 August 2012 did not factor crime intelligence information.\footnote{Record: ibid at lines 5-12.}

43.5. The plan cannot be compiled without factoring crime intelligent information at SAPS disposal.\footnote{Record: ibid at lines 17-22.}

43.6. He testified that he was not aware that there was a hardware that was selling pangas before 13 August 2012.\footnote{Record: ibid at page 27207 lines 1-9.}

43.7. He further testified that commanders of various units and their information officers were not aware of crime intelligence information.\footnote{Record: ibid at page 27208 lines 1-19.}

43.8. He denied that he briefed members mobilised from other provinces before deployment.\footnote{Record: ibid at page 27209 lines 2-14.}

43.9. He disagreed with Major-Gen Mpembe’s strategy to not disarm strikers near the railway line.\footnote{Record: ibid at page 27209 lines 2-14.}
43.10. He testified that Maj-Gen Mpembe did not inform his members about the decision to escort strikers near the railway line.57

43.11. Maj-Gen Mpembe did not inform strikers that they were being escorted by the police from the railway line to the koppie.58

43.12. Some of the police officers who were escorting armed strikers were empty-handed and did not have helmets and gas masks.59

43.13. The decision to block and disperse strikers must factor safety of members before being implemented.60

44. We submit that evidence of Lt-Col Merafe demonstrates how the Standing Order 262 and other POP Policies were flouted on that day. It is submitted that, Maj-Gen Mpembe did not conduct threat assessment of armed protesters before deployment of members near the railway line. It is submitted that, evidence of Lt-Col Merafe further demonstrate that members were not properly briefed before they were deployed to intercept strikers near the railway line.

45. We further submit that his evidence further reveals that, the line of command and control between Maj-Gen Mpembe and his members created an atmosphere of confusion among his units. As a result of that confusion, we

56 Record: Ibid at page 27211 lines 8-25.
57 Record: Ibid at page 27212 lines 8-21.
58 Record: Ibid at page 27213 lines 8-17.
59 Record: Ibid at 27214 at lines 12-21 and page 27218 lines 3-9.
60 Record: Ibid at page 27215, lines 9-16 and page 27217 lines 13-24.
submit that, Maj-Gen Mpembe as a senior officer in charge of the operation failed to provide a decisive leadership and flouted Standing Order 262 read with other SAPS POP Policies.

46. In that regard, we submit to the Commission that Lt-Col Merafe is an experienced POP Commander in the platinum belt mining unrest and the Commission must accept his evidence without any doubts.

EVIDENCE OF LT-COL VERMAAK

47. He testified that he was in the chopper hovering above the protesters when the armed strikers attacked and killed the police W/O Lepaaku. His cross-examination revealed the following crucial aspects about the operation of 13 August 2012:

47.1. He agreed with the version of Lt Baloyi put to him that Maj-Gen Mpembe ought to have relayed/shared crime intelligence information with members before intercepting strikers near the railway line.  

47.2. The operation plan of the 13 August 2012 did not factor crime intelligent information and the fact that the strikers had performed on the previous day.  

47.3. He agreed with Lt Baloyi’s version that members were supposed to be briefed before intercepting strikers near the railway line.

61 Record: Cross examination of Lt-Col Vermaak, 27 March 2014, day 208, page 25727, lines 16-25.

62 Record: ibid at page 25728 lines 13-19.
47.4. The police were outnumbered by armed strikers near the railway line.64

47.5. He did not regard Maj-Gen Mpembe, as an experienced POP negotiator.65

47.6. When the strikers ignored the police line near the big rock next to the railway line, Maj-Gen Mpembe was supposed to implement protective measures to protect the police.66

47.7. If he was in charge of the operation would not have instructed his members to follow armed strikers who disregarded police instruction before.67

47.8. Members who were following strikers near the railway line were not properly equipped to confront armed protesters.68

47.9. No instruction issued for vehicle formation when the decision to escort strikers to the koppie was taken.69

47.10. Maj-Gen Mpembe was in the state of shock and had lost control of members after police attack and killing near the railway line.70

63 Record: ibid at page 25729 lines 1-6.
64 Record: ibid at page 25732 lines 8-25 and page 25733 lines 1 and 2.
65 Record: ibid page 25733 lines 18-20.
66 Record: ibid page 25741, lines 3-13.
67 Record: ibid page 25742 lines 1-13.
68 Record: ibid page 25743 lines 13-25.
69 Record: ibid page 25744 lines 17-25 and page 25745 lines 1-4.
47.11. Members were instructed to leave shotgun behind so that they would not provoke strikers.\textsuperscript{71}

47.12. At Root Meeting in preparation for the Commission, Lt-Col Merafe told him that he was not happy about the manner in which Maj-Gen Mpembe handled the scene near the railway line and the fact that Maj-Gen Mpembe took over from him as an Operational Commander.\textsuperscript{72}

47.13. At Root Meeting, Maj-Gen Mpembe was accused by members of contravening Standing Order 262.\textsuperscript{73}

47.14. At Root, members were of the view that Lt-Col Merafe would have handled the scene better than Maj-Gen Mpembe.\textsuperscript{74}

47.15. He considered Lt-Col Merafe as an experienced POP Commander in dealing with mine unrest situations.\textsuperscript{75}

47.16. Lt-Col Merafe has never handled mine unrest incident which resulted to the death or injury of a police officer. He has provided air-wing support to Lt Col Merafe before.\textsuperscript{76}

\textsuperscript{70} Record: ibid page 25757 lines 1-7.

\textsuperscript{71} Record: ibid page 25758 lines 1-12.

\textsuperscript{72} Record: ibid at page 25768 lines 10-22.

\textsuperscript{73} Record: ibid at page 25778, lines 1-25.

\textsuperscript{74} Record: See, Cross-Examination of Lt-Col Vermaak, 28 March 2014, day 209, page 25783,lines 1-5.

\textsuperscript{75} Record: ibid at page 25783 lines 6-12.

\textsuperscript{76} Record: Ibid lines 12-23.
47.17. At Root Meeting their group analysed the video footage of the 13 August 2012 and they concluded that members were less equipped to confront armed strikers.\(^{77}\)

47.18. He confronted Lt-Col Scott about discrepancies in the presentation to be presented before the Commission about the incident of 13 August 2012 near the railway line.\(^{78}\)

47.19. On 21 January 2013, he had a meeting with the National Commissioner, Lt-Gen Mbombo and other senior SAPS officials and presented a document to the National Commissioner identifying weaknesses in the POP operation of 13 August 2012.\(^{79}\)

47.20. Up to date, he has never been summoned to appear before any internal inquiry probing the death of police attack and killing.\(^{80}\)

47.21. It was further put to him that the National Commissioner and Gen Mbombo did not testify about the meeting they had with him.\(^{81}\)

47.22. He does not know whether the document he presented before the National Commissioner and other SAPS senior officials was shared

\(^{77}\) Record: ibid at page 25792 lines 9-25.

\(^{78}\) Record: ibid page 25802 lines 1-9.

\(^{79}\) Record: “Exhibit 000 10” page 16, para 3.

\(^{80}\) Record: Cross- Examination of Lt-Col Vermaak , 28 March 2014, day 209,lines 15-23.

\(^{81}\) Record: ibid page 25817,25818,25819,25820.
with commanders who were involved in the POP operation near the railway line.\textsuperscript{82}

47.23. He was confronted with earlier versions of Exhibit \(L\) retrieved from Lt-Col Scott.\textsuperscript{83}

48. We submit that the Commission must accept his evidence without any doubts. His evidence does not contradict any of the witnesses who testified about the incident of 13 August 2012.

49. It is submitted that his evidence corroborates evidence of Lt Col Merafe and confirm the contention that on 13 August 2012, Maj-Gen Mpembe issued a command to fire teargas and stun grenade.

50. It is further submitted that his evidence demonstrate the scale of contravention of Standing Order 262 and other POP Policies near the railway line.

**EVIDENCE OF CAPT THUPE**

51. He is a TRT Commander and was at the scene when the police intercepted armed strikers near the railway line. His cross-examination revealed the following crucial aspects:

51.1. Maj-Gen Mpembe did not inform members that he has taken a decision to escort strikers from the railway line to the koppie.\textsuperscript{84}

\textsuperscript{82} \textit{Record}: ibid at page 25823 lines 8-17.

\textsuperscript{83} \textit{Record}: See "Exhibit JJJ 156", Exhibit 000 19.1," Exhibit 000 19.2.
51.2. Maj-Gen Mpmbe gave instruction to W/O Kuhn to utilise teargas.\textsuperscript{85}

51.3. He did not instruct anyone to delete his name from the SAPS narratives (\textit{Exhibit JJJ 156, Exhibit 000 19.1, Exhibit 000 19.2}) produced after Root Meeting leading to the production of Exhibit ‘L” presented before the Commission\textsuperscript{86}

52. We submit that the Commission must accept the version of Capt Thupe without any doubts. His evidence does not contradict any of the witnesses who testified about the incident of 13 August 2012.

53. It is submitted that his evidence corroborate evidence of Lt-Col Merafe and confirm our contention that on 13 August 2012, Major-Gen Mpmbe issued a command to fire teargas and stun grenade as a result of that police were attacked and killed.

\textbf{EVIDENCE OF LT- GEN MBOMBO}

54. Lt-Gen Mbobbo testified that she was not at the scene when Maj-Gen Mpmbe intercepted armed strikers near the railway line. On her way to Potchefstroom, Maj-Gen Mpmbe phoned and informed her about police attack and killing near the railway line.

\textsuperscript{84} \textit{Record}: Cross-Examination of Capt Thupe, 12 May 2014, day 227, page 28078 lines 1-8.

\textsuperscript{85} \textit{Record}: ibid at Page 27938, lines 11-16 and page 27967, lines 1-23.

\textsuperscript{86} \textit{Record}: ibid, page 28078-28083.
55. Maj-Gen Mpembe did not explain to her that certain members fired without instruction.\textsuperscript{87} When they briefed the National Commissioner later on that day, Maj-Gen Mpembe indicated that, he did not issue instruction near the railway line. When she was questioned about her failure to mention this in her statement she contended that, it was a mistake.\textsuperscript{88}

56. She tasked Maj-Gen Mpembe to initiate inquiry on these allegations and has sent a request to Gauteng Provincial offices requesting them to initiate disciplinary steps against those implicated members and they would provide the Commission with a list of implicated members.\textsuperscript{89}

57. We submit that if indeed this important information was relayed to her, Lt-Gen Mbombo would have canvassed this information in her statement presented before the Commission.

58. We submit that in the absence of any corroboration, the Commission must draw a negative inference against her evidence and conclude that it was never relayed to the National Commissioner that members fired without instruction near the railway line on 13 August 2012.

\textsuperscript{87} \textit{Record}: Cross-Examination of Gen Mbombo, Day 184, 23 August 2014, page 22157, lines 1-18.

\textsuperscript{88} \textit{Record}: Ibid page 22158 lines 1-17.

\textsuperscript{89} \textit{Record}: Ibid at page 22165 lines 1-25
EVIDENCE OF THE NATIONAL COMMISSIONER OF POLICE GENERAL RIAH PHIYEAGA

59. The National Commissioner was recalled by the Commission after taking a stand before the Commission and she was cross.examined about the meeting she had with Lt-Col Vermaak.

60. The content of Exhibit OOO 10 was read to her and she testified that she had a meeting with Lt-Col Vermaak and she challenged him to provide the Commission with all the necessary information.90

61. She could not explain why Exhibit “L” does not mention the allegations of members firing without a command.91 She testified that she will initiate internal inquiry about the death of W/O Lepaaku as soon as the Commission finishes its work.

62. It is submitted that her testimony on this aspect corroborates the version of Lt-Col Vermaak and other SAPS witnesses that indeed on 13 August 2012, Maj-Gen Mpembe issued a command to fire teargas and stun grenade near the railway line.

63. We submit that the mere fact that Maj-Gen Mpembe and Lt-Gen Mbombo did not testify about this meeting with Lt-Col Vermaak, the Commission must

90 Record: Cross-Examination of the National Commissioner, 10 September 2014, day 288, page 37463, lines 1-25.

91 Record: Ibid page 376463 lines 1-7
draw a negative inference against their testimony and conclude that this information was deliberately omitted from Exhibit “L”.

64. Furthermore, the National Commissioner testified before the Commission on the wider scale of challenges facing the SAPS. She was cross-examined on the high rate of police killing in South Africa and employee health and wellness program in the SAPS.92 The following researches from independent research institutes were put to her:

64.1. The National Commissioner confirmed that after she took over as the National Commissioner she was vocal and concerned about the high rate of police killing in SA, she was quoted by the press saying that “in South Africa the police officer is killed on duty in every 10 days. She further confirmed that 82 police officer had been killed on duty in that financial year.

64.2. She agreed with the previous National Commissioner that, the high rate of police killing in SA is a “national crisis”.93

64.3. She agreed with the Minister of Police that, ‘a killing of a single police officer robs the nation’.94

64.4. She confirmed that other sectors of community had condemned the high rate of police killing in South Africa. 95

92  Record: Cross-Examination of the National Commissioner,11 June 2013,day105 page 11258.

93  Record: ibid page 11263 lines 6-23 and see Exhibit FFF 34.2.

94  Record: ibid page 11264 lines 1-7.
64.5. She agreed with POPCRU’s campaign to educate the community about the role of the police in a democratic country and changing the mind-set of the community about police.  

64.6. She agreed with a research conducted by the Centre for the Study of Violence and Reconciliation ("CSVR") compiled by Ted Legget, “Save our cops Prevent Police Killing in SA Crime Quarterly No 4, June 2003, which finds that one of the possible explanations why South Africa has such a high rate of police killing, it’s because South Africans is a violent society.

64.7. She further agreed that the motive for police killing is to rob them of their service pistol. The Minister of Police’s address on the summit against Police Killings on 08 July 2011 indicates that 8 % of police officers were killed when being robbed of their service pistol. On 13 August 2012, the police were robbed of 2 x 9mm pistols, 1 x R5, 1x shotgun, and 1 x police hand radio.

64.8. She further agreed that 20 % of the police officers were killed while responding to a crime, during search and seizure or conducting follow

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95 Record: ibid page 11265 lines 1-12.
96 Record: ibid lines 14-25.
97 Record: ibid page 11269 lines 1-25.
98 Record: ibid page 11270 lines 1-23 and see Exhibit FFF 43, Address by the Minister of Police, Nathi Mthethwa on the summit against Police Killings, 08 July 2011 and see Exhibit FFF 34.3 and Exhibit 34.4.
up operations. The late W/O Monene and Lepaaku and Lt Baloyi were deployed to Marikana to maintain law and order.\textsuperscript{99}

64.9. She agreed with a finding of \textbf{Prof Herman Conradie} of the Department of Criminology, University of South Africa his research titled “\textit{the Modus Operandi of Police Killers in Four Provinces of South Africa}” which analysis \textit{the} modus operandi of police killers in SA.\textsuperscript{100} She agreed with some of his research findings which revealed that, police attackers use shooting, stabbing, and physical force to attack. On the 13 of August 2012, the late W/O Lepaaku and Monene and Lt Baloyi sustained stab wounds.

64.10. She agreed with his findings that the police attackers shoot; stab and use force more on male police officers than on female police officers. The late W/O Lepaaku, and Lt Baloyi who was severely wounded were male police officers.\textsuperscript{101}

64.11. She agreed with his findings that the younger the attackers, the more they shoot, stab and use physical force. Video footages of the 13th of August 2012 indicate clearly that those armed protesters who later attacked the late W/O Lepaaku, Monene and Lt Baloyi were younger attackers.\textsuperscript{102}

\textsuperscript{99} \textbf{Record}: ibid page 11270 lines 24-25 and page 11271 lines 1-14.

\textsuperscript{100} \textbf{Record}: ibid page 11271.11272,11273 and exhibit FFF 38.

\textsuperscript{101} \textbf{Record}: ibid.

\textsuperscript{102} \textbf{Record}: ibid.
64.12. She agreed with his findings that the police attackers utilize handguns when executing the attacks. On 13 August 2012, the protesters responsible for police attack and killing were pursued by TRT members and the TRT members were shot at with some of the weapons robbed from the SAPS members. They returned fire but the attackers managed to escape.  

64.13. She agreed with his findings that the police attackers attack police officers who are on duty. The late W/O Lepaaku, Monene and Lt Baloyi were on duty when they were attacked by the armed protesters.

64.14. She agreed with his findings that when the police are directly interacting with the public, they are most vulnerable. On 13 August 2012, the police were interacting with armed protesters and later on W/O Monene and Lepaaku were hacked to death and Lt Baloyi was severely injured.

64.15. She further agreed with a study/research conducted by Frank Plani, Douglas M Bowley, Jacques Goosen “Death and injury on duty — a study of South African police officers” November 2003; Vol. 93, No. 11 South African Medical Journal. The research analyses injury sustained

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103 Record: ibid.
104 Record: ibid.
105 Record: ibid.
by members of the SAPS on duty and finds that there is a high degree of psychological distress in the SAPS.\textsuperscript{106}

64.16. She agreed with the finding of the research that police officers who have been injured on duty may express anxiety about returning to work as police officers, or may not be able to return at all due to psychological distress. \textsuperscript{107}

64.17. She agreed with the findings of the research study by \textbf{Jacobus Pienaar, Sebastiaan Rothmann} “Suicide ideation in the South African Police Service” South African Journal of Psychology, 35(1) 2005, pp. 58–72. The study finds that, the SAPS have higher suicide rates compared to the rates of the general population and those of other professions. The study indicates that low rank police officers are more inclined to commit suicide opposed to high rank police officers. Lower ranking police officers are operational and they deal with operational issues on daily basis. These police officers they resort to alcohol abuse to reduce high level of stress. \textsuperscript{108}

64.18. She further agreed that the SAPS have 160,000 active members and SAPS 515 service providers (psychologists, social workers, and chaplains) providing debriefing services to the active SAPS member

\textsuperscript{106} \textbf{Record}: ibid page 11277 lines 23-25 and page 11278 lines 1-25 and page 11279 lines 1-25 and See Exhibit FFF 39 and FFF 42.

\textsuperscript{107} \textbf{Record}: ibid page 11279, lines 1-11.

\textsuperscript{108} \textbf{Record}: Ibid page 11280, lines 16-25 and page 11281-11284 and Exhibit FFF 41.
and these 515 providers are insufficient to reach all SAPS members that require help and the SAPS is addressing this challenge.\footnote{Record: Ibid page 11292 lines 19-25 and page 11293 lines 1-25, page 11293-11295, See also Exhibit FFF 42}

64.19. She further explained what the SAPS have done to address the findings of the research compiled by J Pienaar and S Rothmann, “Occupational Stress in the South African Police Service”, SA Journal of Industrial Psychology, 2006, 32 (3), 72-78. The research identified some stressors in the SAPS. Lacks of recognition for good work, inadequate or poor quality equipment, inadequate salaries, seeing criminals go free are some of the stressors in the SAPS.\footnote{Record: ibid page 1129-11302 and see exhibit FFF40.}

65. We further submit that, this Commission like the Goldstone Commission of Inquiry must also make recommendation on the high rate of police attack and killing in South Africa.\footnote{Report Of The Committee Of Inquiry Into Attacks On Members Of The South African Police, 21 April 1994.}

EVIDENCE OF MR “X”

66. Mr X also testified before the Commission about the incident of 13 August 2012 near the railway line. His cross-examination briefly revealed the following important aspects:

66.1. He was at the scene with other armed protesters when Maj-Gen Mpembe intercepted them near the railway line and was in
possession of dangerous weapons. He testified that on 11 August 2012, they slept at the mountain and they had undergone rituals conducted by the traditional healer.

66.2. The traditional healer instructed them to squat while talking to Maj-Gen Mpembe near the railway line.

66.3. The traditional healer instructed them not to shoot until the police shoot first.

66.4. The traditional healer instructed them to use their weapons to produce clicking sound with a purpose of hastening the effect of muti and the police should be in the hurry to shoot at them first.

66.5. The traditional healer instructed them not to listen to any instruction/order given by the police.

66.6. The strikers bought/acquired their dangerous weapon from kwaNtshebe, Enkaneng informal settlement. The weapons 

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112 *Record:* Cross-Examination of Mr X, 20 June 2014, day 246, page 31002 lines 9-22.

113 *Record:* ibid.

114 *Record:* ibid at page 31002 lines 1-8.

115 *Record:* ibid at page 31003 lines 1-7.

116 *Record:* ibid, lines 8-16.

117 *Record:* Cross-Examination of Mr X, 17 July 2014, day 257, page 30962 lines 1-25.
were manufactured in the engineering sector of the mine and sold at Nkaneng Settlement.\textsuperscript{118}

66.7. When they met the police, they had a plan to attack the police when the police shoot first and rob the police after that.\textsuperscript{119}

66.8. He chased and injured one of the police and that police was running towards a police nyala. He injured that police on the leg.\textsuperscript{120} It was the intention of the group to kill and rob the police.\textsuperscript{121}

66.9. Some of the strikers were in possession of firearms and one of the strikers pointed a firearm at the police while attacking the police.\textsuperscript{122}

66.10. He saw other police being attacked and killed by strikers near the railway line.\textsuperscript{123}

66.11. The police fired teargas and stun grenade while they were being attacked by the strikers.\textsuperscript{124}

\textsuperscript{118} \textit{Record}: ibid page 32542 lines 6-12.

\textsuperscript{119} \textit{Record}: ibid page 32544 lines 20-25 and page 32545 lines 1-16.

\textsuperscript{120} \textit{Record}: ibid page 32546, lines 1-17.

\textsuperscript{121} \textit{Record}: ibid page 32548 lines 1-8.

\textsuperscript{122} \textit{Record}: ibid lines 9-25 and page 32550 lines 22-15 and page 32551 lines 1-3.

\textsuperscript{123} \textit{Record}: ibid page 32552-32553.

\textsuperscript{124} \textit{Record}: ibid page 32556 lines 1-9.
67. We submit that, the evidence of Mr X corroborates evidence of other witnesses presented before the Commission about the incident of 13 August 2012 near the railway line. In that regard, it is submitted that the evidence of Mr X must be accepted without any doubts.

EVIDENCE OF MR XOLANI NZUZA

68. Mr Xolani Nzuza was among the protesters near the railway line. His cross-examination revealed the following aspects:

68.1. On the 13th August 2012, he joined the group of armed strikers who went to K3 shaft and he was not armed.\textsuperscript{125}

68.2. Major-Gen Mpembe counted near the railway line and the strikers did not disperse.\textsuperscript{126}

68.3. He did not observe strikers handling their dangerous weapon to the police.\textsuperscript{127}

68.4. The police followed them on their way to the koppie.\textsuperscript{128}

68.5. Despite the fact that he was not armed, he did not convince the strikers to hand over their dangerous weapon to the police.\textsuperscript{129}

\textsuperscript{125} \textit{Record}: Cross-Examination of Mr Nzuza on 27 August 2014, Day 279, page 35929, Day 279, lines 6-16.

\textsuperscript{126} \textit{Record}: ibid page 35931, lines 5-22.

\textsuperscript{127} \textit{Record}: ibid

\textsuperscript{128} \textit{Record}: ibid page 35932, lines 1-25.

\textsuperscript{129} \textit{Record}: Cross-Examination of Mr Xolani Nzuza, 28 August 2014, Day 280, page
68.6. The police nyala blocked the strikers on their way to the koppie and the police alighted from that nyala thereafter a teargas and stun grenade were fired.\textsuperscript{130}

68.7. He could not give a plausible explanation why the strikers were carrying dangerous weapons near the railway line.\textsuperscript{131}

68.8. He does not blame the strikers who were in possession of dangerous weapons.\textsuperscript{132}

68.9. He could not tell the Commission what Mr Noki said to the strikers at the koppie and what he said to his fellow strikers at the koppie after police attack and killing.\textsuperscript{133}

68.10. He contended that, the testimony of Mr X about the incident of 13 August 2012 is a blatant lie.\textsuperscript{134}

68.11. He was on the delegations that went and fetched the traditional healer but he did not talk to the traditional healer and they left inyanga behind.\textsuperscript{135}

\begin{itemize}
\item \textsuperscript{130} \textit{Record}: ibid page 35933 lines 1-25.
\item \textsuperscript{131} \textit{Record}: Cross-Examination of Mr Nzuza on 28 August 2014, Day 280, page 35938, lines 15-25.
\item \textsuperscript{132} \textit{Record}: ibid at page 35939 lines 1-10.
\item \textsuperscript{133} \textit{Record}: ibid page 35939-35942 and see page 35943 lines 1-11.
\item \textsuperscript{134} \textit{Record}: ibid page 35944, lines 1-25
\item \textsuperscript{135} \textit{Record}: ibid page 35946 to 35948.
\end{itemize}

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68.12. He cannot remember when he saw the traditional healer again.\textsuperscript{136}

68.13. He could not explain why the strikers involved the traditional healer in their labour demand and the strikers were aware that they had engaged the service of inyanga\textsuperscript{137}

68.14. He is not prepared to give information to the police on facts surrounding police attack and killing on 13 August 2012, near the railway line.\textsuperscript{138}

69. We submit that he was among the strikers that attacked and killed W/O Lepaaku near the railway line and therefore he is an accomplice and the Commission must assess his evidence with caution.\textsuperscript{139}

70. We submit that he was in company of protesters armed with dangerous weapons before they were intercepted by Maj-Gen Mpembe and his units near the railway line.

71. We submit that Maj-Gen Mpembe told the protesters that carrying of dangerous weapons was illegal and he did not disassociate himself from the

\textsuperscript{136} Record: ibid page 35950, lines 1-25.

\textsuperscript{137} Record: ibid page 35952-35954.

\textsuperscript{138} Record: ibid page 35957 lines 18-25.

\textsuperscript{139} See, Hoffmann & Zeffert “The South African Law of Evidence” 3ed (1988) 572. In S v Francis 1991,(1) SACR 198 (A) at 205 e-g Smallberger JA held that: an accomplice, in order for his or her evidence to be accepted, need not be wholly consistent and wholly reliable, or even wholly truthful, in all that he says’ but the ‘ultimate test is whether, after due consideration of the accomplice’s evidence with the caution which the law enjoins, the Court is satisfied beyond all reasonable doubts in its essential features that the story that he tells is a true.
group instead he defended armed protesters and contended that they would disarm at the koppie.

72. We submit that he was not just an ordinary passive striker near the railway line but he was an active leader, and he spoke on behalf of armed strikers when Maj-Gen Mpembe requested the strikers to disarm at the railway line and he did not convince his fellow strikers to disarm at the railway line.

73. We submit that he continued to associate himself with armed strikers when the police were following them to koppie. He was among the group of armed protesters who were signing until the police were attacked and killed.

74. We submit that after the incident near the railway line, he did not go home but he went to the koppie and found Mr Noki addressing other strikers about the confrontation with the police.

75. We submit that he was a party to an unlawful common enterprise during which the police were attacked and murdered near the railway line.\(^\text{140}\)

\(^{140}\)\textit{S v Mgedezi} [9] 1989 (1) SA 687 (A) it was held that for the doctrine of common purpose to be invoked the State must prove that "[i]n the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. Furthermore in \textit{S v Thebus and Another} [2003] ZACC 12; 2003 (6) SA 505 (CC) the constitutional court held that the common law doctrine of common purpose as set out in Mgedezi does pass constitutional
76. We submit that, the Commission must take into consideration his demeanour and credibility when assessing his evidence of the 13 August 2012 and make adverse findings on his demeanour and credibility.\textsuperscript{141}

77. We submit that he was not a credible witness at all, his evidence did not create an impression of a sharp, truthful witness, and he did not testify straightforward with ease and confidence about the incident of the 13 August 2012.

78. We submit that he was very evasive when asked simple questions about the incident of 13 August 2012.

79. We submit that on a number of occasions, he hesitated unnecessarily in responding to simple questions asked by counsels, the Chairperson of the Commission and Commissioners. He was reluctant to give his own account of the event of 13 August 2012 after police killing at the koppie.

\textsuperscript{141} in Medscheme Holdings (Pty) Limited and Another v Bhimjee 2005(5) SA 339 (SCA): the court in dealing with the assessment of evidence on the basis of demeanour and credibility had the following to say: "It has been said by this Court before, but it bears repeating, that an assessment of evidence on the basis of demeanour - the application of what has been referred to disparagingly as the 'Pinocchio theory' - without regard for the wider probabilities, constitutes a misdirection. Without careful evaluation of the evidence that was given (as opposed to the manner in which it was delivered) against the underlying probabilities, which was absent in this case, little weight can be attached to the credibility findings of the Court a quo. Indeed, on many issues, the broad credibility findings, undifferentiated as they were in relation to the various issues, were clearly incorrect when viewed against the probabilities."
80. We further submit that he was not objective and unwilling to furnish this Commission with detailed information about the incident of 13 August 2012 unlike Mr X.

81. We submit that he was not independent and tried to protect his fellow strikers who were armed to teeth despite the fact that he was not armed on that day.

82. In that regard, we submit that he was not an honest and truthful witness and therefore the Commission must make adverse finding on his demeanour and credibility.

83. We further submit that this Commission like the Goldstone Commission must make recommendation on the carrying of dangerous weapons during public meetings or demonstrations.  

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See, South Africa 1992, Commission of Inquiry Regarding the Conduct of Members of 32 Battalion on 8 April 1992, released on 10 June 1992, at page 25, it was held that: "the Commission is convinced that the carrying of dangerous weapons should be outlawed—whether in respect of political meetings or at any other place"……… This public flaunting of the law in the presence of a large South African Police presence is unfortunate and should not be allowed to occur again in the future. (my emphasis) Steps should be taken urgently to prohibit the carrying in public of any dangerous weapons at any time at all. Furthermore see, Report of the Multinational Panel to Enquire into the curbing of violence before, during and after the forthcoming election released on 11 August 1993, at page 66, it was held that: The carrying of dangerous weapons and especially firearms by any person who participates in a public meeting or demonstration should be made an offence and severe penalties should be provided for the contravention thereof. Furthermore, see the Third Interim Report, released by RJ Goldstone (Chairman of the Commission) by then on 21 December 1992 at page 46, it was held that: the Commission expressed its concern that the flouting of the law with regard to the carrying and displaying of dangerous weapons by the IFP members and its op
84. We submit that on 13 August 2012, carrying of dangerous weapons during public meetings or gatherings were prohibited by the Dangerous Weapons Amendment Act.\textsuperscript{143} In terms of this Act the Minister of Police may at any time by notice in the Government Gazette issue notices prohibiting carrying, manufacturing or supply of dangerous weapons.\textsuperscript{144}

85. We submit that all those who were carrying dangerous weapon near the railway line contravened the above mentioned legislation and thereby they must be prosecuted and face the full might of the law.\textsuperscript{145}

EVIDENCE OF LT BALOYI

86. Lt Baloyi is a POP member from Rosslyn, Pretoria and was severely injured by the strikers near the railway line on 13 August 2012.

\textit{leadership in Johannesburg and Durban some months ago has met with no actions from the authorities concerned.}

\textsuperscript{143} Act 71 of 1968 as amended and S v Thunzi and Another (CCT 81/09) [2010] ZACC 27 (2 December 2010) the Constitutional Court declared Dangerous Weapon Act unconstitutional and the Dangerous Weapons Act 15 of 2013 was introduced thereafter. Furthermore see President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others [1999] ZACC 10; 1999 (4) SA 682 (CO); 1999 (11) BCLR 1219 (CC) at para 8, where the Constitutional Court postponed sine die the confirmation of a declaration of invalidity pending the enactment of new legislation that would regulate the matter, see further Mary McGovern, Bronwen Manby, Human Rights Watch (Organization), Africa Watch Committee, (1993), \textit{South Africa half-hearted reform: the official response to the rising tide of violence}, (New York) ,p 69 -71

\textsuperscript{144} See Section 2 of the Act.

\textsuperscript{145} See, \textit{2012.09.12: GG 35680,Clause 5 of Term and Reference of the Commission no 50, the Commission shall where appropriate, refer, any matter for prosecution, further investigation or the convening of a separate enquiry to the appropriate law enforcement agency, government department or regulator regarding the conduct of a certain person/s.}
87. Lt Baloyi could not provide an oral testimony before the Commission hence he is still suffering from the post-traumatic stress disorder.\textsuperscript{146} His version of the 13\textsuperscript{th} August 2013 is contained in his statement that was presented before the Commission and was used during the cross-examination of witnesses who testified before the Commission.\textsuperscript{147}

88. According to his statement, on 13 August 2012 he was deployed to Marikana under the command of Lt-Col Seloane. They were briefed about the situation in the area and killing of security guards.

89. He explained how his crew shared 12 (twelve) shot guns with insufficient rubber rounds before confronting the strikers near the railway line.

90. While they were briefed by a mine manager, they were informed about the group of armed strikers who were marching to the koppie.

91. They intercepted the strikers near the railway line under the command of Maj-Gen Mpembe. Maj-Gen Mpembe addressed the strikers and informed them that carrying of dangerous weapons is illegal and they must surrender their weapons to him. The strikers refused to hand over the weapons and Maj-Gen Mpembe gave them an ultimatum to hand over their dangerous weapons and they refused to do so and proceeded with their march to the koppie.

92. Lt Baloyi and other senior police officials advised Maj-Gen Mpembe about disarming strikers near the railway line opposed to disarming them at the

\textsuperscript{146} Note that the psychiatrist certificate/report was submitted to the Commission declaring him unfit to testify in the Commission until further notice.

\textsuperscript{147} See, Exhibit GGG 16.
He advised Maj-Gen Mpembe that stun grenades should be used to disperse the strikers. Maj-Gen Mpembe instructed the police to follow strikers.

93. He got into the police nyala and followed the strikers and they stopped in front of the strikers facing southern direction. He alighted from the police nyala.

94. After he alighted from the police nyala, a teargas was fired and the strikers attacked and stabbed him. He threw a stun grenade and fired rubber bullets while being chased away by strikers. He sustained 9 stab wounds and was robbed of his service pistol and police radio. He was airlifted to Marikana Clinic to receive medical treatment.

95. We submit that this Commission must accept the version of Lt Baloyi and is corroborated by witnesses who testified before the Commission about the incident of 13 August 2012.

96. We submit that, they are no contradictions and inconsistencies in his evidence and therefore his evidence must be submitted without any doubts.

EVIDENCE OF MR GARY WHITE

97. The evidence of Mr Gary White criticized the SAPS for lack of accountability. He criticized the SAPS for failure to present detailed evidence that deals with an acceptance of responsibility, the identification of errors of strategy and tactics, and lessons learned. He contended that, the

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148 Record: See Exhibit JJJ 178, page 27, par 4.2.2.
SAPS evidence appears to be focused primarily on defending SAPS actions.\textsuperscript{149}

98. He further criticized the SAPS for its failure to hold debriefing sessions from 9-16 August 2012 as provided by Standing Order 262\textsuperscript{150} He also criticized SAPS for failure to divulge all the information emanated from Potchefstroom Meeting in preparation for the Commission. \textsuperscript{151}

99. The risk assessment of the operational plan of 13\textsuperscript{th} August 2012 omitted reference to a threat against police officers by the protestors.\textsuperscript{152}

100. He also criticized the SAPS for failure to conduct proper briefing of members on what was planned before intercepting strikers near the railway line. He is of the view that, the absence of any clear plan or briefing in advance of the interception of the group of miners on the railway line heightened the risk of conflict.\textsuperscript{153}

101. He criticized the SAPS for its failure to put into place a contingency plan if the strikers refuse to disarm and disperse and the confusion that broke between Major Gen Mpmbe and his commanders.\textsuperscript{154}

\textsuperscript{149} \textit{Record}: ibid, page 27.
\textsuperscript{150} \textit{Record}: ibid, page 28, par 4.2.4.2.8.
\textsuperscript{151} \textit{Record}: ibid, page 51, par 5.2.3.
\textsuperscript{152} \textit{Record}: ibid page 51, par 5.2.3.
\textsuperscript{153} \textit{Record}: ibid.
\textsuperscript{154} \textit{Record}: ibid page 53, par 5.2.8-5.2.12.
102. He criticized the SAPS for its failure to disclose information about the incident of 13th August 2012 and failure to take disciplinary steps against those members who fired without a command near the railway line.\textsuperscript{155}

103. It is submitted that the Commission must take into consideration the above mentioned criticisms by Mr Gary White and conclude that, the operation of the 13th August 2012 near the railway line was flawed.

EVIDENCE OF MRS PETUNIA LEPAAKU

104. Mrs Lepaaku, the widow of the late W/O Lepaaku testified before the Commission. Her testimony is briefly as follow:\textsuperscript{156}

104.1. She married the late W/O Lepaaku on 07 May 1996.

104.2. Their marriage was blessed with 3 children, that is Tsholofetso (22 years old son), Botshela (17 years old son) and Tisetso (5 years old daughter).

104.3. Her husband was employed by the SAPS as a police officer since 1988 until he was killed on duty on 13 August 2012.

104.4. When he was killed he had 24 years experience as a police officer.\textsuperscript{157}

\textsuperscript{155} Record: page 56, par 5.3.1, see page 57-58.

\textsuperscript{156} Record: See Exhibit KKKK 3, family presentation on behalf of the late W/O Lepaaku.

\textsuperscript{157} Record: See “Exhibit FFF 6”
104.5. He was stationed at Klipgat Police Station as a member of Public Order Police Unit, North West Province.

104.6. In his career as a police officer he received SAPS 10 years Loyal Service Medal, SAPS 10 years Commemoration Medal, SAPS 20 years Loyal Service Medal.

104.7. He had no records of disciplinary steps taken against him until his death.

104.8. He was a member of the Zion Christian Church (ZCC) and the Secretary of the church Male Organization (Masogana)

104.9. He was a good church follower who loved God with all his heart. He was a hard worker. His career as a police officer was very important to him and he enjoyed his job.

104.10. Even though he spent a lot of hours working, he always made sure to take time for his family and was always there when needed.

104.11. W/O Lepaaku was well loved by his friends, colleagues and the entire family. He was very generous and kind-hearted. They were meant to be together and she so thankful that they met. She would never forget all of the wonderful times they spent together. He was always there for her when she needed him and she knew she could count on him.
104.12. W/O Lepaaku was the most supportive and loving husband and father and his family and will always miss him so much. His memory will live on in their hearts for as long as they live.

104.13. During his death, he earned a salary of +/- R8 000.00 per month and was taking care of his children, siblings, his mother, 3 sisters and a brother including her as his wife.

104.14. He was a sole bread winner in the family, taking care of his children’s daily financial needs until his death and took care of financial needs of his mother, 3 sisters and a brother.

104.15. On 12th of August 2012 her late husband informed her that he would be deploy to Marikana mines and attend to striking miners.

104.16. On 13th August 2012 when he departed to Marikana, he promised her that he would come back late as usual.

104.17. While she was watching 7:30 pm TV news bulletin, it was reported that 2 police officers had been hacked to death by striking miners near the railway line.

104.18. She saw her wounded husband being carried away from the scene to hospital by his colleagues and she tried to call him but his cell phone rang unanswered.
104.19. She waited until the SAPS chaplain arrived at their home and broke the saddest news that her husband was killed by armed striking miners near the railway line and he died on his way to hospital.

104.20. The SAPS explained to her that her husband was killed while the police was trying to disperse armed striking miners.

104.21. News of brutal killing of her husband send shockwaves and caused major trauma throughout the entire family and his colleagues who witnessed his killing by strikers on the 13th August 2012 near the railway line.

104.22. She missed him a lot and she can’t keep up with her daily duties as a single unemployed parent.

104.23. His 17 year old son, Botshela was very close to him and is taking a strain of growing without a father.

104.24. His 5 year old daughter, Tisetso is also traumatized and she kept on saying that one day her father would come back from work.

104.25. His mother is still sad about the death of her first born child who took care of her and siblings.

104.26. She is struggling as a single unemployed mother and she can’t provide her children with their daily needs like their late father who was employed by SAPS.
104.27. News headlines about Marikana Commission serves as a reminder how her late husband was killed by miners on the 13th August 2012 near the railway line.

104.28. She personally lost the best part of her life, he was her soul mate, and the entire family missed him on a daily basis.

104.29. She believes that the Commission will reveal how and why her husband was killed by armed protesters near the railway line.

104.30. She believes that those responsible for the killing of her husband will face full might of the law and the Commission will make recommendation for their criminal prosecution.

105. We submit that the Commission must accept her evidence without any doubts.

CONCLUSION AND RECOMMENDATIONS

106. For all the above reasons, we hereby recommend the following to the Commission:

Recommendation on the conduct of SAPS near the railway line

106.1. We submit that the Commission must recommend the National Commissioner to institute internal inquiry in terms of Section 34.1 of the Police Service Act as amended read with Regulation 20 of the Police Service Act on the police attack and killing on 13 August 2012 near the railway line.
106.2. We submit that evidence ventilated before the Commission revealed the extent of contraventions of Standing Order 262 and other POP Policies and can be used to initiate an internal enquiry to ascertain whether indeed members fired without a command of Major-Gen Mpembe as a result of that conduct police were attacked and killed near the railway line.

106.3. We further submit that if the Commission finds that Major-Gen Mpembe issued instruction to fire teargas and stun grenade near the railway line, the Commission must recommend for a review/amendment of SO 262 and POP Policy on dispersal order issued by commanders.

106.4. We submit that this Commission should make recommendation on the importance of having debriefing reports after conducting POP operations. We submit that debriefing reports of various units involved in the POP operations near the railway line would have assisted this Commission and the SAPS to understand what transpired near the railway line and lessons learnt from that operation.

106.5. We submit that this Commission must make recommendation to the SAPS that, POP operations must be led by an experienced POP commander and operational plans must be compiled by an experienced POP commander. We submit that if Major-Gen was well experienced like Lt-Col Merafe loss of life would have been prevented near the railway line.

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158 See, Exhibit WW 3, Presentation to the Portfolio Committee of Police briefing on Crowd Control by the ICD, 30 August 2011, Slides 27, IPID Identified lack of post-events/protest/strike reports as a challenge and recommended that Commanders must be responsible for preparing detailed, post-crowd control reports, which must be made available to the ICD for investigation purpose.
106.6. We further submit that the Commission must make recommendation to the SAPS that any POP operations must prioritise safety of POP members. We submit that if Major-Gen Mpmembe prioritised the importance of safety of POP members when he made a decision to escort and follow strikers on foot near the railway line, W/O Lepaaku would be still alive.

106.7. We submit that this Commission must make recommendation to the SAPS that, they must ensure that POP members are properly equipped and briefed before being deployed to any POP operation. We submit that if members were well equipped and briefed before they were deployed to intercept strikers near the railway line, loss of life would have been prevented.\textsuperscript{159}

106.8. We further submit that this Commission must make recommendation on the efficiency of SAPS Employee Health and Wellness Program. We submit that, Lt Baloyi who survived the brutal attack of strikers near the railway line could not testify before this Commission as a result of suffering from post-stress traumatic disorder.

106.9. We submit that this Commission must also make recommendation on the high rate of police killing in South Africa. In that regard we refer this Commission to the recommendation made by Goldstone Commission of Enquiry\textsuperscript{160} where he held that:

\textsuperscript{159} Ibid, ICD identified lack of crowd control equipment at Police Stations as a challenge and recommended that Police Stations to be stocked with minimum crowd control equipment to be able to respond appropriately to unplanned events.

(a) “Every possible step should be taken by the Government, the community political organisations and the SAP to ensure that the SAP be accepted as a force for the community and from the community. Steps already taken in this regard are commendable and should be made known at all levels of society. It is not only necessary to take such steps but, those steps, as in respect of justice, should be seen to have been taken.”……

(d) Members of political organisations, community leaders, the media and others should exercise restraint when dealing with issues that could have the effect of creating perceptions that could result in incitement of violence against the SAP.

Recommendation on the conduct of strikers near the railway line

106.10. We submit that this Commission like the Goldstone Commission of Inquiry must make recommendations on carrying of dangerous weapons on public gatherings/demonstrations or public meetings. The Commission must call upon law enforcement agencies like SAPS to enforce legislations that prohibit carrying of dangerous weapons during public gatherings and demonstrations.

106.11. We submit that this Commission must recommend for the criminal prosecution of all the protesters who were carrying dangerous weapons on 13 August 2012 near the railway line. We submit that, they are responsible for the killing of the late W/O Lepaaku and injury of Lt Baloyi.

106.12. We submit that the video footage of 13 August 2012 can be used to identify those protesters who were present at the scene when the police were attacked and killed.
Recommendation on the conduct of the Association of Mineworkers and construction Union (AMCU) the National Union of Mineworkers (NUM) its members and officials.

106.13. We submit that the Commission must make recommendation that NUM and AMCU should be held liable for riot damages caused by their members. Our submission is informed by the decision of the Constitutional Court in SATAWU vs. Garvis and others 161, where the majority of the Constitutional Court, per Mogoeng CJ (with 8 judges concurring) upheld the decision of the Supreme Court of Appeal which had dismissed an appeal by SATAWU against a decision of the Western Cape High Court holding it vicariously liable to innocent bystanders who suffered damages and loss of livelihood following riotous conduct on the part of its members engaged in protest action that it had organized.

106.13. Furthermore in In2FOOD (Pty) Ltd v FAWU, Madisha, RS and 470 others (LC Case Number: J350/13, 1 March 2013) the court held that: “The time has come in our labour relations history that trade unions should be held

161 2012 ZACC 13 and see Tsogo Sun Casino (Pty) Ltd v Montecasino vs Future of South Africa Wokers’ Union and others (2012) 33ILJ 998 (LC) See Jada and others 2003,(6) SA 294(W) court found that union was liable in delict as union organiser instigated the strike. See also Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union 2002 (1) BLLR 84 (LC) the court ordered the union to pay compensation to the employer for the employees’ participation in an unprotected strike after union officials were videotaped urging the employees not to return to work. Only after the union was threatened with disciplinary action did they urge their members to return to work. In Mangaung Local Municipality vs SAMWU [2003] 3 BLLR 268 (LC) and see Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood and Allied Workers’ Union and others (2005) 26 ILJ 1458 (LC)
accountable for the actions of their members. For too long trade unions have
glibly washed their hands of the violent actions of their members…These
actions undermine the very essence of disciplined collective bargaining and
the very substructure of our labour relations regime”

106.14. We submit that AMCU and NUM failed to take reasonable steps to prevent
escalation of violence before and after police attack and killings therefore they
must be held liable.

We submit accordingly,

Dated at Sandton on this the 27th day of October 2014

LC Gumbi
Counsel in Chambers

Instructed by Mofomme Attorneys and the Legal Aid Board of South Africa
Reference

Case law

1. S v Gentle 2005 (1) SACR 420 (SCA)
2. S v Francis 1991,(1) SACR 198 (A)
5. S v Thunzi and Another (CCT 81/09) [2010] ZACC 27 (2 December 2010)
6. President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC)
7. SATAWU vs. Garvis and others 2012 ZACC 13.
8. Tsogo Sun Casino (Pty)(Ltd) t/a Montecasino vs Future of South Africa Workers’ Union and others (2012) 33ILJ 998 (LC)
9. Jada and others 2003,(6) SA 294 (W)
10. Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union 2002 (1) BLLR 84 (LC) In Mangaung Local Municipality vs SAMWU [2003] 3 BLLR 268 (LC)
11. Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood and Allied Workers’ Union and others (2005) 26 ILJ 1458 (LC)

Reports


Articles and Journals


16. IPID Presentation before the Parliament, “Briefing On Crowd Control”


19. Prof Herman Conradie, the Modus Operandi of Police Killers in Four Provinces of South Africa”


Legislations


25. Police Service Act 68 of 1995