IN THE MARIKANA COMMISSION OF INQUIRY
SITTING IN CENTURION

WRITTEN SUBMISSIONS
OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION
REGARDING “PHASE ONE”

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PART ONE:

INTRODUCTION
SECTION 1: THE MARIKANA TRAGEDY

Section 1.1: The deaths in the week of 9 – 16 August 2012

1.1.1 The week of 9 – 16 August 2012 marked the nadir of democratic South Africa. During that week, 44 individuals were killed as a result of violent acts in the vicinity of the Lonmin mine in Marikana, North West. Thirty-seven of those individuals were shot dead by the South African Police Service ('the SAPS'), 34 on a single day on 16 August 2012.

1.1.2 On 12 August, four individuals were killed: two Lonmin security guards were brutally hacked to death by unknown striking mineworkers and two mineworkers were killed with multiple stab wounds and fractures to the skull. Their names were:

(1) Mr. Hassan Fundi;

(2) Mr. Frans Mabelane;

(3) Mr. Thapelo Eric Mabebe; and

(4) Mr. Julius Langa.

1.1.3 On 13 August, three mineworkers and two members of the SAPS were killed in a violent confrontation. Their names were:

(5) W/O Hendrick Tsietsi Monene;

(6) W/O Sello Ronnie Lepaaku;

(7) Mr. Tembelakhe Mati;
On 14 August, a Lonmin mineworker and National Union of Mineworkers ('NUM') shop steward was brutally stabbed to death by unknown persons. His name was:

(10) Mr. Isaiah Twala

On 16 August 34 people were shot and killed by the SAPS. The majority were mineworkers employed at Lonmin who had been on strike in demand of higher wages. Others fell victim to a dispute that they had not been part of and paid with their lives. Their names were:

(11) Mr. Michael Mgweyi;

(12) Mr. Patrick Akhona Jijase;

(13) Mr. Bonginkosi Yona;

(14) Mr. Andries Motlapula Ntsenyeho;

(15) Mr. Mzukisi Sompeta;

(16) Mr. Jackson Lehupa;

(17) Mr. Mongezeleli Ntenetya;

(18) Mr. Mphangeli Thukuza;

(19) Mr. Thobisile Zimbambele;
(20) Mr. Cebisile Yawa;

(21) Mr. Mgcineni Noki;

(22) Mr. Khanare Elias Monesa;

(23) Mr. Bongani Nqonogophele;

(24) Mr. John Kutlwano Ledingoane;

(25) Mr. Babalo Mtshazi;

(26) Mr. Thembinkosi Gwelani;

(27) Mr. Thobile Mpumza;

(28) Mr. Thabiso Johannes Thelejane;

(29) Mr. Anele Mdizeni;

(30) Mr. Makhosandile Mkhonjwa;

(31) Mr. Julius Tokoti Mancotywa;

(32) Mr. Janeveke Raphael Liau;

(33) Mr. Thabiso Mosebetsane;

(34) Mr. Mafolisi Mabiya;

(35) Mr. Ntandazo Nokamba;
(36) Mr. Fezile David Saphendu;

(37) Mr. Mpumzeni Ngxande;

(38) Mr. Stelega Meric Gadlela;

(39) Mr. Henry Mvuyisi Pato;

(40) Mr. Nkosiyabo Xalabile;

(41) Mr. Bongani Mdze;

(42) Mr. Telang Vitalis Mohai;

(43) Mr. Modisaotsile Van Wyk Sagalala; and

(44) Mr. Molefi Oisiel Ntsoele.

1.1.6 In addition to those killed, many more were wounded, with some suffering devastating and permanent disablement. It is not possible to give accurate figures for the numbers who were shot by police but survived. The medical records of the injured and arrested suggest around 50, but the number may be higher than that. The fact that the Marikana Commission of Inquiry (‘the Commission’) has not engaged closely in the circumstances of the shootings of the survivors does not lessen their significance.

Section 1.2: Continued violence and intimidation after August 2012

1.2.1 The impact of the violence at Marikana was not limited to the week of 9 – 16 August 2012. Other deaths followed in the wake of the immediate violence. Mr. Dumisani Mthinti, an NUM shop steward, was killed on 12 September
2012. An African National Congress (‘ANC’) councilor and leader in the community, Ms. Paulina Masuhlo, tragically died on 19 September after having been shot by rubber bullets by members of the SAPS.

1.2.2 The violence continued into October 2012 when Mr. Daluvuyo Bongo, an NUM branch secretary, was shot and killed on 5 October. Mr. Bongo had attended the Commission’s inspections in loco on 1 and 2 October 2012 and was to be a material witness before the Commission. The deaths did not stop in 2012 and the climate of violence and intimidation continued throughout the Commission’s hearings. On 22 July 2014, Mr. Bongani Mehlomkomo (commonly known as ‘Bhayi’) was shot and killed while leaving work in Marikana. Mr. Mehlomkomo was a secretary of the Association of Mineworkers and Construction Union (‘AMCU’) at the time of his tragic death.

1.2.3 In addition, and throughout the Commission’s hearings, allegations were made of torture of and assault on the injured and arrested mineworkers at the hands of the SAPS. The SAPS denied these allegations. What cannot be denied is that the climate of violence and intimidation, and the tragic consequences of this climate that started in August 2012, have continued for two years.

1.2.4 During those two years of Commission hearings the shock of the catastrophe of 9 – 16 August may have dulled; 40,000 pages of transcript may have normalised the abnormal; tens of thousands of pages of written evidence may have immunized against the horror of the continuing violence and the murder of witnesses. But we must not forget that the level of violence at Marikana and its tragic consequences were of a scale unprecedented in democratic South Africa.

1.2.5 Forty-four killed in a single week. Thirty-four shot dead by police in a single day. More than 50 others seriously wounded by bullets fired by a purportedly democratic police service. This was followed by the absurdity of the common purpose charge: 270 mineworkers charged with the murder of their fellow
strikers. Not a single police officer disciplined or charged. Marikana now sits alongside Sharpeville and Soweto, evoking domestic shame and international condemnation. This Commission’s task is to ensure accountability for that horror, to make recommendations that prevent its recurrence, and to restore confidence in the State’s ability to ensure justice.
SECTION 2: THE MARIKANA COMMISSION AND THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION’S PARTICIPATION

Section 2.1: The South African Human Rights Commission’s participation

2.1.1 The Commission was established under Proclamation No. 50 of 2012 published in Government Gazette No. 35680 of 12 September 2012. The Regulations to the Commission were published on 28 September 2012 under Government Gazette No. 35730.

2.1.2 By the date the Commission was established, the South African Human Rights Commission (‘SAHRC’) had already determined to investigate a complaint received against the National Commissioner of the SAPS, Gen Phiyega. The complaint was received from a Non-Profit Organisation (‘NPO’), on 22 August 2012, and requested an investigation into the National Commissioner’s responsibility for the conduct of the SAPS at Marikana. Under its statutory role, the SAHRC may investigate and report on the observance of human rights and take steps to secure appropriate redress where human rights have been violated1.

2.1.3 In light of the establishment of the Commission, the SAHRC took the decision not to duplicate the Commission’s work by conducting a parallel investigation, but instead resolved to participate in the Commission process. The SAHRC considered this to be the most appropriate approach as the findings of fact by the Commission are largely the findings of fact that would inform the SAHRC’s work in relation to the complaint received and its own investigation into the causes and consequences of the events at Marikana.

2.1.4 The participation of the SAHRC in the Commission proceedings has been deliberately focused, as follows:

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1 South African Human Rights Commission Act, 40 of 2013
a. Procedurally, the SAHRC has sought to act in the public interest and in accordance with its role as a National Human Rights Institution (‘NHRI’) to monitor proceedings and ensure fairness and impartiality throughout. That role is consistent with the SAHRC’s constitutional mandate\(^2\), the Paris Principles relating to the status of National Human Rights Institutions\(^3\), and the guidance of the UN Special Rapporteur on extra-judicial, summary or arbitrary executions\(^4\); and

b. Substantively, in respect of Phase One, the SAHRC has focused its evidence, cross-examination, and submissions on police culpability for the deaths caused between 9 – 16 August 2012. The Terms of Reference of the Commission are broad and mandate the Commission to inquire into, make findings, report on and make recommendations concerning the conduct of Lonmin Plc. (‘Lonmin’); the conduct of the SAPS; the conduct of AMCU; the conduct of NUM; and the conduct of individuals and loose groupings. The SAHRC took a clear and conscious decision to focus solely on the responsibility of the SAPS.

2.1.5 The decision to focus the SAHRC’s participation in Phase One only on the matters falling within paragraph 1.2 of the Terms of Reference was taken for the following reasons:

a. The complaint received by the SAHRC, which was a significant motivating factor in the SAHRC’s participation in the Commission proceedings, was a complaint against the National Commissioner of Police, Gen Phiyega, in relation to the conduct of members of the SAPS at Marikana in August 2012.

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\(^2\) Section 184 of the Constitution of the Republic of South Africa, 1996

\(^3\) Principles relating to the Status of National Institutions, GA res 48/134 (20 December 1993)

\(^4\) See A/HRC/8/3, paras 12 - 58
b. **International human rights law creates obligations on States.** While human rights obligations may apply horizontally between private individuals, the international human rights framework primarily imposes obligations on States.

c. **Similarly, the domestic human rights framework primarily creates obligations on organs of the State.** The Constitution obliges all organs of State to respect, protect, promote and fulfill the rights contained in the Bill of Rights\(^5\). Further, the Constitution provides that the Bill of Rights is applicable to all law, binds the legislature, the executive, the judiciary and all organs of State and mandates that the obligations imposed by the Constitution must be fulfilled\(^6\). Although there are contexts where provisions contained in the Bill of Rights bind a natural or juristic person, the primary obligations rests with organs of the State.

2.1.6 Accordingly, as a NHRI contributing a human rights perspective to the Commission process, a particular focus on the deaths caused by state institutions over those deaths caused by private individuals is justified. Fundamentally, the SAHRC submits that – from a human rights perspective – there is no equivalence between deaths at the hands of the State and deaths caused by private individuals. The United Nations Human Rights Committee has stated in this regard that\(^7\):

> *States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must*

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\(^5\) Section 7(2) of the Constitution

\(^6\) Sections 2 and 8(1) of the Constitution

\(^7\) Human Rights Committee Gen Comment No. 6 (1982), para.3 (emphasis added)
strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”

2.1.7 This does not mean that the SAHRC’s position is that the Commission should not investigate, make findings on, and refer for prosecution other parties who may be responsible for causing or contributing to a climate of intimidation and violence during the week of 9 – 16 August. We do not say that the SAPS is solely responsible for the catastrophic outcome of that week. Some responsibility clearly rests with Lonmin, in particular through its failure to engage the strikers during the week. Some responsibility clearly lies with the unions, neither of which appears to have been driven solely by a desire to de-escalate the situation. And – without any question – some responsibility lies with the murderous individuals who are responsible for seven of the 44 deaths of that week. The fact that the SAHRC does not make submissions in relation to these parties does not reflect a judgment that they are blameless. It does, however, mean that from a human rights perspective, the party of greatest concern is the SAPS: after all, it was the SAPS that killed 37 people.

Section 2.2: Evidence, analysis, and cross-examination from the SAHRC

2.2.1 The evidence submitted by the SAHRC has been largely expert evidence. At the core of the SAHRC contribution has been the evidence of Mr. Gary White MBE, a Public Order Policing (‘POP’) expert. Mr. White has provided four written statements to the Commission as well as giving oral testimony, including extensive cross-examination at the Commission. The focus of the majority of the submissions made by the SAHRC, including those made in this closing argument, will be drawn from Mr. White’s evidence.

2.2.2 Alongside the evidence of Mr. White, the SAHRC has also provided the Commission with expert evidence analysing the contemporaneous audio and video evidence available to the Commission. In that respect, the evidence of Ms. Katherine Scott provides the Commission with expert analysis of the shots
fired at Scene 1. The evidence of Mr. Yoav Dagan – provided in conjunction with the representatives for the Families of 36 of the deceased – provides the Commission with synchronized, chronological and time-coded video footage of the events leading up to and at Scene 1. It also provides an analysis of this footage including an evidenced animation showing the route taken by the strikers from Koppie 1 to the kraal.

2.1.8 In addition to the expert evidence provided, the SAHRC has also provided the Commission with analyses of its own, prepared by the legal team for the SAHRC. These analyses are provided by the legal team on the basis of objective evidence that does not require expert analysis. These analyses are not provided as sworn evidence, but as submissions on the objective evidence available; for the reasons set out in Part Two below, this is a perfectly acceptable approach in a commission of inquiry.

2.1.9 Finally, the SAHRC has contributed to the Commission through cross-examination of SAPS witnesses. The result of that cross-examination is set out below in the submissions that follow.
PART TWO:

THE LEGAL CONTEXT OF THE MARIKANA COMMISSION
SECTION 1: THE RIGHT TO LIFE AND THE DUTY TO INVESTIGATE IN INTERNATIONAL LAW

Section 1.1: The components of the right to life

1.1.1 The operation and effect of section 231 (international agreements), section 232 (customary international law), and section 233 (application of international law) of the Constitution is to domesticate the international law obligations of the State. These sections also require the domestic application of the principles of international law identified herein since they are wholly consistent with the Constitution.

1.1.2 Section 39 of the Constitution mandates courts and forums to interpret the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. International law must be considered and foreign law may be considered in such an interpretation. When interpreting any law, a court or forum must promote the spirit, purport and objects of the Bill of Rights.

1.1.3 The right to life is protected by section 11 of the Constitution, and should be read alongside the right to human dignity (section 10) and the right to freedom and security of the person (section 12). The right to life is also recognised and protected in a number of global and regional human rights treaties and instruments. It is a rule of customary international law and has been described as forming part of jus cogens. It is a fundamental human right, one without which all other rights would be devoid of meaning.

1.1.4 It is well recognised that the right to life has two components. These components can be described as preventative and investigatory. The preventative component recognises that every person has the right to be free from the arbitrary deprivation of life. The investigatory component requires a
proper investigation and accountability where the arbitrary deprivation of life is suspected or has occurred.

1.1.5 The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions mandate that thorough, prompt and impartial investigations should follow all suspected cases of extra-legal, arbitrary or summary executions. Article 2(3) of the International Covenant on Civil and Political Rights (‘ICCPR’) further mandates States to:

“Ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

1.1.6 The failure of a State to conduct a full, proper and impartial investigation into suspected arbitrary killings is itself a violation of the right to life. Human rights treaty bodies have recognised the positive obligation placed on States to carry out investigations where death has resulted from the use of force.

Section 1.2: The positive obligation to carry out an effective investigation

1.2.1 In order to discharge the obligation to carry out exhaustive and impartial investigations, the following factors must form part of the investigation: an official investigation initiated by the State; independence from those implicated; capability of leading to a determination of whether force was justified in the circumstances; the requirement of a level of promptness and reasonable expedition; and a level of public scrutiny. The United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions notes that where government involvement in a

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8 E.S.C Res 1989/65, 24 May 1989
9 International Covenant on Civil and Political Rights, 1966
10 Finucane v the United Kingdom, European Court of Human Rights, Application No. 29178/95 (1 July 2003)
11 Isayeva v Russia, European Court of Human Rights, Application No. 57959/00 (24 February 2005)
suspicious death is suspected, “an objective and impartial investigation may not be possible unless a special commission of inquiry is established.” It notes that a commission of inquiry is particularly well placed to satisfy the investigative obligation of the right to life.

1.2.2 As signatories to the ICCPR and under our Constitution, South Africa is bound by the international law principles on the right to life, including the investigative obligation. The Constitutional Court in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*, confirmed the duty imposed on the State and all of its organs not to perform any act that infringes a right contained in the Bill of Rights. The Court also confirmed the positive component of this duty that arises in certain circumstances, which obliges organs of state to provide appropriate protection to everyone, including – we submit – by conducting investigations into alleged breaches of those rights.

1.2.3 The SAHRC submits that this Commission is the mechanism through which the South African Government has sought to comply with that investigative obligation. We submit that a number of consequences flow from this.

1.2.4 First, the investigative obligation requires the investigation to reach a determination on whether any force used was justified in the circumstances. This has been elaborated on as:

“The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right

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15 *Nachova and Others v Bulgaria*, European Court of Human Rights, Application Nos. 43577/98 and 43579/98 (6 July 2005). See also *Jordan v United Kingdom*, European Court of Human Rights, Application No. 24746/94 (4 May 2011)
to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.”

“The investigation must also be effective in the sense that it was capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible.”

1.2.5 This principle has also been recognised by the African Commission on Human and Peoples’ Rights, as well as by the Inter-American Court of Human Rights16.

1.2.6 Secondly, an exhaustive and impartial investigation must also lead to the requisite accountability. There is a need to ensure that those in office are held responsible where violations of the right to life have occurred. This is important in the fight against impunity and the obligation “to conduct exhaustive and impartial investigations ... to identify and bring to justice those responsible ... and to adopt all necessary measures ... to put an end to impunity” has been recognised by the General Assembly17.

1.2.7 Accordingly, in order to satisfy the investigative obligation, this Commission is required to make findings on whether the force used by members of the SAPS at Marikana was justified in all the circumstances and, if not justified, must ensure accountability for those responsible.

1.2.8 Those international law requirements are reflected in the Commission’s Terms of Reference, as follows:

16 In Amnesty International and Others v Sudan, African Commission on Human and Peoples’ Rights Communication Nos. 48/90, 50/91, 52/91 and 89/93 and Zambrano Velez and Others v Ecuador, Inter-American Court of Human Rights, Judgment of 4 July 2007
17 GA res 63/182
a. Paragraph 1.2.2 of the Terms of Reference states that the Commission must inquire into, make findings, report on and make recommendations concerning “the precise facts and circumstances which gave rise to the use of all and any force and whether this was reasonable and justified in the circumstances” (emphasis added); and

b. Paragraph 5 of the Terms of Reference mandates the Commission to refer any matter for prosecution or further investigation, thereby ensuring accountability where necessary.

1.2.9 Thus, the SAHRC submits that the absence of any explicit reference to ‘human rights’, ‘constitutional rights’ or ‘the right to life’ in the Commission’s Terms of Reference should not be misunderstood. The Commission is quintessentially an inquiry into the breach of human rights, constitutional rights and the right to life. And the Commission’s investigation of these breaches as breaches of human rights is a necessary part of discharging the South African Government’s international and domestic law obligations.
SECTION 2: COMMISSIONS OF INQUIRY – THE LEGAL PROCEDURAL CONTEXT

Section 2.1: National Commissions of Inquiry in International Law

2.1.1 In his report of 2 May 2008, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, addressed the role of national commissions of inquiry in ending impunity for extrajudicial executions. He said as follows:\textsuperscript{18}:

“12. The duty arising under international human rights law to respect and protect life imposes an obligation upon Governments to hold an independent inquiry into deaths where an extrajudicial execution may have taken place. While an independent police investigation will often suffice for this purpose, the creation of an official commission of inquiry with a human rights mandate is a time-honoured and oft-repeated response, especially to incidents involving multiple killings or a high-profile killing. These commissions vary greatly as to the terminology used, and their composition, terms of reference, time frames and powers... While such inquiries are by definition established at the initiative of the government authorities, they are most often a result of concerted demands by civil society and sometimes also by the international community. Indeed it is now almost standard practice for a commission to be demanded in the aftermath of major incidents in which the authorities which would normally be relied upon to investigate and prosecute are feared to be reluctant or unlikely to do so adequately.

13. In historical terms, the technique of creating inquiries can be traced back to many examples in the early part of the twentieth century, including in colonial and immediately post-colonial contexts. More

\textsuperscript{18} A/HRC/8/3 p.5
recently, the number and range of inquiries has been expanded significantly by two relatively new phenomena. The first is the considerable increase in internationally mandated inquiries, set up by bodies like the Human Rights Council or its predecessor. The second is the proliferation of transitional justice commissions, including truth and reconciliation commissions, designed to review historical injustices and help map a balanced response...

14. The thrust of the analysis is that the mere setting up of a commission of inquiry and even its formal completion will often not be adequate to satisfy the obligation to undertake an independent inquiry. Empirical inquiry, based on the many examples that have come to the attention of the Special Rapporteur and his predecessors, indicates that such inquiries are frequently used primarily as a way of avoiding meaningful accountability. The international human rights community needs to scrutinize such initiatives far more carefully in the future and to develop a mechanism for monitoring and evaluating their adequacy.”

2.1.2 The Special Rapporteur expressed strong concerns in relation to the manifold ways in which national commissions of inquiry have been used by governments variously to “deflect criticism by international actors of the Government rather than to address impunity” and to “defuse domestic or international criticism and prevent strong advocacy... to promote accountability within the state”. He emphasised that unless a national commission of inquiry is directed at seeking accountability and combatting impunity it amounts not only to a waste of time and resources, but itself “contributes to impunity by deterring other initiatives, monopolising available resources and making subsequent endeavours to prosecute difficult or impossible.”
2.1.3 The SAHRC does not cite these passages to suggest that the Marikana Commission can legitimately be subjected to the criticisms highlighted by the Special Rapporteur. Instead, we cite them to highlight the key role of this Commission in combatting impunity and seeking accountability. A commission of inquiry that satisfies the investigative obligation of the right to life does not simply find facts and identify causation; it must also combat impunity and ensure accountability for state-involved killings.

2.1.4 If this key role is embraced and satisfied, then the flexibility of a commission of inquiry allows a more wide-ranging investigation into the causes of state-involved killings than the criminal justice system might allow. As the Special Rapporteur noted:

“22... A commission may also be seen as desirable where one incident is particularly complex and significant, requiring sustained and focused investigation in order to be understood. In such cases, a commission can help to explain or analyse a complex situation, and thus perform important functions normally beyond the scope of police investigations or judicial procedures.

23. Second, a commission can provide informed advice to the Government on the institutional reforms necessary to prevent similar incidents from occurring in the future. It can perform an essential function that is generally unsuitable to police, prosecutors or courts, and explain the underlying causes for serious human rights abuses or the causes of impunity for those abuses. In addressing the causes of the abuses, a commission can be the first step in a Government’s effort to take measures to prevent the recurrence of violations and to ensure that its institutions, policies, and practices ensure the right to life as effectively as possible. Importantly, where it appears that the regular institutions are incapable of combating impunity, a commission can propose structural or long-term reforms to address criminal justice
institutional deficiencies. When used in this way, and when the commission’s recommendations are followed up by the Government, a commission can be an effective way for the State to reform its criminal justice institutions so that it will meet its obligation to investigate, prosecute and punish violations of human rights in the future.”

2.1.5 Crucially, a commission of inquiry is not ordinarily mandated to make findings on criminal liability, although it may well be mandated to recommend prosecutions. The SAHRC submits that this is a strength of commissions of inquiry. In cases where the Commission is mandated to investigate state-involved killings, it allows the commission of inquiry to adopt a human rights centred approach where the State must prove the lawfulness of each killing, rather than a criminal-justice, defendant-centred approach, where the burden is to prove that the killing was unlawful beyond reasonable doubt.

Section 2.2: The Marikana Commission of Inquiry in Domestic Law

2.2.1 The Constitutional Court has confirmed that accountability is at the core of a commission of inquiry in South Africa. In *Magidiwana and others v President of the Republic of South Africa and others*[^19] , it noted that:

“It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission’s search for truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those closely affected need to know the truth: the country at large does, too.”

[^19]: CCT 100/13 [2013] ZACC 27
2.2.2 The power to appoint a commission of inquiry is mandated by section 84(2)(f) of the Constitution and afforded to the President as part of his executive powers. As a creature of both the Constitution and of statute, a commission of inquiry in South Africa has no powers beyond those granted to it by statute, regulation or in its terms of reference. It is not governed by any of the ordinary rules of court.

2.2.3 That is confirmed in respect of this Commission by the Regulations promulgated by Proclamation No 59 of 2012, which confirm, “the Commission may determine its own procedures”\(^\text{20}\). The SAHRC supports the submissions made by Adv. Madlanga SC on Day 67 where, in reliance on the case of *Bongoza v Minister of Correctional Services & Others*\(^\text{21}\), he submitted that the Commission was entitled to take into account evidence in any form it might appear, whether hearsay evidence, newspaper evidence, representations without sworn evidence and the like\(^\text{22}\). In a commission of inquiry, we submit that – in the absence of any regulation or ruling to the contrary – the evidential question for the Commission is one of weight, not admissibility.

2.2.4 That approach is consistent with case-law, but also consistent with principle: a commission of inquiry is a mechanism with flexibility at its core, designed to allow an investigation which goes beyond that which might otherwise be permitted in a court of law.

**Section 2.3: Standards of proof in the Commission**

2.3.1 There is no real doubt that the standard of proof to be applied is a matter for the Commission’s discretion. In this respect, we submit that the Commission is entitled to, and should, apply different standards of proof to different issues.

\(^{20}\) Regulation 19

\(^{21}\) 2002 (6) SA 330 (Tk)

\(^{22}\) Transcript Day 67, pp 7188 - 7190
2.3.2 Standards of proof mark “a point somewhere along the line between two extremes: a mere conjecture at one end, and absolute certainty at the other.” Standards of proof can be illustrated on a scale, as depicted below.

![Scale of Proof](image)

2.3.3 The Commission has indicated, without making an explicit ruling, that the standard of proof it will apply in relation to findings of fact is the balance of probabilities. The Chairperson gave this indication when he stated on Day 135 that: “The Commission will evaluate all of the available evidence and come to a view as to the probabilities on the facts.” The SAHRC submits that this is the appropriate standard to apply to the majority of the issues in dispute between the parties. However, the SAHRC submits that some flexibility may be justified in relation to certain issues.

2.3.4 We submit that a degree of flexibility is justified, depending on the following two factors:

a. The amount of evidence considered by the Commission; and

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25 Transcript Day 135, p.14347
b. Practical hurdles faced by the Commission, including lack of cooperation and deliberate deception (the level of engagement with parties under investigation).

2.3.5 First, where the Commission has – due to limited time or capacity constraints – heard only part of all the available evidence, it would be justified to apply a lower standard of proof and reach findings on the basis of “reasonable suspicion” or “reasonable conclusion”. For example, in respect of the written evidence provided by Sgt Myburgh and W/O Swarts, alleging the possibility of deliberate unlawful killing by the SAPS at Scene 2, no oral evidence was heard. The Commission may conclude that the absence of oral evidence prevents any finding in respect of those allegations on the balance of probabilities, but the SAHRC submits that findings should be made (and further investigations recommended) on the basis of a reasonable suspicion. Similarly, given that almost no oral evidence was heard from shotists at Scene 1 and Scene 2, the SAHRC submits that if the Commission cannot reach conclusions on the balance of probabilities in relation to individual shotists, it should reach conclusions (and recommend further investigation or prosecutions) on the basis of a reasonable suspicion.26

2.3.6 Secondly, it is well established that a court or a commission of inquiry can draw adverse inferences where parties or individuals refuse or fail to provide relevant information. Similarly a commission can take into account the level of cooperation that can be expected from parties under investigation when determining the standard of proof to apply. In instances where parties under investigation are not open and receptive, where such parties are found to have made attempts to deceive the commission – these factors will impact the standard of proof and may justify the application of a lower standard of proof. In his publication on ‘Standards of Proof in International Humanitarian and

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26 See below at Part Four, section 3; Part Seven, section 3, Part Ten, section 8; and Part Twelve, section 4
Human Rights Fact-Finding And Inquiry Missions’, Wilkinson illustrates this as follows:

2.3.7 A similar approach was set out by the European Court of Human Rights in *Orhan v Turkey*, where the Court drew adverse inferences against the failure of the Government of Turkey to provide full cooperation in furnishing the Court will all necessary information in relation to the case. It said:

“266. It is important to note that Convention proceedings, such as the present application, do not in all cases lend themselves to a rigorous application of the principle affirmans incriminat probandum (he who alleges something must prove that allegation). The Court has previously held that it is of the utmost importance for the effective operation of the system of individual petition instituted under former Article 25 of the Convention (now replaced by Article 34) that States should furnish all necessary facilities to make possible a proper and effective examination of applications (Tanrıkulu v Turkey, no. 23763/94, § 70, ECHR 1999–IV). It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances

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28 European Court of Human Rights, Application No.25656/94 (18 June 2002)
solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government’s part to submit such information which is in their hands without a satisfactory explanation may not only give rise to the drawing of inferences as to the well-foundedness of the applicant’s allegations, but may also reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (Timurtas v Turkey, no. 23531/94 §§ 66 and 70, ECHR 2000-VI). The same applies to delays by the State in submitting information which prejudices the establishment of facts in a case.

274. The Court concludes that the Government has not advanced any, or any convincing, explanation for its delays and omissions in response to the Commission and Court’s requests for relevant documents, information and witnesses. Accordingly, it finds that it can draw inferences from the Government’s conduct in this respect. Furthermore, and referring to the importance of a respondent Government’s cooperation in Convention proceedings (see paragraph 266 above) and mindful of the difficulties inevitably arising from an evidence-taking exercise of this nature (the above-cited Timurtas case, at § 70), the Court finds that the Government fell short of their obligations under Article 38 § 1(a) (formerly Article 28 § 1(a)) of the Convention to furnish all necessary facilities to the Commission and Court in its task of establishing the facts.”

2.3.8 The SAHRC submits that the Commission should adopt a similar approach: where the SAPS have failed to provide an adequate explanation for a failure to furnish the Commission with vital information, the Commission is entitled to draw inferences against the SAPS and is entitled to apply a lower standard of proof in reaching findings against it.
2.3.9 As set out below at Part Four, the SAHRC submits that the SAPS has not only failed to provide full cooperation to the Commission, it has deliberately set out to deceive it. We submit that adverse inferences must follow. Similarly, we submit that adverse inferences must be drawn – and a lower standard of proof applied – in light of the appalling inadequacy in the vast majority of the witness statements provided by SAPS members. The Commission is faced with a situation analogous to that facing the European Court of Human Rights in *Orhan v Turkey*: only the individual SAPS members on the ground on 16 August are in possession of the information required to corroborate or refute allegations of unlawful killing. Inferences must be drawn against the failure of the vast majority of those members to provide any detailed evidence which might assist the Commission.

2.3.10 Finally, the standard of proof applicable to the Commission’s decisions on referrals for prosecution must be lower than the balance of probabilities. In international commissions of inquiry, there are three recognised standards of proof that can be applied in instances of individual criminal responsibility:  

a. Reasonable grounds to suspect individual criminal responsibility, based either on prima facie evidence or sufficient grounds;

b. Grounds for saying that individuals may be held criminally liable; and

c. Presumed involvement and further in-depth investigation is required to determine the exact responsibilities.

2.3.11 The National Prosecuting Authority (‘NPA’) will, absent other germane considerations, initiate a prosecution where there is *prima facie* evidence of a crime in the sense of a reasonable chance of conviction. The SAHRC submits

29 S Wilkinson et al “Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions” p.34

30 National Director of Public Prosecutions v Zuma 2009 (1) SACR 361 (SCA) at [43]
that the Commission should refer matters for prosecution on the same basis; that is, prosecutions should be recommended where there is a *prima facie* case.

2.3.12 That approach is supported by domestic case law on making findings under section 16 (2) (d) of the Inquests Act, 58 of 1959, as to whether a death was brought about by any act or omission prima facie involving or amounting to an offence on the part of any person. We submit that the Commission’s role is analogous to that of an inquest in this respect. In *In re Goniwe and Others (Inquest)*\(^{31}\) Zietsman JP held that the test to be applied is simply whether there is evidence available which, at a subsequent criminal trial may be held to be credible and acceptable and, which, if accepted, can prove that the death was brought about by an act or omission which amounts to a criminal offence\(^{32}\). The Commission may also draw assistance from the standards of proof ruling by Lord Saville in the Bloody Sunday Inquiry, which leads to a similar conclusion\(^{33}\).

**Section 2.4: Burden of proof in the Commission**

2.4.1 The SAHRC submits that the burden of proving the lawfulness of deaths by the SAPS rests on the SAPS themselves. We submit that the SAPS must prove that the deaths were lawful, rather than any other party proving that the deaths were unlawful. This is consistent with the principle of international law, which dictates that a State must discharge the burden of proof where its agents were involved in a suspicious killing. Domestic law follows the same approach.

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\(^{31}\) 1994 (3) SA 877 (SE), p.880

\(^{32}\) That approach was approved by Sharbot J in *Padi en ’n Ander v Botha NO en Andere* 1996 (3) SA 732 (W)

\(^{33}\) The Bloody Sunday Inquiry: Standard of Proof Ruling
2.4.2 The United Nations Human Rights Committee has clearly enunciated this requirement in several cases. In *Bleier v Uruguay*, for instance, it noted:

“With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4(2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated... In cases where the author has submitted to the Committee allegations supported by substantial witness testimony... and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.”

2.4.3 Similarly, the European Court of Human Rights has acknowledged that in a police shooting case, it is the State party that bears the burden of proving that the shooting was justified. In *Bektas and Ozlap v Turkey*, the Court noted:

“In the present case the Court notes firstly that it is undisputed between the parties that the second applicant’s brother Erdinc Arslan was shot and killed by police officers. It follows therefore that the Government bears the burden of proving that the force used by the police officers was no more than absolutely necessary within the meaning of Article 2, para.2 of the Convention. In examining whether

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35 European Court of Human Rights, Application No. 10036/03 (20 July 2010), para.57
the Government have discharged their burden the Court will not only examine whether the use of lethal force used by the police officers was no more than absolutely necessary, but also whether the operation was regulated and organized in such a way as to minimize to the greatest extent possible any risk to life (see Makaratzis v Greece [GC], no. 50385/99, para. 60, ECHR 2001 XI).”

2.4.4 We submit that the Commission should adopt the same approach. Thus, if the Commission finds itself hampered by inadequate evidence provided by the SAPS, in circumstances where such evidence could reasonably be expected to have been provided, we submit that it is open to the Commission to find a violation of the right to life purely on the basis that the burden of proof has not been discharged.

2.4.5 This is consistent with the domestic law approach to the burden of proof in inquests and in civil law when establishing a defence of private and self-defence. In the context of an inquest where the defence of private defence is pleaded, the starting point is that the conduct was unlawful. The onus then is on the person pleading private defence to rebut that prima facie unlawfulness. Similarly, under civil law the defendant must prove on a balance of probabilities a claim of self or private defence. The Appellate Division in Mabaso v Felix held that if the justification pleaded is self-defence:

“...The onus is generally on the defendant too to plead and prove that the force used by him in defending himself was in the circumstances reasonable and commensurate with the plaintiff’s alleged aggression.”

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36 Padi en ’n Ander v Botha NO en Andere 1996 (3) SA 732 (W)
37 1981 (3) SA 865 p.874 and p.876
“According to substantive and adjective law, the onus was on the defendant to prove that in shooting and injuring the plaintiff he acted in self-defence and that such shooting was reasonably and legitimately required for defending himself.”

2.4.6 While the approach of the criminal courts may differ in this respect, we reiterate that the Commission is a civil process aimed at the investigation of human rights abuses and not a criminal trial aimed at securing a conviction beyond reasonable doubt. The Commission should therefore follow the approach adopted in international human rights tribunals, and in domestic inquests and civil trials, as set out above.
SECTION 3: LEGAL APPROACH TO ASSESSING POLICE CULPABILITY FOR POTENTIAL VIOLATIONS OF THE RIGHT TO LIFE

Section 3.1: Legal approach to assessing police responsibility for the 34 deaths at Marikana on 16 August

3.1.1 The SAPS case is largely based on self and / or private defence. In essence, the SAPS seeks to argue that each individual killed on 13 and 16 August was shot by an individual SAPS member who:

a. Had a genuine and reasonable belief of an imminent threat to life and considered that lethal force was absolutely necessary in the circumstances (the principle of necessity); and

b. The lethal force was the minimum reasonably necessary in the circumstances in order to neutralize the threat (the principle of proportionality).

3.1.2 That appears to be the start and finish of the SAPS defence for the deaths caused on 13 and 16 August 2012.

3.1.3 The SAHRC submits that while the question of self and / or private defence is relevant to the Commission hearings, it is not determinative of the lawfulness of police killings. The SAHRC submits that even if every individual member who fired his weapon on 16 August could be shown to have acted in private and / or self-defence, the killings would still be unlawful because the SAPS failed to plan and control the operation in such a way as to minimize the risk of deaths and / or serious injuries.

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38 Exhibit FFF9: Opening statement of the SAPS, paras.28, 44.10, 45.5 and Exhibit L: SAPS presentation slides 204, 283.
3.1.4 The fundamental problem with the SAPS approach is that it ignores the fact that the Commission is not engaged in a process of criminal justice. In a criminal trial, self and / or private defence would be a complete answer to a prosecution of an individual shotist for murder. But this is not a criminal trial: it is a commission of inquiry tasked through its Terms of Reference with investigating a wide range of matters relating to the policing operation at Marikana, including:

“1.2.1 The nature, extent and application of any standing orders, policy considerations, legislation or other instructions in dealing with the situation which gave rise to this incident;

1.2.2 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;

1.2.3 To examine the role played by SAPS through its respective units, individually and collectively in dealing with this incident; and

1.2.4 Whether by act or omission it directly or indirectly caused loss of life or harm to persons or property.”

3.1.5 Those matters are plainly not limited to the question of whether an individual shotist was justified, at a particular moment, to use lethal force. They require consideration of the entire SAPS operation and the suitability of its policy framework to assess whether, by act or omission, the SAPS directly or indirectly caused loss of life or harm to persons. The SAHRC submits that, in the context of breaches of the Constitutional right to life, the President was correct not to limit the Commission’s mandate to questions of self and / or private defence.
3.1.6 International case law strongly supports the view that a narrow focus on the justifiability of lethal force at the immediate time it was used by an individual agent of the state is anathema to a human rights focused approach. In the Valasquez Rodriguez case\(^\text{39}\), the Inter-American Court of Human Rights said the following:

“134. The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible...

173. Violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability. For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant - the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1(1) of the Convention.

174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its

\(^{39}\) Inter-American Court of Human Rights, (21 July 1989)
jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.”

3.1.7 Thus, a state may have violated the right to life even though the individual directly responsible for the killing has committed no criminal offence. Irrespective of the liability of the individual, a breach of the right to life may arise if the State did not take sufficient care in placing its agents in a particular situation.

3.1.8 This principle is most clearly articulated in the case of McCann and Others v the United Kingdom⁴⁰ where the European Court of Human Rights held that in determining whether lethal force was compatible with Article 2 of the European Convention, the Court must carefully scrutinise not only whether the force used was proportionate to the aim of protecting persons against unlawful violence but also whether the operation was planned and controlled by the authorities so as to minimize, to the greatest extent possible, recourse to lethal force. In the circumstances of that case, the Court held that the actions of SAS soldiers who used lethal force did not violate the right to life under the European Convention. However, the Court held that the operation as a whole was controlled and organised in a manner that did breach Article 2 of the Convention.

⁴⁰ European Court of Human Rights, Application No.18984/91, (27 September 1991)
3.1.9 The principle has been applied by the European Court of Human Rights on numerous occasions, including:

a. In *Makaratzis v Greece*\(^{41}\), the Court held that the recourse to potentially lethal force by individual officers was compatible with Article 2, but the command and control of the operation was sufficiently chaotic as to amount to a breach of Article 2. The Court held that the absence of a clear chain of command was a factor which by its very nature must have increased the risk of some police officers shooting erratically. The court went on to find that\(^{42}\):

> “While accepting that the police officers who were involved in the incident did not have sufficient time to evaluate all the parameters of the situation and carefully organise their operation, the Court considers that the degeneration of the situation, which some of the police witnesses themselves described as chaotic was largely due to the fact that at that time neither the individual police officers nor the chase, seen as a collective police operation, had the benefit of the appropriate structure which should have been provided by the domestic law and practice.”

b. In *Nachova v. Bulgaria*\(^{43}\), the Grand Chamber noted that\(^{44}\):

> “A crucial element in the planning of an arrest operation ... must be the analysis of all the available information about the surrounding circumstances, including, as an absolute minimum, the nature of the offence committed by the person to be arrested and the degree of danger – if any – posed by that person...”

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\(^{41}\) European Court of Human Rights, Application No. 50385/99, (20 December 2004)

\(^{42}\) Para.70

\(^{43}\) European Court of Human Rights, Application Nos. 43577/98 and 43579/98, (6 July 2005)

\(^{44}\) Para.103
3.1.10 In the Azelle Rodney Inquiry, a recent United Kingdom public inquiry into the
circumstances and lawfulness of a police shooting causing death, the
Chairman of the Inquiry, Sir Christopher Holland, drew on the case law of the
European Court of Human Rights to describe his own duty to investigate the
killing as follows:

“I have to satisfy the investigative duty demanded by Article 2. The
precise meaning of that investigative duty under Article 2 is the subject
of considerable authority. However, it has been summarised by Counsel
to the Inquiry in a form which I accept and adopt:

“The Inquiry must carefully scrutinise whether the force used was
strictly proportionate to the aim of protecting persons against unlawful
violence – i.e. was no more than absolutely necessary; and whether the
operation was planned and controlled so as to minimise, to the greatest
extent possible, recourse to lethal force…”

3.1.11 Similar reasoning has been applied by the Inter-American Court of Human
Rights in finding violations of the right to life. In the case of Nadege Dorzema
et al v Dominican Republic, the State was found to have breached its
obligation to guarantee the right to life by failing to provide adequate
legislation on the use of force, and by failing to prove that it had provided
adequate training and instruction on the matter to law enforcement officials,
and, specifically the agents involved in the events of the case.

3.1.12 Indeed, the SAHRC submits that the principle embodied in the cases cited
above is not a principle merely of regional application; it is an accepted
principle of international law known as the principle of prevention:

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45 The Report of the Azelle Rodney Inquiry, para.1.8
46 Inter-American Court of Human Rights, (24 October 2012)
precaution. In his April 2014 Report, the United Nations Special Rapporteur on extra-judicial, summary, or arbitrary executions\textsuperscript{47}, Prof Christof Heyns, described the principle thus\textsuperscript{48}:

"Once a situation arises where the use of force is considered, it is often too late to rescue the situation. Instead, in order to save lives, all possible measures should be taken "upstream" to avoid situations where the decision on whether to pull the trigger arises, or to ensure that all the possible steps have been taken to ensure that if that happens, the damage is contained as much as is possible.

A failure to take proper precautions in such a context constitutes a violation of the right to life. In McCann and Others v the United Kingdom, for example, the European Court of Human Rights (application No. 18984/91, 27 September 1995) held that the use of lethal force by soldiers who erroneously but in good faith believed that a group of terrorists were about to trigger an explosion did not violate the right to life, but that the lack of control and organization of the operation as a whole did violate the right."

3.1.13 The SAPS policing expert Mr. de Rover accepted that the principle is applicable to law enforcement officials internationally and goes to the heart of accountability\textsuperscript{49}. Indeed, his own publication for the International Committee of the Red Cross (‘ICRC’), ‘To Serve and Protect’, restates the principle as one of international application\textsuperscript{50}. We submit that in line with our Constitutional values, it must be applied in the context of Marikana. In this respect, the SAHRC notes that the Constitutional Court in the matter of Ex Parte Minister of Safety and Security: In re S v Walters\textsuperscript{51} cited the case of McCann with

\begin{itemize}
\item \textsuperscript{47} Exhibit UUUU4
\item \textsuperscript{48} Exhibit BBBB8, paras 63 - 64
\item \textsuperscript{49} Transcript Day 285, p.36980
\item \textsuperscript{50} Exhibit UUUU3, p.259
\item \textsuperscript{51} (2002) 4 SA 613 (CC)
\end{itemize}
approval in its determination of principles on the proportional use of lethal force and the right to life.

3.1.14 We stress, as noted by Mr. White, that the principle of prevention / precaution is intended to minimise the risks not only to those who are policed, but also to the police themselves. Operations should be planned and controlled to ensure that law enforcement officers are not themselves placed in situations of avoidable risk, or placed in avoidable situations where they are forced to utilise lethal force to defend themselves. The psychological impacts on law enforcement officers of using lethal force should not be underestimated.

3.1.15 As set out above, the consequence of the principle of prevention / precaution is that the State may be held liable for a breach of the right to life, even where its agents have committed no criminal offence. In the context of this Commission, we submit that the SAPS will have breached the right to life, and failed to justify a death, unless the individual shotist who used lethal force:

a. Had a genuine and reasonable belief of an imminent threat to life and considered that lethal force was absolutely necessary in the circumstances (the principle of necessity);

b. The lethal force was the minimum reasonably necessary in the circumstances in order to neutralize the threat (the principle of proportionality); and

c. The belief in the imminent threat arose despite the fact that the operation was planned and controlled in such a way as to minimize the risk of death and / or serious injury, right up to the time where lethal force was used (the principle of prevention / precaution).
Section 3.2: Conclusion

3.2.1 As set out in the sections that follow, the SAHRC submits that the Commission must find that the killing of 3 people by the SAPS on 13 August 2012 and 34 people by the SAPS on 16 August 2012 was unlawful, and a breach of the constitutionally protected right to life, on the following bases:

a. On the evidence provided, many of the individuals who fired live ammunition at the strikers on 16 August have not made out a reasonable or prima facie defence of private and / or self-defence because they have failed to provide adequate evidence to satisfy the principles of necessity and / or proportionality (see below at Part Four, section 3; Part Seven, section 3; Part Ten, section 8; and Part Twelve, section 4); and

b. The operation was so poorly planned, briefed, commanded and controlled that it was foreseeable that it might lead to multiple avoidable deaths, and therefore the operation as a whole did not comply with the principle of prevention / precaution (see below at Part Seven, section 2; Part Nine; Part Eleven; and Part Thirteen).
PART THREE:

ISSUES TO BE DETERMINED BY THE COMMISSION
SECTION 1: ISSUES TO BE DETERMINED BY THE COMMISSION IN RELATION TO 
MATTERS OF POLICE CULPABILITY

1.1.1 In that context, and within the confines of the SAHRC’s focus on the culpability 
of the SAPS, the issues the Commission must determine are wide. They 
include:

a. Were the SAPS sufficiently prepared for the outbreak of violence and 
disorder at Marikana in August 2012? In particular, were the POP units 
in the North West, and nationally, adequately trained and resourced?

b. Was the immediate response of the SAPS to the outbreak of violence 
between 9 – 12 August 2012 adequate, and did the SAPS take all 
reasonable steps during those days to seek to de-escalate the 
situation?

c. Was the spontaneous operation to intercept the crowd on the railway 
line on 13 August conducted adequately by the police? In particular:

   i. Was the order to disarm the strikers appropriate in the 
circumstances?

   ii. Was the command and / or briefing of the operation adequate?

   iii. Was use of tear gas and stun grenades by the SAPS authorized 
and justified in the circumstances?

   iv. On the balance of probabilities, was the attack on the police by 
the strikers pre-meditated, or was it a spontaneous response to 
the use of force by police?
v. Is there sufficient evidence to conclude, on the balance of probabilities, that each live round fired by SAPS officers was fired (a) in justifiable self-defence; and (b) responsibly:

1. If not, which shotists, rounds, and / or victims cause particular concern?

2. Is there a prima facie case to recommend prosecution against particular shotists or others?

d. After the events of 13 August, was the command of the operation entrusted to the appropriate officers?

e. After the events of 13 August, were adequate steps taken to ensure that those who were involved in the incident of 13 August were fit and capable of continuing to perform their duties?

f. After the events of 13 August, was the SAPS operation at Marikana subject to undue political influence? If so, to what extent did that undue political influence affect the course of the operation at Marikana?

g. After the events of 13 August, did the SAPS leadership and / or command take all reasonable steps to oversee and plan the operation in a way that ensured that the risk of the need to use lethal force was minimized? If not, to what extent can the outcome of the operation on 16 August be attributed to failures of the SAPS leadership and / or command in overseeing and planning the operation?

h. Was the decision to move to a tactical option on 16 August justified in the circumstances? Was that decision consistent with the imperative
of Standing Order 262 to “avoid the use of force at all costs” and was it calculated to minimize the risk of the need to use lethal force?

i. Was the SAPS briefing of the operation of 16 August adequate? In particular, was the briefing sufficiently clear to ensure that the plan was fully understood by those members who were to implement the plan?

j. What, as a matter of fact, took place on or near the Koppie between 15:42:00 and 15:55:30. In particular:

   i. Did the lead group of strikers make several attacks on police lines before rounding the kraal, as alleged by the SAPS?

   ii. Were water cannon, tear gas and stun grenades used to repel these attempts, as alleged by the SAPS? If not, when were these less-lethal methods utilized by the SAPS?

   iii. Was less-lethal force ‘ineffective’ against the advancing strikers, as claimed by the SAPS?

   iv. Did the arrangement of SAPS resources, and the use of less-lethal force have the effect of channeling strikers towards the Tactical Response Team (‘TRT’) line?

   v. Does the evidence suggest, on the balance of probabilities, that the lead group of strikers moved off the Koppie with an intent to attack police?

      1. If not, did some or all members of the lead group develop such an intent at some stage before they rounded the kraal?
2. If not, did some or all members develop that intent at some stage after they rounded the kraal?

k. Is there sufficient evidence to conclude, on the balance of probabilities, that each live round fired by SAPS officers at Scene 1 was fired a) in a reasonable belief that the officer’s – or another’s - life was in imminent danger, and b) proportionately?

   i. If not, which shotists, rounds, and / or victims cause particular concern?

   ii. Is there a prima facie case to recommend prosecution against particular shotists?

l. Was the SAPS command and control of the operation on 16 August adequate? In particular,

   i. Can blame be attached to those in command of the operation for:

      1. A failure to halt the operation after the shootings at Scene 1?

      2. The failure to coordinate the various units that surrounded Koppie 3?

      3. The decision to engage the strikers in Koppie 3 rather than retreat and negotiate?

      4. The failure to call a cease-fire at Scene 2?
5. The failure to manage the crime scene adequately at Scene 2?

6. The failure to ensure medical attention was provided to the injured victims at Scene 1?

ii. To the extent that difficulties with radio communication may have contributed to some of these failures, do these difficulties provide a complete explanation for the SAPS?

iii. To the extent that command and control is found to be inadequate, to what extent did that contribute to the outcome of the operation of 16 August 2012?

m. Have the SAPS provided a justification for each of the deaths caused at Scene 2? If not, which deaths remain unjustified?

n. Is there sufficient evidence to conclude, on the balance of probabilities, that each live round fired by SAPS officers at Scene 2 was fired a) in a reasonable belief that the officer’s life was in imminent danger, and b) responsibly?

i. If not, which shotists, rounds, and / or victims cause particular concern?

ii. Is there a prima facie case to recommend prosecution against particular shotists?

1.2.1 In the parts that follow, the SAHRC provides its submissions in regard to all of these issues. Part 14 below summarises the SAHRC’s answers to the questions set out here.
SECTION 2: PRELIMINARY ISSUES THE COMMISSION MUST ADDRESS

2.1.1 Informing the answers, and providing context to those questions, are the following preliminary considerations which must first be addressed in detail:

a. To what extent have the SAPS demonstrated a willingness to be held accountable for their actions at Marikana, and to what extent have they engaged in the Commission process in a spirit of cooperation and full and frank disclosure? This is relevant insofar as it may inform the Commission’s judgment on whether it has received all relevant information from the SAPS, and it may inform the relative weight to be given to contemporaneous versus witness evidence, where there is a conflict. As set out above in Part Two, it may also impact on the standard of proof the Commission will require before reaching findings, and may lead to the drawing of adverse inferences against the SAPS.

b. What was the nature of the threat faced by the SAPS during the week of 9 – 16 August? In particular:

   i. What was the make-up of the crowd on the Koppie between 13 – 16 August?

   ii. What were the objectives of the striking crowd?

   iii. What was the purpose of the muti taken by members of that crowd?

   iv. Were the police a pre-determined target for the crowd’s aggression?
v. What is to be made of the threats allegedly made to the SAPS on 15 and 16 August?

vi. In the context of all the preceding questions, what is the weight to be attached to Mr. X’s evidence?

c. Was this a ‘crowd management’ operation or a ‘hybrid’ operation, and did Standing Order 262 (‘SO.262’) apply to the acts of the SAPS?

d. In determining whether individual officers fired in self and / or private defence, how is the Commission to deal with the paucity of evidence available from those individual officers?

e. How is the Commission to deal with the evidence of the expert police witnesses, Mr. White, Mr. de Rover, and Mr. Hendrickx? What weight ought to be attached to the evidence of each?

f. How is the Commission to deal with the evidence provided by Mr. Yoav Dagan, the video expert instructed by the SAHRC and the Families of 36 deceased miners, in light of SAPS objections?

2.1.2 In the submissions that follow the SAHRC seeks to assist the Commission by providing an analysis of the evidence from a human rights perspective. At the core of our submissions is that this Commission is not engaged in a criminal process and must not seek to apply criminal standards or approaches to the evaluation of evidence.

2.1.3 However, under paragraph 1.5 of its Terms of Reference, the Commission must consider whether the evidence, considered as a whole, warrants the reference of any individual or grouping for prosecution or further investigation. Consequently, in what follows, the SAHRC highlights some of the evidence that the Commission will need to consider when determining
whether to make such references for prosecution or further investigation. That approach should not be misinterpreted. The SAHRC recognizes the jurisdiction and mandates of the Commission to make references for prosecution, and the Independent Police Investigative Directorate (‘IPID’) and the National Prosecuting Authority (‘NPA’) to investigate alleged criminal conduct and to take measures necessary to secure criminal sanction. It does not wish to encroach onto these respective mandates so highlights issues of possible criminality only to assist the Commission in its task and not to demand or call for the prosecution of any specific individual for any specific crime. Only the Commission itself can determine whether a *prima facie* case for prosecution exists that warrants a reference for prosecution following its evaluation of all of the evidence before it.
PART FOUR:

PRELIMINARY ISSUES
SECTION 1: HAS THE SAPS COMPLIED WITH ITS OBLIGATIONS OF FULL COOPERATION, TRANSPARENCY, AND FRANK DISCLOSURE WITH REGARD TO THE COMMISSION PROCESS? IF NOT, WHAT EVIDENTIAL CONSEQUENCES MAY FLOW FROM THAT?

Section 1.1: The importance of accountability in a democratic police service

1.1.1. The Constitution mandates that the State has a positive constitutional duty to act in protection of the rights in the Bill of Rights. The Supreme Court of Appeal has found that “the very existence of that duty necessarily implies accountability” and that section 41 of the Constitution provides expressly that all organs of State must provide government that is not only effective, transparent and coherent, but also government that is accountable. Accountability assumes an important role in determining whether a legal duty should be recognized where the conduct of the State is in conflict with its constitutional duty to protect the rights in the Bill of Rights.

1.1.2. Accountability is a particularly important principle in respect of policing in a democratic society. The police are granted extensive powers on the use force – including lethal force – but are required to use that force responsibly and to the minimum extent necessary. A police service that is not properly accountable for its use of force is a police service that does not accord with democratic principles.

1.1.3. The importance of accountability mechanisms in establishing an effective and democratic police service is emphasized in numerous documents, including, for instance, in the ICRC’s publication ‘To Serve and Protect’ – originally

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52 Minister of Safety and Security v Van Duivenboden 2001 (6) SA 431 (SCA) at [20] and the Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 (CC)

53 Minister of Safety and Security v Van Duivenboden 2001 (6) SA 431 (SCA) at [21]
authored by Mr. de Rover – which describes accountability as a “governing principle” which “must permeate law enforcement work.”

1.1.4. Mr. White’s evidence was that:

“The key factor in regulating the conduct of officers in relation to the use of force, including firearms, is the strength of the accountability regime that is in place... In my experience over 30 years of policing, I witnessed a significant cultural change in relation to the use of higher levels of force by the police and I am of the view that robust accountability played a key role in this.”

1.1.5. The United Nations Office of Drugs and Crime (‘UNODC’) has published its ‘Handbook on Police Accountability, Oversight and Integrity’ to guide police services around the world. It emphasises that effective accountability within a police service is established through both external and internal mechanisms. External mechanisms – such IPID or the courts, or a commission of inquiry – can only have a limited impact in ensuring investigation or prosecution for obvious breaches of the law. By contrast, internal accountability mechanisms seek to build a culture of integrity and transparency within a police service with the aim of ensuring that the police can police themselves. As the UNODC handbook notes:

“It is impossible to regulate every single police action in advance through laws, regulations and standard operational procedures. Given the discretion available to police officers in their actions, within the bounds of law, policies and instructions, to a great extent policing takes place at the moment of delivery and is accounted for afterwards.

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54 Exhibit UUUU3, p.138
55 Exhibit BBBB4: Supplementary Statement of Gary White MBE, para.4.2.6
This is why police accountability requires an effective reporting system that enables management and other oversight bodies to review the trail left by officers’ actions and inactions and assess their appropriateness. In particular, any use of firearms must always be reported, in addition to the use of other police powers. In the interests of maintaining the integrity of this reporting system, it is essential to establish a working culture in which integrity and transparency are valued. This can be facilitated through various interventions, including by actors from outside the police, but primarily the responsibility of those in charge of the police.

Figure VII illustrates the relationship between leadership, culture and conduct.

Figure VII: The relationship between leadership, culture and conduct

Police supervisors at any level need to be aware that their behaviour has a strong impact on the organizational culture, which in turn contributes to police behaviour. Worldwide, the police culture is often characterized by what is referred to as the “blue wall of silence.” Such a culture, valuing loyalty over integrity, facilitates misconduct by keeping it concealed. Any attempt to enhance police integrity needs to be accompanied by measures to enhance transparency and stimulate a culture of openness, in other words, a professional ethos in which awareness of and respect for accountability during police actions is fully ingrained. Police leadership will have to take the lead in realizing this.
Police leadership must ensure an effective internal disciplinary system that is applied in a fair way [...]. This includes dealing with complaints from civilians and extends to procedures for officers to complain about their colleagues, for example in situations of sexual violence or harassment… If misconduct does occur, it needs proper investigation and correction.

The approach taken to misconduct is an important indicator of the values guiding the leadership. In responding to the misconduct and eradicating it within the organization, the underlying causes of wrongdoings have to be addressed and preventive measures adopted.”

1.1.6. In his evidence to the Commission, Minister Mthethwa agreed that accountability was central to the SAPS objective of raising standards and meeting best practice in policing. He also agreed that leadership was key to ensuring this accountability: as he acknowledged, if the leadership of an organisation does not demand accountability and transparency when standards are not met, it is unlikely that there will be accountability when standards are not met56. His responses were consistent with the principles set out in the UNODC handbook.

1.1.7. Regrettably, the Minister’s sentiments expressed in oral evidence have not been matched by the acts and pronouncements of the SAPS leadership in the aftermath of the killings at Marikana or in the manner in which the SAPS has conducted itself throughout the Commission process.

1.1.8. On reviewing the limited discovery available to him in January 2013, Mr. White noted that57:

56 Transcript Day 256, pp.32430 – 32431
57 Exhibit WW2: Provisional Statement of Gary White MBE, para.4.2.2
“The evidence submitted to the Commission by the SAPS does not contain what one would expect to see from a police service in the aftermath of such a failure, namely, an acceptance of responsibility, the identification of errors of strategy and tactics, and lessons learned. Instead, the SAPS evidence to the Commission is lacking in detail, and is almost entirely defensive.”

1.1.9. As the Commission progressed, Mr. White’s criticism was proved not to be a factor of the early stage at which his evidence was submitted, but to be the consequence of a SAPS case which lacked transparency and was indicative of a cover-up. Mr. White’s updated criticism of the lack of accountability and transparency in the SAPS case is set out in Exhibits JJJ178 and BBBB4.

1.1.10. Rather than a complete “blue wall of silence” referred to in the UNODC handbook, the SAPS case presented to the Commission has been defined by half-truth, obfuscation, non-discovery and omission. In the aftermath of the use of force by police which resulted in the deaths of 37 people, the approach of the SAPS when accounting to this Commission – and to the public – has fallen far short of the standards of internal accountability one would expect from a democratic police service.

1.1.11. The ICRC publication ‘To Serve and Protect’ notes that:

“Where law enforcement agencies accept full scrutiny of their actions and operations, their credibility and their acceptance by the population will be enhanced.”

For the reasons set out in the following sections, the approach of the SAPS to this Commission has left its credibility substantially diminished.

58 Exhibit JJJ178: Final Statement of Gary White MBE, Sections 4.1 and 4.2
59 Exhibit BBBB4: Supplementary Statement of Gary White MBE, Section 2.6
60 Exhibit UUUU3, p.352
Section 1.2: Setting the tone for a cover-up

1.2.1. Immediately on hearing of allegations of abuse and mistreatment of those arrested on 16 August 2012, Minister Mthethwa issued a stern statement encouraging a full investigation of the allegations and stating that:

“Any police officer who conducts him or herself in a manner that is not in line with constitutional principles should face the full might of the law”.

As the Minister explained in evidence, that kind of statement from the political principal of the SAPS was important to set the tone in which the SAPS would deal with the allegations made.

1.2.2. Regrettably, the Minister conceded that no similar statements were made in relation to the killing of 37 strikers by police at Marikana on 13 and 16 August. In the immediate aftermath of 16 August 2012, none of the leadership of the SAPS – whether political or operational – made statements demanding investigations and/or accountability. None of the statements suggested that SAPS members might need to face “the full might of the law”; none of the statements contemplated that the SAPS may have done wrong. Instead, despite a great deal of continuing uncertainty over the circumstances in which the deaths were caused, the SAPS leadership were consistent in making unambiguous statements justifying the killings in self and private defence and defending the police actions.

1.2.3. Minister Mthethwa conceded that his statements in the aftermath of the killings of 13 and 16 August did not leave open the possibility that the SAPS
did anything wrong\textsuperscript{64}, despite the fact that he was not in possession of sufficient information to reach any such conclusion\textsuperscript{65}. The statements he made included the following:

a. Statement released to the media in the Minister’s name on the evening of 16 August saying that “the police did their best in a volatile situation”, and asking: “Now what should police do in such situations when clearly what they are faced with are armed and hardcore criminals who murder police?”\textsuperscript{66}

b. Speech to SAPS members on 17 August 2012, in which he said the following\textsuperscript{67}:

“You must know that as your minister and on behalf of the government, the executive as a whole, on behalf of the President of the Republic, the Commander in Chief of all the armed forces in this country, we are all behind you. We know what you have gone through…

... Here as your leadership, we are confident that what we have done, you did it in trying to ensure that the rule of law reigns in South Africa. We are not going to allow anybody to run amok in the country; to want to turn South Africa into a banana republic. It is painful that in the process lives are lost, but we are a professional force and we must keep to that. We must ensure that at all times we do everything in our power so that anarchists do not think that South Africa is their stage. From the bottom of my heart as your minister, I want to thank you on behalf of our government. I want to thank you and commend you for

\textsuperscript{64} Transcript Day 256, p.32442
\textsuperscript{65} Transcript Day 256, pp 32442 - 32443
\textsuperscript{66} Exhibit CCCC10: Business Day Article dated 16 August 2012
\textsuperscript{67} Exhibit CCCC7: SAPS Hard drive Marikana Press Conference, from 00:13:20
what you are doing. Continue to protect your country. Continue to protect the citizens of South Africa. It is your duty; it is your constitutional obligation, and I thank you.”

c. Address to Parliament on 21 August 2012, in which the Minister claimed that “the police did all in their power to avert such a situation”.

1.2.4. The National Commissioner made similar statements which did not leave open the possibility that the SAPS did anything wrong and sought to justify the SAPS killings in self and private defence, despite the fact that she was not in possession of sufficient information to allow her to reach that conclusion. Those statements included:

a. The National Commissioner’s press briefing on the morning of 17 August. Despite a great deal of uncertainty as to what had taken place, in particular at Scene 2, the National Commissioner made an unequivocal statement in which she stated that “the SAPS did all in their power to avert such a situation” and suggested that all shooting by the SAPS had taken place in only two shooting incidents: the first to defend SAPS members from “a charging group”; and the second to defend SAPS members from a storming militant group, who were “firing shots and wielding dangerous weapons”. Despite the fact that the National Commissioner recognized that the purpose of the press briefing was “to explain to the entire world, to the nation to everybody about the work that we did, to explain the facts of what evolved and what has happened”, the account was seriously misleading. Her claim that “all we did was to be open, transparent and take the facts as they

67 Exhibit CCCC10: Business Day Article dated 16 August 2012
68 The National Commissioner’s evidence was that, of those who briefed her, only Maj Gen Naidoo had been present at Scene 2. As Maj Gen Naidoo’s evidence showed, he could not account for a single death at Scene 2
69 Exhibit FFF12: Transcription of National Commissioner 20 August 2012, p.2
are to everybody” does not stand up to even the most cursory scrutiny. Indeed, it is likely that the account given in the press briefing in respect of the events at Scene 2 was knowingly misleading: the internal briefing note provided at the same time to the Department for International Relations and Cooperation (while still inaccurate) was far more nuanced in respect of the deaths caused at Scene 2.

b. The National Commissioner’s address to SAPS members on 20 August, in which she said:

“I come before you to actually say trying as it may be, mourning as we are, let us take note of the fact that whatever happened represents the best of responsible policing. You did what you did, because you are being responsible, you were making sure that you continue to lead your oath of ensuring that South Africans are safe and that you equally are a citizen of this country and safety starts with you. So for that I just want to once more thank you for having done what you did, for having endured the challenges, that we endured and as we mourn as a country let us remember that the pain that everybody is feeling is felt by all of us, but all we did was to do our job and to do it in the manner that we are trained, that we know it should be done responsibly, caringly and focussing on that which is our core responsibility.”

1.2.5. The Operational Commander, Brig Calitz, also made statements to members praising their performance on 16 August and commending their actions. When addressing members on the incidents of 16 August in a briefing on the morning of 18 August, he said:

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71 Exhibit FFF12: Transcription of National Commissioner 20 August, p.2
72 Exhibit FFF4, pp 1 - 2.
73 Exhibit FFF12, p.1
74 Exhibit JJJ82, p.3
“At this stage we did nothing wrong. From the planning to the execution was 110%. Exactly how we plan it and it is not often that this happens in this large group. I have to congratulate you. Exactly how we planned it and we briefed the commanders, exactly we executed in that line. The force continuum, we did the water cannons, we did the stun grenades, we did the tear smoke, we did the push back, we tried. When it was ineffective the guys run back. Ne. On the media they say police were running away. Yes, it is true, but we call it, tactical retreat, we don’t call it running away. Ne? Ja.

[8:53] We tactically retreat with a speed, why, because your head and your neck cannot take the blow for a panga or a spear – alright? I am not joking when I am saying. That is the words that we are using. We tactically retreat, and you have to face the Nyala in order to get in there. So it is right, your actions was completely right. By retreating and going back to your safe haven. Therefore we got over to the second phase. [9:20] And that is where the TRT line and the NIU line was formed. And when they become under attack, that is where the command was given by their commanders as well as some of them act in self-defence. Alright? So on that, nothing, nothing, nothing was wrong. Okay? You acted. It was justified.”

1.2.6. On the morning of 17 August, Brig Calitz provided Capt Govender with all of the facts which informed the official ‘Shooting Incident Report’ to be provided to IPID. Brig Calitz gave no detail of Scene 2 at all, and the information he provided to Capt Govender suggested that every shot was fired in self and private defence, despite the fact that there was still serious uncertainty around Scene 2 and no officer had yet given a statement claiming that he or she had acted in self and private defence.

75 Exhibit WW7
76 Transcript Day 274, p.35058
77 Transcript Day 274, p.35063
78 Transcript Day 274, p.35077
1.2.7. The impact of these statements by the political and operational leadership of the SAPS cannot be underestimated. In the aftermath of the worst loss of life during a police operation since the birth of South African democracy, the political and operational leadership of the SAPS announced to the world, to its own members, and to IPID that the SAPS had acted responsibly, in accordance with policy, in self and private defence, and could not be faulted.

1.2.8. The SAHRC submits that these statements by the SAPS leadership were not only premature, irresponsible and wrong, but they also had a direct impact on the willingness of the SAPS as a whole to hold itself up for proper scrutiny by the public and by the Commission. It is one thing for the leadership of an organization to be concerned for the morale of the organization in the aftermath of a tragic event. It is quite another publicly to exonerate the organisation in its entirety and unequivocally without first conducting even a cursory investigation. To repeat the UNODC handbook:

“Police supervisors at any level need to be aware that their behaviour has a strong impact on the organizational culture, which in turn contributes to police behaviour. Worldwide, the police culture is often characterized by what is referred to as the “blue wall of silence.” Such a culture, valuing loyalty over integrity, facilitates misconduct by keeping it concealed. Any attempt to enhance police integrity needs to be accompanied by measures to enhance transparency and stimulate a culture of openness, in other words, a professional ethos in which awareness of and respect for accountability during police actions is fully ingrained. Police leadership will have to take the lead in realizing this.”

1.2.9. In this case, the SAPS as an organization were given a clear and public lead by the police leadership: you did nothing wrong; you acted in self-defence; you have nothing to account for. In those circumstances, it is unsurprising that the
SAPS failed to engage with the Commission in a spirit of full cooperation and full disclosure. It is unsurprising that the statements provided by members present on 16 August are so lacking in detail. It is unsurprising that allegations of unlawful acts by SAPS members were absent in initial statements to the Commission and only emerged when apparently convenient for the SAPS. And it is unsurprising that crucial evidence of the planning and decision making in the lead-up to 16 August was concealed from the Commission until unwittingly, or involuntarily, discovered almost a year into the Commission proceedings.

1.2.10. The SAHRC submits that the examples of a lack of transparency, concealment of evidence and half-truth in the SAPS case, as set out below, can be directly traced back to the failure of the SAPS leadership to set a tone from the outset that demanded rigorous investigation, complete transparency and full accountability.

Section 1.3: The absence of debriefing and the meeting at Roots

1.3.1. Paragraph 13 of SO.262 requires that debriefing takes place after each event or gathering to highlight good practices as well as shortcomings. As noted in the SAPS document, ‘Crowd Management for Platoon Commanders: Briefing and Debriefing’, debriefing is a key aspect of continuous improvement of a police service. The document notes:

“Debriefing is an important possesses which is to be considered just as important as the briefing process. Without good debriefing after public order interventions it is not possible to assess one’s actions for the improvement of techniques and better command and control during...”

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79 See below at Part 4, section 1, Part 10, section 8, Part 12, section 4
80 See below at Part 4, section 1
81 See below at Part 4, section 1
82 Exhibit SS2, p.10
83 Exhibit GGG25, sections 9 and 13
the operation. During debriefing members can give their input thus the commanders are able to have another viewpoint of the operation.

Debriefing is an important evaluation tool for the unit commander which enables them to evaluate the level of professionalism and effectiveness of his members and operational platoon commanders.

The changing circumstances require that members continuously evaluate their techniques according to the threats in their particular area. Techniques need constantly to be evaluated by operational members to ensure that the techniques are able to address to issues at hand.”

1.3.2. The same document notes that debriefing should take place at a number of levels – from section, to platoon, to company – each reporting up to the higher level after debriefing, and ultimately resulting in a commander debriefing where commanders do their own debriefing with the information received from the lower levels. After every debriefing session – at each level – a brief report should be compiled and filed.

1.3.3. After the operation at Marikana, the SAPS claim that a first level debriefing between members and section commanders, and a second level debriefing between section commanders and the command leadership took place on 16 August 2012. However, contrary to policy, no reports were filed in respect of any of these debriefing sessions. Further, a final commander-level debriefing never took place as required by SO.262.

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84 Exhibit GGG25, section 11
85 Exhibit GGG25, section 12
86 Exhibit JJJ107: Consolidated statement of Brig Calitz paras 136 - 137
87 Maj Gen Annandale confirmed that there should have been written records kept of these debriefings: Transcript Day 91, p.9764
1.3.4. The absence of a formal commander-level debriefing session in respect of the Marikana operation, and the failure to submit any reports in respect of the lower level debriefings, is troubling. Debriefing is the primary mechanism by which the SAPS seeks to identify mistakes made and lessons learned in its operations, so the failure to properly debrief, or document the lower-level debriefings that took place, means that the SAPS command leadership never engaged in identifying the lessons-learned or mistakes made in the operation of 10 – 16 August.

1.3.5. The SAPS case is that this was appropriate in circumstances where a commission of inquiry had been announced. Perhaps. As noted by Mr. White, it might have been justified for the SAPS to forgo a debriefing session in order to avoid the appearance of collusion in advance of the Commission. However, that justification cannot possibly hold true in light of the meeting that was held in place of a debriefing session: the meeting at Roots in Potchefstroom (‘Roots’).

1.3.6. The purpose of the two-week meeting at Roots has been described in different language by different SAPS witnesses, but it is quite clear why it was called. The work products emanating from Roots were the SAPS presentation to the Commission, and the accompanying narrative. These documents contain the SAPS case. In blunt terms, the purpose of Roots was to identify and prepare that case, and to ensure it was consistent.

1.3.7. Managed carefully, this approach was not necessarily inappropriate. The SAPS needed to present a case to the Commission; it needed to gather together the relevant evidential material; it needed to explain the events from a SAPS

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88 Exhibit JJJ178: Final Statement of Gary White MBE, para.4.2.6
89 Exhibit L: SAPS presentation
90 Exhibit HHH28: Marikana Narrative Report
91 It also appears that attempts were made to ensure that the SAPS case was consistent with the Lonmin case. See Exhibit EEEE30.2, an email from Col Visser to Dirk Botes of Lonmin, sent on the third day of the Roots meeting
perspective; and it needed to identify the appropriate witnesses to call. So the SAHRC does not criticize the fact that a meeting was held to prepare the SAPS case for the Commission. However, substantial criticisms can be leveled at the manner in which the meeting was held.

1.3.8. The SAPS should have been acutely aware of the risk that the meeting could be perceived as an opportunity to collude and it should have taken steps to mitigate that risk, to ensure transparency, and to ensure public confidence. Possible measures open to it included:

   a. Minuting or recording the meetings;

   b. Inviting the Chief Investigating Officer (‘CIO’) of IPID to attend;

   c. Inviting another independent party to attend; or

   d. Confirming that the Commission was content for the meeting to proceed and seeking guidance on any measures to put in place to ensure transparency.

1.3.9. However none of these steps – nor any alternatives – were taken. Instead, the SAPS had a closed meeting, without informing IPID or the Commission, that was not recorded or minuted, which sought to agree on a case to put before the Commission, and which pre-dated the drafting of statements by the senior leadership. As Mr. White noted\textsuperscript{92}:

   “By holding a meeting which did not seek to identify errors or lessons learned, but simply sought to prepare the police case for the Commission, the SAPS left themselves open to allegations of possible collusion. That is all the more so given that it appears that most of the

\textsuperscript{92} Exhibit JJJ178: Final Statement of Gary White MBE, para.4.2.7
SAPS statements to the Commission by the senior leadership of the operation post-date the commencement of the Potchefstroom event.”

1.3.10. In making this criticism, Mr. White referenced the United Kingdom policy with which he is most familiar that warns against officers conferring after an incident and before making a personal account of what transpired. Paragraphs 3.60 – 3.62 of Keeping the Peace state as follows:\footnote{Exhibit JJJ178.13: Manual of Guide on Keeping the Peace, Annexure GW2}

“3.61 However, as a matter of general practice, an officer should not confer with other officers prior to making his or her personal account. This is the case whether an initial or subsequent account is to be provided. The officer should individually record what his or her honestly held belief of the situation was at the time the event took place.

3.62 If for any reason a need to confer should arise, a conferring officer should ensure transparency and public confidence is maintained by documenting any discussion that has taken place, paying particular attention to the following details:

- Time, date and place where conferring took place;
- The issues discussed;
- With whom; and
- The reasons for such discussion.”

1.3.11. In the case of Marikana, the entire JOCCOM, except Brig Calitz, waited until the Roots meeting was substantially complete and a clear police case had been prepared by consensus before committing to a statement their version of events. That included Provincial Commissioner Mbombo, Maj Gen Mpembe, Maj Gen Annandale, Maj Gen Naidoo, Brig Fritz, Brig Pretorius, Lt Col Scott, Lt Col Vermaak, Capt Loest, and Lt Col Merafe. Lt Cols Stapelberg
and Mopedi provided undated statements, but both appear to be from September 2012, and therefore after the commencement of the Potchefstroom event.

1.3.12. The question that necessarily follows is whether the SAPS did, in fact, use Roots as an opportunity to collude, or whether the criticism is limited to allowing a perception of collusion to arise. Regrettably, the SAHRC submits the former. The following evidence, discussed in more detail below, suggests that the Roots meeting was used as an opportunity to prepare a materially misleading case to the Commission:

a. Evidence that key aspects of the SAPS case – as set out in Exhibit L and elsewhere – are materially false;

b. Evidence that the SAPS failed to comply fully with its discovery obligations after Roots\(^94\), including failing to discover vital documents relevant to the Commission process, falsely claiming that there were no notes or draft documents produced at Roots, and making several false claims in respect of digital evidence\(^95\); and

c. Evidence that purportedly contemporaneous minutes were in fact drafted at Roots more than 10 days after the event and that those belatedly prepared notes are materially different in their contents to the contemporaneous handwritten notes\(^96\).

**Section 1.4: Key false claims in the SAPS case**

1.4.1. The SAPS case originally presented to the Commission was materially false in a number of key respects, as set out below.

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\(^{94}\) See below at Part 4, section 1
\(^{95}\) See below at Part 4, section 1
\(^{96}\) See below at Part 4, section 1
1.4.2. **First**, the initial SAPS case in respect of the development of the Stage 3 ‘disarm, disperse and arrest’ plan (‘DDA’), and the decision to implement that plan on 16 August, was materially false. The initial SAPS case was that:

a. The Stage 3 DDA plan was devised as part of a six stage plan on 14 August 2013;  

b. The Stage 3 DDA plan was approved after substantial input from various members, including POP commanders; and  
c. The decision to move to Stage 3 was taken around midday on 16 August by Maj Gen Mpembe, in response to an escalation of the threat from the strikers.

1.4.3. The true facts are that:

a. Prior to 13:30 on 16 August, there was no Stage 3 DDA plan. That plan was devised in haste between 13:30 and 14:30 on 16 August in response to a command by the Provincial Commissioner, Gen Mbombo, to disperse, disarm and arrest the strikers.

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97 See Exhibit L: SAPS presentation slide 78; Exhibit GGG15, paras 23 – 27 (Initial Statement of Maj Gen Mpembe); Exhibit QQQ15.3, para.3.3 (SAPS Discovery Correspondence with CALS Dated 08.02.2013); Transcript Day 77, p.8257, per Maj Gen Annandale  
98 Exhibit HHH3, para.15 (Supplementary Statement of Maj Gen Mpembe); Transcript Day 77, pp 8229 – 8330, 8415, per Maj Gen Annandale; Transcript Day 123, p.12650, per Maj Gen Mpembe  
99 Exhibit L: SAPS presentation slide 174; Exhibit TT4 (Minutes of the 06:00 JOCCOM Meeting), Exhibit HHH3, para.17 (Supplementary Statement of Maj Gen Mpembe); Transcript Day 84, pp 8654, 8671 per Maj Gen Annandale; Transcript Day 106, pp 11438-11443, per Maj Gen Mpembe  
100 Exhibit HHH20: Consolidated Statement of Lt Col Scott, pp 81 - 82 and Transcript Day 128, p.13483
b. The DDA plan was approved by the JOCCOM without any significant input from any other members except Lt Col Scott, and without any POP input at all\textsuperscript{101}, and

c. The decision to disarm the strikers on 16 August was not taken in response to an escalation of threat\textsuperscript{102}. Instead, it was taken by the Provincial Commissioner, Gen Mbombo, and endorsed by an extraordinary session of the NMF of the SAPS on the evening of 15 August\textsuperscript{103}. The decision was taken without reference to the operational leadership of the Marikana operation, without any plan before the decision makers, and without regard to the risks of – or planned mitigation for – such an operation\textsuperscript{104}.

1.4.4. \textbf{Secondly}, the SAPS case in relation to the movement of the lead striker group from the Koppie to the kraal is materially false. The SAPS claim that the alleged ‘charge’ towards the TRT line that precipitated the firing of 328 live rounds by SAPS members at Scene 1 was the third time in five minutes that the group had sought to ‘attack’ police lines. Slides 194 – 205 of Exhibit L set out the alleged ‘incidents’ that preceded the volley of fire by the SAPS, and explains that water cannon, tear gas and stun grenades were used more than 1.5 minutes before the volley of fire at Scene 1 to deter an alleged attack at incident 2.

1.4.5. In fact, the objective evidence submitted to the Commission after Exhibit L was finalised proves that alleged incidents 1 and 2 never took place at all\textsuperscript{105}. The objective video and photographic evidence makes clear that the lead

\textsuperscript{101} Exhibit HHH20: Consolidated Statement of Lt Col Scott, p.142 and Transcript Day 128, pp. 13483 - 13485
\textsuperscript{102} Transcript, Day 180, p.21616, per Maj Gen Mbombo
\textsuperscript{103} Exhibit JJJ177: SAPS National Management Forum Minute, Exhibit LLL1: Supplementary Statement of Lt Gen Mbombo para.43
\textsuperscript{104} Transcripts Day 181, pp. 21660 – 21664 and Transcript Day 187, pp. 22631 – 22635, per Lt Gen Mbombo
\textsuperscript{105} See below at Part Ten.
striker group moved directly from the Koppie, around the outside of Nyala 5, and towards the road to Nkaneng. When they were blocked from passing down the road to Nkaneng by Nyala 4, they skirted around the kraal, where the shooting commenced. It also shows that that:

a. Water cannon was not used until 10 seconds before the TRT volley, and it was never used against the lead striker group;

b. Tear gas was not used until 10 seconds before the TRT volley, and all tear gas was discharged behind the lead striker group; and

c. Stun grenades were not used until 20 seconds before the TRT volley, and all stun grenades were discharged behind or above the lead striker group.

1.4.6. Thirdly, the SAPS case in relation to the shooting at Scene 1 was false. The initial SAPS case was that the volley of shooting by SAPS members at Scene 1 lasted for eight seconds and stopped immediately after calls for ceasefire. The case is that the shooting was a proportionate response to an imminent threat to life.

1.4.7. In fact, the objective evidence, analysed after the submission of Exhibit L, shows that the volley of shooting at Scene 1 lasted for around 12 seconds, but individual shots continued to be fired for more than one minute, with at least four R5 shots being fired more than one minute after the shooting commenced. The first call for ceasefire was made four seconds into the

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106 Exhibit UUUU10.3: Video Annexure V2(a), CALS and SERI Presentations
107 Exhibit UUUU10.4: Video Annexure V3, CALS and SERI Presentations
108 Exhibit UUUU10.5: Video Annexure V4, CALS and SERI Presentations
109 Exhibit UUUU10.5: Video Annexure V4, CALS and SERI Presentations
110 Exhibit L: SAPS presentation slide 188
111 Exhibit UUUU10.6: Video Annexure V5, CALS and SERI Presentations
112 Exhibits JJJ198: Statements and Annexures of Katherine Scott
shooting, with more than 14 visible or audible calls for ceasefire within the first 10 seconds, but shooting continues regardless\textsuperscript{113}.

1.4.8. **Fourthly**, the SAPS case in relation to the state of knowledge of the JOC members, and the Operational Commander, Brig Calitz, during the unfolding operation on 16 August is false. The SAPS case is that\textsuperscript{114}.

\begin{itemize}
\item[a.] The members of the JOC were ‘blind’ and were unaware of the use of live ammunition, deaths, and serious injuries at Scenes 1 and 2 until around 16:20, when the shooting at Scene 2 was complete; and
\item[b.] Brig Calitz was unaware of the shooting of live ammunition at Scenes 1 and 2, and unaware of any injuries or deaths at Scenes 1 and 2, until the shooting at Scene 2 had ceased.
\end{itemize}

1.4.9. In fact, it is clear that\textsuperscript{115}:

\begin{itemize}
\item[a.] Members of the JOC heard the volley of live ammunition at Scene 1 over the radio in the JOC. JOC members were aware of the probability of deaths and serious situation at Scene 1 by 16:03 at the latest, and were in direct contact with the TRT commander on the scene at Scene 1, Capt Loest, at 16:05, before the shooting at Scene 2 had even commenced; and
\item[b.] Brig Calitz was aware of the use of live ammunition at Scenes 1 and 2, and is very likely to have been aware of the deaths and / or serious injuries at Scene 1 well before the shooting at Scene 2 ended.
\end{itemize}

\textsuperscript{113} Exhibit UUUU10.6: Video Annexure V5, CALS and SERI Presentations
\textsuperscript{114} See below at Part Eleven
\textsuperscript{115} See below at Part Eleven
1.4.10. *Fifthly*, the initial SAPS case presented in Exhibit L in relation to Scene 2, was so misleading that it cannot be described as anything other than false. Exhibit L presents Scene 2 as the effective continuation of an operation where multiple units approached the strikers at Koppie 3 as part of the DDA plan and used live ammunition in response to life threatening attacks.\(^\text{116}\)

1.4.11. Exhibit L contains no mention of the following highly relevant facts:\(^\text{117}\):

   a. Command and control broke down at Scene 2. Brig Calitz was more than 150m to the north of Koppie 3 and was not controlling the movements of any units except some POP units;

   b. When K9 members led by Maj Gen Naidoo approached Koppie 3 from the south, and TRT members led by Capt Kidd approached Koppie 3 from the west, their approach was contrary to the plan and not pursuant to any order. Moreover, they did not announce their arrival at the Koppie, thereby creating a situation of dangerous cross-fire where SAPS units were firing into the Koppie on all sides;

   c. The SAPS could not account for 12 of 17 deaths caused at Koppie 3. In respect of those unaccounted deaths, SAPS witnesses had alleged that at least one was shot and killed unlawfully and without justification. In respect of the rest, it was likely that they were shot by ‘incidental’ or ‘reckless’ cross-fire; and

   d. In respect of two of the five explained deaths (Mr. Mdezi and Mr. Thelejane), the explanation in Exhibit L was false. In respect of one of the five explained deaths (Mr. Xalabile), there is no witness evidence supporting the SAPS version.

\(^{116}\) Exhibit L: SAPS presentation slides 213 - 257  
\(^{117}\) See Part Twelve below
1.4.12. These five false claims are not exhaustive, but they form the backbone of a false case the SAPS sought to construct from the outset. A comparison of the claims versus the realities illustrate quite how significant the false claims were.

<table>
<thead>
<tr>
<th>False claim</th>
<th>True facts</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The DDA plan was devised and approved on 14 August as part of a comprehensive planning process with input from a variety of commanders. The decision to implement the Stage 3 DDA plan was taken on 16 August by the operational leadership in response to an escalation of the threat by strikers.</td>
<td>1. The DDA plan was devised and approved on the afternoon of 16 August with no input from POP Commanders. The decision to disarm, disperse and arrest the strikers on 16 August was taken by the Provincial Commissioner, and endorsed at an extraordinary session of the NMF of the SAPS on 15 August, without reference to the operational leadership at Marikana.</td>
</tr>
<tr>
<td>2. Prior to the SAPS firing live ammunition at Scene 1, the SAPS had defended themselves from two previous attacks by the lead striker group, using less-lethal methods, including water cannon, tear gas and stun grenades.</td>
<td>2. There were no previous ‘attacks’ on police lines by strikers, and no water cannon, tear gas or stun grenades were employed until the strikers had rounded the kraal. Water cannon was not used against the lead group of strikers at all, and tear gas and stun grenades were only used behind that lead group.</td>
</tr>
<tr>
<td>3. The SAPS fired live ammunition at Scene 1 for a period of eight seconds when they stopped in response to a call for ceasefire.</td>
<td>3. The SAPS fired a volley of live ammunition for 12 seconds at Scene 1 with intermittent shots continuing for more than one minute, despite calls for ceasefire commencing after four seconds.</td>
</tr>
<tr>
<td>4. The JOC members and the Operational Commander were unaware of the shooting of live ammunition, deaths and serious injuries.</td>
<td>4. The JOC members and Brig Calitz were aware of the use of live ammunition at Scene 1 and aware of the high probability of deaths.</td>
</tr>
<tr>
<td>Injuries at Scenes 1 and 2 until around 16:20, after the shooting at Scene 2 was finished.</td>
<td>and serious injuries there before the shooting at Scene 2 had commenced.</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>5. Scene 2 occurred as various units approached Koppie 3 in order to carry out the DDA plan and responded with live ammunition to life threatening attacks by strikers.</td>
<td>5. Scene 2 occurred as a consequence of a complete breakdown in command and control and the creation of a situation of dangerous crossfire. SAPS witnesses gave evidence of at least one unlawful, execution-style killing of a striker, there is no adequate explanation for at least 14 of the deaths, and it appears likely that recklessly fired, stray bullets shot most of those 14.</td>
</tr>
</tbody>
</table>

1.4.13. The SAHRC submits that these five false claims were deliberately constructed to:

a. Protect the National Commissioner and Provincial Commissioner from any blame for the deaths caused at Marikana;  

b. Protect the command leadership from blame for the reckless implementation of a hastily constructed plan, which lacked any POP input, and carried known high risks of causing death or serious injury;  

c. Protect the command leadership from blame for its failure to ensure adequately trained and briefed operators of water cannons in an operation where water cannons were intended to play a crucial role;  

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118 See below at Part Nine  
119 See below at Part Nine  
120 See below at Part Ten, section 4
d. Absolve the command leadership for failures to intervene in the operation after Scene 1, and therefore prevent 17 further deaths and multiple crippling injuries at Scene 2\textsuperscript{121};

e. Absolve the command leadership for a complete breakdown of command and control that led to the deaths at Scene 2\textsuperscript{122};

f. Bolster the SAPS claims of acting in self or private defence at Scene 1; and

g. Bolster the SAPS claims of acting in self or private defence at Scene 2.

1.4.14. What this demonstrates is a consistent attempt to pass responsibility downwards: from the National Commissioner and Provincial Commissioner to the operational leadership of the Marikana operation; from the operational leadership in the JOC to the Operational Commander on the ground; from the Operational Commander on the ground to the individual members who pulled the trigger. The SAPS case revolves around persuading the Commission that the only relevant question is whether individual officers were justified in shooting in self and / or private defence. The SAHRC does not disagree that this is a vital question, but submits – in line with the principle of precaution / prevention – that it is only one of many vital questions.

1.4.15. The five false claims highlighted above are five of many aspects of the SAPS case that are demonstrably false. In addition to those five claims could be added the following: the claim that the striker group on 13 August changed direction to move towards the settlement\textsuperscript{123}; the claim that Maj Gen Naidoo drove his contingent towards Koppie 3 because he was unfamiliar with the

\textsuperscript{121} See below at Part Twelve
\textsuperscript{122} See below at Part Twelve
\textsuperscript{123} See below at Part Seven, section 2
area and had never been to IRA1\(^{124}\); the claim that Maj Gen Naidoo diverted his members from providing medical assistance at Scene 1 in response to shots fired at Koppie 3\(^{125}\); and the SAPS explanation for the clear evidence of crime scene tampering at Scene 2\(^{126}\).

1.4.16. The false claims set out above are not merely false claims in submissions made by the SAPS or in Exhibit L. They are false claims given in evidence by SAPS witnesses under oath. They are false claims of such gravity that the Commission will need to consider whether they amount to perjury\(^{127}\).

**Section 1.5: Failure to comply with discovery obligations**

1.5.1. Alongside false claims made by the SAPS, there has been an egregious failure to discover or disclose vital evidence that is harmful to the SAPS case. The extent of this failure became apparent in July 2012 when the hard drive of Lt Col Scott (‘the Scott hard drive’) was provided to the Commission through a fortuitous set of circumstances beyond the control of the SAPS. That hard drive contained substantial amounts of material that ought to have been disclosed to the Commission, including *inter alia*:

a. The contemporaneous planning material which showed that the ‘reverse engineered’ plans contained in Exhibit SS3 bore little resemblance to the original documents. In particular, the contemporaneous planning material showed:

i. That there was no written Stage 3 DDA plan at the time of the operation of 16 August 2012; and

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\(^{124}\) See below at Part Fourteen, section 2  
\(^{125}\) See below at Part Fourteen, section 2  
\(^{126}\) See below at Part Fourteen, section 3  
\(^{127}\) See below at Part Fifteen, section 1
ii. That there was an alternative Stage 3 plan which appeared to still be active on the morning of 16 August 2012.

b. Numerous documents prepared by various people at Roots and which fed into the preparation of Exhibit L. The SAPS had previously claimed, in response to an explicit discovery request, that no such documents existed.

c. Numerous witness statements that had not been disclosed to the Commission including, for instance, a statement from Lt Col Merafe, containing significant criticisms of the SAPS.

1.5.2. The Scott hard drive also showed that minutes purporting to be contemporaneous minutes kept during the week of 9 - 16 August had been drafted more than 10 days later, at Roots. Subsequent discovery of the original handwritten notes showed those typewritten minutes to contain significant omissions, including most importantly, that a decision had been taken that 16 August was ‘D-Day’.

1.5.3. Other vital information that the SAPS failed to disclose to the Commission – but which was received from other sources – includes:

a. The fact that, on the morning of 16 August, the SAPS requested four mortuary vans to be put on standby in advance of the planned

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128 Exhibit JJJ190: List of Notes or Files Produced at Roots
129 On 18 and 24 January 2013 (Exhibit QQQ15.1), the SAHRC asked the SAPS to discover “any documents, notes, draft statements or similar used to inform the meetings and sub-meetings at Potchefstroom, as well as any draft or final reports or plans or similar produced by groups or subgroups to inform the final Presentation”. In their letters dated 08.02.2013 (Exhibit QQQ15.3, paras 10.5-10.7) and 26.02.2013 (at section 8) (not exhibited, but attached in Annexure D), the SAPS denied that any documents within that class existed
130 Exhibit TT4: Minutes of the 06:00 JOCCOM on 16 August
131 The properties of the file used for Exhibit TT4 show that it was created on 28 August 2012
132 Exhibit JJJ168: Notes from JOC 16 August, p.1
and ordered 4000 rounds of R5 ammunition to be delivered to the Marikana operation; and

b. A tape of the Provincial Commissioner’s meeting with Lonmin on 14 August 2012, at which she is recorded making highly compromising remarks suggesting that the operation at Marikana was driven – at least in part – by improper political purposes.

1.5.4. Yet further vital evidence was discovered by the SAPS at an extremely late stage of the Commission proceedings, and only in response to specific demands by the Evidence Leaders of the Commission. That evidence included:

a. The minutes of an extraordinary session of the NMF on 15 August, in which the endorsement of the Provincial Commissioner’s decision to disarm the strikers at Marikana is recorded;

b. The original, handwritten notes taken in the JOC during the week of 13 – 20 August 2012. As well as containing serious discrepancies when compared to the formal minutes drafted some time later at Roots, they also contain notes kept by Capt Van Heerden, during the operation of 16 August, which undermine the SAPS claim that the JOC members were unaware of the shooting and deaths at Scene 1 until the shooting at Scene 2 was finished; and

135 Exhibit HHH26: pocketbook of Lt Col Merafe; Exhibit ZZZZ4.10: Statement of Lieutenant Kgoadibana; Transcript Day 217, p.26695 and pp 27137 - 27141, per Lt Col Merafe
136 Exhibit JJJ192: Transcript of Meeting between Provincial Commissioner and Lonmin, 14 August 2012
137 Exhibit JJJ177
138 Exhibit JJJ168: Notes from JOC 16 August 2012
139 Exhibit KKK42: Annotated Copy of Capt Van Heerden JOC Notes
c. The report of a Task Team that had been set up by the National Commissioner to review the Marikana operation and advise on lessons learned\(^{140}\). When a key member of that Task Team, Brig Mkhwanazi, gave evidence to the Commission, neither he, nor the SAPS legal team, gave any hint of the existence of this Task Team or his role in it. Indeed, notwithstanding the fact that the National Commissioner had appointed him as part of the Task Team to report on lessons learned from the Marikana operation, the SAPS resisted Brig Mkhwanazi’s categorization as an expert who could express a view on the adequacy or otherwise of the SAPS operation at Marikana, explicitly suggesting that “if [he] were asked questions regarding the events of the 16\(^{th}\) and the events leading up to it, [he] wouldn’t be in a position to shed any light on it”\(^{141}\). The existence of the Task Team was only revealed in the cross-examination of Lt Col Scott\(^{142}\).

1.5.5. Further evidence of relevance to the Commission has mysteriously disappeared – or is claimed not to exist – including:

a. The tape recording of the extraordinary session of the NMF. The explanation for its disappearance strains credulity\(^{143}\);

b. The minutes of the JOC meeting of 14 August\(^{144}\), at which the SAPS initially claimed the Stage 3 DDA plan was presented. No adequate explanation has been given for the absence of these minutes; and

\(^{140}\) Exhibit LLL11: Final Interim Report and Exhibit JJJ203: Call up Instructions for Work Session on Operational Response Service Policies Commencing on 28 August 2012 until 20 September 2012 (Roots)

\(^{141}\) Transcript Day 27, p.2879

\(^{142}\) Transcript Day 136, p.14511

\(^{143}\) See Exhibit HHHH1: Statement of Maj Gugulethu Lethoko, para. 6 and Transcript Day 270, pp. 34387 - 34388

\(^{144}\) Maj Gen Mpembe insisted that minutes were taken at this meeting
c. The minutes or notes kept by the Task Team set up by the National Commissioner to report on the Marikana operation. That Task Team met for 20 days\textsuperscript{145}. As noted by the Chairperson, it is inconceivable that a 20-day meeting at which numerous interviews were conducted, and which was held with a view to producing a report, could have taken place without minuting, noting or recording\textsuperscript{146}.

1.5.6. Together, this evidence of a failure to disclose vital information to the Commission suggests a police service that has not engaged with this Commission in a spirit of full and frank disclosure. That conclusion is reinforced by the approach taken by the SAPS to reasonable requests for documentation or inspection and the false statements given in respect of the same. Two examples are instructive.

1.5.7. The first example is set out in the affidavit of Bongumusa Trevor Sibiya, dated 22 October 2013\textsuperscript{147}, with accompanying annexures. That affidavit sets out the obstructive and non-cooperative approach of the SAPS to requests by the Legal Resources Centre (‘LRC’) to inspect the computer hard drives used during the Marikana operation. As set out in paragraph 34 of that affidavit, the lengthy interaction was concluded with an affidavit from Maj Gen Mpembe that “from 13\textsuperscript{th} to the 16\textsuperscript{th} there was no computer available for the use of the JOC personnel”\textsuperscript{148}. That statement was false. As Maj Gen Mpembe conceded in cross-examination, when faced with photographic evidence to the contrary, there were computers for the use of the JOC personnel\textsuperscript{149}. The SAHRC submits that his clarification that his affidavit meant that “there were

\textsuperscript{145} Exhibit JJJ203: Call up Instructions for Work Session on Operational Response Service Policies Commencing on 28 August 2012 until 20 September 2012
\textsuperscript{146} Transcript Day 184, p.22151
\textsuperscript{147} Statement of Mr. Sibiya, not exhibited but attached at Annexure C
\textsuperscript{148} Exhibit HHH34, para.3
\textsuperscript{149} Transcript Day 123, pp 12684 – 12697. The Commission is also reminded of the false evidence given by Maj Gen Mpembe that he had no visual aids in the JOC to assist in seeing what was happening on the ground: Transcript Day 106, p.11477. In fact, two television screens in the JOC were showing the CCTV imagery of the operation
no computers connected to the SAPS mainframe” is disingenuous and does not, in any case, alter the fact that he made a false statement in an affidavit that had the effect of thwarting a legitimate inquiry from the representatives for the Ledingwane family. In light of the evidence found on the Scott hard drive, it is difficult not to conclude that this was a deliberate attempt to avoid discovering harmful material.

1.5.8. The second example relates to the SAPS response to a discovery request from CALS, made on 24 January 2013, for all original and handwritten notes made by members on 13 and 16 August 2012. On 26 February 2013, the SAPS responded:

“Requests were sent out to all members for any contemporaneous notes. Feedback received back from members indicates that no such notes are available.”

1.5.9. In light of subsequent witness evidence, that answer must be doubted. On 13 April 2014, the handwritten, contemporaneous notes of Lt Col Merafe were discovered to all parties in advance of his oral evidence. Under cross-examination, he confirmed that he had never previously been asked for any of his contemporaneous notes to be provided for the Commission. On 12 May 2014, Lt Col Thupe confirmed that he, too, had never previously been asked to provide any contemporaneous notes for the Commission.

1.5.10. From February 2013 to September 2014, the SAHRC made numerous discovery requests to the SAPS. Many of these requests had to be repeated due to the failure to discover. The correspondence shows, for example, that at least 13 requests for discovery of documents had to be requested on average.

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150 Exhibit QQQ15.1, para.5.13
151 Exhibit QQQ15.2, annexure, para.4.2
152 Exhibit QQQ5: Col Merafe Written Notes
153 Transcript Day 221, pp 27272 - 27275
154 Transcript Day 227, p.27996
four separate times. Often when discovery requested was still not forthcoming, despite the repeated requests, the SAHRC had to seek the intervention of the Evidence Leaders and/or the Chairperson and Commissioners. At times, the SAHRC requested that the Commission make a ruling on the SAPS’ continued failure to discover relevant evidence. Often when commitments to provide the requested evidence were made, the SAPS still failed to do so and often did not disclose the information requested in full. A schedule illustrating the discovery process engaged, between the SAHRC and the SAPS, as well as all supporting correspondence is attached as Annexure D.

Section 1.6: Failure to provide adequate statements

1.6.1. The failure to disclose pertinent information at an early stage, if at all, is not limited to the SAPS failure to discover documents. Mr. White said this of the SAPS statements he had read by October 2013\textsuperscript{155}:

\textit{“4.2.14 when considered as a whole, many of the statements provided to the Commission by members who were present at Marikana on 13 and 16 August, including from very senior officers, are so lacking in detail that I question whether the SAPS leadership and/or unit commanders made any serious attempt to encourage their members to provide full, detailed and frank accounts of what happened. In my experience, where the PSNI used higher levels of force in any public order operation, there was an obligation on each and every member present to provide as full and detailed an account of events as possible. ... 
4.2.17 While I recognise that many of the statements of SAPS members are statements given under warning of potential criminal prosecution, I do not think that this is an answer to the lack of detail provided. On the}

\textsuperscript{155} Exhibit JJJ178, paras 4.2.14 – 4.2.17
assumption that the lack of detail is the result of legal advice, I would have expected the SAPS to take steps to provide further statements from those members to assist the Commission process. As it is, the warning statements are the only statements provided by the vast majority of the members who were on the ground during the operation of 16 August, so the Commission is left with opaque, terse and sometimes contradictory accounts of what occurred.”

1.6.2. The initial statements of Commanders were terse and general, and lacking any significant detail on the background, planning, briefing, operational decision making, command and control and execution of the operations that one might expect to see. A review of the initial statements of the JOCCOM members makes that clear\textsuperscript{156}.

1.6.3. It appears that the strategy adopted by the SAPS commanders was to reveal as little as possible in the initial evidence and to drip-feed further evidence only where necessary to respond to damaging facts as they emerged.

1.6.4. The SAHRC frequently warned the Commission of this approach starting in February 2013 when the SAPS failed to comply with the Commission’s first deadline for all statements to be submitted (1 February 2013). Since then, the SAPS have failed to comply with every subsequent deadline for the submission of statements. Indeed, on 28 August 2014, a month before the conclusion of Commission hearings and when the Commission had concluded hearing evidence from SAPS witnesses, the SAPS submitted at least a further 50

\textsuperscript{156} Maj Gen Mpembe sets out the JOC and JOCCOM leadership structure at para.7 of his first statement (Exhibit GGG12). Their initial statements are exhibited as follows: Provincial Commissioner Mbombo (Exhibit GGG5), Maj Gen Mpembe (Exhibit GGG12), Maj Gen Annandale (Exhibit GGG1), Maj Gen Naidoo (Exhibit DD), Brig Calitz (Exhibit GGG13), Brig Fritz (Exhibit GGG8), Brig Pretorius (Exhibit JJJ178), Lt Col Scott (Exhibit FFF18), Lt Col Vermaak (Exhibit GGG17), Capt Loest (Exhibit SSS1.1), Lt Col Merafe (Exhibit GGG15), Lt Col Stapelberg (Exhibit ZZZZ3.604) and Lt Col Mopedi (Exhibit MMM20)
statements. Indeed, even on the final day of hearings, 29 September 2014, the SAPS submitted a further statement.\textsuperscript{157}

1.6.5. Regrettably, the Commission never sought to enforce its own deadlines, so the drip-feed approach was permitted.

1.6.6. That the SAPS have adopted this drip-feed strategy is clear when reviewing the number of supplementary statements that were required as the Commission process continued. In many cases, the supplementary statements contained highly relevant and material information previously omitted from initial statements and not disclosed to the Commission until necessary to respond to damaging evidence as it emerged. For instance, of the JOCCOM members:

a. Lt Col Scott submitted an original statement of 19 pages.\textsuperscript{158} Following the discovery of his hard drive nine months into the life of the Commission, he followed that up with a supplementary statement of 149 pages in July 2013.\textsuperscript{159} His initial statement falsely claimed that the Stage 3 DDA plan was devised on 14 August 2012 and omitted:

i. Any evidence on the true circumstances in which the Stage 3 plan was devised; and

ii. Any evidence in relation to the intention to roll out the barbed wire simultaneously, rather than consecutively.

b. Brig Pretorius initially submitted a terse four-page statement outlining her role in the operation.\textsuperscript{160} In response to evidence revealed at the

\textsuperscript{157} Exhibit ZZZZ13.2: Supplementary statement of Prof Lamla
\textsuperscript{158} Exhibit FFF18: Statement of Lt Col Scott
\textsuperscript{159} Exhibit HHH20: Supplementary Statement of Lt Col Scott
\textsuperscript{160} Exhibit JJJ187: Statement of Brig Pretorius
Commission, she submitted two supplementary statements in August 2013 (12 pages)\textsuperscript{161} and March 2014 (16 pages)\textsuperscript{162}. The initial statement omitted the following highly pertinent information:

i. Any mention of the circumstances of the briefing by Lt Col Scott at FHA1;

ii. Any mention of contacting IPID after receiving reports of people shot and/or injured; and

iii. Any mention of contacting Capt Loest by telephone after receiving reports of people shot and/or injured.

c. Brig Fritz initially submitted a four-page statement\textsuperscript{163}. In response to evidence revealed in the Commission, he submitted a nine page supplementary statement in August 2013\textsuperscript{164}. The initial statement omitted, \textit{inter alia}, to say that Brig Fritz could hear over the radio that people were shot, medical assistance was required, and the police were trying to ascertain how many were shot.

d. Col Merafe initially submitted a 10-page statement\textsuperscript{165}. In response to evidence that emerged in the Commission, he followed that statement with two supplementary statements in November 2013\textsuperscript{166} and April 2014\textsuperscript{167}. His initial statement omitted, \textit{inter alia}, reference to:

\begin{itemize}
\item Exhibit JJJ187A: Supplementary Statement of Brig Pretorius, dated August 2013
\item Exhibit MMM22: Supplementary Statement of Brig Pretorius, dated March 2014
\item Exhibit GGG8: Statement of Brig Fritz
\item Exhibit JJJ7: Supplementary Statement of Brig Fritz
\item Exhibit GGG15: Statement of Lt Col Merafe
\item Exhibit QQQ3: Supplementary Statement of Lt Col Merafe, dated November 2013
\item Exhibit QQQ1: Supplementary Statement of Lt Col Merafe, dated April 2014. Lt Col Merafe had also made a statement in November 2012 which was not disclosed to the Commission, but was discovered on the Scott hard drive (Exhibit QQQ2)
\end{itemize}
i. General criticisms of POP capacity in the North West;

ii. The request he received from Brig Calitz on 16 August 2012 for 4000 rounds of R5 ammunition to be sent to Marikana;

iii. Lt Col Vermaak unlawfully taking an R5 rifle from a TRT member and pursuing fleeing strikers on 13 August; and

iv. Evidence relating to the Task Team of POP experts.

e. Capt Moolman initially submitted a three-page statement. In response to evidence revealed in the Commission, she followed that with a 19-page statement in August 2013. Her initial statement omitted any reference to, inter alia:

i. Hearing over the radio, within the JOC, that there was a shooting; and

ii. Hearing what she thought to be Brig Calitz’s voice shouting “cease fire” after that shooting.

f. Brig Van Zyl did not submit an initial statement at all, despite being a key member of the 17 person JOCCOM. Brig Van Zyl only submitted a statement in January 2014, in response to the revelation that he had requested the deployment of four mortuary vans to Marikana on the morning of 16 August.

g. One member of the JOCCOM, Capt Seleke has still not submitted a statement.

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168 Exhibit HHH19: Statement of Capt Moolman
169 Exhibit LLL9: Supplementary Statement of Capt Moolman
170 Exhibit ZZZZ3.657: Statement of Brig Van Zyl
h. Brig Tsiloane has submitted a terse one pager\(^{171}\), despite being the head of the National Intervention Unit (‘NIU’) at Marikana, and present in the Protea Coin helicopter with the Overall Commander, Maj Gen Mpembe, during the operation.

1.6.7. These examples are not exhaustive and the same exercise could be done in relation to the supplementary statements of Brig Calitz, Maj Gen Mpembe, Maj Gen Naidoo and the Provincial Commissioner, all of which include pertinent information that ought to have been disclosed up-front in their initial statements.

1.6.8. In summary, the command leadership initially provided terse statements which omitted very important details in relation to the operation at Marikana. Those details only emerged in supplementary statements that were required to respond to damaging evidence as it emerged in the Commission process. That is not the approach one would expect from a responsible police service seeking proactively to provide full disclosure to a commission of inquiry.

1.6.9. Moreover, the initial terse statements of the command leadership were mirrored by the equally terse and opaque statements by SAPS members on the ground on 16 August. Numerous members present on 16 August 2012, who witnessed relevant incidents, have given accounts that are completely lacking in any detail and simply note their presence in Marikana on 16 August and record the fact that they did not discharge their firearms. Other witnesses provide a little more detail about events, but omit crucial elements.

1.6.10. The wholly inadequate nature of the statements of shotists at Scenes 1 and 2 is examined below at Part Ten, section 8; and Part Twelve, section 4. But the inadequacy of statements is not limited to the statements of shotists. As an

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\(^{171}\) Exhibit ZZZZ3.646: Statement of Brig Tsiloane
example, a review of the statements of POP members in Papa 4 and Papa 5 is instructive. Papa 4 and Papa 5 were POP nyalas located immediately adjacent to the pile-up of bodies at Scene 1\(^{172}\). The nyalas remained at Scene 1 for 50 seconds after the TRT volley commenced\(^{173}\). It is inconceivable that the members inside those Nyalas were unaware of the shooting incident. Nonetheless:

a. Of the seven statements from Papa 4 members\(^{174}\), four fail to mention the live ammunition fired by the TRT, or any injuries or deaths to strikers\(^{175}\). And even though Sgt Baloyi discharged two 9mm rounds from inside Papa 4 at Scene 1\(^{176}\), no other member in his Nyala mentions this in their statement; and

b. Of the eight statements from P5 members\(^{177}\), six – including POP commander Lt Col Pitsi – fail to mention the live ammunition fire by the TRT, or any injuries or deaths to the strikers\(^{178}\). One member, W/O Tawana, denies that he was even at Scene 1, claiming that Papa 5 was “at the other scene”.

\(^{172}\) Exhibit KKK51: Position of SAPS Vehicles at the time of the TRT Volley, slide 49
\(^{173}\) Exhibit UUUU10.2(5): CALS and SERI Presentations. Papas 4 and 5 are visible driving away from the scene at 15:54:40 in Exhibit UUUU10.2(5)
\(^{176}\) See Exhibit FFF35: List of Shooters at Scene One
1.6.11. Moreover, both Papas 4 and 5 proceeded to Scene 2 where the members effected arrests\textsuperscript{179}. Shortly after Mr. Mpumza was shot dead, Papa 5 parked within 15 metres of the body and members, including Lt Col Pitsi, alighted from the vehicle and engaged in conversation with Brig Calitz and Lt Col McIntosh next to the body. However:

a. From Papa 4, not a single occupant mentions anything beyond the incidents at Scene 1; and

b. From Papa 5, there are opaque references to arrests made after Scene 1, but not a single member mentions Mr. Mpumza, or any other deaths at Scene 2.

1.6.12. These statements are opaque at best; at worst, they are dishonest by omission. And it must be emphasized that the statements of those in Papas 4 and 5 are chosen purely as examples: they are no better and no worse than the majority of statements submitted by members involved in the operation. Considering all the initial statements provided as a whole, it is impossible to disagree with Mr. White’s conclusion that\textsuperscript{180}:

“The gaps in the evidence, and the inadequate nature of many of the statements provided by the SAPS, does not suggest a police force striving to ensure transparency and/or full and frank disclosure”.

1.6.13. The number of supplementary statements provided by junior members who were present on 13 and 16 August 2012 is limited, but where supplementary statements have been submitted, they have highlighted the lack of frank disclosure in the initial statements submitted. For example:

\textsuperscript{179} Exhibit JJJ178.3: Scene Two Vehicle Movement Analysis; GW6(c), p.18

\textsuperscript{180} Exhibit JJJ178, para.4.3.7
a. Members of Papa 11 gave supplementary statements in relation to a shooting incident witnessed at Scene 2. Cst Mamabolo alleged he witnessed members led by Maj Gen Naidoo climbing over the rocks at Scene 2 firing at protestors. He called ‘ceasefire’ because he could see no threat but his calls were ignored. Cst Mathavha alleged that he witnessed Maj Gen Naidoo firing his pistol at a protestor from the rocks. None of this highly relevant evidence appears in the initial statements of the members concerned. Indeed, both Csts Mathavha and Mamabolo originally provided no evidence on Scene 2, falsely claiming that P11 had parked 150m away from Koppie;

b. W/O Swarts gave a supplementary statement alleging that Sgt Myburgh had admitted to shooting a protestor at Scene. This highly relevant allegation did not appear in his initial statement; and

c. Cst Mguye and Cst Sekgweleya submitted supplementary statements alleging that Lt Col Vermaak had ordered them to shoot at a striker on 13 August after they had pursued a group of fleeing strikers. This highly relevant allegation did not appear in their initial statements. Indeed, their initial statements contained no evidence relating to the pursuit of the striker group at all and provided plainly false evidence in relation to the circumstances of their shooting.

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182 Exhibit ZZZZ3.277: Initial Statement of Sgt Mathava and Exhibit ZZZZ3.249: Initial Statement of Sgt Mamabolo
183 Exhibit LLL14: Supplementary Statement of W/O Swarts, para.42
184 Exhibit LLL13: Statement of W/O Swarts
185 Exhibit QQQ7: Supplementary Statement of Cst Sekgweleya, para.9 and Exhibit QQQ8: Supplementary Statement of Cst Mguye, para.3.2
186 Exhibit HHH29: Statement of Cst Sekgweleya and Exhibit HHH30: Statement of Cst Mguye
1.6.14. Setting aside the concerns relating to the circumstances in which some of these supplementary statements were produced, they raise deeply troubling questions about the amount of information that has still not been disclosed to the Commission by SAPS members who have not provided supplementary statements. The SAHRC submits that the Commission can have no confidence that the majority of members present on 13 and 16 August have provided all relevant evidence to the Commission because there is clear evidence that the initial statements provided by many SAPS members – whether in command positions or otherwise – omitted highly pertinent details.

Section 1.7: Failure to provide statements from many members

1.7.1 Moreover, there are still many witnesses who were present on 16 August 2012 who have provided no evidence to the Commission at all. In October 2013, the SAHRC compiled a list of all members present on 16 August and created a spreadsheet indicating whether the member had provided a statement or pocketbook. In compiling that spreadsheet\(^{187}\), the SAHRC included all statements on the Scott hard drive, as well as those submitted to the Commission. At that stage, the exercise showed that the Commission was missing:

a. More than 65 of c.200 POP members present at Marikana on 16 August 2012 (32.5%);

b. More than 70 of c.165 TRT members present at Marikana on 16 August 2012 (42%);

c. More than 30 of 110 NIU members present at Marikana on 16 August 2012 (27%);

\(^{187}\) SAHRC Spreadsheet: List of all Members Present on 16 August indicating Statement or Pocketbook. Not exhibited, but find at Annexure C
d. Eleven of 22 Special Task Force (‘STF’) members present at Marikana on 16 August 2012 (50%); and

e. Four of 38 Dog Squad (‘K9’) members present at Marikana on 16 August 2012 (10.5%).

1.7.2 Despite numerous requests, by both the SAHRC and the Chairperson\textsuperscript{188}, the SAPS refused to confirm or dispute those figures until 28 August 2014, only a month before the conclusion of Commission hearings. On that date around 50 further statements, produced between May and July 2014, were submitted. However, the Commission is still missing statements from more than 170 members who were present during the operation of 16 August 2012\textsuperscript{189}.

1.7.3 Further cause for concern is evidence that statements that have been produced for the Commission have not been submitted:

a. Lt Col Classen’s oral evidence was that all his TRT Katlehong members had provided statements to the SAPS command at Roots\textsuperscript{190}. However, the Commission is currently in possession of statements from only three of the nine TRT Katlehong members present at Marikana on 16 August; and

b. The Provincial Commissioner’s evidence was that statements were sought from every member who was involved in the Marikana operation, and so she could not explain why so many were missing\textsuperscript{191}.

1.7.4 Further, the SAPS have failed to discover the statements made by arresting officers on 16 August, despite requests made by the Chair for them to do

\textsuperscript{188} Transcript Day 187, pp 22651 – 22652
\textsuperscript{189} Exhibit ZZZZ3: Index to statements of 16 August (those who have not produced any statement are highlighted in purple)
\textsuperscript{190} Transcript Day 236, pp 29535 - 29538
\textsuperscript{191} Transcript Day 187, pp 22649 - 22651
so\textsuperscript{192}. These arresting statements are directly relevant to the Terms of Reference and may either support or undermine the other statements given by members.

\textit{Section 1.8: Failure to conduct any internal investigation or provide any internal critique}

1.8.1 As set out above, the SAPS did not hold a formal debriefing session, as required by SO.262, to identify lessons learned and mistakes made during the operation of 10 – 16 August 2012. Nor did they conduct any internal investigation in relation to \textit{prima facie} evidence of unlawful behaviour by SAPS members. For instance:

a. No internal investigation was conducted into the allegations that tear gas and stun grenades were fired by SAPS members without authority on 13 August 2012\textsuperscript{193}; an act which precipitated the attack by strikers on the police and the deaths of five people;

b. No internal investigation was conducted into the allegations that certain members had threatened to kill Maj Gen Mpembe after the operation of 13 August\textsuperscript{194}; and

c. No internal investigation was conducted into the allegations made by Sgt Myburgh that an NIU member had shot dead an injured striker in Koppie 3 on 16 August 2012\textsuperscript{195}.

1.8.2 In relation to the first two examples, the SAPS have provided no adequate explanation for the failure to investigate. Indeed, Maj Gen Mpembe has

\textsuperscript{192} Transcript Day 140, p.15248 and Transcript Day 187, p.22644

\textsuperscript{193} Transcript Day 110, pp 11802, 11809 - 11810

\textsuperscript{194} Transcript Day 123, pp 12745 - 12748

\textsuperscript{195} Transcript Day 197, pp 24091 - 24101
admitted that investigations should have been carried out\textsuperscript{196}. In relation to the allegations by Sgt Myburgh, the SAPS claim that they could not investigate because they could not interfere with an ongoing IPID investigation\textsuperscript{197}.

1.8.3 That answer is disingenuous. The SAPS were investigating \textit{many} aspects of the events of 16 August, \textit{all of} which were also the subject of an IPID investigation and all of which involved potentially unlawful acts by SAPS members. There is nothing about the Myburgh allegations that distinguishes them, for instance, from allegations made by the injured and arrested strikers that injured victims were shot dead while surrendering at Scene 2. The SAPS sought statements and gave evidence in respect of those allegations so there is no adequate justification for a different approach in respect of the Myburgh allegations. The identity of the \textit{complainant} should make no difference to whether the SAPS can investigate an allegation of unlawful activity by a SAPS member.

1.8.4 Moreover, despite not investigating the Myburgh allegations, it appears that the SAPS \textit{did} investigate Sgt Myburgh himself: Sgt Aucamp was charged by the SAPS legal team to make inquiries about Sgt Myburgh which led to the production of the supplementary statement of W/O Swarts\textsuperscript{198}.

1.8.5 The unwillingness of the SAPS genuinely to engage in an internal critique was brought home in the evidence of Mr. de Rover. Under cross-examination, he revealed quite how resistant the SAPS had been to engage in any self-analysis. The Commission was first told, on 15 May 2013, that the SAPS were working on a further statement setting out the lessons learned from Marikana\textsuperscript{199}. Nothing further was heard of the ‘lessons learned’ document until 23 January 2014, when the Chairperson asked Adv Semenya SC for an update and was told that the document was being produced by Mr. De Rover, but no

\begin{footnotesize}
\textsuperscript{196} Transcript Day 127, pp 13220 - 13221
\textsuperscript{197} Transcript Day 191, pp 23316 - 23317
\textsuperscript{198} Transcript Day 197, pp 24097 - 24098
\textsuperscript{199} Transcript Day 92, p.9815
\end{footnotesize}
indication could be given about the date for submission\textsuperscript{200}. Mr. de Rover confirmed in his evidence that he was never asked to prepare the report on lessons learned and that the statement provided to the Commission that he was engaged in this exercise was wrong\textsuperscript{201}.

1.8.6 However, Mr. de Rover did note that he had pushed the SAPS to produce such a report themselves, but had encountered significant resistance. He said that he thought the SAPS\textsuperscript{202}:

\begin{quote}
\textit{"Equate lessons learnt with mistakes made, rather than saying 'I have an experience and I learn from that experience, and whether that was a good experience or a bad experience I seek to further the learning organisation model and I seek to improve my professional practices... There had been a genuine reticence on that perception of lesson learned equals mistake made, for them to be as forthcoming as you would have wanted them to be."}
\end{quote}

1.8.7 In respect of every level of the SAPS, he gave evidence of a lack of willingness to engage properly in the lessons learned from Marikana. In respect of his engagement with the National Commissioner, Mr de Rover noted:

a. The National Commissioner did not voice any particular criticism of the operation at Marikana to Mr. de Rover\textsuperscript{203};

b. When Mr. de Rover raised the issue of the NMF with the National Commissioner, he received what he, diplomatically, referred to as a "diplomatic answer". When pressed by the Chairman, he agreed that "diplomatic" means "evasive"\textsuperscript{204}, and

\textsuperscript{200} Transcript Day 173, pp 20442 - 20443
\textsuperscript{201} Transcript Day 285, p.36929
\textsuperscript{202} Transcript Day 285, p.36930
\textsuperscript{203} Transcript Day 285, pp 6898 - 36900
\textsuperscript{204} Transcript Day 286, pp 37082 - 37084
c. Regarding whether there was an executive order resulting in the
decision at the NMF endorsing the move to a tactical phase, a critical
issue for the Commission to resolve, Mr. de Rover testified that:

“[His] questions have been straightforward on the point, the answers
have not been. So [he’s] raised that issue, of course [he’s] raised that
issue because it’s an important issue but the answers are not helping
[him]”.

1.8.8 In respect of the Provincial Commissioner\textsuperscript{205}, Gen Annandale\textsuperscript{206} and Brig
Calitz\textsuperscript{207}, Mr. de Rover noted that the only mistakes or errors they shared with
him related to the breakdown of organization or communication during the
operation, and did not engage at all with how the broader failures in
intelligence, planning, briefing and command and control resulted in the death
of 34 strikers.

1.8.9 In respect of Maj Gen Mpembe, Mr de Rover’s evidence was coy. He
acknowledged that Maj Gen Mpembe’s “voice did not prevail” in the decision
making at Marikana\textsuperscript{208}, but stated that Maj Gen Mpembe would not share any
critical comments on the operation of 16 August with him\textsuperscript{209}.

1.8.10 Even at the level of the junior members on the ground, Mr. de Rover
experienced serious reluctance to engage in any analysis of what may have
gone wrong at Marikana. He noted that:

\textsuperscript{205} Transcript Day 285, pp 36900 -36901
\textsuperscript{206} Transcript Day 285, pp 36902 - 36904
\textsuperscript{207} Transcript Day 285, pp 36901 - 36902
\textsuperscript{208} Transcript Day 286, pp 37075 - 37066
\textsuperscript{209} Transcript Day 285 p.36903
a. His first session with the shotists present at Scene 2, “necessitated a General to come in and give an order to speak to me because nobody was prepared to answer, not even a question as to where were you” 210;

b. There was “a general reticence to be specific with [him] on detail” 211; and

c. He acknowledged the serious deficiencies in the details of the statements of junior members before the Commission, which “fall far short” of providing the necessary and required details regarding “whether such fear existed and whether there was a factor of imminence that warranted and necessitated the response given” 212; 213.

1.8.11 Mr de Rover noted that he had seen a draft of the lessons learned document produced internally by the SAPS, but thought it was inadequate. He said 214:

7 It doesn’t identify authors. It doesn’t set terms of
8 reference and it doesn’t clarify the methodology. So I can
9 go on, but it covers some of the issues that interest this
10 Commission, and if I just take my interest as a
11 professional in this field, it doesn’t cover many of the
12 Issues that would interest me as a policing professional.”

1.8.12 In the event, a ‘lessons learned’ document was submitted to the Commission on 16 September 2014, more than two years after the catastrophic Marikana

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210 Transcript Day 286 p.37123
211 Transcript Day 286, p.37122
212 Transcript Day 286, p.37122
213 Transcript Day 286, p.37122. Also see above at Part Four, section 1, and below at Part Four, section 3
214 Transcript Day 285, p.36936
operation, and on the penultimate day of Commission hearings\textsuperscript{215}. As Mr. de Rover anticipated, it is not dated, it does not identify authors, it does not set its terms of reference, it does not clarify the methodology and it does not cover many of the issues that would be of interest to the Commission.

1.8.13 If there was a single act by the SAPS to illustrate the disregard with which it holds the Commission, it was the submission of this lessons learned document on the penultimate day of hearings, at a time when its content could not be explored, questioned or analysed. When it could not assist the Commission to narrow its focus. And when all possible criticisms of the SAPS already were out in the open. The cynical calculation is obvious: wait until the Commission’s investigation is almost complete, then only address those points of criticism that are unavoidable.

1.8.14 But a question remains as to whose lessons are they? What was originally promised to be an internal view on lessons learned transformed into an expert opinion, before transforming into a document seemingly agreed by committee and filtered through the SAPS legal team. Unsurprisingly, the ‘lessons learned’ mirror the points already conceded by the SAPS legal team in the Commission. The SAHRC submits that the circumstances of its production, its methodology and derivation means that the Commission should disregard this document entirely.

1.8.15 However, in the event that the Commission does choose to engage with its content, it will note that after two years of hearings, and in the face of overwhelming evidence of grossly negligent planning and decision making, and disproportionate use of force, the SAPS do not highlight any lessons learned in decision making, planning, briefing, command, or the use of force. Recall that these are the key areas of criticism highlighted by Mr. White – and endorsed by Mr. De Rover who agreed with Mr White. Instead, the SAPS

\textsuperscript{215} Exhibit YYY1: SAPS Lessons Learned
would have the Commission accept that one of the key lessons to be learned is that in future the SAPS should engage experts in the occult to assist in understanding “issues more akin to the realm of magic or supernatural phenomena”. This would be laughable if it were not so serious a matter. If that represents the genuinely held view of the SAPS as to what went wrong at Marikana and how best to learn from that tragedy as a police service, then it tellingly reveals quite how far the SAPS have missed the opportunity to learn the real lessons from the events of August 2012.

1.8.16 SAPS witnesses have repeated that it is for the Commission to reach conclusions on lessons learned and not the SAPS. That is disingenuous. It is absolutely clear that the operation at Marikana went horribly wrong by the most basic measure of loss of life. The SAPS themselves are best placed to analyse what went wrong and to assist the Commission in reaching its conclusions and recommendations. By making no serious attempt at doing so, it makes the Commission’s job substantially more difficult. Moreover, if the SAPS have not genuinely engaged with what went wrong at Marikana, how do they expect to prevent a similar outcome in future. The Chair posed this very question to Mr. de Rover, as follows216:

“So if there’s a problem of
4 the Marikana kind somewhere else tomorrow they still won’t
5 be ready to implement such lessons as they’ve learned from
6 what happened at Marikana. That seems to be implicit in
7 what’s been said. Am I right?
8 MR. DE ROVER: Ja, I would agree that
9 however outlandish some of the facts that appear related in
10 what transpired and produced at Marikana, they managed to
11 get into a sequence and produce that result. Now if you as
12 an organisation don’t recognise that you can’t suffice with

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216 Transcript Day 285, p.36937
setting out the responsibilities of others, you also have to look at your own organisation, so SAPS as an organisation needs to recognise where it fell short of expectations that South African society can hold, and you need to act on those, and whether that is because people that are in charge are not subject matter specialist or expert enough to recognise that, I don’t know. It’s, but the reality remains that some of these discussions that I have had on a personal level, they are difficult. They frustrate because it’s, I almost feel there is a miscommunication, a misunderstanding of the purpose that such a document would serve, and that produces a hurdle that I haven’t been able to get across.”

Section 1.9: The use and treatment of Mr. de Rover

1.9.1 Linked to the SAPS failure to engage in any internal critique has been its use, and treatment, of its policing expert, Mr. de Rover. For the 18 months between the submission of Mr. de Rover’s initial statement and the date of his oral evidence, it appeared he was an expert wholly supportive of the SAPS case, who made only very limited criticisms of the SAPS. By the end of his oral evidence, it was quite clear that he was highly critical of the SAPS, and shared and endorsed most of the criticisms made by the other policing experts, Mr. White and Mr. Hendrickx. The cause of this apparent volte face is clear.

1.9.2 First, it is clear that Mr. de Rover was provided with a great deal of incomplete or misleading information. This matter is developed more fully below at Part Four, section 6. But it says much of the SAPS that it not only misled the Commission; it also misled its own expert.

1.9.3 Secondly, it is clear that SAPS never disabused Mr. de Rover of his misconception of his role in the Commission. Mr. de Rover explained his
failure to provide any evidence on the intelligence, planning, briefing, command and control, and decision making in the fact that he did not want to duplicate the work already done by Mssrs White and Hendrickx, in relation to whom he was broadly in agreement. He said:

“... I need to clarify that here,
4 there’s probably a misunderstanding at that time on my part
5 of what this Commission was supposed to do. It’s only
6 become clear later to me that the parties that are here,
7 besides assisting the Commission, also have a personal – if
8 I, and I allow the wording – a personal case that they
9 represent, an argument. So I was aware of the fact that
10 there were two other international experts and I’d read
11 early statements of both that already went into that. Now
12 I could give you more of the same. I thought I’d try and
13 focus on something different that would actually then
14 assist the Commission, because you have two qualified
15 experts that have looked in detail at that and have made
16 their findings and presented their argument and there has
17 been cross-examination of those. So it wasn’t on my part a
18 deliberate attempt to not look at it, other than
19 misunderstanding your role here. Had I better understood
20 that I may have well decided to say something about it
21 myself and to measure that, but the benchmarks that were
22 used by Mr. White and Mr. Hendrickx are by and large accepted
23 international benchmarks. I likely would have come with
24 similar findings.”

1.9.4 However, until Mr. de Rover gave oral evidence to the Commission, it was entirely unclear that he broadly agreed with Mr. White and Mr. Hendrickx,
because the SAPS had never asked him specifically to consider the matters on which Mr. White and Mr. Hendrickx had given an opinion\textsuperscript{218}.

1.9.5 \textbf{Thirdly}, it appears that there was a concerted attempt by the SAPS to prevent Mr. de Rover from engaging with the other policing experts. \textbf{Annexure E} is attached and sets out the repeated attempts made by the SAHRC to comply with the request of the Chairperson, first made in May 2013, for the experts to reach agreement and narrow points of dispute. That annexure shows, in stark terms, the blanket refusal of the SAPS to engage in this process. Although the SAPS legal team has put interrogatories to Mr. White and has set out its points of agreement and disagreement with Mr. White, Mr. de Rover never engaged directly with Mr. White’s evidence – or with Mr. White – until he expressed his broad agreement with Mr. White in oral evidence\textsuperscript{219}.

1.9.6 Mr. de Rover was coy when asked whether his failure to engage in the expert process requested by the Commission was due to his own reluctance or an instruction from the highest levels of the SAPS. He diplomatically answered: “\textit{a bit of both}”\textsuperscript{220}. We therefore assume that the Commission shares our concerns at this evidence of the likelihood that the National Commissioner actively discouraged any engagement between Mr. de Rover and the other expert witnesses. One can only speculate as to the reasons.

1.9.7 The Commission will conclude for itself whether the manner in which the SAPS treated its own expert is what one would expect from a responsible police service genuinely seeking answers in the aftermath of a catastrophic operation and expert guidance to prevent its re-occurrence. We submit not.

\begin{tabular}{l}
\textsuperscript{218} Transcript Day 285, p.36932  \\
\textsuperscript{219} Transcript Day 286, p.37172  \\
\textsuperscript{220} Transcript Day 286, p.37086
\end{tabular}
Section 1.10: A culture of non-disclosure and denial

1.10.1 Taken together, the examples and instances of false claims, half-truths, omissions of vital evidence, and failures to discover or disclose evidence represent a culture of denial and non-disclosure by the SAPS. At its core, the SAPS is unwilling, or unable, to accept responsibility for the deaths and injuries caused on 13 and 16 August 2012 and has not volunteered any evidence that might lead to such responsibility being attributed.

1.10.2 This culture of denial was encapsulated in the National Commissioner’s evidence. Through 16 days of cross-examination, and a further day before the Chair, the National Commissioner stonewalled. It is not possible to point to a specific transcript reference to exemplify this stonewalling; the reference is her entire evidence. She cannot remember, she does not have the details, she cannot comment. The SAHRC submits that the totality of her oral evidence represented the nadir of the SAPS case. Particularly egregious was her refusal to agree that the SAPS had killed 34 strikers on 16 August, despite the fact that this was an undisputed fact accepted as part of the SAPS case.\(^{221}\)

1.10.3 Similarly, her evidence was that she stood by “every little bit of what” was contained in her statement of 17 August, including the unequivocal claim that all those shot at Scene 2 were part of a militant group storming towards police and firing shots and the police were forced to return fire in self-defence.\(^{222}\) She said that she had had no facts brought to her attention which had caused her to think her statement on the 17\(^{th}\) may not be accurate in some respects.\(^{223}\) This claim was astonishing and false. At the time she gave evidence, she was in possession of:

\(^{221}\) Transcript Day 75, pp 7995 - 7997
\(^{222}\) Transcript Day 65, p.6876
\(^{223}\) Transcript Day 65, p.6921
a. The statement of Sgt Myburgh, which alleged that he witnessed an execution-style killing of a striker by a SAPS member\textsuperscript{224};

b. The Opening Statement of the SAPS, which acknowledged that:

i. Some of the deaths of protestors could not be explained by the SAPS\textsuperscript{225};

ii. Only four of those shot dead were alleged to have been ‘charging’ or ‘storming’ towards police; and

iii. It was possible that some of the strikers were shot mistakenly, in response to friendly fire\textsuperscript{226}.

1.10.4 Further, the National Commissioner’s evidence was given more than three weeks after the walk-through at Scene 2 conducted by Mr. de Rover at which he concluded that at least nine strikers were shot dead by ‘incidental fire’\textsuperscript{227}. As Mr. de Rover confirmed in evidence, he was in regular contact with the National Commissioner around this time.

1.10.5 The culture of denial represented in the National Commissioner’s evidence found its way into the evidence of other witnesses too. Even in June 2014, nearly two years after the killings and in a context where the evidence of the SAPS’s own expert concluded that nine strikers were shot dead by ‘incidental fire’, Capt Kidd gave evidence to the Commission that there was nothing the police should have done differently at Scene 2\textsuperscript{228}.

\textsuperscript{224} Exhibit FFF7: para.3
\textsuperscript{225} Exhibit FFF9, para.45.5
\textsuperscript{226} Exhibit FFF9, para.45.5
\textsuperscript{227} The walk-through took place on 26 and 27 March 2013: see Exhibit UUUU11
\textsuperscript{228} Transcript Day 233, p.29159
1.10.6 Of course, the SAPS have admitted some failures, but they are strategic admissions which do not go to the central issues agreed by all of the policing experts to explain the failure of the policing operation at Marikana. In essence, the SAPS have admitted problems with equipment, not management; provisions, not decisions. In relation to equipment, they have admitted that they had inadequate radios\textsuperscript{229}, insufficient camera technology\textsuperscript{230}, should not have been using high-velocity 5.56 calibre ammunition\textsuperscript{231}, should have had tear-gas masks at Scene 1\textsuperscript{232}, and needed more less-than-lethal options\textsuperscript{233}. All these admissions may well be justified, but they miss the point. As Mr. White noted\textsuperscript{234}:

"I do not accept that the Marikana tragedy occurred because the SAPS were not issued with the correct equipment. Instead, I believe that it occurred because of poor planning, poor briefing and most importantly poor decision making."

1.10.7 In addition to the admissions in relation to inadequate equipment, the SAPS have also made admissions in relation to poor record keeping. In light of the vast gaps in the evidence and the lack of contemporaneous documentation, this is hardly a significant concession, and it is, in any case, a safe concession for the SAPS in the context of the Commission’s terms of reference: poor record keeping did not cause 37 deaths.

1.10.8 More significantly, the SAPS have admitted a breakdown in command and control\textsuperscript{235}. This initially appears to be a significant concession which genuinely engages with the failures of the SAPS operation at Marikana. But on closer
scrutiny, the concession is paper-thin. The SAPS do not concede that those in charge of commanding and controlling the operation failed. They concede only that radios failed and therefore communication broke down and made command and control impossible. So in reality, the concession is yet another concession of inadequate equipment and not – as it might appear – an acknowledgement of inadequate decision making or leadership.

1.10.9 The SAPS culture of denial manifests in several other aspects of the SAPS case. The point-blank refusal to accept that SAPS members may have fired SSG ammunition at Scenes 1 and 2, and the failure to conduct any investigation into its use, despite clear evidence to the contrary\(^ {236}\) is a case in point.

1.10.10 But the high point of the SAPS culture of denial is the transparent strategy of attacking its internal critics. Only two SAPS members have broken ranks and made any substantial criticism of the SAPS operation at Marikana: Lt Col Vermaak and Sgt Myburgh. In response, the same two members have been subjected to hostile attacks in the SAPS case. We say “in response” advisedly: prior to the criticisms made by the members no attacks were aimed their way by the SAPS.

1.10.11 This was most stark in relation to Lt Col Vermaak. Only after he had broken ranks in or around January 2014 did the SAPS attack him in the Commission. After that date:

a. Legal representation was withdrawn by the SAPS who aggressively cross-examined him\(^ {237}\);
b. He was accused, in respect of the events of 13 August, of unlawfully taking an R5 rifle from a TRT member\textsuperscript{238}, launching a vigilante pursuit of strikers, ordering the shooting dead of one striker, and falsely alleging threats made against the life of Maj Gen Mpembe in order to take control over the operation\textsuperscript{239};

c. He was blamed, in respect of the events of 16 August, for the lack of command and control at Scene 2, on the basis that Brig Calitz appointed him as the aerial command post during the operation of 16 August; and

d. He was described by the SAPS as acting, “at the best of times, as a maverick”\textsuperscript{240} who “acted independent of any police structures that control their conduct”\textsuperscript{241}.

1.10.12 Similarly, in response to the statement of Sgt Myburgh, alleging that he witnessed an execution style killing of an injured striker at Scene 2, the SAPS submitted a further statement from a member who alleged that it was Sgt Myburgh himself who had shot the injured striker in Scene 2\textsuperscript{242}.

1.10.13 There are substantial reasons to doubt the evidence used to attack both Lt Col Vermaak and Sgt Myburgh. But assuming the evidence is true, it is the only evidence to have been submitted by the SAPS which directly implicates named SAPS members in unlawful activity at Marikana. Is it purely co-incidence that that evidence relates exclusively to the two members who have made damaging criticisms of SAPS conduct? The SAHRC submits not.

\textsuperscript{238} Exhibit QQQ1: Consolidated Statement of Lt Col Merafe para.5.21
\textsuperscript{239} Transcript Day 223, pp 27503 - 27529
\textsuperscript{240} Transcript Day 225, p.27816
\textsuperscript{241} Transcript Day 225, p.27816
\textsuperscript{242} Exhibit LLL14: Supplementary Statement of W/O Swarts, para.42
1.10.14 Let us assume that the supplementary statement of W/O Swarts is truthful when it alleges that Sgt Myburgh shot an injured striker in Koppie 3. Why was this highly relevant information not included in W/O Swarts’ initial statement? We submit that it was because of the culture of non-disclosure. Why did the SAPS engage Sgt Aucamp to make inquiries about Sgt Myburgh, but not make inquiries about his allegations? We submit that this was because the SAPS needed to discredit Sgt Myburgh.

1.10.15 Let us assume that the supplementary statement of Col Merafe is truthful when it alleges that Lt Col Vermaak unlawfully took an R5 rifle off a TRT member. Let us assume that the evidence of Sgt Mguye and Cst Sekweleya is also truthful when it describes Lt Col Vermaak orchestrating an apparently vigilante pursuit of strikers. Let us assume that Brig Calitz’s evidence is truthful when he alleges that he appointed Lt Col Vermaak as the aerial command post during the operation of 16 August. Why was none of this plainly relevant evidence included in the original statements of the relevant witnesses? We submit that it was the result of the culture of non-disclosure. Why was it submitted only after Lt Col Vermaak had made substantial criticisms of the SAPS? Because the SAPS needed to discredit him.

Section 1.11: Conclusion

1.11.1 In the preceding sections, we have set out the manifold ways in which the SAPS have failed to engage with the Commission in a spirit of full and frank disclosure. We have highlighted key false claims made in the SAPS case, the failures to disclose or discover key evidence, the failure to conduct any internal critique of the Marikana operation, the failure to accept that any errors were made in decision-making or leadership, and we have highlighted

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243 Exhibit LLL13: Statement of W/O Swarts
244 Exhibit QQQ8: Supplementary Statement of Cst Mguye, para.3.2
245 Exhibit QQQ7: Supplementary Statement of Cst Sekgweleya, para.9
246 Transcript Day 165, p.19142
the attacks launched against those internal critics who have broken ranks. The SAHRC’s submission is that the SAPS’ approach to the Commission has been driven by a culture of denial and non-disclosure.

1.11.2 In our submission, that approach was established at the top, in the days following the killings of 16 August. The Minister for Police, the National Commissioner of Police, and the Operational Commander of the Marikana operation all gave a clear and unequivocal lead to SAPS members: ‘you did nothing wrong,’ they said, ‘you have nothing to account for’.

1.11.3 But where does that take us? Why is that relevant to the Commission’s task in reaching conclusions on its terms of reference?

1.11.4 The SAHRC submits the SAPS must be treated as having deliberately concealed evidence and knowingly presented a false case. And that has evidential consequences. As set out above in Part Two, there is ample authority for the proposition that, in the context of an investigation into the breach of the right to life, inferences can – and should – be drawn against a party who fails to provide an adequate explanation for its failure to satisfactorily meet its disclosure obligations or otherwise fails to give its full cooperation to the investigation.

1.11.5 We submit that the following evidential consequences must flow:

   a. The Commission can have no confidence that it is has all relevant documentary material in the possession of the SAPS;

   b. The Commission can have no confidence that SAPS witnesses have disclosed all relevant information within their knowledge to the Commission;
c. Where the only evidence the Commission has to rely on is witness evidence from a SAPS witness, and there are prima facie reasons to doubt that evidence, the Commission should treat it with the utmost caution;

d. Where witness evidence of SAPS members is contradicted by the contemporaneous material, the Commission should prefer the contemporaneous material;

e. Where the SAPS have failed to provide evidence on matters that ought to have been within its knowledge, adverse inferences should be drawn as to why that evidence has not been provided; and

f. Where the Commission is prevented from reaching a finding on the balance of probabilities because of a lack of information provided by the SAPS, the Commission should adopt a lower standard of proof and reach conclusions on the basis of a ‘reasonable suspicion’.
SECTION 2: HOW SHOULD THE COMMISSION APPROACH SAPS EVIDENCE ON THE
DECISION MAKING AND PLANNING OF THE OPERATION FROM 13 – 16 AUGUST,
GIVEN THE INADEQUACY OF THE RECORD KEEPING AND AUDIT TRAIL?

2.1.1 The SAPS have conceded Mr. White’s criticism that the record-keeping and
decision-making audit trail at Marikana was inadequate\(^{247}\). It does well to
recall quite how poor that audit trail is.

2.1.2 Mr. White’s evidence was as follows\(^ {248}\):

> “In the PSNI, there was an oft-repeated maxim that “if it’s not written
down, it didn’t happen”. Providing a decision-making audit trail is
important for two reasons: first, because it allows a reconstruction of
that decision making process after the event; and secondly because the
requirement to document the rationale for decisions ensures that the
rationale is carefully thought through. ‘Keeping the Peace’ requires
such an audit trail\(^ {249}\), but it is a practice that should be culturally
embedded within a police service.”

2.1.3 In relation to the Marikana operation, there are vast gaps in the minutes of
meetings held and the records of decisions made. Annexure GW6(g) to the
Final Statement of Gary White\(^ {250}\) sets out the contemporaneous material that
was available to the Commission in October 2013, and highlights the vast gaps
in that material. Since that document was produced, the handwritten JOC
notes have been disclosed to the Commission\(^ {251}\), but they do not
fundamentally alter the content of that document.

\(^{247}\) Exhibit JJJ178.10: GW8(a) para.3.4; Transcript Day 79, p.8416, per Maj Gen Annandale; Transcript
Day 221, p.27297, per Lt Col Merafe and Transcript Day 210, pp 25994 - 5, per Lt Col Vermaak
\(^{248}\) Exhibit JJJ178: Final Statement of Gary White MBE, para.4.3.2
\(^{249}\) Exhibit JJJ178.13 sections 1.4, 3.30, 3.34, 3.40, 4.29, 4.42, 4.49, 4.66, 4.73, 4.75, 4.77, 4.101, 5.43.
\(^{250}\) Not exhibited, but attached at Annexure C
\(^{251}\) Exhibit JJJ168: Notes from JOC 16 August, Exhibit JJJ169: Notes from JOC 14 August, Exhibit JJJ170:
Notes from JOC 15 August, Exhibit JJJ171: Notes from JOC 17 August, Exhibit JJJ172: Notes from JOC
18 August, Exhibit JJJ173: Notes from JOC 19 August, Exhibit JJJ174: Notes from JOC 20 August,
2.1.4 At paragraph 4.3.1 of his Final Statement\textsuperscript{252}, Mr. White highlights the more significant gaps in the contemporaneous records. They include, \textit{inter alia}:

a. No minute of the JOC meeting at 23:00 on 13 August 2012 where strategic guidance on how to deal with situation was provided by the senior leadership, including the National Commissioner;

b. No minute of the JOCCOM meeting at 14:00 on 14 August 2012, which was the first briefing to a structured JOCCOM, and where stages 1 – 6 of the plan were allegedly set out and agreed upon; and

c. Lack of any contemporaneous record of the reasoning for the following decisions:

i. Decision to abandon the proposed Stage 3 encirclement option, apparently discussed at some stage on 15 August, but confirmed in a formal JOCCOM on the morning of 16 August;

ii. Decision taken around midday on 16 August, to withdraw Nyala 6 from its position and reposition it near the kraal; and

iii. Decision to proceed to the Stage 3 tactical option prior to the 13:30 JOCCOM on 16 August 2012.

2.1.5 Further, there are no records of any briefings given to members throughout the week of 10 – 16 August, nor any records of the debriefing sessions that are

\textsuperscript{252} Exhibit JJJ178

Exhibit JJJ175: Notes from JOC 22 August and Exhibit JJJJ176: Notes from Brief Meeting at Lonmin Mine 23 August 2012
alleged to have taken place between members and section commanders, and section commanders and the command leadership, on 16 August\textsuperscript{253}.

2.1.6 Additionally, the contemporaneous notes kept by members and commanders, where they have been discovered, are extremely limited. On 24 January 2013, the SAHRC sought discovery of all members’ pocketbooks and diaries for 16 August. Less than half of the 677 members’ diaries or pocketbooks have been discovered\textsuperscript{254}, and those that have been illustrate a failure to record anything close to the detail required by SAPS policy and orders.

2.1.7 It is clear that information management and record keeping is an acknowledged problem within the SAPS\textsuperscript{255}. However, for the reasons set out in section 4.1, the Commission can have no confidence that the missing records identified by Mr. White, and highlighted here, do not exist. Indeed, there are reasons to believe that at least some of the documents listed above may exist:

a. In respect of the minutes of the JOCCOM on the afternoon of 14 August, the Commission has evidence from Maj Gen Mpembe that there were minutes taken\textsuperscript{256};

b. In respect of the contemporaneous notes taken by members and commanders, the Commission has evidence from Lt Col Merafe and Capt Thupe that no request was made for such notes\textsuperscript{257}, despite an explicit discovery request made by the SAHRC and an explicit response from the SAPS that no such notes existed. Capt Thupe’s contemporaneous notes were only disclosed because he was due to

\textsuperscript{253} As confirmed by Maj Gen Annandale, these debriefings should have been recorded: Transcript Day 91, p.9764
\textsuperscript{254} Exhibit ZZZZ3: SAPS index of statements and pocketbooks for 16 August
\textsuperscript{255} Exhibit CCCC1.2: Information Note provided to the Minster for Police, February 2014
\textsuperscript{256} Transcript Day 104, p.11182
\textsuperscript{257} Transcript Day 227, p.27996
give oral evidence to the Commission and his legal team saw him referring to the notes during consultations\(^{258}\); and

c. In respect of the contemporaneous notes disclosed by Lt Col Classen\(^{259}\), his evidence was that he first provided them to the SAPS legal team while he was at Roots, but they were not provided to the Commission until the day before he gave evidence to the Commission, almost two years later\(^{260}\).

2.1.8 Nonetheless, whatever the cause of the gaps in the contemporaneous evidence, the fact is that the Commission is faced with a dearth of contemporaneous material on which to reach conclusions. Mr. White notes one consequence of the lack of contemporaneous material as follows\(^{261}\):

"Within his statement, Mr. de Rover makes the point about it being important to avoid the use of hindsight in judging the actions of the SAPS. One of the benefits of maintaining clear and accurate records of the decisions made and the rationale for those decisions is precisely so that officers will be judged on the decisions they took, against the information they had available to them at the material time. The lack of a decision making audit trail at Marikana means that one cannot avoid using a degree of hindsight to assess the decisions taken."

2.1.9 While it would be an error for the Commission to use *unreasonable* hindsight when judging the decisions of the SAPS, it is impossible to avoid a degree of hindsight, given that the contemporaneous material does not set out in clear terms the rationale for the decisions taken, nor the information that was

\(^{258}\)Transcript Day 227, p.27996

\(^{259}\)Exhibit VVV2: Diary of Lt Col Classen

\(^{260}\)Transcript Day 236, p.29521

\(^{261}\)Exhibit JJJ178, para.4.3.2
available at the time. If the SAPS complain of the Commission using a limited degree of hindsight, they only have themselves to blame.

2.1.10 In addition, the SAHRC submits that there may be further evidential consequences that flow from the absence of contemporaneous records in circumstances where such records should have been maintained. We submit that the following approach should be adopted:

a. Contemporaneous material – where it can be verified as genuinely contemporaneous – should be preferred where it conflicts with SAPS witness evidence or with other evidence created by the SAPS after the event;

b. Where the only evidence that the Commission has to rely on is witness evidence by the SAPS, and where a responsible police service would have retained contemporaneous records bearing on that witness evidence, the Commission should treat the witness evidence with caution; and

c. Where no reasonable explanation has been given for the absence of contemporaneous material, the Commission may draw adverse inferences against the SAPS and / or apply a lower standard of proof to questions which would otherwise be answered if that contemporaneous material was before the Commission.
SECTION 3: HOW SHOULD THE COMMISSION REACH CONCLUSIONS ON THE
PROPORTIONALITY AND NECESSITY OF THE USE OF LETHAL FORCE BY SAPS
MEMBERS WHEN MANY OF THE STATEMENTS PROVIDED BY SHOTISTS ARE
INADEQUATE AND NO ORAL EVIDENCE HAS BEEN HEARD FROM THE VAST
MAJORITY OF THE SHOTISTS?

Section 3.1: The SAPS case of self and private defence and the duties of the
Commission

3.1.1 The Terms of Reference of the Commission mandate it to inquire into, make
findings, report on and make recommendations concerning the conduct of a
number of parties, including the SAPS. In assessing the conduct of the SAPS,
the Commission must make findings on262:

“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”

3.1.2 The Commission is further mandated, where appropriate, to refer any matter
for prosecution or further investigation263. As set out above in Part Two, in
order to refer an individual for prosecution, the Commission must only be
satisfied that there is a prima facie case for prosecution; it is not necessary to
conclude that there is a strong case. A prima facie case exists where there is a
reasonable chance of conviction264.

3.1.3 Central to the case of the SAPS is the claim that individual police officers used
lethal force in self and / or private defence265. Self and / or private defence
contain both a ‘subjective’ and an ‘objective’ element. The trier of fact must

262 Terms of Reference, para.1.2.2 (emphasis added)
263 Terms of Reference, para.5
264 National Director of Public Prosecutions v Zuma 2009 (1) SACR 361 (SCA) at [43] where the Court
held that “if there is prima facie evidence of a crime in the sense of reasonable prospects of success the
NPA should, in the absence of other germane considerations, initiate a prosecution.”
265 Exhibit FFF9: Opening statement of the SAPS, paras 28, 44.10, 45.5 and Exhibit L: SAPS presentation
slides 204, 283
put itself in the position of the accused at the time of the alleged attack. In order to do so, evidence from the individual who used lethal force in order to repel what he or she perceived to be an imminent unlawful threat to life is required.

3.1.4 In order to benefit from self and / or private defence, the witness evidence must address both the principle of necessity and the principle of proportionality. That is, it must not simply disclose a reasonable belief of an imminent life threatening attack, but also demonstrate that the response was the minimum necessary in the circumstances to neutralise the threat. In a shooting incident where the shotist fires multiple rounds that means that the shotist must prove that each round fired was justified. In a hypothetical situation, a person may benefit from the defence if he or she fires two shots in response to a threat, but he may have committed murder if he fires 15 shots in response to the same threat.

3.1.5 In the recently concluded United Kingdom inquiry into the police shooting of Azelle Rodney, the Chairman of the Inquiry, Sir Christopher Holland, adopted this approach when assessing whether the eight shots fired by the unnamed police officer were proportionate to the threat he perceived. His conclusion was that the perceived threat was clearly neutralized after the first two shots, and the further six shots were disproportionate and unlawful. The officer was referred for prosecution and is currently awaiting trial.

3.1.6 The SAHRC commends this rigorous shot-by-shot approach. The SAHRC submits that the requirement for justification of each and every round fired is not academic or trivial. As Sir Christopher Holland noted: “This analysis has life and death consequences.” In the circumstances of that case, had the officer paused after shot two, the victim would have survived. The same approach is applicable in respect of Marikana.

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267 The Report of the Azelle Rodney Inquiry, para.21.11
3.1.7 The SAHRC submits that in the vast majority of cases, the SAPS has failed to put forward the evidence necessary to sustain its case on private and self defence. As demonstrated in Part Ten, section 8 and Part 12, section 4 below, the statements of shotists at both Scene 1 and Scene 2 are wholly inadequate. The SAPS’ own expert witness said the statements of shotists at Marikana “fall far short” of providing the necessary and required details regarding “whether such fear existed and whether there was a factor of imminence that warranted and necessitated the response given”\(^{268}\). Mr de Rover noted that they\(^{269}\):

“All sing much of a tune and they don’t offer [the Commission] much clue. And where they do offer a clue I’d actually want detail, the same detail that [the Commission wants]. So they are a frustrating bunch of statements in that sense and that is a given”.

3.1.8 While many statements of shotists set out the circumstances in which they started to shoot, most do not even attempt to justify their continued firing. As such, while many statements may satisfy – at least in part – the principle of necessity, most fail to satisfy the principle of proportionality.

3.1.9 The fact that there were so many shotists does not dilute the responsibility of each individual and does not alter his obligation to justify each and every round. Similarly, the fact that the evidence provided by shotists at Marikana is so appallingly lacking in detail does not alter the legal obligations of the Commission when determining whether shots fired were both necessary and proportionate. The Commission must reach conclusions on proportionality and it can only do that on the evidence before it. To the extent that the SAPS have failed to provide evidence which proves that their use of force was proportionate, then they have failed to discharge their burden of proof.

\(^{268}\) Transcript Day 286 p.37122

\(^{269}\) Transcript Day 286 p.37130
3.1.10 Since the start of the Commission hearings, it has been open to the SAPS to make its case in respect of private and self-defence by calling witnesses to give oral evidence, by submitting detailed written statements from members, and by relying on other evidence before the Commission\textsuperscript{270}. While it may be the case that limited available hearing time has prevented the SAPS from calling all shotists to give oral evidence, this is no answer to a failure to provide adequate \textit{written statements} to support the claim of self and / or private defence. The SAPS has never been prevented from submitting supplementary statements, even where the late submission of many statements – including statements accepted on the final day of hearing – may have been to the prejudice of other parties. Self and / or private defence is the core of the SAPS case. It was incumbent on the SAPS to produce legally satisfactory evidence to establish this case and it has failed to do so.

\textbf{Section 3.2: Irrelevance of the fact that many statements are warning statements}

3.2.1 Throughout the hearings there has been some debate over the relevance of the fact that many of the statements provided by shotists are in the form of warning statements and, therefore, provided in the context of a right to silence. But the nature of the right to silence has at least the following consequences in these circumstances:

\begin{itemize}
  \item [a.] It is a right not to self-incriminate. So it is a right to remain silent about facts that might otherwise lead to prosecution and / or conviction for a criminal offence;
  \item [b.] It does not mean that where the right to silence is waived, and facts are disclosed which – on a prima facie basis – suggest a criminal
\end{itemize}

\textsuperscript{270} Transcript Day 292, p.38359, per the Chairperson
offence has been committed, then that admission carries any less
evidentiary weight; and
c. It is not a right to lie and provides no justification for dishonesty. If
ballistics show that a member fired 10 rounds from his rifle, but the
member has given a statement denying firing any rounds, the fact that
the lie was made in a warning statement provides no protection to that
member.

3.2.2 The Chairperson has stated that\textsuperscript{271}:

“A cross-examiner cannot attach any weight to the fact that such
statement [a warning statement] is silent about an issue as the maker of
the statement might have done so in the exercise of one of his or her
rights”.

3.2.3 The SAHRC submits that this ruling is, in large part, unobjectionable. However,
in one crucial respect it is wrong. A cross-examiner – and the Commission –
can attach weight to the fact that a statement admitting to the use of lethal
force is silent in relation to a defence which would justify that force. The
absence of the defence means that the statement is a \textit{prima facie} admission
to attempted murder. The fact that it is a warning statement does not alter
that admission. To repeat the point: the right to silence is a protection against
self-incrimination; but if an individual chooses to self-incriminate, and then
provides insufficient detail to justify the \textit{prima-facie} crime, the admission is no
less weighty because it appears in a warning statement.

3.2.4 The SAPS bears the onus to justify its conduct at Marikana. Despite the fact
that there is a lack of evidence before the Commission to justify the conduct,
the SAPS has chosen not to provide evidence of such justification. Kriegler JA

\textsuperscript{271} Transcript Day 135, p.14350
stated that “litigation in general, and defending a criminal charge in particular, can present a minefield of hard choices.”272 One of those hard choices is the decision on whether to speak or to keep silent. Either decision carries consequences. But the right to remain silent does not assist the SAPS where, as here, they bear the onus to justify their conduct, they fail to do so, and the Commission is therefore left with a record of evidence of conduct that is, *prima facie*, unlawful and unjustified.

**Section 3.3: Conclusions on approach to be adopted by the Commission in relation to statements of shotists**

3.3.1. The SAHRC submits that the Commission *must* review each and every statement made by shotists in order to reach conclusions on the necessity and proportionality of ‘all and any’ force at Marikana and to discharge its obligations under paragraph 1.2.2 of the Terms of Reference. The SAHRC has not provided a comprehensive review of all statements. We submit that only the Commission can conduct such a review and reach conclusions for itself. We submit that such a review must assess compliance with both the principle of necessity and the principle of proportionality.

3.3.2. In Part Ten, section 8 and Part 12, section 4 of these Heads of Argument, we set out – in respect of both Scenes 1 and 2 – particularly egregious examples of witness evidence that disclose unlawful use of force. Those examples are provided not as a comprehensive summary of all statements that should concern the Commission, but to draw the Commission’s attention to particular classes of statement it will encounter when conducting its own review. Those classes include:

a. Statements that provide no, or no adequate, explanation for the discharge of multiple rounds;

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272 *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) at [97]
b. Statements in which members who shot cannot account for all shots discharged;

c. Statements in which members who shot do not identify any specific target but admit merely to shooting, or shooting at ‘the crowd’, ‘the mob’ or similar; and

d. Wholly inconsistent first and second statements.

3.3.3 As a matter of approach, the SAHRC submits that where an individual has admitted to using lethal force against another person or against members of the crowd of strikers, but has failed to provide adequate justification for each round fired, a *prima facie* case for prosecution for attempted murder exists.

3.3.4 Similarly, we submit that where a shotist has admitted to firing indiscriminately at ‘the crowd’ with no apparent attempt to distinguish between a threat and non-threat, a *prima facie* case for prosecution for attempted murder or reckless discharge of a firearm exists.

3.3.5 Further, the SAHRC submits that where objective evidence shows that an individual has discharged his firearm, but the individual claims to have fired warning shots only, the Commission will have to consider whether the individual’s claims are credible and, if not, whether there is a *prima facie* case to refer for prosecution or further investigation. For instance, where a shotist originally claims to have fired ‘several’ warning shots, and ballistics subsequently established that 15 rounds were in fact fired, the Commission will need to consider whether it is credible that all 15 rounds were warning shots.\(^{273}\)

\(^{273}\) See, for instance Exhibit ZZZZ3.106: Statement of Cst Samuel Hlongwane, para.5 and Exhibit ZZZZ3.106: Additional Statement of Samuel Hlongwane, para.2
SECTION 4: WHAT WAS THE NATURE AND INTENT OF THE CROWD BETWEEN 9 – 16 AUGUST

Section 4.1: Introduction

4.1.1 A key issue to be determined by the Commission is the nature and intent of the ‘core group’ of strikers. While the crowd on or near the Koppie from 13 August 2012 – 16 August 2012 fluctuated in number between around 50 – 3000 people, the evidence as a whole supports the view that there was a core group of around 300.

4.1.2 In essence, the SAPS case is that the core group was an irrational, violent mob. They contend that the core group was militant, highly organized, and shared a single intent to kill and cause destruction. They also contend that the core group had taken muti which they believed made them ‘invisible’ and ‘invincible’ and which would protect them from sharp ammunition. Accordingly to Adv. Semenya SC: “that explains what, absent an explanation, is inexplicable: how people can almost walk in the line of fire as they did”\(^\text{274}\). To understand the SAPS case, you need only understand that starting point. Given that the SAPS have sought to explain why strikers “walked into the line of fire,” it is no surprise that their explanation fixes on the irrational.

4.1.3 There is a very obvious problem with the SAPS case: while there has been substantial comment, accusation, and emotion used to describe the nature of the core group, there is very little reliable evidence which supports the SAPS contentions. Unfortunately for the SAPS, the Commission can reach conclusions only on the evidence before it and not on the basis of submissions or allegations alone.

\(^{274}\) Transcript Day 269, p.34229
4.1.4 In the section that follows, the SAHRC sets out the evidence relevant to this matter and submits that the heights of the SAPS case are wholly unsustainable. The core group undoubtedly contained within it violent, single-minded individuals who were intent on achieving their goal, including by using extreme violence if necessary. There was also a degree of organization and coordination amongst that group. But to extrapolate from that and conclude that, at the time they were shot by the SAPS, there was a ‘single intent’ within the group or that they all believed they were rendered invincible and invisible by muti has no reliable evidential support.

Section 4.2: The undisputed nature of the crowd

4.2.1 The crowd of up to 3000 who gathered on the Koppie at Marikana between 13 – 16 August was not the ‘faceless mob’ initially claimed by Lonmin executives. Instead, it was made up largely of RDOs employed by Lonmin and contained a mix of NUM and AMCU members.

4.2.2 The evidence of Lonmin security was that the crowd became progressively more aggressive and organized as the week progressed. The march on Friday 10 August to the LPD offices was fairly peaceful according to a number of witnesses. On Saturday 11 August, the evidence was that the situation felt a little more tense, the crowd was a little more organized, but it did not feel significantly different from a normal Saturday. By contrast, by the morning of Sunday 12 August, the situation was very tense and the body language of the crowd was different and apparently threatening. The crowd was more organized and contained a separate group of 50 or so who appeared to be

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275 Transcript Day 3, p.130 and Transcript Day 74, pp 7866 - 68 and p.7895
276 Exhibit XXX1: Note to Lonmin Schedules: Composition of strikers; also see Part 2 of Exhibit NNNN2: Phase Two Preliminary Report
277 Transcript Day 261, p.32865 and Transcript Day 262, p.33042
278 Transcript Day 262, pp 33057 - 33058
279 Transcript Day 262, p.33058; Transcript Day 262, pp 33158 - 33159 and Transcript Day 263, p.33277
leading\textsuperscript{280}. The evidence in relation to the attack witnessed by Mr. Louw, Mr. Masibi, and Mr. Motlogeloa was reasonably consistent: the crowd was crouching or squatting and rhythmically banging their weapons before attacking the security members and later killing Mr. Fundi and Mabelane.

4.2.3 Accordingly, it is reasonably clear that by 12 August a fairly organized and coordinated core group had developed within the crowd, even if it was, by that stage, smaller than the 300 members it became. That core group contained a number of very violent individuals willing to commit murder. On 12 August, members of the core group are very likely to have been responsible for the murders of Mr. Mabelane and Mr. Fundi and for the mutilation of Mr. Fundi’s body. On 12 and 13 August, it is possible (but not certain) that members of that core group were responsible for the murders of Mr. Langa and Mr. Mabebe. On 13 August, members of the core group were responsible for the deaths of two police officers, W/O Monene and W/O Lepaku and on 14 August, they were very likely responsible for the murder of Mr. Twala.

4.2.4 The SAHRC has no desire to minimize the threat that members of this group posed to public safety and order. As acknowledged by Mr. White, as the week progressed, the “potentially very very violent crowd”\textsuperscript{281} presented a serious challenge to Lonmin security and to the SAPS\textsuperscript{282}. There is no real dispute about that. However, disputes arise in respect of the following questions:

a. Were the police a pre-meditated target for the group’s hostility?

b. What was the purpose, and the believed effect of, the muti that was taken by members within the group?

\textsuperscript{280} Transcript Day 262, pp 33058 - 61; Transcript Day 262, pp 33158 - 33159 and Transcript Day 263, pp 33277 - 33280

\textsuperscript{281} Transcript Day 251, p.31635

\textsuperscript{282} Exhibit JJJ178: Final Statement of Gary White MBR, paras 1.2.11, 4.1.1, 5.2.11-5.2.12, 7.2.3, 10.1.2; and Exhibit BBB4: Supplementary Statement of Gary White MBE, Part Three
c. Can any significance be attached to particular behaviours of the group, including crouching, singing and rhythmic banging of sticks and spears? and

d. Can the group’s level of organization be equated with a ‘single intent’ or ‘de-individuation’?

The starting point for the Commission to answer each of these questions is the evidence of Mr. X.

Section 4.3 Evidence of Mr. X

4.3.1 Mr. X was to be the star witness for the SAPS; a witness to throw light on the internal workings of the core group of strikers and to explain the motives behind the violence perpetrated against fellow workers, Lonmin security and police members. He was to reveal the murderous intentions of the core group, the purpose of their allegedly gruesome rituals and their desire to kill police members.

4.3.2 Unfortunately, he was not up to the task. Indeed, the SAHRC submits that the quality of Mr. X’s evidence was so poor that it would be unsafe for the Commission to rely on any of his evidence at all. While it is possible that there are elements of truth in his statements and oral evidence, that evidence was littered with so many untruths, fabrications, and contradictions that it is impossible to separate fact from fiction. Below, we set out the reasons to reject his evidence in totum.

4.3.3 First, there are substantial reasons to believe that Mr. X was ‘groomed’ for the role.

   a. Despite his admission to very serious crimes, including murder, Mr. X, uniquely amongst strikers suspected of crimes in the week of 9 – 16
August, has not been arrested or charged with any crime\textsuperscript{283}. Instead he has been kept under police protection since February 2013.

b. Between the submission of his February 2013 statement and his March 2014 statement, his evidence morphed from a potentially credible and frank account of events during the week of 9 – 16 August into an account which perfectly aligns with the SAPS case and reads as though it were an addendum to Exhibit L. The discrepancies between Mr. X’s statements of February 2013 and March 2014 are vast. They were traversed in detail in his cross-examination and it is not necessary to review them all here. As Mr. White noted, there is\textsuperscript{284}:

“A significant difference in the two statements: the latter statement provides substantially more evidence of intention on the part of the striking miners to use force and to attack the police”.

Indeed, a bloodthirsty statement that included numerous references of a pre-meditated intention to kill police, amongst others, replaced an initial statement that contained no reference to any pre-meditated intention to kill police.

c. Mr. X sought to explain away the discrepancies between statements in numerous ways. First, he claimed that the person who took his statement in February 2013 could not speak Xhosa properly\textsuperscript{285}. Following confirmation from the SAPS legal team that the statement taker, Captain MN Ngqoko, was a native Xhosa speaker, Mr. X made various other attempts to explain away the differences between the two statements. The answer he finally settled on did not provide

\textsuperscript{283} Transcript Day 253, p.31884
\textsuperscript{284} Exhibit JJ178.12: Annexure GW10; Gary White Response to SAPS Interrogatories section 4, para 4.1
\textsuperscript{285} Transcript Day 253, pp 31985 – 31988
reassurance: he said that the person who took his March 2014 statement simply asked more detailed (leading?) questions.  

d. Finally, the SAHRC submits that Mr. X’s answers to questions in cross-examination were not the answers of a person giving frank and truthful evidence. In particular, Mr. X’s repeated – and often unprompted – defence of the SAPS was striking. His repeated refrain that “the police were defending themselves”, and his unprompted statements that the police “were innocent about the Marikana happenings” rang hollow and appeared rehearsed. He appeared to be a witness determined to make the SAPS case.

4.3.4 Secondly, Mr. X’s evidence in relation to his core claims to have been at the centre of the lead group of strikers were shown to be false or highly dubious. As Adv. Budlender SC put it to Mr. X: “You were a foot soldier but you want to present yourself as a general.” His cross-examination showed that, contrary to claims:

a. **Mr. X was not part of the Committee of five** chosen on 10 August 2012, as claimed in oral evidence. His February 2013 and February 2014 statements both clearly imply that he was a bystander;

b. **Mr. X was not part of the Committee of 15 makarapas.** The person he identified as himself in a picture of the committee of 15 was shown to be Mr. Madumbe and he was unable to name most of the other

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286 Transcript Day 165, p.31961 and pp 31996 - 31999  
287 Transcript Day 259, pp 32750, 32754  
288 Transcript Day 260, p.32773  
289 Transcript Day 254, p.32010  
290 Transcript Day 245, p.30947  
291 Exhibit AAAA1.2: Typed Statement of Mr. X, para.4 and Exhibit LLL26: Statement of Mr. X, para.8  
292 Exhibit AAAA34: Col Mere’s Photograph
members of the committee of 15, even when shown photographs of those individuals;  

c. **Mr. X is unlikely to have witnessed the killing of Mr. Fundi and Mr. Mabelane.** His allegation that Bhayi Mehlomkomo shot Mr. Fundi is not supported by the post-mortem evidence that shows no evidence of a gunshot wound;  

d. **Mr. X’s is unlikely to have been present during the confrontation with police on 13 August.** The person he identified as him in a photograph of strikers on the railway line appears – on closer inspection – not to be him. Moreover, his account of the events of 13 August in his statement of February 2013 is plainly wrong, particularly his claim that the shooting by police started before Maj Gen Mpembe had ceased counting at the railway line. In oral evidence, he repeated his claim that the shooting took place at around the same time as Maj Gen Mpembe’s counting. In fact, it took place several minutes later;  

e. **Mr. X’s claim that Mr. Mathunjwa arrived at the Koppie on 14 August, after having phoned Mr. Nzuza, to recruit members is false.** The cell records of Mr. Mathunjwa and Mr. Nzuza show the claim to be untrue. Mr. Mathunjwa was not even within 100km of Marikana; and  

f. **Mr. X was not present at the shooting incident at Scene 1 on 16 August.** His evidence of the circumstances of the shooting by police

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293 Transcript Day 253, pp 31890 – 31896 and Transcript Day 254, pp 32014 -32029  
294 Transcript Day 269, pp 34191 - 34195  
295 Exhibit A, p.755  
296 Exhibit AAAA33 and Transcript Day 254, p.31978  
297 Transcript Day 254, pp 31991 - 31993  
298 Exhibit AAAA31  
299 Exhibit AAAA32
was wrong. He claimed that those who were shot – including Mr. Noki – were shot while trying to get in front of Nyala 4 as it drove to the kraal. In fact, the shooting took place 1 minute and 47 seconds after Nyala 4 reached the kraal. Moreover, he claimed that he was still near the kraal when the water cannon was sprayed, which he claimed was before Nyala 4 reached the kraal. In fact, the water cannon was sprayed for the first time 1 minute and 37 seconds after Nyala 4 reached the kraal. His account is fundamentally wrong according to all the objective evidence. Either he was not there at all, or he fled at ‘alleged incident 2’ and never saw the actual shooting or firing of water.

4.3.5 Thirdly, Mr. X’s evidence was lacking credibility in other significant respects:

a. In respect of the use of muti, his claim that the inyanga gave instructions, on 11 August, on how to defy police bullets, lacks credibility. On 11 August, there was a very small police presence in Marikana, and there had been no confrontation between police and strikers by that date. As Mr. X accepted in re-examination, the strikers had no difficulties with police on 10 August, and that had remained the same on 11 August. Simply put, the police were no part of the Marikana story by 11 August. On that date, the strikers’ concern was squarely with NUM. That is whom the inyanga was called to provide protection against. It is simply not credible, given the circumstances, that the inyanga was called to provide protection against the police, or would have given instructions for how to defy police bullets.

300 Transcript Day 259, p.32752 and pp 32759 - 32760
301 See Exhibit UUUU10.3(1)
302 Transcript Day 259, p.32761
303 Exhibit UUUU10.3(1): Video Annexure V2, V2(a), V2(b), CALS and SERI Presentations
304 Indeed, it was such a small presence that Lonmin executives were frustrated and were putting pressure on the SAPS to increase resources: see Part 6, section 1 below
305 Transcript Day 269, pp 34290 - 34291
b. Mr. X’s claim that the inyanga required all who took muti not to change their clothes is not borne out by the evidence:

i. On 13 August, Mr. Noki was wearing different clothes to those worn on 14 August\(^\text{306}\), and

ii. On 15 August, Mr. Noki was wearing a different top to that worn on 16 August\(^\text{307}\).

c. Mr. X’s claim that only one cellphone was permitted on the Koppie is not supported by evidence that the police seized at least five cellphones from strikers arrested on 16 August\(^\text{308}\), and the photograph of the body of Mr. Gwelani, who lay dead next to his cellphone\(^\text{309}\).

d. Mr. X’s claim that coloured string, and a hole in the ground, found at Koppie 3 in October 2012 was evidence of the rituals which took place there between 9 – 16 August is questionable in light of his concession that Koppie 3 was regularly used by many groups in the Marikana area to do rituals\(^\text{310}\). It is unclear on what basis the string and hole in the ground can be tied to 9 – 16 August rather than any of the other rituals held there. Moreover, there is evidence that the hole in the ground may have significantly pre-dated August 2012\(^\text{311}\).

\(^{306}\) Exhibit TTT4: Miners Shot Down film By Rehad Desai; see 2:22 (13 August) and 10:27 – 10:29 (14 August)

\(^{307}\) Compare Exhibit AAAA42: Video Clip from 15 August from 01:33 – 01:36 to Exhibit EEE13: Schedule of Persons Arrested on 16 August 2012 (List of Lonmin employees) at 00:35

\(^{308}\) In the Scott hard drive there is a file called ‘Marikana Cas Five Phones 2012-08-23’ which contains records of five telephones seized from strikers arrested on 16 August: Shobuko Mthethelele; Simphiwe Magezana (IPID A18) (and one of those pictured in hospital in the Zuma visit - DDD2 and DDD3), Mohlalifi Manamulela (IPID A300), Unknown Nokia 1208, Unknown Samsung E1080 All the phones were used on 16 August for either text messages or phone calls

\(^{309}\) 01 SAPS Hard Drive\(\backslash\)LCRC forensics original\(\backslash\)Scene 2\(\backslash\)201208308\(\backslash\)\_DSC3074.JPG

\(^{310}\) Transcript Day 270, p.34328

\(^{311}\) Exhibit AAAA48: Google Earth Image of 24 October 2011 Showing Big Hole on the Koppie
4.3.6 For all those reasons, the unavoidable conclusion is that – while some of his evidence may be truthful – the multitude of false claims and inconsistencies in his evidence does not permit the Commission to distinguish between fact and fiction. Mr. X may have been part of the large group of c.3000 strikers between 10 – 16 August, but it is clear that he was no part of the leadership of that group and has no genuine insight into the intentions or motivations of that leadership. Consequently, it would be unsafe for the Commission to base any conclusions on his evidence.

**Section 4.4: Whether the crowd had a pre-meditated intent to kill police**

4.4.1 The SAHRC submits that there is no evidence supporting the conclusion that the core group of strikers had a pre-meditated intention to attack or kill police either on 13 August or 16 August.

4.4.2 The first time any suggestion of a pre-meditated intention to kill police entered Mr. X’s case was in his March 2014 statement. His earlier statement contains no reference to such an intention. Even the so-called, and disputed, ‘confession’ statements contained in the Mr. X dockets provide no evidence that the ‘confessors’ planned to attack the police on either date\(^{312}\). Those statements reveal two consistent concerns:

a. A clear demand for a salary increase to R12,500 and a desire for management to attend the Koppie to discuss their demand; and

b. Concern by the strikers to protect themselves from attacks by NUM after the shooting incident of 11 August.

\(^{312}\) See confession statements in Dockets 107/08/2012, 109/08/2012, 11/08/2012
4.4.3 None of the confession statements contain any suggestion that the group pre-planned an attack on police on 13 or 16 August. That is consistent with Mr. X’s statement from February 2013 and consistent with statements made by strikers to the police on the railway line on 13 August\(^\text{313}\) and at the Koppie subsequently. The consistent message can be summarized as: ‘we have no argument with the police. We want management to come to the Koppie to discuss our demands. We are carrying weapons to protect ourselves from NUM’.

4.4.4 Aside from the say-so of Mr. X, the SAPS point to two pieces of evidence to support the contention that the strikers had a pre-meditated intent to attack and kill police: the alleged threats made by strikers to various police members from the afternoon of 15 August through to the afternoon of 16 August; and the taking of muti which – at the height of the police case – is alleged to have been taken in advance of a planned attack to provide protection against police bullets.

4.4.5 In respect of the alleged threats made by the strikers, there are serious inconsistencies in the police case. The SAHRC submits that the evidence suggests that certain threats were probably made, but that the number and ferocity of those threats has been exaggerated in the police case. We say that for the following reasons:

a. The Occurrence Book\(^\text{314}\) records none of the threats alleged to have been made, save for a single note at number 998 that records, in respect of the morning of 16 August:

   “The group are moving towards the Nyala. The group leader asked the police official to remove their wires and he said he’s not going to ask them again as he’s also aggressive”.

\(^{313}\) Exhibit QQ2: Video Transcript of 13 August
\(^{314}\) Exhibit FFF25
If the threats were in fact of the nature now alleged by the SAPS, one would expect a report to have been made to the JOC and recorded in the OB.

b. The different drafts of Exhibit L show that the alleged threats increased in both number and ferocity as the police presentation developed. The draft of the police presentation saved on the first day of the Roots meeting contained only a single alleged ‘threat’, in terms that were far less bloodthirsty or threatening than the many threats which were to make their way into the final presentation and statements prepared after the Roots meeting.

i. In Exhibit JJJ37, presented on 27 August 2012, the following was alleged:\cite{315}

“At 15:37 [on 16 August] the leader of the militant group approached the police armoured 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”.

ii. By the time Exhibit L was finalized on 7 November 2012, that threat was one of many, and had morphed into an allegation that Mr. Noki had said that “we must sign a paper to that the world will see how we will kill one another today”\cite{316}.

c. Moreover, the number and ferocity of the alleged threats continued to increase beyond the final draft of Exhibit L. In particular, the alleged threat against Nyala 6 went through several iterations, as follows:

\cite{315} Exhibit JJJ37: Evidence Leaders Table of Time Differences, p.31
\cite{316} Exhibit L: SAPS Presentation slide 192
i. The Occurrence Book entry 998 records:\(^{317}\):

“The group are moving towards the Nyala. The group leader asked the police official to remove their wires and he said he’s not going to ask them again as he’s also aggressive”.

ii. Lt Col Seloane, the commander of Nyala 5, recorded the incident in his operational diary at 10:45. He noted:\(^ {318}\):

“Sitrep: Participants approached nyala no6 which is in front and came to nyala no5 which Lt Col Seloane referred them to the nyala of the negotiations which is at the back by pointing to the back. The participants leader went back to join the participants.”

He explained the incident in his statement as follows:\(^ {319}\):

“While arriving at the scene the strikers approached us with the intention of chasing us away from the line-up. They however went back when noting that we do not pose any threat to them”.

iii. The first reference in Exhibit L, slide 160, notes that “the protestors are formed up near Nyala 6 which was moved back to avoid it being isolated”. There was no mention of any specific threat made to Nyala 6 in Exhibit L or any of the initial statements or pocketbooks of members in Nyala 6.

\(^{317}\) Exhibit FFF25: SAPS JOC OB (Occurrence Book) (12 August – 18 August)

\(^{318}\) Operational Diary of Lt Col Seloane (not exhibited but attached at Annexeure C)

\(^{319}\) Exhibit HHH45: Statement of Lt Col Seloane, para.4
iv. In April 2013, when Maj Gen Annandale gave oral evidence he said that\textsuperscript{320}:

“Mr. Noki came forward and he said that what is this wire doing here, it must be removed and we’re not going to ask again”.

v. In September 2013, Brig Calitz’s supplementary statement recorded that\textsuperscript{321}:

“They moved towards Nyala 6 where they informed the police that they must remove the barbed wire. Mr. Noki informed the police that he was not going to ask them again. The Commander of Nyala 6 then reported this to me.”

vi. On 21 January 2014, after Brig Calitz had been subjected to damaging cross-examination on the nature and extent of the alleged threats, a further statement was submitted by Lt Mhlongo in which the Nyala 6 incident morphed further and it was claimed that Mr. Noki had said: “we must leave the area immediately or we will die”\textsuperscript{322}. Lt Mhlongo’s initial statement contains no mention of the incident at all, consistently with all the other members of Nyala 6.

d. Both Brig Calitz and Lt Col McIntosh acknowledged that the threats were made in Fanagalo and translated to them by the Lonmin

\textsuperscript{320} Transcript Day 78, p.8283
\textsuperscript{321} Exhibit JJJ107, para.81
\textsuperscript{322} Exhibit ZZZZ3.319 Supplementary statement of Lt Mhlongo, para.6
interpreter who accompanied the negotiation team\textsuperscript{323}. Brig Calitz agreed that the interpreter’s understanding was likely to be closer to the truth\textsuperscript{324}. The interpreter’s statement\textsuperscript{325} only contains reference to a \textit{single} threat, and the wording of that threat is significantly different to that alleged by police. A comparison of the alleged wording is instructive.

i. The interpreter states that on the morning of 16 August\textsuperscript{326}:

\begin{quote}
"Two people came forward and said to us that today there will be a fight. They said the police and the strikers must sign a paper that there would be a fight... They started threatening us. They said that the police will run away by foot today. They told us that the police would leave the Nyalas there and that the police would run away on foot”.
\end{quote}

ii. That can be contrasted with the language used in Exhibit L, slide 192:

\begin{quote}
"These Hippos would not leave this place and you will all die today (interpreter)" ... "we must sign a piece of paper so that the world can see how we kill one another today”.
\end{quote}

4.4.6 Considering all the evidence together, the SAHRC submits that it is likely that some hostile words were used by Mr. Noki, and potentially by others, when communicating with the SAPS. But the nature and frequency of that hostility has been exaggerated by the SAPS in an attempt to bolster its case that there was a pre-meditated plan by strikers to attack police.

\begin{flushleft}
\textsuperscript{323} Transcript Day 170, p.20099 and Transcript Day 231, pp 28645 - 28646  \\
\textsuperscript{324} Transcript Day 231, p.20120  \\
\textsuperscript{325} Exhibit JJJ202: Statement of Interpreter  \\
\textsuperscript{326} Exhibit JJJ202, paras 45 - 48
\end{flushleft}
4.4.7 In any case, assuming that a degree of hostile language was used by Mr. Noki or others, it must be seen in context. Mr. White’s evidence was that it is rare in a public disorder situation for the police not to be threatened. He called it “a fairly regular thing”\textsuperscript{327}. And in the context of the tense situation at Marikana, it would have been surprising if there had been no threats or hostility directed at the police.

4.4.8 Rightly or wrongly, the strikers on the Koppie on 16 August believed that the SAPS intended to use force against them and potentially intended to kill them. A cursory reading of the IPID statements taken from the injured and arrested make this clear: three of the first five IPID statements contain clear statements that the strikers believed the police intended to kill strikers on 16 August\textsuperscript{328}. Mr. Mathunjwa told the strikers that if they did not leave the Koppie, the police would kill them\textsuperscript{329}. Further, eyewitness reports given to reporters on the day afterwards suggest that explicit threats were being made to the strikers by police. A Daily Maverick article published on 08 September 2012, reported an eyewitness account given to reporter Greg Marinovich on 17 August 2012, as follows\textsuperscript{330}:

“One miner, on the morning after the massacre, told Daily Maverick that, “When one of our miners passed a Nyala, there was a homeboy of his from the Eastern Cape inside, and he told him that today was D-day, that they were to come and shoot. He said there was a paper signed allowing them to shoot us.”

\textsuperscript{327} Transcript Day 248, p.31253
\textsuperscript{328} Exhibit UUUUS.1: IPID (A3) Statement of Mziwakhe Sekrokro – “if we do not cooperate, blood is going to flow”, Exhibit UUUUS.2: IPID (A4) Statement of Edward Mogathane “police will do anything like shoot them” and Exhibit UUUUS.3: IPID (A6) Statement of Mkhuseli Cakala “the police are going to kill us”
\textsuperscript{329} Exhibit NN: Statement of Mr. Mathunjwa para.81
\textsuperscript{330} UUUUS7
The language reportedly used by the policeman is strikingly similar to that used by Adriao early on 16 August, and quoted on MineWeb: “We have tried over a number of days to negotiate with the leaders and with the gathering here at the mine, our objective is to get the people to surrender their weapons and to disperse peacefully.”

“Today is D-day in terms of if they don’t comply then we will have to act ... we will have to take steps,” he said.”

4.4.9 This is the context in which speeches were made on the Koppie where strikers complained that management were not coming, demanded that the police leave and where Mr. Noki said that two bulls could not fit in one kraal. But the comments need to be seen as part of a whole: as Mr. Matshamba noted most of the strikers were repeating that they were not fighting and simply wanted the employer to come. It is reasonably clear that some hostile language and threats were made to the SAPS, even if the extent has been exaggerated.

4.4.10 But is that evidence of a genuine pre-mediated intent to kill police? We submit not. It would be easy – but erroneous – for the Commission to apply a logic along the following lines: “there is some evidence of threats made by strikers to kill police; later the police perceived that there was an attack on them; therefore the strikers must have been following through on their threats and there must have been a pre-mediated intent by the strikers to attack”. The same logic could be applied to the police: “there is some evidence that the police intended to use live ammunition at Marikana (4000 rounds sent on the afternoon of 16 August, mortuary vans prepared, alleged threats made by police members to strikers); they did use live ammunition; therefore there must have been a pre-mediated intent to do so”. The SAHRC rejects that logic in both cases.

331 Transcript Day 275, p.35165; also see Exhibit L: SAPS presentation slides 163 - 167
4.4.11 In respect of the hostile language and limited threats that were probably made by the strikers we make the following submissions on what the evidence tends to suggest:

a. The strikers were determined to remain on the Koppie until Lonmin management arrived and their demand for R12 500 was met;

b. The police turned up on 16 August with barbed wire trailers and armed units with hundreds of members carrying military assault rifles;

c. Public statements were made by the Provincial Commissioner and the SAPS spokesperson that today was the day that the strike would end and that the police would end the matter;

d. Hostile and ill-judged statements were probably made by SAPS members to strikers along the lines reported in the Daily Maverick piece;

e. The strikers believed that the police intended to forcibly disarm them and force them from the Koppie, and they were determined not to let that happen; and

f. Mr. Noki and potentially others conveyed to the police – and to fellow strikers - in hostile terms, that if that was attempted, there would be resistance and a fight.

4.4.12 That is consistent with the SAPS intelligence on 16 August that the strikers would not leave the Koppie and were prepared to fight if their demands were not met, including by resisting the police. It does not indicate a new

332 Exhibit TT5: Criminal Intelligence Information: Lonmin Platinum Mine: Marikana Labour Unrest
intention to launch an unprovoked attack on a police service then present and numbering more than 600, visibly armed with hundreds of assault rifles.

**Section 4.5: What was the purpose – and believed effect – of the muti?**

4.5.1 At its height, the police case is that muti was taken by the core group of strikers because – in preparation for an attack on the police – they believed it would make them invisible and invulnerable to police bullets. The SAHRC submits that the case is erroneous on three levels:

a. First, it is clear that the inyanga was first called in response to the shots fired by NUM members at the striker group on 11 August 2012. To the extent that the muti was used to provide protection, it was initially protection against the NUM;

b. Secondly, to the extent that muti may have been used after 13 August 2012 for protection against the SAPS, there is no reason to believe that protection was sought for an offensive attack against police, rather than for defensive purposes, in anticipation of an operation by police; and

c. Thirdly, while it seems likely that the strikers hoped and believed that the muti would provide them with some level of protection, the suggestion that they all believed it would make them invisible and invincible does not bear scrutiny, and is, frankly, patronizing.

4.5.2 The first of these three points needs no development. Aside from Mr. X’s nonsensical claim – first made in his March 2014 statement – that the inyanga gave instructions on how to attack police on 11 August, all other evidence points to the fact that the inyanga was first called in response to the shooting

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333 Exhibit FFF6.5 – RDO Disruption Brief 3
by NUM. Indeed, in unguarded moments, Mr. X acknowledged that muti was used to protect people against what they felt were going to be further attacks by the NUM\textsuperscript{334}.

4.5.3 The second point needs only a little further development to note that there is \textit{no} evidence before the Commission – other than the evidence of Mr. X – that muti was ever used as protection against the police, rather than against anticipated attacks from NUM. Nonetheless, it is reasonable to assume that those who were taking muti might have recognized a potential dual purpose as the week progressed. Certainly, by 16 August, a large number of the strikers – and Mr. Mathunjwa – believed that the police intended to use maximum force against the strikers and potentially intended to kill them. It would not have been surprising if muti that was previously used for protection against the NUM was also used for protection against the police. But there is nothing to indicate that it was used – at any stage – for offensive, rather than defensive purposes against an anticipated police operation.

4.5.4 The third point requires substantial development and is a point that the SAHRC urges the Commission to consider very carefully. There is ample evidence that muti was used by numerous members of the core group of strikers, and potentially others, from 11 – 16 August. But as Mr. X conceded in cross-examination, he – and many other South Africans – have used muti all their lives\textsuperscript{335}. Indeed, Mr. X conceded that the use of muti at the Koppie for protection purposes was not unusual\textsuperscript{336}.

4.5.5 As such, it is important to demolish the canard that the use of muti by the strikers at Marikana was somehow exotic or unusual. It was not. It was ordinary. The Commission must be extremely wary of exoticising the core group, and exoticising muti into an anthropological insult. The use of inyangas

\textsuperscript{334} Transcript Day 269, p.34217, p.34221 and p.34224
\textsuperscript{335} Transcript Day 269, p.34216
\textsuperscript{336} Transcript Day 269, p.34217
and the prescription of muti is a part of daily life for millions of rational, intelligent and modern South Africans. It cannot be equated with primitivism or irrationality, but that is – in essence – what the SAPS ask the Commission to conclude.

4.5.6 And what is its intended effect? Manifold. Muti is said to cure illness, heal wounds, assist with financial problems, improve relationships, help remember dreams, induce vomiting, etc. It is part medicine, part belief-system, part traditional practice. And like all medicine, belief systems, or traditional practices, it is fallible and known to be fallible.

4.5.7 Bishop Seoka gave an example of soccer players who would use muti to help them win their matches. He noted:

“RT REV SEOKA: And so the soccer players would, the night of their camping, go through that ritual of cleansing. They’ll be sprinkled with this Ntelezi water and some herbs. Sometimes they go to the soccer fields and sprinkle that thing on the poles, but that doesn’t mean that the team will abandon the game or they would not be defeated – they still get defeated and they still get injured and the following week they will do the same thing. …

23 MR. MPOFU: Maybe just to stretch your example of the soccer players, does the fact that they might use muti prevent them from training and preparing for the game in the belief that the muti will win the game on its own?

24 RT REV SEOKA: No sir, they still

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337 See Exhibit YYYY1: SAPS ‘lessons learned’ document. It is revealing in its reference on p.3 to the use of muti as part of the occult, and within “the realm of magic or supernatural phenomena”

338 Transcript Day 12, p.1379
4.5.8 In relation to the allegation that the strikers truly believed that the muti would make them invisible, and invulnerable to bullets, he noted⁴³⁹:

"1 So these allegations of use of muti to protect the workers against the bullets, it's nonsense really. I mean you're making black people stupid, they're not stupid."

4.5.9 The SAHRC endorses that view. It is one thing to recognize that a cultural practice or belief system exists. It is another thing to say that every person who takes part in that practice unquestioningly subscribes to the beliefs. Prof Lamla tells us that⁴⁴⁰:

"Traditionally, warriors were treated with an infusion of intelezi to render them invulnerable, invincible and invisible. The role of magic comes into play here and it is inexplicable."

Does that therefore mean that this is also what took place at Marikana, and that the strikers shared the belief that they were invulnerable, invincible and invisible? Of course not. Prof Lamla’s choice of the word ‘traditionally’ is revealing. It is a tradition, and part of a belief system, but Prof Lamla does not suggest that it is believed without question by all those who actually take part in the practice.

4.5.10 An analogy: the teachings of the Roman Catholic Church are that when Communion bread and wine is blessed by a priest, it goes through a process of transubstantiation, and the bread and wine is transformed – not metaphorically, but actually – into the blood and body of Jesus Christ. But ask

³³⁹ Transcript Day 12, p.1380
³⁴⁰ Exhibit ZZZ13.1: Statement of Prof Lamla, p.5
a Catholic if they believe that they are actually drinking the blood and body of Jesus Christ during Communion. Some may say yes. Most will not\textsuperscript{341}. But they still engage in the ritual or practice of Communion despite the fact that they do not believe it is having the effect that the formal belief system prescribes.

4.5.11 Indeed, Prof Lamla’s supplementary statement – submitted on the final day of Commission hearings – is striking in the complete absence of any suggestion that the strikers at Marikana would have believed they were invisible or invincible. Instead, he states only that the intelezi would have galvanized the strikers into action to allow them to “die for a noble cause” and “confront the inevitable with fortitude”\textsuperscript{342}. Notwithstanding the fact that we do not accept that the strikers had any intention to die, it is clear that the police’s own expert has disassociated himself from the SAPS case. When their own expert rejects the suggestion that the strikers believed they were invisible and invincible, do the police really maintain that it was the believed effect of the muti?

4.5.12 In relation to the events of 16 August, the suggestion that the lead group of strikers genuinely believed that they were invisible and invincible is also nonsensical when considered against the evidence. This point is developed further in Part Eleven below, but in summary:

a. The strikers were wearing large blankets, allegedly to protect them from rubber bullets. If they believed that rubber bullets could hit them, why would they believe they were invulnerable to sharp point ammunition?

b. The strikers were blocked by Nyala 4 while trying to walk down the road to Nkaneng. Allegedly, rubber bullets were fired at them more

\textsuperscript{341} A 1985 Gallup Poll of practicing United States Catholics showed that less than 30% believed in transubstantiation: see \url{http://www.traditio.com/tradlib/polls.txt}.

\textsuperscript{342} Exhibit ZZZZ13.2: Supplementary Statement of Prof Lamla, paras 20 and 29
than 1 minute and 50 seconds before the TRT fire. If they had been blocked by a Nyala and shot at with rubber bullets, why would they have continued to believe they were invisible?

c. The strikers were shot at, and hit by, rubber bullets before running towards the line of TRT. If they had already been hit by rubber bullets, why would they still believe they were invulnerable to sharp point ammunition? and

d. The strikers who retreated to Koppie 3 are alleged by the SAPS to have been part of the core group of strikers who had initially attacked at Scene 1. If they had seen their fellow strikers shot and killed by police bullets, why would they continue to believe they were invulnerable to sharp point ammunition at Scene 2?

4.5.13 The SAHRC does not question that the SAPS believed that the strikers had developed a “minds et of invincibility”. That is clear from the contemporaneous plan produced by Lt Col Scott on 16 August 2012. But the SAPS belief is irrelevant. The proposition with which Mr. X agreed under questioning by Adv. Mpofu was that muti was intended to offer protection and to make the strikers feel strong and/or brave. The SAHRC submits that this was the extent of the belief. In circumstances where the strikers had been shot at by the NUM, and where they believed the police were likely to launch an offensive operation directed at them, the muti was used to make the strikers feel protected, strong and brave. But it is a leap too far – with no reliable evidential basis – to conclude that the strikers genuinely believed they were invisible and invulnerable to police bullets.

4.5.14 But let us assume the alternative, that at least some of the strikers did believe that the muti had the described effect and that they did believe they were

\[343\] Exhibit JJJ50
\[344\] Transcript Day 269, p.34224
invisible and invulnerable. Does that show intent to attack police? No. In circumstances where the strikers believed that there were likely to be further attacks by the NUM, and believed – rightly or wrongly – that on 16 August the police were going to launch an offensive operation against them, it is far more credible that the muti was used defensively. Accordingly, even on the best case for the SAPS, the use of muti does not assist in seeking to establish a pre-meditated intent to attack the police.

Section 4.6: Can any significance be attached to particular behaviours of the group, including crouching, singing and rhythmic banging of sticks and spears?

4.6.1 The SAPS case appears to be that prior to launching an attack, the core group of strikers would adopt a consistent set of behaviours: crouching, singing and rhythmically banging their sticks and spears. The SAHRC does not intend to engage in this argument in any significant way. It is quite clear that there is no correlation between these behaviours and an imminent ‘attack’.

4.6.2 While it is true that this appears to have been the behaviour exhibited in advance of the attack on Lonmin security guards on 12 August, varying forms of this behaviour were witnessed throughout the days of 12 – 16 August, often in circumstances that did not precede an attack. See:

a. The evidence of Mr. Motlogeloa was that the crouching, singing and banging of weapons that he saw on 12 August was exactly the same as the crouching, singing and banging of weapons he witnessed when he intercepted the crowd on 13 August at the railway line. On 12 August, the behaviour preceded a violent and gruesome attack. On 13 August, the crowd were “very cooperative” and turned back towards the Koppie as requested;

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345 Transcript Day 262, p.33058; Transcript Day 262, pp 33158 - 33159 and Transcript Day 263 p.33277
346 Transcript Day 264, pp 33316 - 33317
b. Mr. Motlogeloa said that the crouching movement that preceded the attack on 12 August was not the same as the crouching visible in Exhibit Z1 as the strikers moved away from the railway line and passed police on 13 August\(^{347}\), and nor was it the same as the movement visible in Exhibit JJJ194.16 which shows the lead group on 16 August\(^ {348}\). When he described the crouching on 12 August, he was adamant that it was more a squatting movement than crouching;

c. In respect of the behavior visible in Exhibit Z1, as the strikers move away from the railway line, it is clear that the behaviour does not indicate an imminent attack. The strikers walked within metres of SAPS members and passed by them without incident\(^ {349}\). Had the SAPS not followed the strikers and fired tear gas and stun grenades, it is highly unlikely any confrontation would have happened; and

d. There is ample media footage of the strikers on the Koppie on 15 and 16 August where they are crouching, singing and rhythmically banging their weapons in circumstances that do not precede an attack\(^ {350}\).

4.6.3 For all these reasons, the SAHRC submits that the crouching, singing and banging of weapons did not indicate an imminent intention to attack. Without further evidence, the Commission cannot conclude with any certainty whether these behaviours have any significance at all or whether they are simply behaviours that manifest solidarity within a group, much as a group of football supporters may clap their hands and sing songs in unison.

\(^{347}\) Transcript Day 264, pp 33253 - 33254

\(^{348}\) Transcript Day 263, pp 33246 - 33247

\(^{349}\) See Exhibit Z1 from 23:30 – 24:05

\(^{350}\) See, inter alia, the Al Jazeera footage from the morning of 16 August, not exhibited but attached at Annexure C, and the SABC footage of the morning of 16 August, not exhibited but attached at Annexure C.
Section 4.7: Whether there is evidence of ‘de-individuation’ or a ‘single intent’?

4.7.1 During the cross-examination of Mr. White, it was suggested by Adv. Semenya SC that the behaviours exhibited by the strikers from 12 – 16 August were indicative of a ‘single intent’ or ‘de-individuation’ within the crowd. In circumstances where mainstream crowd psychology has completely and long rejected the de-individuation theory\(^{351}\), we were surprised at this line of questioning.

4.7.2 Mr. White’s response was measured. He did not discount the possibility of de-individuation or single intent and responsibly suggested that it was a matter for the Commission to determine\(^{352}\). He agreed that the evidence he had seen of the core group showed them moving together and suggested a degree of organization. He gave an example of organised crowds he had experienced where a large section would open up to reveal a gunman who would fire a few shots before the crowd closed again. But he emphasized that this was an example of organization within a crowd, rather than the crowd ‘acting as one’ or individuals within the crowd being ‘de-individuated’\(^{353}\). The Chair referred him to South African cases from the 1980s and 1990s where Le Bon’s de-individuation theory was accepted by the courts. Mr. White responded by noting that his understanding of modern crowd psychology – and his training in crowd management – does not support that theory. He said\(^{354}\):

“17 MR. WHITE: As you say, can’t see into
18 their minds but you know when you deal with crowds, let’s
19 say for example large crowds, football hooligans and I use
20 the term advisedly, you know, there will be a large group
21 of them who are walking together, quite often in packed

\(^{351}\) See Exhibit UUUU11: ‘Crowd Psychology and Public Order Policing’, by Prof Clifford Stott
\(^{352}\) Transcript Day 251, pp 31635 - 31638
\(^{353}\) Transcript Day 251, p.31635
\(^{354}\) Transcript Day 251, pp 31636 - 31637
22 tight formation or whatever. Does it mean that every
23 single person within that group, you know, is going to
24 react in the same way, that they have a single intent
25 because there seems to be a degree of organisation and a
Page 31637
1 degree of connection between them, you know. No, it
2 doesn’t and I think this relates back to some of the
3 conversations we were having yesterday vis-à-vis the Le Bon
4 and you know, the thinking around how crowds are, that
5 people act as individuals within crowds as opposed to a
6 single entity.”

4.7.3 In both his oral and written evidence, Mr. White referred to the work of crowd psychologist Professor Clifford Stott. A sample of Professor Stott’s work was subsequently provided to the Commission as Exhibit UUUU11. We urge the Commission to engage fully with this work as it forms the only formal evidence on crowd psychology that the Commission has received. It was prepared in 2009 for the United Kingdom’s Inspectorate of Constabulary (‘HMIC’) and provides a comprehensive analysis of the way in which the ‘de-individuation theory’ first set out by Gustav Le Bon is outdated, lacking in evidentiary basis, and is counter-productive to public order policing.

4.7.4 The simple position is this: modern crowd psychology does not support the idea of de-individuation within crowds, but suggests instead that individuals remain independent actors even within crowd situations. Mr. de Rover was asked if he was aware of any respectable and up-to-date publications in crowd psychology that supported the de-individuation theory. He was not. We submit that the Commission has no evidence before it that could support a finding which relied, even peripherally, on deindividuation.

355 Exhibit UUUU2.6: Mr. de Rover’s response to CALS interrogatories, August 2014
4.7.5 Given that modern crowd psychology does not support the idea of de-individuation within crowds, on what basis do the SAPS contend that the Commission should conclude that there was a ‘single intent’ or ‘de-individuation’ within the core group at Marikana? The answer is entirely unclear.

4.7.6 Consider the deaths that have been attributed to the core group. Assuming that members of the core group were responsible for the deaths of Mssrs Fundi and Mabelane, is it possible to say that all 300 – 400 were responsible and that all 300 – 400 had an intent to kill? We submit the only answer is in the negative on the evidence available. Large numbers may have been present at the time of these murders, but there is no credible principle of law which equates shared presence with shared intent. Similarly, the evidence available regarding the circumstances of the deaths of Mr. Langa and Mr. Mabebe, as well as Mr. Twala, does not provide any support for the contention that the group of 300 – 400 shared any intent to kill or injure. We do not even know with any certainty that members of the group were involved in Mr. Langa’s and Mr. Mabebe’s murders.

4.7.7 In respect of the police deaths on 13 August, it is absolutely clear from the footage available that there was no ‘single intent’ to kill. The available footage suggests – and police evidence confirms\(^{356}\) – that the group were heading calmly towards the Koppie when the second stun grenade exploded, causing members of the crowd to scatter in all directions. Some of those individuals attacked and killed police members. The majority of the others appeared to run away immediately. So the video evidence prior to the confrontation suggests co-ordination and organization within the group as they move towards the Koppie singing and clanking their weapons, but the video evidence of the moment of confrontation strongly suggests the breakdown of any organization at the time and the absence of any ‘single intent’ to kill.

\(^{356}\) See Part Seven below
4.7.8 The problem for the SAPS is that they need to establish single intent or de-individuation to defend their actions at Scene 1. If there were a multitude of intentions within the crowd at Scene 1, then on what basis could an officer lawfully fire his weapon ‘at the approaching crowd’, rather than at a specific target? That was made clear in the cross-examination of Mr. White when Adv. Semenya SC suggested that all 400 members of the group were attacking the police at Scene 1 and that it was justified to fire at all 400. In fact, only 37 people came past the northern edge of the kraal, and even this group of 37 split into two still smaller groups as they moved towards the TRT. The video evidence of the incidents leading up to and during the incident at Scene 1 does not suggest that the group of 300 – 400 shared any intent. Indeed, that group did not even stay or move together.

4.7.9 Simply put, there is no evidence of ‘single intent’ or ‘de-individuation’ within the crowd, as opposed to evidence of organization and co-ordination within and between certain members of the group. As much as the SAPS may urge the Commission to find that there was a single intent within the crowd, there is no evidence to support that finding over of a finding that the crowd had a degree of organization and coordination. Accordingly, the Commission should reject that urging by the SAPS given that it cannot – and the SAHRC has every confidence that it will not – make such a finding in the absence of any evidence to support it.

4.7.10 Finally, a fundamental assumption in the SAPS case on single intent is that all those who were part of the crowd at Scene 1 and / or Scene 2 were part of the ‘militant group’ who had been taking muti and believed themselves to be invincible. That is plainly wrong.

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357 Transcript Day 251, pp 31687 - 31691
358 Exhibit UUUU10.13: Affidavit of Yoav Dagan, paras 43 – 48; Exhibit UUUU10.3(2): Video Annexure V2(a): The movement of the strikers from the Koppie to the kraal
4.7.11 Because we do not know the identities of all those who were part of the core group between 11 – 16 August, it is impossible to conduct a full analysis of whether those who were at Scene 1 and Scene 2 were part of that group or not. However, at a minimum we can say this:

a. Of the 34 people killed by police on 16 August, 14 showed no evidence of having taken muti\textsuperscript{359}. To the extent that it is claimed that the ‘militant group’ were defined by their use of muti, there were at least 14 individuals killed who appear not to have been a part of that group;

b. Mr. Gwelani was not an employee at Lonmin\textsuperscript{360}. He was not on strike at the Koppie, but was delivering food to his cousin on 16 August when he was caught up in the police operation\textsuperscript{361}. He was no part of the core group. He had not been taking muti\textsuperscript{362}. He was shot dead near Scene 1; and

c. Mr. Mtshamba attended the Koppie for the first time on 15 August\textsuperscript{363}. He was not part of the core group. There is no evidence that he had been taking muti, and the SAPS do not allege that he had. He was caught up in Scene 2 where he witnessed several deaths.

4.7.12 Accordingly, a core assumption of the SAPS case is flawed. Even at the heights of the police case, and on the assumption that the core group was a de-individuated, crazed mob, high on muti and all intent on killing police, there were others who were caught up in the chaos who were innocent of any wrongdoing. In those circumstances, the treatment of the crowd by the SAPS as a single entity – and the suggestion that it was justified to shoot at all 400 individuals who approached Scene 1 – reflects a reckless disregard for life.

\textsuperscript{359} Exhibit KKK10: Summary of Post-Mortem Reports
\textsuperscript{360} Exhibit NNNN2: Phase Two Preliminary Report
\textsuperscript{361} Transcript Day 273, pp 34951 - 34953
\textsuperscript{362} Exhibit A: Post-mortem Reports, report A604 shows no scarification marks
\textsuperscript{363} Exhibit MMM50, para.5
which may explain, in part, the catastrophic loss of life that took place on 16 August 2012.
SECTION 5: WAS THE OPERATION AT MARIKANA A CROWD MANAGEMENT OPERATION OR A ‘HYBRID’ OPERATION AND WHAT WAS THE POLICY GOVERNING SAPS ACTIONS?

5.1.1 At the commencement of the Commission process, there was no dispute that the operation at Marikana was a crowd management operation governed by SO.262 and other public order policing policies. However, as the SAPS case progressed, the waters were muddied by a suggestion that the operation at Marikana was a ‘hybrid’ operation combining elements of crowd management with elements of crime fighting or similar. The current position of the SAPS on this point is unclear, but in this section the SAHRC submits that SO.262 applied for the duration of the operation at Marikana and the SAPS should be judged for its compliance with and against the demands of that policy.

5.1.2 Slides 277 – 281 of Exhibit L set out the Official Directives and Circulars considered by the SAPS to be relevant for the Commission at the time the presentation was finalized. They include, inter alia:

a. Standing Order 262 (Crowd Management);


c. National Instruction of 2012: Crowd Regulation and Management During Public Gatherings and Demonstrations;


f. Divisional Directive XX/12: POP Operational Standards;

g. Use of Force Directive: Public Order Police (POP) Division: Operational Response Services (ORS);

h. Equipment Policy: Public Order Police;

i. Circular: Use of Force during Crowd Management Incidents dated 20 December 2011; and


5.1.3 Reading the full list of relevant policies and circulars cited in Exhibit L, one could not be left with any impression other than that the SAPS considered the operation at Marikana to be a public order operation governed by public order policies. At no point in Exhibit L or in the SAPS opening statement was any hint given of it morphing into a ‘hybrid’ operation.

5.1.4 The first suggestion from the SAPS that the operation might not have fallen wholly within the public order policy framework came in the supplementary statement of Lt Col Scott, dated 19 November 2012, which stated\textsuperscript{364}:

\begin{quote}
\textit{I am not aware that the SAPS has ever been confronted with a situation of the kind with which members were confronted on the ground on 16 August 2012. The plan or strategy that I prepared and proposed for adoption by the JOCCOM was the first of its kind. Neither the crowd management strategies for which Standing Order 262 provides, nor the hostage management strategies were appropriate in isolation. I thus had to devise what I considered at the time to be an appropriate plan for an}
\end{quote}

\textsuperscript{364} Exhibit GGG39, para.6
unprecedented situation, being one which had to encompass the principles of Standing Order 262 but moving beyond the restrictions of the Standing Order to effectively plan for the disarming of the protestors while considering the protection of the police officials and the community in the area when dealing with a belligerent armed group numbering up to 3000 persons who were choosing to contest the request to disperse and/or disarm, demonstrating a clear defiance towards the law and the enforcers of the law with aggressive action should they be approached – as demonstrated on Monday 13th August 2012” (emphasis added).

5.1.5 Setting aside the fact that this statement misleadingly suggests that Lt Col Scott was familiar with SO.262 (he was not), it was the first time that the SAPS had suggested that their plan and approach to Marikana was not governed by it.

5.1.6 Maj Gen Annandale then introduced the concept of the ‘hybrid’ operation in his oral evidence. He stated that:

a. The situation at Marikana was a hybrid situation that went much wider than the circumstances catered for by SO.262\(^ {365}\),

b. The situation was ‘hybrid’ not just because of the presence of other tactical units, but also because of the situation\(^ {366}\) including the level of dangerous arms that part of the group had, and the numbers involved\(^ {367}\); and

c. SO.262 was deficient because it did not deal with such a situation that faced the SAPS at Marikana\(^ {368}\).

\(^{365}\) Transcript Day 86, p.9127

\(^{366}\) Transcript Day 94, p.9997

\(^{367}\) Transcript Day 97, pp 10354 - 10355

\(^{368}\) Transcript Day 169, p.9817
5.1.7 It is important to examine precisely what might be meant by a ‘hybrid’ operation and what we object to. The SAHRC submits that:

a. It is perfectly legitimate to say the Marikana operation was a hybrid operation insofar as there were specialist tactical units supplementing POP units;

b. It is perfectly legitimate to say it was a ‘hybrid plan’ insomuch as the plan involved public order, crowd control elements and tactical, disarm and arrest elements;

c. However, it is not legitimate to say that it was a ‘hybrid’ operation so it fell outside the scope of SO.262 and was governed by no existing policy.

5.1.8 It is quite clear that SO.262 did apply to the operation at Marikana. One of the most experienced POP witnesses to give evidence to the Commission, Lt Col Merafe, disavowed any knowledge of a hybrid operation to which SO.262 does not apply. His evidence was that he had been involved in operations – for instance at Tlhabane in May 2012 – where there was serious public violence, intimidation, loss of life and carrying of dangerous weapons by strikers. He was assisted by TRT, NIU and Air Wing. But it remained a POP operation. He knew of no rule, standing order or legislation that allows the SAPS to exclude SO.262 from a public order operation. He was unaware of any formal principle of a ‘hybrid operation’ as described by Annandale and Scott\(^\text{369}\). He agreed that the operation at Marikana remained a crowd management operation governed by SO.262 after 13 August, even if others might term it a ‘hybrid’ operation\(^\text{370}\).

\(^{369}\) Transcript Day 219, pp. 26924 – 26936
\(^{370}\) Transcript Day 221, p.27310
5.1.9 Mr. White reached the same conclusions on the basis of his own experience. He noted\textsuperscript{371}:

“3.2.4 Notwithstanding the fact that the threat to police was significant, and specialist units were brought in to assist the POP members, I consider that the situation at Marikana was a crowd management situation to be managed according to established crowd management principles. In the wide spectrum of public order events, the situation presenting itself at Marikana was extremely challenging, but that does not mean that the application of public order / crowd management principles was no longer appropriate. My understanding is that SO.262 continued to be applicable to the SAPS operation at Marikana.

3.2.5 As set out in my Final Statement, I have been involved in the management of many public order situations in Northern Ireland, ranging from the very peaceful and predictable to the very violent and unpredictable. An increase in the violence or unpredictability of a situation does not lessen the relevance or applicability of established crowd management principles. However, what it does require is an intensified focus on intelligence gathering, planning, briefing, communication, and command and control. Fundamentally, this is the foundation of many of the criticisms in my Final Statement: precisely because the situation at Marikana was potentially so volatile, substantially greater consideration should have been given to alternatives to a tactical option to disarm the strikers; and precisely because the situation was so challenging, there should have been a substantially greater focus on intelligence gathering, planning, briefing and communication.”

5.1.10 Mr. White developed this point in oral evidence where he noted\textsuperscript{372}:

\textsuperscript{371} Exhibit BBBB4: Supplementary Statement of Gary White MBE, paras 3.2.4 – 3.2.5
"4 So is this purely and simply a crowd management situation in the same way that we’re dealing with a football match or something else? No, it’s not, but I’ve never said that, and, but ultimately this is about dealing with crowds and understanding how crowds work and understanding how when police officers do certain things the implications and the likely response from crowds, and working through a system which is planned and well thought out so that hopefully we can get to an outcome which means everybody goes home."

5.1.11 There is a suggestion in some of the interrogatories set for Mr. White, and in the questions Mr. White was asked in cross-examination, that the SAPS contend that SO.262 only applies when protestors are acting within the law. At the risk of stating the obvious, this is nonsensical: if protestors consistently acted within the law, there would be no need for public order policing. SO.262 clearly applies in circumstances where protestors are breaking the law. The one limited exception may be where police members are genuinely forced to act in private and self defence. In those circumstances, their actions may fall outside SO.262 and instead be governed by common law. However, in this context, it is worth repeating Mr. White’s response to a SAPS interrogatory, questioning the relationship between clause 11 of SO.262 and the SAPS claim to self and private defence during the Marikana operation. Mr. White set out his view as follows:373:

“1. An officer can use lethal force in a public order situation and remain within the law and within policy;"
2. Therefore, the fact that police use lethal force against an individual within a public order event does not necessarily mean that the policing operation is a failure;

3. However, where more than 100 police members shoot more than 600 rounds of live ammunition in a public order event, killing 34 people and injuring more than 70, it is almost impossible to conceive of circumstances in which that would not represent a failure of public order policing.

4. Further, for all the reasons set out in my Final Statement, I consider that the SAPS operation of 16 August 2012 represents a serious failure of public order policing.”

5.1.12 Accordingly, the SAHRC submits that, save for circumstances in which individuals can prove that they acted in private and self-defence, the SAPS operation at Marikana was governed by SO.262 from start to finish. The chief planner, Lt Col Scott, may not have been aware of that fact and may not have been aware of the policy, and Maj Gen Annandale may not have liked the limitations imposed by the policy, but there is no legitimate argument that SO.262 was somehow set aside.
SECTION 6: HOW SHOULD THE COMMISSION APPROACH THE EVIDENCE OF THE EXPERT POLICING WITNESSES?

Section 6.1: The value of expert evidence on policing (violent) public (dis)order

6.1.1 Expert evidence is both necessary and required to assist the Commission and enable it to fulfill its Terms of Reference:

a. Policing is a matter of expertise, following years of training and experience, about which the Commissioners, with respect, do not possess the necessary specialist knowledge. And, within policing, public order policing is a matter of particular expertise, and public order policing in the context of violent protest is a further specialisation;

b. Similarly, the collation of videographic evidence is a matter of technical expertise, as is the analysis of videographic and audio material;

c. Accordingly, the SAHRC has obtained the evidence of various experts and specialists in relevant areas that have provided the Commission with the assistance of their expert opinions and conclusions. In what is set out below, we focus on the evidence of the three POP experts that testified before the Commission. However, we submit that the evidence placed before the Commission from Ms. Katherine Scott and Mr. Yoav Dagan similarly is essential in enabling the Commission to determine the questions set out in the Terms of Reference (and paragraph 1.2 in particular).

6.1.2 The particular need for expertise to be available to commissions of inquiry into killings by the State was recognised in a report by the United Nations Special
Rapporteur, Philip Alston\textsuperscript{374}. That report noted that the assistance of experts is required to ensure that such commissions of inquiry are able to carry out their mandated investigations into the use of force.

6.1.3 In sum, particular policing expertise is required here for the Commission to reach any conclusions (as required by the Terms of Reference) regarding the appropriateness or otherwise of police action at Marikana. Moreover, because such conclusions cannot be reached purely on the basis of common sense or general knowledge, the expert evidence placed before the Commission by the SAHRC, the LRC and the SAPS must point the Commission towards its conclusions in determining whether the SAPS operation at Marikana can be criticised, on what grounds, and as to the recommendations to be made to the President to redress these identified failures and deficiencies.

6.1.4 Of course, the utility and relevance of the expert evidence is a function of the level of expertise of the expert in question, the scope of evidence considered, and the rigour of the analysis by the expert of that evidence. Here, this means that the policing experts are no better-placed than the Commission to advise on the question of the proportionality or justifiability of individual officers shooting, but none have sought to do so. Rather, the policing experts here have provided invaluable evidence and insight into how policing should work in circumstances such as those prevailing at Marikana.

\textit{Section 6.2: The consensus reached between policing experts assisting the Commission}

6.2.1 Initially, it appeared as if there were two experts who were critical of the police’s conduct and the operation at Marikana, namely Mr. Gary White, MBE and Mr. Eddie Hendrickx, and one that appeared to exonerate the SAPS, Mr. Cees de Rover. The scope of their expert evidence also was revealing. In broad

\textsuperscript{374} A/HRC/8/3, para.32
terms, Messrs. White and Hendrickx gave evidence in line with the prevention / precaution approach, engaging in considering (and criticizing) the adequacy of the intelligence, oversight, planning, decision-making, briefing, tactics, operational command and control, and inadequate accountability mechanisms. Mr. De Rover did not address any of these matters.

6.2.2 However, as became abundantly clear during his oral evidence, Mr. De Rover endorsed the criticisms of the Marikana operation made by the other experts, and by Mr. White in particular. He explained that he did not address the criticisms made by Mr. White because he was in broad agreement with them and sought not to duplicate them before the Commission. He testified as follows:

“9 So I was aware of the fact that
10 there were two other international experts and I’d read
11 early statements of both that already went into that. Now
12 I could give you more of the same. I thought I’d try and
13 focus on something different that would actually then
14 assist the Commission, because you have two qualified
15 experts that have looked in detail at that and have made
16 their findings and presented their argument and there has
17 been cross-examination of those. So it wasn’t on my part a
18 deliberate attempt to not look at it, other than
19 misunderstanding your role here. Had I better understood
20 that I may have well decided to say something about it
21 myself and to measure that, but the benchmarks that were
22 used by Mr White and Mr Hendrickx are by and large accepted
23 international benchmarks. I likely would have come with
24 similar findings.”

Transcript Day 285, pp 36992 - 36994
6.2.3 Further, Mr. de Rover confirmed that the SAPS document setting out points of agreement and disagreement with Mr. White was not a document he had seen or approved. The points of disagreement in that document were not his points of disagreement. Because it was not clear prior to Mr. de Rover’s oral evidence, he stated that he “tried to make amends here, publicly, by acknowledging that I agree with [Mr. White’s] analysis”.

6.2.4 The only material point of disagreement between Messrs. De Rover and White appeared to be that Mr. de Rover considered that the SAPS were incapable of meeting the best practice standards against which Mr. White assessed the SAPS performance at Marikana due to poor recruitment, training, leadership and operational competence. Mr. de Rover said:

“20 MR DE ROVER: And I apologise, but I do
21 think it’s important to say that ideally you’d hold a
22 police force to 100% achievement on those points that Mr
23 White has made. Stockwell shows that it was impossible;
24 what it has done is lead to recommendations of improvement,
25 but it didn’t lead to condemnation because none of the
Page 36996
1 officers involved have been held accountable for the death
2 of Mr De Menezes. There has been no finding of
3 illegitimate killing.
4 So what I’m saying here is whilst I acknowledge
5 the pertinence of Mr White’s findings, I take issue with
6 the relevance in the local context, and particularly in
7 terms of SAPS’ ability as an organisation and police force
8 to comply, because best practice is something that you can

376 Emailed response from Mr. de Rover, dated 10 September 2014, not exhibited but attached as Annexure C. The SAPS points of disagreement with Mr. White, dated 01.06.2014, are not exhibited but attached at Annexure C
377 Transcript Day 286, p.37172
378 Transcript Day 285, pp 36995 - 36996
9 afford economically. You can have the cost to bring it
10 into your organisation and you can train your people to the
11 level to produce that result and then you can sustain it.
12 So, and then it can be your best practice.
13 So if you impose a standard you have to I think
14 also ask these questions, and that I think is critical. I
15 think that SAPS’ ability in absolute terms, and I’m not
16 talking ill will or bad design, or you know, I’m just
17 saying that I don’t judge SAPS’ ability to conform to the
18 requirements that those standards put on par with the UK
19 police. So their score would never be a perfect 100. Even
20 at the onset with the best of intentions and the best of
21 will they would not be able to score 100.”

6.2.5 However, even that limited point of disagreement can be challenged. The
SAHRC submits that Mr. White was not applying an unreasonable standard to
the SAPS because:

a. International best practice is the standard that the SAPS set for itself:
   see the evidence of Minister Mthethwa; and

b. Although Mr. White relied on his own personal experience of policing
   public order, the majority of his analyses and criticisms of the SAPS
   operation at Marikana were based on the policy framework
   applicable to the SAPS, in particular SO.262, that he analysed carefully
   before engaging in any critique.

6.2.6 Consequently, Mr. de Rover’s oral evidence essentially confirmed that the
Commission has no genuine conflicting opinions before it from the policing
experts. In respect of the causes of the failures in the police operation at

379 Transcript Day 256, p.32430
380 See Exhibit JJJ178: Final Statement of Gary White MBE, Part 2
Marikana, all experts are in broad agreement with each other and endorse the criticisms made by Mr. White\textsuperscript{381}.

**Section 6.3: Evidence of Gary White MBE**

6.3.1 Mr. White’s extensive, decades-long experience in public order policing, including the policing of violent protest, renders him uniquely placed to comment on the SAPS’ public order policing of the volatile crowd present at Marikana in August 2012. The SAPS did not object to his qualification as an expert before the Commission, and we therefore do not address his credentials any further.

6.3.2 Mr. White’s evidence followed the *McCann* approach to assessing policing conduct where lives were lost. He engaged specifically in the inadequacy of the intelligence, planning, decision-making, briefing, tactics, and command and control utilised by the SAPS during the Marikana operation. In broad terms, Mr. White’s conclusions on the factors that contributed to the failure of the policing operation at Marikana on 16 August 2012 are set out in detail – and fully referenced – in the parts that follow. Here, they are merely summarized, as follows:

a. Poor intelligence –\textsuperscript{382}

   i. The operation was not intelligence-led, in that the intelligence requirement set by the chief planner was not satisfied, little actionable intelligence was obtained and the further intelligence that was available did not reach the chief planner or commander.

\textsuperscript{381} We do not address the evidence of Mr. Hendrickx in these submissions since we leave that to the LRC and do not wish to duplicate those submissions. We merely note that Mr. Hendrickx agreed with the criticisms and analysis provided to the Commission by Mr. White, and that his own further submissions to the Commission complement and reinforce those of Mr. White.

\textsuperscript{382} Exhibit JJJ178: Final Statement of Gary White MBE, p.59, and Transcript Day 249, pp 31295 – 31299 and pp 31347 - 31360
and therefore did not inform the planning for the tactical phase of the operation;

ii. The overall strategic commander who made the decision to proceed to the tactical phase of the operation (Provincial Commissioner Mbombo) failed to engage with the most up-to-date intelligence before making critical decisions; and

iii. The decision to move to a tactical phase of the operation was an error given that the limited intelligence available indicated the inevitability of violent confrontation with at least some of the strikers.

b. Poor decision-making –

   i. The officer in overall command of the operation and who made the decision to implement the tactical phase of the operation (Provincial Commissioner Mbombo) had no public order policing expertise or experience;

   ii. The decision to implement the tactical phase of the operation was taken by the Provincial Commissioner and others at the extraordinary session of the NMF without input from the experienced operational commanders on the ground at Marikana;

   iii. This decision preceded the development and adoption of any plan for a tactical DDA phase, and preceded any risk assessment,

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and therefore was an uninformed decision that did not take into account what was reasonably foreseeable; and

iv. No record was kept of both the fact and the rationale for critical operational decisions, including the absence of a record for why alternative options were rejected in favour of the adopted course.

c. Poor planning

i. The planning process was unreasonably rushed, did not draw on public order policing expertise or experience, failed to include contingency planning (exploring the ‘what ifs’) and was not the product of a robust challenge process by the command leadership of the operation;

ii. The plan placed large numbers of armed police officers in a position where there was a high risk they would be forced to utilise higher levels of force, and that this risk could have been substantially reduced with a different plan;

iii. Very few of the commanders designated for key roles in the operation had recent or relevant training in policing protest; and

iv. The plan contained several fundamental errors regarding crowd dynamics and expected crowd behaviour.

d. Poor briefing

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384 Exhibit JJJ178: Final Statement of Gary White MBE, p.61, Exhibit BBBB4: Supplementary Statement of Gary White MBE pp 7 – 13, and Transcript Day 249, pp 31294, 31299 – 31304, 31317, 31366 - 31380

i. Some officers were not briefed at all regarding their role in the operation;

ii. Some officers misunderstood even the fundamental features of the stage 3 operation;

iii. An inappropriate environment was used for briefing, and there were no written notes from which briefing was conducted that members could take away with them, nor a written record of what various units were told during the briefing; and

iv. No video record of ‘mission critical’ briefings was made.

e. Poor command and control –

i. There was no clear strategy that informed the actions of the police on the ground during the operation;

ii. Despite the fact that a ‘command structure’ had been put in place for the duration of the operation, critical operational decisions were made outside of that structure, notably at the NMF;

iii. The events following Scene 1 show a complete breakdown in command and control, including failures in the JOC, by the Overall Commander, by the Operational Commander, and by individual unit commanders; and

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386 Exhibit JJJ178: Final Statement of Gary White MBE, p.97 and Transcript Day 250, pp 31453 - 31455
iv. It also appears that the Operational Commander was overwhelmed with the scope of command required of multiple units across an expansive operational terrain and was not in command or control of the operation.

f. Inadequate accountability mechanisms – 387

i. There is evidence of a culture of impunity or indifference within the SAPS, rather than a culture of accountability where officers are aware that their actions, and those whom they command, will be scrutinised and subject to discipline or other consequences if found to be lacking in any way;

ii. A lack of cooperation or willingness to assist the Commission in its fact-finding role, notably with respect to the poor statements of the SAPS members and difficulties experienced by the Commission in obtaining contemporaneous evidence timeously;

iii. A systemic failure to account for the use of live ammunition, and the extent of that use; and

iv. Poor leadership that failed to set the tone for accountability and taking responsibility for the failure of the policing operation that resulted in 34 deaths by the SAPS.

6.3.3 In summary, Mr White concluded that even if all shots fired by SAPS members on 16 August were fired in legitimate self or private defence, the operation at Marikana represented a significant failure of policing and – based on the McCann approach – the SAPS should be held accountable for the deaths caused.

387 Exhibit JJJ178: Final Statement of Gary White MBE, p.27, Exhibit BBBB4: Supplementary Statement of Gary White MBE, p.21, and Transcript Day 249, pp 31335 – 31336, pp 31433 - 31434
6.3.4 Mr. White expressly acknowledged that it was not within his expertise to provide an opinion to the Commission regarding the conduct of the trade unions, Lonmin or other third parties that were relevant to the strike. However, he did acknowledge that in a typical public order policing operation, there were third party stakeholders and role-players whose actions and conduct could assist in resolving a given situation. But he also explained that the police retained primary responsibility for ensuring safety and security, including facilitating the right to protest, regardless of whether third parties actually assisted in de-escalating a situation.388

6.3.5 Similarly, it is not within Mr. White’s expertise to determine the proportionality or justifiability of individual shotists’ actions, since this is for the Commission alone. But Mr. White did come to a *prima facie* conclusion that there was evidence of a disproportionate response at Scene 1 given the number of rounds fired and the circumstances in which those were fired (the vast majority into a dust cloud as a result of which no imminent threat was perceptible).389

6.3.6 In addition to his clear qualification as a public order policing expert, with expertise in policy violent protest in particular, Mr. White clearly demonstrated a full and comprehensive grasp of the facts and familiarity with the evidence before the Commission. Indeed, a review of his evidence reveals that there was no piece of evidence that the SAPS – or any of the Commissioners – put to Mr. White that he was not familiar with or which he had failed to consider in reaching his conclusions and opinions.

6.3.7 Specifically, Mr. White reviewed and considered the overwhelming majority of the statements submitted to the Commission by the SAPS. In addition, he

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388 Transcript Day 250, pp 31499 - 31503  
389 Exhibit JJJ178: Final Statement of Gary White MBE, pp 111 – 118 and Transcript Day 249, pp 31428 - 31433
reviewed much of the transcript evidence of the key role-players in the oversight, decision-making, planning and operational command of the operation at Marikana. As a result, Mr. White reached his conclusions having seen the vast majority of the evidence before the Commission and, we submit, all of the evidence that is material to evaluating the SAPS’ conduct at Marikana as required by paragraph 1.2 of the Terms of Reference.

6.3.8 Mr. White’s analysis and conclusions reached following this engagement with the evidence before the Commission was comprehensive, clear and compelling. He provided the Commission with extensive references to the evidence to justify each and every one of his findings.

6.3.9 Turning to consider the attacks on Mr. White’s evidence by the SAPS, we submit that the nature of the cross-examination of Mr. White was revealing.

a. First, he was not attacked on his evidence, but on what he had not given evidence on: 390

i. As explained above, Mr. White properly conceding that he had neither considered, nor expressed a view to the Commission, on the conduct of the trade unions or Lonmin or regarding how this conduct contributed to the outcome of the policing operation on 16 August 2012;

ii. This, however, was a wrongheaded attack since Mr. White readily acknowledged the limits of his expertise, and his lack of qualification to opine on matters of labour democracy or labour relations between employees and their employer;

390 Transcript Day 250, pp 31499 - 31503
b. Secondly, the SAPS attempted to minimise the usefulness of Mr. White’s evidence to the Commission by contending that he had no experience of violence comparable to the scale and severity of that seen in the days preceding 16 August 2012:

i. Mr. White consistently acknowledged that the strike presented a highly volatile and violent situation, and that the SAPS faced a serious challenge from the crowd;

ii. However, Mr. White was not unfamiliar with extreme levels of violence arising from sectarian violence, nor with highly motivated crowds prepared to resort to violence and dangerous weapons, including against the police;

iii. The wrong-headed nature of the attack was shown up by Mr. White’s testimony of regular encounters with crowds with individuals carrying AK47s, and his evidence that he had, for example, commanded a POP operation where he found a suspected informant “decapitated by use of a shovel.”

c. This approach to Mr. White’s evidence by the SAPS – highlighting the dangerous nature of the crowd – simply confirmed his oft-stated view: the planned operation to disperse, disarm and arrest the strikers was unnecessary and foreseeable high risk, and likely to result in the use of live ammunition. Mr. White’s opinion remained that the tactical phase of the operation was an option most likely to lead to an escalation of risk and the threat of violence being used by the strikers and police.

d. Most telling was the fact that the cross-examination by the SAPS did not include any proper engagement on Mr. White’s primary criticisms.

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391 Transcript Day 250, pp 31500, 31541
392 Transcript Day 282 p.31646
regarding planning, briefing, oversight, decision-making, and command and control.

i. It became clear once Mr. de Rover took the stand as to why this was so: the SAPS had no contrary expert opinion to put to Mr. White since Mr. de Rover endorses each of these criticisms.

ii. While the SAPS did cross-examine Mr. White regarding whether he was of the view that further POP measures were available to the SAPS but unused at Marikana, this misunderstood the evidence. The objective evidence is that the POP measures, or, rather, the less-than-lethal force that was available to the SAPS during the operation at Marikana, was either not used at all on the lead group of strikers (water cannon) or used inappropriate (tear gas and stun grenades)\(^{393}\).

iii. In all other respects, the SAPS did not challenge Mr. White’s evidence regarding the contributing failures that resulted in the overall failure of the policing operation at Marikana.

iv. As a result, substantial weight should be attached to the evidence provided by Mr. White, whose evidence only was strengthened rather than diminished under cross-examination.

6.3.10 In short, there is no expert evidence before the Commission that contradicts that of Mr. White. Given that the Commission is required to utilise expert evidence in fulfilling its mandate with respect to paragraph 1.2 of its Terms of Reference, there is no alternative available to it but to accord his evidence substantial weight.

\(^{393}\) Transcript Day 251, pp 31661 - 31663
6.3.11 As a result, Mr. White was requested by the Evidence Leaders to provide them with his proposed recommendations to the Commission addressing the issues he raises with respect to the conduct of the SAPS at Marikana. This document is attached hereto as Annexeure B and addressed in the final section of these submissions.

6.3.12 We turn to address the evidence of Mr. de Rover. We begin with his oral evidence because – in very large part – it superseded and rendered his previous written evidence redundant.

Section 6.4: Oral evidence of Cees de Rover

6.4.1 The oral evidence of Mr. de Rover was devastating for the SAPS case. As set out above in Part Four sections 1.8 and 1.9, and in this Part at section 6.2 his oral evidence revealed an expert whose best attempts at encouraging genuine self-reflection by the SAPS had been frustrated, and whose true opinions had been kept from the Commission until the day he gave oral evidence.

6.4.2 As the Commission is aware, the primary opinion expressed by Mr. White, and underpinning all of his other views regarding the failures in the policing operation at Marikana, is that the SAPS lacks a culture of accountability. Strong and clear leadership is a prerequisite to the SAPS transforming into a police service striving for accountability, rather than erecting and hiding behind “the blue wall of silence”.

6.4.3 Unfortunately, Mr. de Rover’s testimony confirmed the suspicions of many in the Commission regarding the SAPS’ reluctance to accept that its policing operation at Marikana was a failure, that serious mistakes were made, that grave lessons needed to be learnt and that there was much that could and needed to be done to address these failures, and reduce the risk of a re-occurrence of Marikana. Indeed, the SAHRC submits that Mr. de Rover’s testimony goes beyond describing an organisation that is reluctant to reflect
and learn. Rather, it reveals an organisation that stubbornly refuses to grapple with its failures, and denies that there are any material, systemic failures to address.

6.4.4 Mr. de Rover was not only handicapped in his investigation by the organisational stonewalling described in Part Four sections 1.8 – 1.9 above. He was also not briefed with the full, accurate and truthful set of objective facts from which to build his understanding of the operation. He admitted that “[a] lot has come to light that I was not aware of when I wrote [my] statements.”394 In this regard:

a. Mr. de Rover was told of radio communication difficulties, but was not informed that there was evidence that the shooting at Scene 1 could be heard over the radio at the JOC395;

b. He was provided with a plan for the operation that he considered adequate, but this turned out to be the plan contained in Exhibit L, and not any of Lt Col Scott’s contemporaneous planning documentation396;

c. He was eventually told informally, over coffee – albeit earlier than the Commission was advised of this by the SAPS – that the decision to implement the tactical phase of the operation occurred at an extraordinary session of the NMF, rather than being informed of this by either the National or Provincial Commissioners397. He was forced to confirm this with Majs Gen Annandale and Mbombo398;

394 Transcript Day 286, pp 37070 - 37071
395 Transcript Day 285, pp 36905 - 36907
396 Transcript Day 285, p.36999
397 Transcript Day 285, pp 36926 – 36927 and Transcript Day 286, p.37081
398 Transcript Day 285, p.36927
d. Mr. de Rover claimed that a risk assessment took place, contrary to the evidence before the Commission, on the basis that he was told that a “low risk” assessment was taken by Maj Gen Annandale and Lt Col Scott on 16 August 2012. He did not know when on that day this risk assessment was said to have occurred, and did not apply his mind independently to consider whether “low risk” was a reasonable conclusion given what was known at the time. He did, however, testify that the SAPS did not need intelligence sources to confirm that there was a likelihood of confrontation with the strikers\textsuperscript{399}; and

e. Finally, Mr. de Rover conceded that the factual account of Scene 2 set out in his written evidence does not purport to be accurate and that it was simply based on the information provided to him by members\textsuperscript{400}. Consequently, it is of very limited use to the Commission.

6.4.5 During his cross-examination, Mr. de Rover accepted the foreseeability of a dangerous, armed confrontation with the strikers that was likely to involve the use of lethal force by the SAPS against the strikers. He agreed that in light of 12 pieces of evidence, known to the command of the operation – but clearly not known to Mr. de Rover when he wrote his statements – the decision to proceed with the implementation of the tactical phase of the operation was not only wrong, but was potentially unlawful\textsuperscript{401}. This is addressed in further detail at Part Nine below.

6.4.6 All the evidence set out here and at Part Four sections 1.8 and 1.9 above, establish the inescapable conclusion that while the SAPS retained Mr. de

\textsuperscript{399} Exhibit UUUU2.5: Mr. de Rover’s response to evidence leaders interrogatories, dated 26 August 2014 para.1.7 and Transcript Day 285, pp 37006 - 37011

\textsuperscript{400} Transcript Day 285, p.36938

\textsuperscript{401} Transcript Day 286, pp 37071 - 37072
Rover, and explicitly briefed him to investigate the operation at Marikana, the top leadership of the organisation and the commanders of the operation at issue did not hold the view that anything had really gone wrong. It is difficult to resist the sense that they were going through the motions, probably in response to the SAHRC’s filing of Mr. White’s first statement, and not out of genuine desire to obtain an independent and expert view of the failures evident at Marikana.

6.4.7 Nonetheless, Mr. de Rover’s oral evidence established that his previous written evidence to the Commission was hindered by a number of erroneous factual assumptions and did not represent his considered view as of the date of his oral evidence.

6.4.8 But Mr. de Rover is not entirely blameless for his ignorance of important facts at the date of providing his written evidence. He clearly failed to interview the correct people. When challenged as to why he did not engage with the one commander of the operation on 16 August 2012 who had been critical of the SAPS, Lt Col Vermaak, Mr. de Rover explained that while he had access to Lt Col Vermaak’s statements and transcripts of his evidence before the Commission, he never asked to sit down with him for an interview\textsuperscript{402}.

6.4.9 This is an inexplicable error by an expert briefed to understand “\textit{what went wrong}” at Marikana, and the SAHRC submits that this failure reflects a willingness by Mr. de Rover to sacrifice some measure of his independence. Had he rather vigorously pursued an investigation, interviewing a vocal critic of the operation would have been obvious. Of course, the Commission has had the benefit of Lt Col Vermaak’s views on “\textit{what went wrong}” at Marikana firsthand and therefore little is lost from Mr. de Rover ignoring his views.

\textsuperscript{402} Transcript Day 285, p.36902
6.4.10 When it came to identifying further actual failures of the operation, Mr. de Rover testified regarding:

a. Problems with the operation of the radio communication equipment, and the resulting difficulties with the flow of information during the operation⁴⁰³;

b. His strenuous condemnation of the use of R5 rifles in public order policing operations, coupled with an acknowledgement that his recommendation made in late February / early March 2013 that they be withdrawn from service still has not been implemented by the SAPS⁴⁰⁴;

c. His opinion, only expressed in his oral evidence, that the deployment of the TRT into the operation at Marikana was a mistake due to it increasing the likelihood of the use of lethal force since the TRT have nothing but R5 rifles to use against the crowd⁴⁰⁵;

d. Generally, that the use of military assault weapons was wrong, stating his view that he felt that R5s “have no place in law enforcement, full stop”, summarizing his view that the SAPS rather “needs to arm down and smarten up”⁴⁰⁶;

e. That the “lessons learned” from the events of the operation on 13 August 2012, and the lack of any incidents on 14 and 15 August, were not sufficiently utilised and incorporated into the planning for any operation on 16 August 2012, stating that “[o]n the Monday, you see an abject failure in public order policing”⁴⁰⁷;

⁴⁰³ Transcript Day 285, pp 36901 - 36902
⁴⁰⁴ Transcript Day 285, pp 36943 – 36944, pp 36948 - 36949
⁴⁰⁵ Transcript Day 285, pp 36945 - 36948
⁴⁰⁶ Transcript Day 285, p.36984
⁴⁰⁷ Transcript Day 286, p.37057
f. That, in his opinion, the POP are not very good at improvising since this would require a high degree of training, as well as commanders who are capable of doing that. His view was that the SAPS structures have created so many different units, when in fact centralized control is needed as a result. But the complexity of the operational situation requires decentralized authority, yet, here commanders were not authorized to make decisions on the ground. Moreover, the approach followed at Marikana had never been field-tested. 408;

g. Mr. de Rover testified at length regarding the available alternatives to the SAPS implementing the tactical phase of the operation on the afternoon of 16 August 2012, summarising the approach he preferred: “As long as we are talking we are not fighting.”409 His evidence was that anything that can delay the decision to go tactical is one that should be considered. However, he reiterated that none of this explained the pressure put on the commanders to implement the tactical phase by their superiors410;

h. The training in firearms provided by the SAPS trains people to shoot on a range with a static target, rather than under stress in a dynamic situation, resulting in Mr. de Rover’s conclusion that the SAPS’ firearms training is inadequate, as seen at Marikana. In sum, the lack of judgmental and scenario-based firearms training contributed to the reckless and unlawful shooting observed at Marikana411; and

i. That he observes evidence of “associative threat perception” at Scene 1, namely SAPS members shooting because others are, as well as at

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408 Transcript Day 206, pp 37062 - 37065  
409 Transcript Day 286, p.37091  
410 Transcript Day 286, pp 37131 - 37136  
411 Transcript Day 285, pp 36901 - 36902
Scene 2. Mr. de Rover also acknowledged that this provides no lawful justification for shooting\textsuperscript{412}.

6.4.11 Finally, Mr. de Rover strongly expressed his view regarding the question of whether and how political interference played a role in the decision-making at the NMF where the decision was taken to move to the tactical phase of the operation. He testified that\textsuperscript{413}:

a. The decision “comes and originates from somewhere else”, that it is “an order that comes from the executive and the police must implement that order”;

b. “International law says if an order is manifestly unlawful and if you have a reasonable opportunity to refuse it, you should do so”;

c. This was “a $64 000 question[:] is the order that was given to the police that [he] will take comes from the executive, from government, is that order an unlawful order?”;

d. There was a need “one, to unearth the structures behind what happened and how that happened . . . to get clarity why, in the face of such overwhelming evidence as [is now before the Commission from the SAHRC] and that you hold the police were aware of when they were making that decision and trying to operationalize it, why didn’t they refuse to do it, because if it originated from within the police itself it would have been simple to stop that”;

e. He believes that “it’s time to then unearth who gave that order”; and

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\textsuperscript{412} Transcript Day 286, pp 37138 - 37142
\textsuperscript{413} Transcript Day 286, pp 37071 - 37076
f. “In a democratic society, [he] would be very surprised that SAPS would have been permitted to make that decision on its own alone and not guided or would not have actively sought the guidance of the executive on this prior to doing it” because it would be unacceptable for the NMF to make such a decision.

6.4.12 Mr. de Rover further insisted that:

“2 You cannot have a police force essentially deciding on issues that have such ramifications attached to it and consequences as Marikana, on its own, and place that beyond the political and judicial control that you would want to exercise before you go ahead. And what I then inversely, if I take that that is what is normal in a democratic society and therefore normal here, I would find it very hard to believe that there weapons no political or judicial guidance on that decision and because a higher authority made it and gave it as an order, then you have your answer to your question as to why it was implemented and why the haste and why the day and why those 12 points in the end, although raised, did not weigh heavily enough to counter the order. And hence my question is the order, because were the ones that issued it made sufficiently aware of those 12 points and the risk that in going ahead – because then it entails a responsibility and the line of command responsibility in law enforcement doesn’t stop at the National Commissioner, it goes right through to the top because the police is not an independent organisation. They are under government control.”

414 Transcript Day 286, p.37076
Section 6.5: Written evidence of Cees de Rover

6.5.1 The written evidence of Mr. de Rover was submitted in March and June of 2013. As he admitted in oral evidence, he was not aware of many of the relevant facts at the time when his written statements were submitted. The SAHRC submits that very little weight can be attached to that written evidence, in light of his near total abandonment of it oral evidence. Mr. de Rover chose to focus on matters other than those addressed by the other experts, and which are not particularly helpful to the Commission, as set out below. We now know that he did this because he is in general agreement with what was set out in Mr. White’s written statements, as he made clear in his oral evidence.

6.5.2 First, he focused in his written evidence on the adequacy of SAPS POP policing in South Africa in general. This does not assist the Commission in its task for three reasons:

a. First, it does not assist in determining liability for the events of 9 to 16 August 2012 of any party before the Commission. That is necessarily a particular and narrow inquiry. The conduct of the SAPS – and even of the same members of the SAPS – in any other operation on any other day anywhere else in South Africa does not assist the Commission in investigating “matters of public, national and international concern arising out of the events at the area commonly known as the Marikana Mine in Rustenburg, North West Province from Saturday 09 August to Thursday 18 August, 2012 which led to the deaths of approximately 44 people, more than 70

415 Exhibit FFF11 and Exhibit FFF11A
416 Exhibit WW2: Provisional Statement of Gary White MBE, Exhibit JJJ178: Final Statement of Gary White MBE; Exhibit BBBB4: Supplementary Statement of Gary White MBE
417 Exhibit FFF11 pp 9 -11
persons being injured, approximately 250 people being arrested and damage and destruction to property”, as required by the Terms of Reference;

b. Second, as he admits, Mr. de Rover formed the views expressed in his written statements on the basis of quantitative data only and without regard to the qualitative material available to the Commission, including the SAPS’ own internal complaints about POP policing capacity;\(^\text{418}\) and

c. Third, his view is simply wrong. As set out in Part Five, the SAPS’ POP policing capacity has dwindled, is now considered highly problematic and insufficient, and this dire state of affairs has even been acknowledged by the SAPS\(^\text{419}\).

6.5.3 Secondly, Mr. de Rover’s written evidence does not assist the Commission because he purported to conduct a statistical analysis of shots fired\(^\text{420}\). However, that exercise is fundamentally flawed and unreliable for at least the following reasons:

a. As conceded by Mr. de Rover, it does not assist the Commission to determine whether the SAPS acted in accordance with the requirements of proportionality, necessity and justifiability when they resorted to lethal force\(^\text{421}\). Mr. de Rover conceded that in order to do so, each SAPS member who discharged his weapon is required to justify each and every round fired. In his response to interrogatories from the SAHRC, he said:

\(^{418}\) Exhibit UUUU2.5: Mr. de Rover’s response to evidence leaders interrogatories, dated 26 August 2014, para.3

\(^{419}\) Exhibit LLL11: Final Interim Report of Marikana (Mkhwanazi report)

\(^{420}\) Exhibit FFF11, p.15 and Exhibit FFF11A, p.4

\(^{421}\) Exhibit JJJ178.8: GW4(b) De Rover response to clarification requested by the SAHRC, para.2.3.2
Q: As an international law enforcement expert, with particular knowledge of international law, do you agree that the defence of self and/or private defence does not justify any response by the person acting in self-defence, it justifies only a necessary and proportionate response to an identified and ascertainable threat?

A: There are three requirements for any law enforcement action or omission to be acceptable. That action or that omission must satisfy the principles of legality, necessity and proportionality. So in addition to your points I would hold that the response given or omitted must also be a lawful one.

. . .[citing Interim report of the UN Special Rapporteur on extrajudicial, summary or arbitrary execution UN GA A/61/311 (5 September 200^) at para 42]. .

Q: Accordingly, do you agree that in order to benefit from the defence of self and/or private defence, a law enforcement officer who has discharged live ammunition towards a crown must not only justify the decision to fire the first round, but must justify his decision to fire each of the subsequent rounds?

A: I agree with you.422.

b. He also conceded in oral evidence that he had conducted a statistical analysis of average shots fired, rather than an individual analysis of actual shots fired423. This would provide the Commission with little assistance in determining the justifiability or proportionality of, for instance, the 17 shots fired by Cst Khuma or the 24 shots fired by Cst

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422 UUUU2.6 paras 10 -11
423 Transcript Day 286, pp 37130 - 37134
Molatowagae at Scene 1, or the 25 shots fired by Cst Ngwaleni at Scene 2\textsuperscript{424}.

c. In any case, he accepted that regardless of the number of shots fired by an officer, at every pull of the trigger, the SAPS would need to prove justification for each and every shot. Statistics do not provide this justification, as Mr. de Rover admitted:

\textit{“I fully agree with that you fire one shot that doesn’t automatically justify number 15 and 16, you would still at every pull of the trigger need to prove the existence of an imminent threat to life or serious injury. But only the person pulling the trigger can tell you that.”}\textsuperscript{425} (emphasis added);

d. The United States data relied upon by Mr. de Rover in conducting his statistical analysis are problematic in any case, because he has used a patchwork of different statistics taken from different locations and circumstances, making it impossible to transpose their results onto the particular outcome at Marikana, particularly when the underlying studies relied on were never disclosed to the Commission;

e. Moreover, the United States data cited by Mr. de Rover appears to relate to police using lethal force against individual criminals, or small groups of criminals, and not crowds numbering in the hundreds or thousands. Accordingly, these statistics cannot be applied reliably to a crowd shooting incident such as Marikana\textsuperscript{426}; and

f. The statistical analysis itself is flawed. In his calculations of ‘hit ratios’ at Marikana, Mr. de Rover failed to take into account the many shots

\textsuperscript{424} Exhibit FFF8: Discharge list 16 August 2012

\textsuperscript{425} Transcript Day 286, pp 37133 - 37134

\textsuperscript{426} Exhibit UUUU2.6: Mr. de Rover’s response to CALS interrogatories, dated 26 August 2014, para.7
that hit individuals who survived. When those shots are factored in to his calculations, it results in damning conclusions about the use of force by the SAPS, and individual shotists in that operation. Mr. de Rover had no adequate response to this when confronted with it during the expert engagement process with the SAHRC\textsuperscript{427}.

6.5.4 Finally, Mr. de Rover’s written evidence does not assist the Commission because it is wholly unreliable since it rests on an incomplete factual basis and he was unaware of swathes of material and relevant evidence\textsuperscript{428}.

a. For example, he purported to provide the Commission with a factual account of events at Scenes 1 and 2\textsuperscript{429}. But this is of no value or utility to the Commission because:

i. Factual reconstruction of a crime scene requires ballistics and forensics specialist knowledge and this is not within his professed expertise\textsuperscript{430};

ii. The purported factual account contained no reference to any evidential basis for it or the conclusions reached about it, and the SAPS have failed to provide that evidence to the Commission. For instance, Mr. de Rover interviewed several members of the SAPS regarding the events at Scene 2, but the SAPS have produced no evidence or record of those interviews. Without that production, the Commission is unable to evaluate the factual account contended for in the written evidence; and

\textsuperscript{427} Exhibit UUUU2.5: Mr. de Rover’s response to evidence leaders interrogatories, dated 26 August 2014, paras 2 – 3 and Exhibit UUUU2.6, para.7
\textsuperscript{428} See, e.g. Exhibit UUUU2.5, paras 10 – 11, part 4 para 1 and Exhibit UUUU2.6, paras 5.6, 13
\textsuperscript{429} Exhibit FFF11A: Supplementary Statement of Mr. de Rover, p.16 and Exhibit UUUU1.3: Mr de Rover’s response to CALS interrogatories, dated 12 November 2013, para.6
\textsuperscript{430} Exhibit FFF11: Statement of Mr. de Rover, p.1
iii. Mr. de Rover admits that he has not even read all of the statements provided by the shotists of 16 August 2012\textsuperscript{431}.

6.5.5 Therefore, we submit that Mr. de Rover’s written evidence is of no assistance to the Commission in its tasks. It is clear that it was not based on the purported “unfettered access”\textsuperscript{432} to all of the relevant SAPS material he believed he was given. It was, in fact, based on a largely incomplete understanding of events, partly because of obstruction within the SAPS. This obstruction by the SAPS of their own expert merely confirms that the organization lacks the leadership or mindset that accepts that a modern, human-rights compliant police service in our constitutional democracy should be reflective, accountable and transparent.

\textit{Section 6.6: Conclusions on expert policing evidence}

6.6.1 In conclusion, Mr. de Rover’s evidence condemns the SAPS regarding those matters on which he can express a view with the benefit of his experience and knowledge of the facts of the operation at Marikana since he agrees with the evidence of the other two policing experts before the Commission.

6.6.2 And the remainder of his evidence can be rejected due to its flawed factual basis.

6.6.3 Accordingly, since the Commission must then accept the undisputed expert opinions of Messrs. White, Hendrickx and De Rover as to failure of policing at Marikana and the reasons for it, it should then adopt the recommendations that follow and that are proposed by Mr. White in \textit{Annexure B}.

6.6.4 Finally, we note that the recommendations made by Messrs. Hendrickx and De Rover to the Evidence Leaders support and mirror those made by Mr.

\textsuperscript{431} Exhibit UUUU2.6: Mr. de Rover’s response to CALS interrogatories, dated 26 August 2014, para.13
\textsuperscript{432} Exhibit FFF11: Statement of Mr. de Rover, p.9
White, albeit that Mr. White’s recommendations and their rationale are more comprehensive and detailed than those provided by the other two experts. In light of this broad agreement on the recommendations proposed by all three policing experts, the Commission is urged to adopt them with confidence.

Section 6.7: Evidence of Katherine Scott

6.7.1 The SAHRC provided the Commission with the assistance of Ms. Katherine Scott, an expert analyst of audio recording, who provided an analysis of the Reuters footage of Scene 1 and reached conclusions regarding the duration of the TRT volley and the number of live rounds recorded in that footage following the first audible calls for cease-fire.

6.7.2 Ms. Scott’s analysis was completed prior to the full range of footage that was available to Mr. Dagan being produced to the Commission, notably she did not have access to the SABC and Al Jazeera footage. As a result, her analysis was bolstered by the video presentations in certain respects. The most important of these is that the TRT volley in fact lasted for 12 seconds, and not eight seconds. Although the SAPS dispute the 12-second claim, the raw footage is indisputable. The Commission is urged to review, in particular, the footage between 15:53:50 – 15:54:05 in Annexures V1.6 (Al Jazeera camera)433; 1.7 (SABC camera)434; 1.8 (ENews camera)435, and 1.9 (Reuters camera)436. Those sources are consistent: the volley continued from 15:53:50 – 15:54:02.

6.7.3 However, Ms. Scott’s analysis remains that at least four R5 discharges can be heard in the Reuters footage more than one minute after the TRT volley commenced437. Some of the R5 rounds identified by Scott in her evidence can also be heard in that new footage as follows:

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433 Exhibit UUUU10.2(6): Video annexure V1.6 – Al Jazeera camera
434 Exhibit UUUU10.2(7): Video annexure V1.7 – SABC camera
435 Exhibit UUUU10.2(8): Video annexure V1.8 – ENews camera
436 Exhibit UUUU10.2(9): Video annexure V1.9 – Reuters camera
437 Exhibit JJJ198: Statements and Annexures of Katherine Scott
a. Al Jazeera (Video Annexure V1.6\textsuperscript{438}) at 15:54:52 and 15:54:54; and

b. SABC footage (Video Annexure V1.7\textsuperscript{439}) at 15:54:52, 15:54:54 and 15:55:00.

\textsuperscript{438} Exhibit UUU10.2(6): Video annexure V1.6 – Al Jazeera camera

\textsuperscript{439} Exhibit UUU10.2(7): Video annexure V1.7 – SABC camera
SECTION 7: HOW SHOULD THE COMMISSION APPROACH THE VIDEO EVIDENCE SUBMITTED BY THE SAHRC AND THE FAMILIES IN SEPTEMBER 2014?

7.1.1 On 4 September 2014, the SAHRC and the Families of 36 individuals killed at Marikana submitted in evidence the affidavit of video expert, Mr. Yoav Dagan, along with a series of annexures numbered V1 – V5. The SAPS objected to what was described as the ‘commentary’ contained within those annexures and the Chairperson indicated that the weight to be attached to such commentary would be the subject of argument.

7.1.2 The content of the Annexures and the process by which Mr. Dagan created them is set out in detail in Mr. Dagan’s affidavit. He engaged in an extremely painstaking technical process to synchronize all the available footage between 15:42:35 – 15:55:25 to an ETV timecode. Having done so, he produced the following annexures:

a. Annexures V1.1 – V1.11 contain raw footage from the different source material. The quality of the raw footage has been improved in parts, and the footage has been placed on an ETV timecode, but no part of the footage has been manipulated, and no commentary appears on it;

b. Annexure V2 is a presentation which uses multiple source material to show the movement of the lead group of strikers from the Koppie to the kraal. In Annexure V2(a) Mr. Dagan used that footage to show, in animated form, the movement of the barbed wire nyalas and the lead group of strikers between 15:42:35 and 15:53:50;

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440 Exhibit UUUU10.13
441 Exhibits UUUU10.2 – 10.6: Video Annexure V1.1-V1.11, Video Annexures V2, V2(a), V2(b), V3, V4 and V5
442 Transcript Day 285, pp 36950 - 36952
c. Annexure V3 is a presentation which uses multiple source material to show the movement and use of water cannons at Scene 1;

d. Annexure V4 is a presentation which uses multiple source material to show evidence of tear gas and stun grenades at Scene 1; and

e. Annexure V5 is a presentation which analyses various aspects of the shots fired at Scene 1.

7.1.3 The SAPS has submitted a document listing its points of disagreement with the videos produced\textsuperscript{443}. That document lacks detail, rigour or forensic analysis. It does not engage in any of the detailed technical evidence given by Mr. Dagan and provided in his Annexures, but instead appears to be a mud-slinging exercise, conducted without any serious engagement with the videos or technical annexures. In essence, the SAPS response notes its disagreement on a number of points but fails to give any satisfactory or sufficient reasons for the disagreements.

7.1.4 The SAHRC has submitted a comprehensive reply to the SAPS response and attaches that reply at Annexure F. In short, the Commission can have complete confidence in the synching exercise undertaking by Mr. Dagan, and can have complete confidence that the timelines included in the video presentations are accurate to within one second. Accordingly, it can have complete confidence that the raw, unedited footage provided in Annexures V1.1 – V1.11 are completely reliable. They provide a much clearer and more comprehensible source of footage than previous exhibits because they include the agreed ETV timecode throughout.

7.1.5 The SAPS objections are to what they describe as ‘narrative’ or ‘commentary’ in Annexures V2 – V5. We describe it as ‘annotation’. But, when arguing

\textsuperscript{443} Exhibit ZZZZ14: SAPS Response to SAHRC Video Dealing with Movement Analysis of Scene 1
weight, it is important to be clear as to exactly what the objection is. There are several categories of annotation, as follows:

a. Some annotations simply identify a particular vehicle (e.g. ‘Nyala 2’). There can be no objection to this annotation. It is provided to assist the Commission’s understanding of what is being viewed. If an annotation within this category is wrong, then it was available to the SAPS to point out the error. They have not done so;

b. Some annotations highlight a particular fact (e.g. ‘There is no barrier between strikers and police along this line’). Again, there can be no objection to this annotation. It is provided to assist the Commission’s understanding of what is being viewed. If an annotation within this category is wrong, then it was available to the SAPS to point out the error. They have not done so;

c. Some annotations identify a particular direction of movement (e.g. ‘The strikers continue to move in a north-easterly direction’). Again, there can be no objection to this annotation. It is provided to assist the Commission’s understanding of what is being viewed. If an annotation within this category is wrong, then it was available to the SAPS to point out the error. Aside from confirming the errata points noted by Adv Le Roux in oral hearings\(^{444}\), they have not done so; and

d. Some annotations describe what is visible on screen (e.g. ‘the strikers appear to keep their distance from Papa 11’ ‘the strikers appear to take steps to their right’ ‘the first striker begins to fall’). No expertise is required to determine whether or not that opinion is correct. This is the category of most disputes indicated by the SAPS. The Commission can determine for itself whether the observation contained in that

\(^{444}\) Transcript Day 285, p.39690
class of annotation is correct or not. If it is not, then the Commission will attach little weight to the annotation.

7.1.6 In addition to annotations, Mr. Dagan has also produced in Annexures V2(a) and (b) an animation showing i) the movement of the barbed wire nyals, ii) the movement of the lead striker group, and iii) the field of view of the cameras that capture the movement of the strikers at any particular time. The accuracy of these animations can be verified against the video material. Either the video material shows Mr. Dagan’s animation and fields of view to be right, or it shows him to be wrong. Despite an opportunity to do so, the SAPS have failed to point out any significant errors and appear to accept that the route shown in the animation is correct.

7.1.7 It was suggested in oral argument regarding the videos that the annotations included by Mr. Dagan are akin to the commentary included by Col Visser in Exhibit L. That suggestion must be rejected. There is no legitimate comparison between the two. Mr. Dagan’s annotations are all verifiable against the very footage in which they appear. As such the annotations live or die by what is visible in the presentation: the footage itself shows whether he is right or wrong. By contrast, Col Visser’s commentary in Exhibit L is not verifiable against material within Exhibit L. One can only know if his commentary is right or wrong by asking witnesses or examining other objective material. Accordingly, the comparison between the two is inapt.

7.1.8 In oral argument it was also argued that Mr. Dagan’s annotations extended beyond his expertise. It is clear that Mr. Dagan has expertise in both creating and interpreting video images. His experience as an army photographer, and his extensive experience as a cameraman, videographer, and video editor provides him with precisely the expertise necessary to understand and identify fields of view and to interpret movement shown on film. It is clear

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445 Transcript Day 285, p.37018
446 Exhibit UUUU10.1: Affidavit of Henk Van der Merwe, paras 4 - 7
that Mr. Dagan’s expertise places him in a better position than the layman to interpret video and photographic images, to identify their fields of view, and to convert the content of the images into a two-dimensional animation.

7.1.9 The SAPS rightly note that his expertise does not extent to ballistics, but – aside from Part Two of Annexure V5, on which the SAHRC and the Families no longer seek to rely – his annotations do not require ballistic expertise. For instance, by playing a video frame-by-frame, it is possible to identify that a gun is fired from the sound it makes and the visible smoke it produces without needing ballistic expertise to confirm this. Similarly, by playing a video frame-by-frame, it is possible to identify a new puff of dust which is likely to have been caused by a bullet (and the Commission should recall that the SAPS do not dispute that the puffs of dust visible in footage at the time of the TRT shooting are caused by bullets), without needing ballistic expertise to confirm this.

7.1.10 Accordingly, the SAHRC submits that the objections of the SAPS in relation to the evidence of Mr. Dagan are without merit. The SAHRC concurs with the submissions of Adv. Chaskalson SC, made on 4 September 2014, when he said on behalf of the Evidence Leaders that\(^\text{447}\):

\begin{quote}
“11 we regard this exhibit as one of the most important pieces of real evidence that this Commission is likely to see. What it does is it strings together the video streams from various different sources so that one gets a composite picture of Scene 1. There are annotations which point you to particular things. I would imagine that 90% of those annotations are utterly uncontroversial, there may be 10% which are. The SAPS are always at liberty to identify that which they dispute and they can table their
\end{quote}

\(^\text{447}\) Transcript Day 285, p.36953
7.1.11 Finally, it is extremely regrettable that the task of compiling and synchronizing all the available video and photographic evidence was left to the Families of the deceased and to the SAHRC. This was a costly and prolonged task that quite clearly should have been undertaken by the Commission itself, using its own resources. The synchronisation and compilation of the footage of the afternoon of 16 August should have been one of the first tasks undertaken by the Commission to ensure that it had as complete an understanding of the events as possible. The SAHRC and the Families only took on the task when it became clear that the Commission had no intention to do so itself and it became clear that – in the absence of such synchronized and compiled footage – the Commissioners were laboring under several material misapprehensions as to what happened in the moments prior to Scene 1.

7.1.12 We trust that those misapprehensions have been corrected by Annexures V1 – V5. But the fact that the Commission progressed for 22 months without synchronized and compiled video evidence is seriously problematic for another reason. Over 22 months of hearings, the SAPS repeated and repeated a false case in respect of the lead-up to Scene 1.\textsuperscript{448} Regrettably, during that period, the Commissioners made numerous comments on the record that appeared to indicate an acceptance of many parts of that false case.

7.1.13 But the repetition of a false case over the course of 22 months does not trump the clear objective evidence of synchronized and compiled video and photographic evidence submitted in the 23\textsuperscript{rd} month of hearings and which is itself not subject to any significant objection. We urge the Commission to ask itself: how might the Commission process have differed if the synchronized and chronological video and photographic evidence was shown at the start, rather than the end, of the Commission hearings? And more importantly: how

\textsuperscript{448} See Part Ten below
might the development of Commissioners’ opinions have differed if the synchronized and chronological video and photographic evidence was shown at the start, rather than the end, of the Commission hearings? Sometimes it is necessary for opinions to change in light of new evidence, even when those opinions are very firmly held and that new evidence is presented towards to end of the Commission’s hearings.
PART FIVE:

THE POLICING CONTEXT IN WHICH THE EVENTS AT MARIKANA TOOK PLACE
SECTION 1: INTRODUCTION

1.1.1 Nothing happens in a vacuum. While the catastrophic outcome of 13 and 16 August 2012 was unprecedented in the history of policing in democratic South Africa, we submit that it was an extreme consequence arising out of mainstream problems within the SAPS, including:

   a. A militarized police service in which abuses of power were systemic;

   b. A police service in which public order policing had been systematically downgraded and under-resourced at a time when public disorder events had been increasing; and

   c. A police service which had failed properly to train members in line with international standards.

1.1.2 In general terms the National Development Plan (‘NDP’) 2030 acknowledges all of these problems. This section provides a broad overview of these issues and identifies the key documents to which the Commission should refer. The SAHRC submits that the general policing context in which the catastrophic operation at Marikana took place is vital to a complete understanding of the causes of the killings by the SAPS on 13 and 16 August 2012.

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449 Exhibit FFF13: NDP 2030, Chapter 12, Building Safer Communities
SECTION 2: MILITARISATION AND ABUSES OF POWER

2.1.1 The NDP 2030, drafted prior to the events at Marikana, warned of the effects of a militarized police service. The SAHRC adopts the wording of the NDP and quotes it in full below. It notes⁴⁵⁰:

“Civilianising a highly militarised and politicised police force was a transformation objective after the 1994 elections. It was considered necessary to professionalise the police, establish a rapport with communities, develop confidence and trust in the police, and promote positive community-police relations. The goal was to transform the police from a paramilitary force to a police service that meets all the criteria of a civilian professional entity. Demilitarisation required changes in police insignia, military ranks and force orders to create a civil police service as the first phase of community policing. The second phase consisted of changing policing methodologies from a “kragdadige” style to one which placed the community at the centre of policing through community policing. This required consultation with the community at a local level about their crime concerns and safety needs. “Problem-solving policing” followed which promoted diversion of youth and first time offenders of minor crimes to agencies and programmes geared at preventing crime. Intelligence driven policing was added as a more sophisticated methodology which replaced random patrols to policing of hotspots. Finally, sector-policing was added as a geographical orientation of the police in respect to personnel and resources which were allocated to areas within police precincts based on policing needs. All these reforms were intended to improve community policing and reduce crime through applying modern policing methodologies and to improve community safety. Police responsiveness to community needs should always be at the

⁴⁵⁰ Exhibit FFF13, pp 392 - 393
heart of policing outcomes. That is the main difference between a police force and a police service.

From 2000 however, the police service gradually started resembling a paramilitary force. This process was formalised with the reintroduction of military ranks in 2010. It took place against the backdrop of increasing violent crime, high levels of community frustration and fear, and a perception that the old military police ranks would command greater respect from communities. However, these arguments are inconsistent with the police’s mandate in a modern democracy. They also neglect the challenges of developing greater competence and skills in the police to respond to growing complexity and changing patterns of crime. The police will earn public respect if they are efficient and effective, and display a professional approach to combating crime. The culture of the police and a professional ethos are interlinked; ethos relates to the skills and competence of the institution and culture relates to the approach, values and discipline of its members.

The most obvious problem with the militarization of civilian policing is that the military and the police force have two distinctly different tasks. The military’s job is to seek out, overpower, and destroy an enemy. Though soldiers attempt to avoid them, collateral casualties are accepted as inevitable. Police, on the other hand, are charged with “keeping the peace”, or “to protect and serve”. Their job is to protect the rights of the individuals who live in the communities they serve, not to annihilate the enemy.

Good management and strategic leadership are crucial to organisational stability, morale and integrity of any police institution. The South African Police Service has undergone radical shifts in the last 17 years, dramatic changes to the leadership following the charges of corruption against one national commissioner, and mismanagement
and a pronouncement of lack of fitness to head the police against another. The impact of serious charges against senior members of the police needs to be assessed so that negative consequences can be mitigated. Morale is a very important aspect of the police culture. Measures should be put in place to ensure that the morale is high, discipline is maintained and respect for leadership and subordinates alike permeates the institution.

Police discipline is based on command and control, whereas discipline in a modern police organisation is based on self-discipline and leadership. The South African Police Service has been under strain as a result of serial management crises over the past few years. Coupled with organisational rank changes to military ranks without any or further training in judgment, discretion and professional conduct, these crises have had a detrimental effect on police culture and subcultures. The recent case where members from a police unit in Cato Manor were charged for allegedly executing suspects could be cited as an extreme example of a police subculture that developed out of a lack of professionalism and a perceived impunity.”

2.1.2 The SAHRC commends these observations and supports the recommendation in the NDP for the police to be demilitarized. But as noted in the NDP, militarization is not the only problem: set alongside is the problem of a police service lacking in professionalism, using excessive force, and suffering from perceived impunity. The statement of Gareth Newham⁴⁵¹, along with his presentation on behalf of the Institute for Security Studies (‘ISS’)⁴⁵², sets out in stark terms the evidence of “wide-spread and systemic police abuse”⁴⁵³ in South Africa. We concur. Mr. Newham’s evidence shows that the high-profile incidents such as those at Cato Manor, or involving victims such as Mr. Andries

⁴⁵¹ Exhibit FFF31
⁴⁵³ Exhibit FFF31, para.38
Tatane and Mr. Mido Macia are not unique. The scale of the catastrophe at Marikana was unprecedented; the use of excessive force by the SAPS was not.

2.1.3 The Commission will need to determine the extent to which this has been encouraged by policy and / or rhetoric from the political leadership. As set out in the evidence of Mr. Newham, in the Council for the Advancement of the South African Constitution (‘CASAC’) submission to the Commission\textsuperscript{454}, and in an article by South African policing expert, Mr. David Bruce\textsuperscript{455}, there is clear evidence of a substantial increase in the use of force by the SAPS from around 2008/2009. Both Mr. Bruce and CASAC attribute that increase to policy decisions (the creation of the Operational Response Services (‘ORS’) as a full division within the SAPS)\textsuperscript{456}, potentially secret policies (the doctrine of maximum force)\textsuperscript{457}, and political rhetoric encouraging excessive force\textsuperscript{458}.

2.1.4 In the context of our submissions made in Part Four above on the lack of leadership in ensuring accountability within the SAPS, we submit that the political rhetoric highlighted by CASAC and Mr. Bruce is deeply problematic. Examples include:

a. Then Deputy Minister of Safety and Security, Susan Shabangu, in April 2008\textsuperscript{459}:

"You must kill the bastards if they threaten you or the community. You must not worry about the regulations. I want no warning shots. You have one shot and it must be a kill shot... I want to assure the police station commissioners and policemen and women from these areas that they have permission to kill these criminals. I will not tolerate any

\textsuperscript{454} Exhibit FFF17: CASAC Submission
\textsuperscript{455} Exhibit FFF14: “Mampoer – Marikana and the Doctrine of Maximum Force”
\textsuperscript{456} Exhibit FFF17: pp 15 – 17; Exhibit FFF14, Chapter 4
\textsuperscript{457} Exhibit FFF17, pp 19 – 27; Exhibit FFF14, Chapter 5
\textsuperscript{458} Exhibit FFF17, pp 19 – 25; Exhibit FFF14, Chapters 2 and 5
\textsuperscript{459} Exhibit FFF14: “Mampoer – Marikana and the Doctrine of Maximum Force”, p.13
pathetic excuses for you not being able to deal with crime. You have been given guns; now use them. If criminals dare to threaten the police or the livelihood of lives of innocent men, women and children, then they must be killed.”

b. Minister of Safety and Security, Nathi Mthethwa, in November 2008460:

“We don’t believe that, when you are faced with criminals armed with sophisticated weaponry, the police’s task would be to take out some human rights charter. Because we are in the field, we are in the killing field, where criminals are killing law-abiding citizens. Now we are saying to the police that we ourselves have an obligation as well to strengthen the arm of these task forces. So that they are able, on the field, to teach those people a lesson – to fight fire with fire. There’s no other way on that.”

c. Minister of Safety and Security, Nathi Mthethwa, in July 2011461:

“There must be a good appreciation of the distinction between the need to use maximum force against violent criminals and minimum force in dealing with fellow citizens”.

2.1.5 Both Ministers Shabangu and Mthethwa argued that their comments were misunderstood and need to be read in context462. The SAHRC submits that however you ‘contextualise’ the comments, they are unacceptable in a constitutional democracy where the right to life is guaranteed to all, including criminals. The Ministers themselves may have sought retrospectively to delimit the application of their comments, but there is no reason to believe

460 Exhibit FFF14: “Mampoer – Marikana and the Doctrine of Maximum Force”, p.15
461 Exhibit FFF14: “Mampoer – Marikana and the Doctrine of Maximum Force”, p.23
462 Transcript Day 255, pp 32140 - 32146; Transcript Day 256, pp 322273 - 322276, per Minister Mthethwa and Transcript Day 278, p.35645 and pp 35721 - 35723, per Minister Shabangu
that the SAPS members to whom the comments were addressed understood those limits.

2.1.6 The NDP notes that crime prevention and community safety pose a daunting challenge to all spheres of government. But it warns against the temptation to fall back on a “more police, bigger guns approach”\textsuperscript{463}. We submit that the “more police, bigger guns” approach is embodied within the rhetoric highlighted above and in the evidence of a substantial increase in alleged police brutality from around 2008/2009\textsuperscript{464}. And as set out in Part Eight below, “more police, bigger guns” was also the response adopted by the SAPS at Marikana after the events of 13 August 2012, with tragic consequences.

\textsuperscript{463} Exhibit FFF13: Chapter 12 of the NDP, p.394

\textsuperscript{464} Exhibit OOO32: Article by Tait and Marks “You strike a gathering you strike a rock”, p.16
SECTION 3: THE DEGRADING OF PUBLIC ORDER POLICING CAPACITY

3.1.1 There is clear evidence that the capacity of POP units throughout the country have been degraded since around 2006. In that year, the centralized POP unit, with a primary function of crowd management, was decentralized, and renamed as Crime Combatting Units ('CCU'), with a primary function of crime control. In January 2011, the CCUs were incorporated within ORS, alongside the STF, NIU, and the TRT; ORS acting essentially as an all-purpose paramilitary response unit.

3.1.2 Academics Monique Marks and Sean Tait, writing in December 2011, noted:

“These restructuring processes have proven very disruptive of public order policing capacity. The result has been a loss of capacity, moral and the esprit de corps that once existed. This restructuring process shifted focus away from the specialist skills developed so painstakingly in the mid 1990s and is reason for concern given the increases in volatile protest action.

An additional problem confronting those police responsible for public order policing has been the introduction of additional layers of ‘paramilitary’ police, such as the Tactical Response Units (TRU), into public order management. Many of the members of these units lack training and skills in the democratic policing of public order events. This has led to problems with coordination during public order events. The CCU was mandated to co-ordinate the actions of the stations and the TRU at protests. Members from the stations who are deployed to public order events are generally not provided with appropriate briefing, equipment or training. The result is that they tend to resort to heavy-

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465 Exhibit OOO32: Article by Tait and Marks “You strike a gathering you strike a rock”, pp 18 - 19
466 Exhibit FFF14: “Mampoer - Marikana and the Doctrine of Maximum Force”, p.21
467 Exhibit OOO32: Article by Tait and Marks “You strike a gathering you strike a rock”, p.19
handed tactics very rapidly. They do not display commitment to the principles of minimal or proportional use of force, tolerance or negotiated arrangements. Lines of accountability have also become blurred and it has become difficult to identify which units and individuals have been unnecessarily violent or rough with protesters.”

3.1.3 The evidence submitted to the Commission by the SAPS supports the view of Marks and Tait that there were significant problems with the capacity of POP units prior to August 2012. Indeed, in August 2011, Minister Mthethwa had signed a new policy aimed at addressing what were perceived to be fundamental problems with the SAPS POP capacity. The document, entitled “Policy and Guidelines: Policing of Public Protests, Gatherings and Maj Events” acknowledges that the restructuring of POP units into CCUs in 2006 had provoked serious criticism and notes that:

“The recent past has exposed serious gaps in the existing operational policies, strategies and approaches applied by the SAPS during the policing of public protests. These gaps widen when SAPS responses to unplanned protests is contextualized”.

The document records that the current policing environment “leans too easily towards intimidation and violent conduct” and repeatedly notes that it “too often results in unnecessary casualties and fatalities”.

3.1.4 The policy made some critical observations of the existing POP capacity, inter alia:

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468 Exhibit R: Minister of Police: Policy and Guidelines - Public Protests, Gatherings and Maj Events
469 Exhibit R: Minister of Police: Policy and Guidelines - Public Protests, Gatherings and Maj Events, pp 12, 16
470 Exhibit R: Minister of Police: Policy and Guidelines - Public Protests, Gatherings and Maj Events, pp 12, 16
a. Inadequate training of POP members and the absence of specialized training for POP commanders below the level of Brigadier, and

b. Absence of effective command and control during public protests and the absence of careful planning. It notes: “If one looks at video footage of the policing of public protests one can be excused for thinking that the policing of such events is uncoordinated and lack planning.”

3.1.5 It further made recommendations for improvements to be made to POP capacity including:

a. Commencing a robust procurement process to ensure that all the required equipment is available to POP members, including inter alia, shields, body armour, and communication and video equipment; and

b. Aligning intelligence capacity to international standards to ensure that a threat analysis can be conducted on all available information.

3.1.6 In order to make the improvements sought, the National Commissioner was tasked to.
“Ensure that sufficient appropriate capacity is created (whether by transferring back previous experienced and skilled members or building capacity through effective and focused training to other members deemed fit) and must ensure that the unit is appropriately resourced. These deliberations must be based within the context of current international trends, developments, norms and standards”

3.1.7 In the event, an implementation plan that the Minister requested for September 2011 was not received until February 2013. The ‘Information Note’ attached to the plan identified at that date significant continuing problems in POP units, including personnel shortages, equipment shortages, training shortcomings, command and control issues, and information management problems. While the Minister said that some implementation of his policy had taken place in the intervening 17 month period, it is clear from the Information Note that the majority of the problems identified in 2011 still existed, or had worsened, by 2013.

3.1.8 With respect to the POP units in the North West Province, all of the problems highlighted above were experienced locally. It is not necessary to trawl through all of the evidence in this regard, but the following is highlighted:

a. Exhibit OOO3: email from Lt Col Vermaak to Provincial Commissioner, dated 6 May 2011, highlighting concerns in respect of, inter alia:

   i. Lack of training of members: “members are more trained in physical actions as in negotiations skills and to be more tolerant”;

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477 Transcript Day 255, pp 32054 - 32056, per Minister Mthethwa
478 Exhibit CCCC1.2: Implementation Plan for the Police Policy on Managing Public Protest
480 Transcript Day 255, p.32056
481 Exhibit OOO3: Email from Lt Col Vermaak to Provincial Commissioner dated 6 May 2011
ii. Lack of command and control by officers: “non-commissioned officer and some officers do not have the experience to handle crowd unrest situations”; and

iii. Equipment, in particular, absence of video operators and failure of some members to wear protective equipment.

b. Exhibit QQQ10: minutes of ORS meeting dated 16 May 2012, which includes reference to Lt Col Merafe noting that:

“His members are still being utilized by the cluster for the Crime Combating Strategy and that creates a shortage which also influences the regular training”.

c. Exhibit JJJ137: letter from Lt Col Vermaak to Provincial Commissioner, dated 28 May 2012, highlighting concerns in respect of:

i. Availability of POP members; and

ii. The use of R5 ammunition in crowd control situations.

d. Exhibit QQQ4: minutes of POP Conference, Manhattan Hotel, 29 May 2012 which record a number of concerns including:

i. That the manner in which SAPS members deal with protestors must change;

ii. Lack of command and control and absence of planning in POP operations;

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482 Exhibit QQQ10: Minute of ORS meeting dated 16 May 2012, p.3
iii. Failure consistently to open a JOC at POP operations;

iv. Inadequacy of OCT training course in preparing officers to deal with protest actions; and

v. Absence of consistently equipped members.

3.1.9 To the extent that the SAPS have attacked Lt Col Vermaak’s complaints as unjustified, the Commission will note that they are entirely consistent with the observations made in formal minutes of ORS and POP meetings, and entirely consistent with the problems identified in the 2011 Policy and the 2013 implementation plan. What is clear is that at the time of the outbreak of violence at Marikana in August 2012, there were very serious problems with the capacity of the POP units of the North West and across the country generally to deal effectively with large-scale unrest. Those capacity issues had been identified by the Ministry of Police in 2011, but little had been done to address them by August 2012.

3.1.10 In relation to the specific situation in the Rustenburg area, significant tensions had been brewing throughout the first half of 2012. The strike at Impala Platinum was an indication that the platinum belt was ripe for further unrest. A clear increase in public violence cases at mines in the Rustenburg area between February and August 2012 indicated similar risks\(^{483}\). However, there was no significant increase in POP resources to the area and the police were unprepared for the outbreak of violence at Marikana in the weekend of 9 – 16 August\(^{484}\).

\(^{483}\) Exhibit ZZZZ18: List of All Public Violence Cases reported in Marikana Area- August 2012

\(^{484}\) See below at Part Six
SECTION 4: TRAINING OF SAPS MEMBERS

4.1.1 The SAHRC submits that there are three significant failures in SAPS training which are relevant to the events at Marikana: first, the absence of any regulated system of continuing professional training in public order policing or crowd management; second, the inadequacy of firearms training; and third, the absence of first aid training.

4.1.2 First, in relation to POP training, the 2011 Policy and its implementation plan acknowledge the inadequacy of training of POP members. The implementation plan notes that although all POP members are required to undergo specific annual training, it is generally being neglected\(^{485}\). That observation is borne out by the SAHRC’s analysis of those SAPS members who discharged firearms on 16 August. That analysis shows\(^{486}\):

a. There is little to no evidence of continuous training of POP members. POP members who discharged firearms at Marikana had generally not been on any POP refresher courses in the five years 2007 – 2012;

b. POP members who discharged firearms at Marikana had attended, on average, four times as many firearms training or shooting practice sessions than crowd management courses in the five years 2007 – 2012; and

c. Despite reasonably regular involvement in crowd management operations, only six of 55 TRT members who discharged their firearms had attended any crowd management training within the five years 2007 – 2012.

\(^{485}\) Exhibit CCCC1.2: Implementation plan for the police policy on managing public protest dated 2013-02-19, para.3.4

\(^{486}\) Exibits LLL18 – LLL25: SAHRC analysis of SAPS members who discharged firearms on 16 August 2012
4.1.3 The training records of the commanders of the SAPS operation at Marikana also highlight inadequate continuing professional development and the absence of refresher or update courses\textsuperscript{487}. In particular, the records of Maj Gen Mpembe, Maj Gen Annandale, Maj Gen Naidoo, Brig Calitz, and Brig Fritz are notable for the absence of any crowd management training since 1994, except in the case of Maj Gen Annandale, who had received a refresher course in 2000, some 12 years before the Marikana operation.

4.1.4 The absence of a regulated system of continuing professional development, which ensures refresher or update training for members and commanders alike, is indicative of a wholly inadequate training system. The SAPS response of ‘experience is what counts, not training’ is revealing and wrong. As Mr. White noted in his Final Statement\textsuperscript{488}:

> “7.3.19 ... Experience is undoubtedly useful and necessary in order to command a major POP operation. However, it is not sufficient. Unless you are properly trained in what is considered as best practice, you can never be sure if your experience is still relevant. Over time, laws change, tactics change and equipment changes. Professional police officers, even highly experienced officers need to refresh their training to ensure they remain fit for purpose and contemporary in their knowledge. In the UK context, commanders of public order operations must be both occupationally and operationally competent. ‘Occupational competence’ requires the completion of a set of specific training modules, continuing professional training and development, and yearly reaccreditation. ‘Operational competence’ requires not only experience in the role, but confirmation by other commanders that the

\textsuperscript{487} Exhibits GGG27.1 – GGG27.6: Training History of Maj Gen Annandale, Training History of Maj Gen Mbombo, Training History of Maj Gen M pembe, Training History of Brig Calitz, Training History of Gen Naidoo and Training History of Brig Fritz

\textsuperscript{488} JJJ178: para.7.3.19
officer’s performance in the role was and is in accordance with national standards."

4.1.5 Secondly, in relation to firearms training, Mr. de Rover shared the SAHRC’s concern that the firearms training provided to SAPS members made them “poorly prepared” for real life situations. In particular, his concern was the absence of any practical judgment-based training. His interaction with Adv. Le Roux was as follows 489:

12 MS LE ROUX: Mr. De Rover, you described a
13 moment ago the SAPS firearm training as static target at a
14 distance, standing still and [un]stressed. Are you aware of
15 whether the SAPS firearm training, in addition to testing
16 accuracy, ability to hit the target whether it also tests
17 judgment, distinguishing between a threat and a non-threat?
18 Does it have any judgment component to it that you’re aware
19 of?
20 MR. DE ROVER: I think that there is
21 theory component that police officers go through where
22 obviously that aspect of judgment is taught to them or told
23 them you know acting in proportionality means nothing if
24 you can’t act proportionately when the situation occasions.
25 So the problem is with operationalisation. What I see
Page 37136
1 concerns because I don’t think that SAPS training in
2 elements is an adequate reflection of the threats and the
3 real circumstances policing every day here puts on police
4 officials. So I think they’re poorly prepared. I think
5 that my preference would be that judgment is part of active
6 shooting training so that you create shoot, don’t shoot

489 Transcript Day 286, p.37136
7 scenarios and there’s very sophisticated ones that have a 8 video wall that even interacts with your voice command. 9 [11:37] So you have a suspect with a knife and you draw 10 your weapon and you shout at the suspect will drop the 11 knife and those moments allow an instructor to judge 12 student response to more realistic scenarios, and I think 13 if you separate shooting from class room that connection 14 isn’t necessarily made. Like I can put 20 people in a room 15 here that will recite for you the definition on 16 proportionality in the use of force, but if I put them in a 17 scenario where they have to use it I’m not so sure that I 18 could say with as much confidence that they all will behave 19 in proportion to what confronts them because that is a 20 function of what they are capable of physically and how 21 strong they are mentally and how they judge the requirement 22 of that particular situation and it becomes very much 23 individual.

4.1.6 The absence of any practical, judgment-based training in discharging firearms is of significant concern to the SAHRC. Indeed, we submit that the absence of such training, in circumstances where officers are routinely involved in shooting incidents, may be unconstitutional. Judgment-based training seeks to ensure that officers can distinguish between threat and non-threat and ensure their actions are proportionate, even in high-emotion situations. The failure to provide such training increases the risk of a non-discriminating, disproportionate response to a perceived threat and heightens the risk of unlawful breaches of the constitutionally protected right to life.

490 United States case law has established that a failure to provide practical judgment-based training to firearms officers may be constitutionally inadequate: Zuchel vs. City and County of Denver, Colorado (997 F. 2d 730, 10th Circuit Court)
4.1.7  **Thirdly**, the SAHRC’s review of those who discharged live ammunition at Scene 1 shows very low rates of training in first aid. Not a single POP member, and only two TRT members were trained in basic first aid. Mr. White’s evidence on this point bears repeating. He said⁴⁹¹:

“8.1.3 In the PSNI, all officers are trained in basic first-aid. Specialist firearms officers receive additional training in administering first-aid for those with bullet wounds. This is done on the principle that if you provide an officer with a firearm, you increase the likelihood that gunshot injuries might arise, therefore to mitigate this the police should provide those officers with the basic first-aid skills to assist any person that they have been forced to shoot with that firearm. Footage from the recent high-profile murder of a soldier in Woolwich, London is instructive⁴⁹². Firearms officers are seen shooting both suspects but, within a matter of seconds, those same officers provide urgent first-aid attention to those suspects and, by doing so, may have saved both of their lives.

...  

8.1.5 In planning an operation where there is a high likelihood of the use of force, it is a matter of good practice and recognised as in compliance with human rights standards, that adequate first aid arrangements should be factored into the plan. I am told by my legal team that the training records of those who were within the TRT line at Scene 1 show only two have records of any such training. If the training records provided to the SAHRC are complete, and this conclusion is correct, then this is a significant omission and one which, if not addressed, is bound to lead to more avoidable deaths.”

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⁴⁹¹ Exhibit JJJ178: Final Statement of Gary White MBE, paras 8.1.3 – 8.1.4  
4.1.8 When this passage was put to Maj Gen Mombo, she acknowledged the desirability of such training for the future\textsuperscript{493}, implicitly acknowledging that it should have been in place in the past.

\textsuperscript{493} Transcript Day 187, pp 22685 - 22687
SECTION 5: CONCLUSIONS

5.1.1 The SAHRC does not suggest that the catastrophic outcome at Marikana was caused by the pre-existing problems within the SAPS. But, to repeat, nothing happens in a vacuum. We submit that the three issues highlighted above contributed to a situation in which a catastrophic outcome to a large-scale, partly violent, protest was more likely.

5.1.2 We cannot show that militarization and a culture of “more police, bigger guns” caused the deaths of 37 individuals, but we do submit that it explains, in the aftermath of the deaths of 13 August, the flooding of Marikana with hundreds of specialized officers from the STF, TRT and NIU carrying military-grade assault rifles.

5.1.3 We cannot show that inadequate POP capacity caused the deaths of 37 individuals, but we can show that it created:

a. A need to bring in substantial support, including from the STF, NIU, and TRT. Those units were not armed with less-lethal equipment and were instead the ‘paramilitary’ units criticized by CASAC and David Bruce, untrained in public order management, and armed with R5 rifles; and

b. A situation in which the command leadership was untrained in public order policing or crowd management and a chief planner who was unfamiliar with the Standing Order governing the policing of public disorder.

5.1.4 Similarly, we cannot show that inadequate training caused the deaths of 37 individuals, but we do argue that:

a. The failure to provide sufficient and continuous training to POP members reduced the chances that POP units would be capable of
handing a serious unrest situation without recourse to substantial support from the STF, NIU and TRT;

b. The failure to provide sufficient and continuous training to POP members increased the chances that the response of POP members to a spontaneous situation would escalate, rather than de-escalate tensions, as happened when members fired tear gas and stun grenades at an apparently peaceful crowd on 13 August;

c. The failure to provide judgment-based training as part of firearms training increased the risk that members in possession of firearms would fail to distinguish between threats and non-threats in a high-emotion / high-risk situation, and respond disproportionately, as at both Scenes 1 and 2; and

d. The failure to provide sufficient first aid training increased the risk that those injured by police use of force during operations would not receive the urgent first aid needed to save their lives, as at Scene 1.

5.1.5 Consequently, we submit that the Commission must look beyond 9 – 16 August to understand the outcomes of that week. The underlying problems of militarization, excessive use of force, inadequate POP capacity, and poor training may not have been the direct causes of deaths and injuries on 13 and 16 August, but they did substantially increase the risk that the police response to the public disorder that arose at Marikana would, to use the phrase from the 2011 Policy, “result in unnecessary casualties and fatalities”. While the catastrophic outcome at Marikana was unprecedented, it was not unimaginable. It was, at least in part, an extreme consequence of pre-existing structural and managerial flaws in the SAPS.
PART SIX

THE EVENTS OF 9 – 12 AUGUST
SECTION 1: THE OUTBREAK OF VIOLENCE AT MARIKANA BETWEEN 9 – 12 AUGUST

Section 1.1: The broader context of the labour dispute at Marikana

1.1.1 The outbreak of violence at the Lonmin mine at Marikana in August 2012 was preceded by increasing tensions both across the Rustenburg Platinum Belt and within the Lonmin mine.

1.1.2 Within the mine, two unions – the NUM and AMCU – were competing for membership after the mass dismissal of around 11,000 employees and the re-employment of around 9,000 employees in May 2011. Although NUM remained the majority union at Lonmin’s Marikana operation, AMCU had achieved majority status at Karee Mine by April 2012. Tensions between the rival unions appear to have been the cause of violence in April 2012, in which several employees were assaulted and one died.

1.1.3 Outside of the mine, tensions over remuneration for mineworkers flared up at Impala Platinum (‘Implats’) in February 2012. An unprotected strike led by RDOs had been marked by huge crowds of armed strikers, substantial violence and four deaths. In April 2012, the Implats strike ended after Implats announced a unilateral wage adjustment to its employees’ salaries following extended strike action. The wage adjustment was made for RDOs, among others. Around the same time, Anglo Platinum (‘Amplats’) negotiated an increase in the allowance for the RDOs in its employ.

1.1.4 Prior to the increases offered by Implats and Amplats, Lonmin offered the least competitive salary for RDOs among the platinum mining houses. After those increases, the differential in pay was substantial. In June 2012, around 300 RDOs from Lonmin’s Karee shaft marched to the office of the Vice

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494 Exhibit XX1: Statement of Erick Gcilitshana, paras 14 - 20
495 Exhibit XX2.4: Impala Platinum Communications Department management brief 11.12 20 April 2012
496 Exhibit OO17: Witness Statement of Mike Da Costa, para.3.5
President of the Karee mining operations, Mr. Da Costa. On his request, they nominated two members to speak to him. In a cordial meeting, those members informed Mr. Da Costa of their demand for an increase in their basic salary to an amount of R12,500. They explained that the trade unions were not involved in their demand. 497.

1.1.5 By the end of July 2012 Lonmin’s EXCO authorised an allowance for its RDOs. The allowance varied from R250 for assistance RDOs, R500 for assisted RDOs and R750 for unassisted RDOs. Lonmin formally communicated the offer on 31 July 2012, without consultation with the unions. 498.

Section 1.2: A narrative of the events of 9 – 10 August 2012

1.2.1 Overtime shifts had been scheduled for Lonmin RDOs on 9 August 2012. The RDOs scheduled to work did not arrive. 499. Since the requisite permissions had not been obtained by the RDOs, this strike action was not protected.

1.2.2 A meeting of RDOs was held in the area of the Wonderkop Hostels. Security personnel offered to open the gates of the Wonderkop Stadium to allow the RDOs to meet in the stadium. This offer was declined by the RDOs who met in front of the stadium between 08:00 and 13:00. Approximately 2,500 miners met outside of the stadium for the meeting. Approximately 15 Lonmin security members attended the meeting, which was peaceful. 501.

1.2.3 The RDOs discussed the RDO allowance proposed by Lonmin management at the meeting. Due to dissatisfaction with the allowance and the demand for an increase in basic salary to R12,500, the RDOs resolved to march to the Lonmin

497 Exhibit OO17: Witness Statement of Mike Da Costa, paras 3.8 – 3.19
498 Exhibit OO17: Witness Statement of Mike Da Costa, para.4.14
499 Exhibit OO17: Witness Statement of Mike Da Costa, para.52
500 Witness Statement of Pieter Willem Botha, para.7, unexhibited and attached at Annexure C
501 Exhibit ZZ4: Witness Statement of Akanyang Julius Motlogelwa, para.3.
Platinum Division offices (‘LPD’) the following day\textsuperscript{502}. That information was received by Lonmin security, who in turn passed it to Marikana Police Station and to POP Rustenburg who were requested to provide assistance\textsuperscript{503}.

1.2.4 On 10 August 2012, the majority of RDOs did not arrive for work with only 10\% of RDOs reporting for duty\textsuperscript{504}. The striking mineworkers started to gather at the open field in front of the sports ground around 09:30\textsuperscript{505}. By 10:00 a crowd of approximately 2000 people had started to move to the four-way stop at Wonderkop. There was no police presence at the time. After a request from Lonmin, some SAPS vehicles from both Marikana Police Station and from the POP Unit arrived at the site\textsuperscript{506}. By 12:00 noon approximately 3,000 striking miners marched to the Wonderkop crossing with the intention of meeting with Lonmin management to discuss their demands\textsuperscript{507}.

1.2.5 The strikers proceeded towards the LPD offices\textsuperscript{508}. Some of the strikers were armed with traditional weapons, mostly sticks, and knobkerries, with very few pangas and spears\textsuperscript{509}. The crowd did not appear threatening to Lonmin security personnel and the march was peaceful\textsuperscript{510}.

1.2.6 Mr. Sinclair met with the group of strikers and requested that they hand their memorandum of demands over to him. The strikers indicated that their demands were not written down and that this was not possible. Mr. Sinclair informed the group that wage demands should be addressed to their union.

\textsuperscript{502} Exhibit OO17: Witness Statement of Mike Da Costa, para.53
\textsuperscript{503} Exhibit L: SAPS presentation slide 12, Exhibit FFFF1: Statement of Graeme Sinclair, para.18
\textsuperscript{504} Exhibit OO17: Witness Statement of Mike Da Costa, para.54
\textsuperscript{505} Exhibit ZZ4: Witness Statement of Akanyang Julius Motlogelwa, para.4
\textsuperscript{506} Exhibit FFFF1: Statement of Graeme Sinclair, para.21; Transcript Day 268, pp 34044 – 34045, per Mr. Louw
\textsuperscript{507} Exhibit OO17: Witness Statement of Mike Da Costa, para.55
\textsuperscript{508} Witness Statement of Pieter Willem Botha, para.12
\textsuperscript{509} Transcript Day 262, p.33042, per Mr. Louw; Transcript Day 261, p.32865, per Mr. Da Costa
\textsuperscript{510} Exhibit GG19: Witness Statement of Dirk Cornelius Botes, para.6; Transcript Day 262, p.33042 per Mr. Louw
representatives\textsuperscript{511}. Mr. Mojela Kgotle, as Lonmin’s Executive Manager of Human Capital, had signed an instruction to cease “the unprotected march and work stoppage”. The note was read out by Mr. Sinclair and the crowd dispersed without incident\textsuperscript{512}.

1.2.7 On the evening of 10 August, Mr. Pieter Botha, Security Superintendent of Lonmin’s Mining Division, witnessed a group of approximately 20 individuals intimidating workers who were changing shifts at the Wonderkop crossing. The group was armed with traditional weapons, including knobkerries, spears and pangas. The group dispersed after Lonmin security personnel fired rubber bullets at them\textsuperscript{513}.

1.2.8 Throughout the day of 10 August, Lonmin had made attempts to increase the SAPS presence at Marikana. Mr. Kgotle made several telephone calls to Col Merafe and expressed his concerns in relation to a very limited police presence\textsuperscript{514}. By the evening of 10 August, Lonmin management was frustrated by the absence of a visible response from the SAPS. Mr. Sinclair sent out an update on the security situation and noted that: “SAPS, both Marikana Policing and Public Order Policing Unit (POPs) fully briefed and visible support requested. This was continuously elevated because of slow response”\textsuperscript{515}.

\textbf{Section 1.3: A narrative of the events of 11 – 12 August}

1.3.1 On Saturday 11 August 2012, at around 11:00, a group of approximately 2,000 striking mineworkers marched to the offices of NUM\textsuperscript{516}. The group was carrying an assortment of weapons\textsuperscript{517}. Lonmin security was dispatched to

\textsuperscript{511}Exhibit ZZ4: Witness Statement of Akanyang Julius Motlogelwa, para.5
\textsuperscript{512}Exhibit 0017: Witness Statement of Mike Da Costa, para.57
\textsuperscript{513}Witness Statement of Pieter Willem Botha, para.14, unexhibited and attached at Annexure C, Exhibit EEEE32.2: Lonmin shooting report
\textsuperscript{514}Witness Statement of Abram Mojela Kgotle, para.19
\textsuperscript{515}Exhibit FFFF6.2: RDO disruption brief 2
\textsuperscript{516}Exhibit ZZ4: Witness Statement of Akanyang Julius Motlogelwa, para.6
\textsuperscript{517}Exhibit YY1: Statement of Mr. Setelele, para.14
monitor the situation\textsuperscript{518}. There was no SAPS presence at the mine. Mr. Da Costa recalls that Mr. Sinclair complained that he was struggling to get the SAPS to react adequately and send sufficient units to deal with the developing situation\textsuperscript{519}.

1.3.2 In response to the alleged threat to their offices approximately 30 NUM members began to throw stones at the approaching RDOs\textsuperscript{520}. The approaching group then turned and ran for safety. During this incident, firearms were discharged and at least two miners were shot and injured\textsuperscript{521}. A single SAPS vehicle arrived after the confrontation\textsuperscript{522}.

1.3.3 Mr. Sinclair continued to be frustrated at the inadequate SAPS response. He noted that on the morning of 11 August he had\textsuperscript{523}:

\begin{quote}
"Repeatedly caused calls to be made to the SAPS for them to be informed that the security situation was getting out of hand. The local SAPS had come to the scene to investigate the shootings, but it was clear to me that we needed more and better support from SAPS".\end{quote}

His evidence was that a bigger or different response from the SAPS might have resulted in a different outcome on the Saturday\textsuperscript{524}.

1.3.4 Mr. Kgotle agreed that “the SAPS team on site was not sufficient to deal with the developing situation”. He therefore contacted the Special Advisor to the Premier of the North West Province to seek assistance in ensuring sufficient

\textsuperscript{518} Exhibit 0017: Witness Statement of Mike Da Costa, para.58
\textsuperscript{519} Exhibit OO17: Witness Statement of Michael Da Costa, para.8.2
\textsuperscript{520} Exhibit ZZ4: Witness Statement of Akanyang Julius Motlogelwa, para.7
\textsuperscript{521} Transcript Day 3, pp 156 - 157
\textsuperscript{522} Exhibit FFFF6.4: RDO Disruption Brief 3
\textsuperscript{523} Exhibit FFFF1: Witness Statement of Graeme Sinclair, para.31
\textsuperscript{524} Transcript Day 267, pp 33993 - 33994
police visibility and presence on site. Dr. Chauke undertook to advise the Premier and the Provincial Commissioner about the situation.  

1.3.5 Independently, Brig Engelbrecht of the SAPS Crime Intelligence received a report from a handler that there were going to be attacks at the Lonmin Mine at Marikana against supporters of NUM. He telephoned Maj Gen Mpembe and shared this information along with information about the gathering that had taken place the previous day, encouraging Maj Gen Mpembe to ensure that visible policing was deployed in the area.  

1.3.6 On the morning of 12 August, Mr. Sinclair sent out a further update on the security situation at Marikana, noting that:

“SAPS support was again very low during much of Saturday. Security Management and EA continue to apply pressure to all levels of SAPS and Provincial Administration in an effort to improve the SAPS visibility and intervention.”

1.3.7 On Sunday 12 August 2012, a large group of strikers marched towards the NUM offices, allegedly in response to the shooting of two strikers by NUM members on 11 August. Despite the requests made by Lonmin on 10 and 11 August, and despite the suggestions of Brig Engelbrecht, there was no police presence at the Marikana mine. Lonmin security personnel gathered at the NUM offices and tried to stop the strikers from approaching their offices. After firing rubber bullets at the group and failing to stop them, the security personnel fled for safety. Two Lonmin security personnel, namely Mr. Fundi and Mr. Mabelane, failed to escape the approaching group and were killed.

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525 Exhibit OO16: witness Statement of Abram Mojela Kgotle, para.25
526 Exhibit JJJ167: Statement of Brig Engelbrecht, paras 2 - 3
527 Exhibit FFFF6.5: RDO disruption brief 4
528 Transcript Day 264, p.33313, per Mr. Motlogelwa
529 Exhibit ZZ4: Witness Statement of Akanyang Julius Motlogelwa, para.14
near the Wonderkop hostels\textsuperscript{530}. Both of the deceased had been hacked to
dead and burned. Mr. Mabelane’s body was burnt beyond recognition\textsuperscript{531}.
Shortly before his death, Mr. Mabelane had complained about the absence of
any SAPS presence\textsuperscript{532}.

1.3.8 During the afternoon of 12 August, Brig Engelbrecht received a further report
from his handler who informed him of the killing of security guards at the
mine, and told him that the strikers wanted to stop employees from going to
work the night shift at Karee. He telephoned Maj Gen Mpembe and conveyed
the content of the report, and also expressed his concern that visible policing
had not been deployed as requested\textsuperscript{533}. Around 18:00 on the evening of 12
August, Mr. Sinclair spoke directly with the Provincial Commissioner, Maj Gen
Mbombo, who committed to enlarging the SAPS presence at Lonmin. By
around 20:00 a visibly increased SAPS presence was noted and a JOC was
established at the mine\textsuperscript{534}.

1.3.9 During the evening of 12 August (the timing of which is unclear) further
assaults took place and two Lonmin employees were killed, namely Mr. Langa
and Mr. Mabebe. In addition, a number of vehicles were torched.

1.3.10 On the morning of 13 August, Maj Gen Mpembe and Maj Gen Mbombo
arrived at the mine and there was a visibly large contingent of SAPS vehicles,
helicopters and members present at the mine\textsuperscript{535}. Lt Col Merafe and Brig
Seboloki also arrived at the mine for the first time on the morning of 13
August\textsuperscript{536}, despite having been nominally the Operational Commander and
Overall Commander of the Marikana operation since 10 August.

\textsuperscript{530} Exhibit L: SAPS presentation slide 6
\textsuperscript{531} See Exhibit L: SAPS presentation slides 28 - 32
\textsuperscript{532} Transcript Day 264, p.33250, per Mr. Motlegelwa
\textsuperscript{533} Exhibit JJJ167: Statement of Brig Engelbrecht, para.4
\textsuperscript{534} Exhibit FFFF1: Statement of Graeme Sinclair, para.34; Exhibit L: SAPS presentation slide 35
\textsuperscript{535} Exhibit FFFF1: Statement of Graeme Sinclair, paras 36 - 37
\textsuperscript{536} Exhibit QQQ14.2: Supplementary Statement of Brig Seboloki, para.3.2; Transcript Day 221, p.27244,
per Lt Col Merafe
SECTION 2: THE INADEQUACY OF THE IMMEDIATE SAPS RESPONSE

2.1.1 The SAHRC submits that the immediate response of the SAPS to the increasing violence at Marikana was wholly inadequate. Between the morning of 10 August and the evening of 12 August there was an extremely limited SAPS presence, which was incapable of dealing with the dangerous situation that was developing. Counter-factuals are always uncertain, but the SAHRC submits that the deployment of a large contingent of POP members on 11 or 12 August, as requested by Lonmin and as recommended by Brig Engelbrecht, may well have prevented the escalation of violence that took place over that weekend and may well have avoided the catastrophe of 13 – 16 August.

2.1.2 Mr. White interpreted Brig Engelbrecht’s suggestion of visible policing as a suggestion that the situation should be “policed out”, “in other words, lots of police officers in the area to try to maintain stability and also in a preventative role”\(^537\). The absence of this visible policing, however, led to a crowd that became increasingly emboldened as the weekend progressed.

2.1.3 We submit that the failure to respond effectively to the immediate break-out of violence can be attributed to:

a. An underlying lack of available POP capacity in the North West;

b. A failure of information management, which prevented key SAPS commanders from learning about the escalating violence; and

c. A failure of Brig Seboloki and Lt Col Merafe to control the situation, as they ought to have done as Overall and Operational Commanders.

\(^{537}\) Transcript Day 249, p.31297
2.1.4 **First**, as set out above in Part Five, POP capacity in the North West suffered from significant problems which hindered the possibility of a swift deployment of substantial POP resources to Marikana. This was the result of a long-term degradation of POP capacity, but also the consequence of a failure to allocate further resources to the SAPS in the platinum belt in response to clear signs of increasing violence throughout the first half of 2012. The SAHRC submits that the events of the first half of 2012 would have led a responsible police service to anticipate the risk that large scale disorder could arise in the platinum belt in the second half of 2012, and to allocate further resources to cater for this contingency.

2.1.5 **Secondly**, it is clear that there was a substantial breakdown in information management. Lt Col Merafe, who was the Operational Commander of the Marikana operation from 10 – 13 August, claims to have been unaware of the information passed from Brig Engelbrecht to Maj Gen Mpembe. Had this information been passed on, Lt Col Merafe states that he would have deployed visible policing as requested on the evening of 11 August\(^{538}\).

2.1.6 **Thirdly**, it is clear that the leadership of the operation from 10 – 13 August by Brig Seboloki and Lt Col Merafe was inadequate. A contingency plan for how to deal with the situation at Marikana was drawn up on 10 August\(^{539}\). The contingency plan was drafted by a non-commissioned officer and signed off by Lt Col Merafe and Brig Seboloki, but neither Lt Col Merafe nor Brig Seboloki had been to the mine and neither of them had been briefed in detail on the situation. As Lt Col Merafe admitted, the contingency plan was a “stopgap” to apply only for as long as it took to get more information and produced a more developed, comprehensive plan\(^{540}\).

\(^{538}\) Transcript Day 221, pp 27242 - 27244
\(^{539}\) Exhibit SS3
\(^{540}\) Transcript Day 221, p.27235
However, no further plan was produced until the afternoon of 13 August. As Mr. White noted:

“5.2.1 The operational plan guiding the police action between 10 – 13 August is marked “contingency plan” and is dated 10 August 2012. The stated mission is that “Public Order be maintained and crime be prevented”. As a strategic aim, this objective provides little useful direction to the police involved in the operation. In the risk analysis section, there is no reference to the risk of an attack on the police. While that may have been appropriate on 10 August, the plan was not updated as the situation on the ground changed on 11 and 12 August...

5.2.2 In my view that failure to update the plan suggests a lack of ongoing planning, where police adjusted the plan in accordance with the information that they were receiving or the events that were occurring on the ground. It is clear that the situation developed over the weekend of 10 to 12 August, to the extent that additional resources were required to be deployed. Violence occurred on Friday 10 and on Saturday 11 August, which lead to the [shooting] of two mine workers. Two further deaths occurred on Sunday 12 August. It is obvious that additional police action was taken in response to the heightening level of violence, but no amendment appears to have been made to the operational plans guiding the public order operation, or to the risk assessments, suggesting that the updated information was not being disseminated to officers on the ground.”

When the statements of Mr. White and Brig Engelbrecht were put to him, Lt Col Merafe accepted that:
a. The plan was not updated between 10 and 13 August and it should have been\textsuperscript{541};

b. The risk analysis contained in the plan of 10 August was out of date for 11, 12 and 13 August\textsuperscript{542}; and

c. There had been a breakdown in communicating information to him as the Operational Commander\textsuperscript{543}.

2.1.9 While Lt Col Merafe’s admissions are to be welcomed, they do not go far enough. The evidence of Capt Govender suggest that the absence of a satisfactory planning process was not the result of a failure of communication, but a complete failure of any leadership at all.

2.1.10 Although the plan for 10 August suggests that a JOC would be set up that day, no JOC was in fact set up at Marikana until the evening of 12 August\textsuperscript{544}. Further, although the plan for 10 August suggests that Capt Govender was the VISPOL commander for the plan and therefore a member of the JOCCOM, Capt Govender was completely unaware of the existence of any plan or any JOCCOM over the weekend of 10 – 13 August. He had no contact with Lt Col Merafe or with Brig Seboloki during that time\textsuperscript{545}. Although he provided visible policing over that weekend, he was providing it in his capacity as the commander of the local Marikana Police Station and not as part of any coherent public order plan\textsuperscript{546}. Brig Seboloki’s supplementary statement settles the matter: despite being the named Overall Commander in the plan of 10

\textsuperscript{541} Transcript Day 221, p.27244
\textsuperscript{542} Transcript Day 221, pp 27244 - 27245
\textsuperscript{543} Transcript Day 221, p.27250
\textsuperscript{544} Exhibit QQQ14.2: Statement of Brig Seboloki, para.3
\textsuperscript{545} Transcript Day 274, pp 35042 - 35052
\textsuperscript{546} Transcript Day 274, p.35051
August, he states that he had no involvement with the Marikana operation prior to 13 August\textsuperscript{547}.

2.1.11 The SAHRC submits that there is only one conclusion to be drawn from this evidence. A contingency plan seems to have been drawn up on 10 August to deal with the situation at Marikana, but nothing was done to implement it. It appears to have been signed off by commanders who had no knowledge of, or involvement in, the situation, and those commanders made no efforts to inform themselves of the developing situation. That explains Lonmin’s clear frustration with the absence of any significant police presence over the weekend of 10 – 12 August.

2.1.12 To repeat, counter-factuals are always uncertain, but the SAHRC submits that the deployment of a large contingent of POP members on 11 or 12 August, as requested by Lonmin and as recommended by Brig Engelbrecht, may well have prevented the escalation of violence that took place over that weekend and may well have avoided the catastrophe of 13 – 16 August.

\textsuperscript{547} Exhibit QQQ14.2, paras 2.1 – 2.3
PART SEVEN:

THE SAPS OPERATION ON 13 AUGUST
SECTION 1: A NARRATIVE OF THE EVENTS OF 13 AUGUST

1.1.1 From the establishment of the JOC on the evening of 12 August, through to the morning of 13 August, there was a substantial increase in the capacity of SAPS resources at Marikana. By the morning of 13 August, there were around 120 members present at or around the Lonmin mine, including some members from specialist units including the TRT and NIU²⁴⁸.

1.1.2 At around 08:30 on the morning of 13 August, the Provincial Commissioner of the North West, Maj Gen Mbombo, arrived at the JOC with the Deputy Provincial Commissioner of the North West, Maj Gen Mpembe. She immediately appointed Maj Gen Mpembe as the Overall Commander of the operation²⁴⁹. Lt Col Merafe and Brig Calitz briefed Maj Gen Mbombo and Maj Gen Mpembe, with some assistance from Mr. Sinclair of Lonmin²⁵⁰.

1.1.3 Some time later, a further briefing took place at which Mr. Mokoena, Mr. Kgotle, Mr. Kwadi and others from Lonmin briefed the SAPS command on the situation and on the events of the weekend²⁵¹. During the course of the meeting it became clear to the Provincial Commissioner that the strike involved a wage dispute in which both the NUM and AMCU had a stake²⁵².

1.1.4 At around 12:30, the Provincial Commissioner was shown live CCTV footage of an armed group of around 200 strikers next to a railway line, moving in the direction of Nkaneng informal settlement. She ordered Maj Gen Mpembe to attend to the group with an order to disperse the gathering and disarm the strikers²⁵³.

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²⁴⁸ Exhibit L: SAPS Presentation slide 42
²⁴⁹ Exhibit GGG12: Statement of Maj Gen Mpembe, para.3
²⁵⁰ Exhibit LLL1: Amplified Statement of Maj Gen Mbombo, paras 25 - 26
²⁵¹ Exhibit GGG12: Statement of Maj Gen Mpembe, para.4
²⁵² Exhibit LLL1: Amplified Statement of Maj Gen Mbombo, paras 27 - 29
²⁵³ Exhibit FFF25: Occurrence book entry 37
1.1.5 Maj Gen Mpembe gathered together around 100 SAPS members and set off to intercept the group. There was no existing plan for the disarmament of the strikers\textsuperscript{554} and no time to brief members before setting off to the railway line\textsuperscript{555}.

1.1.6 Before the SAPS arrived at the railway line, the group of strikers were intercepted by Lonmin security, who described the strikers’ reaction as ‘cooperative’. They were asked by Lonmin security to turn around and return to the Koppie, which they did\textsuperscript{556}.

1.1.7 As the strikers were on their way back towards the Koppie, the SAPS led by Maj Gen Mpembe intercepted them. During a long interaction largely captured on video\textsuperscript{557}, Maj Gen Mpembe insisted that the strikers disarm. The strikers refused, repeatedly stating that they were not fighting with police, but claiming to need their weapons to protect themselves against attacks by NUM members. They offered to disarm if the police escorted them to the Koppie\textsuperscript{558}.

1.1.8 Maj Gen Mpembe finally gave an ultimatum to the strikers and insisted they laid down their weapons before he counted to 10. Before completing his countdown, the strikers stood up and walked away from the railway line in the direction of the Koppie. Despite walking very closely to a number of SAPS members, the strikers did not seek to attack or injure any police members as they moved away.

1.1.9 Despite a disagreement between Maj Gen Mpembe and Lt Col Merafe over whether to disarm the strikers at the railway line (Merafe wanted to disarm them at the railway line, Mpembe did not), the SAPS members allowed the

\textsuperscript{554} It appears that the plan dated 13 August was prepared after Maj Gen Mpembe set off to intercept the strikers: Transcript Day 221, p.27253
\textsuperscript{555} Transcript Day 108, pp 11550 – 11551, per Maj Gen Mpembe
\textsuperscript{556} Transcript Day 264, pp 33316 - 33317, per Mr. Motlogeloa
\textsuperscript{557} Exhibit Z1
\textsuperscript{558} Exhibit QQ2.1: agreed transcript of Exhibit Z1
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... strikers to pass them and followed behind them as they walked away. What followed was then captured on CCTV\(^{559}\). Some minutes after the strikers had left the railway line and passed beyond the police, tear gas was fired at the strikers, who did not respond and continued to walk in the same direction towards the Koppie. Shortly afterwards a stun grenade exploded near the strikers, who did not respond and continued to walk in the same direction towards the Koppie. A second stun grenade exploded in very close proximity to the faces of the strikers at the front of the group\(^{560}\). In response, the group scattered in various directions.

1.1.10 Individuals within the striker group attacked and killed two police members, W/O Lepaaku and W/O Monene, and injured another, Lt Baloyi. During the ensuing altercation, the police shot and killed two strikers at or near the scene: Mr. Mati and Mr. Jokanisi. It appears that a small contingent of SAPS members, led by Lt Col Vermaak\(^{561}\), then pursued another group of strikers who had allegedly stolen an R5 rifle, and shot dead a third striker, Mr. Sokanyile, more than 500 metres away from the original confrontation\(^{562}\).

1.1.11 After the pursuit, Lt Col Vermaak returned to the scene of the initial confrontation and informed Maj Gen Mpembe of threats on his life made by SAPS members who believed that the deaths of W/O Lepaaku and W/O Monene were due to Maj Gen Mpembe’s “incorrect instructions”. Maj Gen Mpembe was removed from the scene for his own safety\(^{563}\).

\(^{559}\) Exhibits Z2 and Z3

\(^{560}\) See Exhibit OOO20: CALS analysis of Exhibits Z2 and Z3

\(^{561}\) Exhibit LLL8.1: Supplementary Statement of Lt Col Vermaak (translated), para.7

\(^{562}\) See Exhibit OOO23

\(^{563}\) See Exhibit LLL8.1: Supplementary Statement of Lt Col Vermaak (translated), paras 7 - 8
SECTION 2: INADEQUATE COMMAND AND CONTROL OF THE OPERATION OF 13 AUGUST 2012

Section 2.1: The order to disarm the strikers and the absence of any plan to do so.

2.1.1 The order to disarm the strikers was given by the Provincial Commissioner, as the overall commander of the operation (not for the purposes of SO.262, but in reality and actual fact). It appears to have been given without any real understanding of the situation on the ground, without a full appreciation of the risks of disarmament and with no disarmament plan. As Mr. White noted, the plan that was in existence had not been updated over the weekend, so it did not highlight the foreseeable threat to police officers by the protestors\(^{564}\); a threat that would be heightened by any attempts to disarm.

2.1.2 The SAHRC submits that the Provincial Commissioner’s order placed Maj Gen Mpembe in an invidious position. As Mr. White noted, an order to intercept or escort the strikers was one thing, and order to disarm them was quite another: attempts forcibly to disarm around 200 strikers would carry extremely high risks and require very careful planning\(^{565}\). The Provincial Commissioner’s order was for the SAPS members to disarm the strikers immediately, without any plan.

2.1.3 To Maj Gen Mpembe’s credit, he determined to do what was situationally appropriate and decided on a flexible approach when he arrived at the railway line\(^{566}\). His decision to allow the strikers to leave the railway line without confrontation was praised by Mr. White\(^{567}\). However, the SAHRC submits that the deficient nature of the Provincial Commissioner’s order was consistent with the order she would give on 15 August: blind to the possible

\(^{564}\) Exhibit JJJ178: Final Statement of Gary White MBE, para.5.2.3
\(^{565}\) Exhibit JJJ178: Final Statement of Gary White MBE, para.5.2.11
\(^{566}\) Transcript Day 103, p.11088
\(^{567}\) Exhibit JJJ178: Final Statement of Gary White MBE, para.5.2.12
consequences and uninformed by the risks or possible mitigation of those risks.

Section 2.2: Was the attack on police by strikers a pre-mediated attack or a spontaneous response to the firing of tear gas and stun grenades?

2.2.1 The SAHRC submits that the evidence is clear: the attack on the police by the strikers was not premeditated, but was spontaneous response by a few of the individuals within the striking group in response to the firing of the second stun grenade.

2.2.2 The video evidence shows that the strikers had long passed the police members, without incident, at the time that tear gas and stun grenades were fired. When the strikers had passed very closely by the SAPS members, they had made no attempts to attack or injure police members but simply walked on by. According to Lt Col Vermaak, who was viewing the strikers from the air, the strikers were walking peacefully in the direction of the Koppie immediately prior to the use of tear gas and stun grenades and had not deviated in their route. He was surprised to see tear gas used because he could see no reason for its use. Lt Col Merafe agreed and said that the strikers were not violent prior to the use of tear gas and stun grenades by the SAPS. Even Maj Gen Mpembe accepted that the ‘spark’ which caused the confrontation on 13 August was the firing of tear gas and stun grenades at the strikers.

2.2.3 The SAHRC submits that the strikers’ peaceful intent prior to the firing of tear gas and stun grenades is consistent with the repeated comments captured in Exhibit Z1 where the strikers say that they are not fighting with police.

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568 Transcript Day 205, pp 25232 – 25233, per Lt Col Vermaak
569 Transcript Day 219, p.26919
570 Transcript Day 101, p.11809, per Maj Gen Mpembe; Transcript Day 198, pp 25232 – 25233, per Lt Col Vermaak
571 Exhibit QQ2.1: agreed transcript of Exhibit Z1
Moreover, it is consistent with the calm reaction of the strikers to the discharge of the first tear gas canister and first stun grenade. Only when the second stun grenade exploded near the faces of the front members of the group did the retaliatory attack commence.\footnote{See Exhibit OOO20: CALS analysis of Exhibits Z2 and Z3}

2.2.4 We emphasize this point not to justify the attack by the strikers, but to explain it. There is no justification for the extremely violent deaths suffered by W/O Monene and W/O Lepaaku and for the serious injury suffered by Lt Baloyi. However, it remains the case that ‘but for’ the firing of tear gas and stun grenades, there is very unlikely to have been any attack on police and very unlikely to have been any violent deaths on 13 August.

Section 2.3: Was there an order to fire tear gas and stun grenades at the strikers? If not, was there confusion in relation to the orders given or has there been a conspiracy to mislead?

2.3.1 Paragraph 11(5) of SO.262 states that a member may only use force, including firing stun grenades or tear gas, on the order of the Overall or Operational Commander.\footnote{Exhibit SS2}

2.3.2 Maj Gen Mpembe denies that he gave any such order and claims that the tear gas and stun grenades were discharged in breach of policy and without any instruction. However, there is substantial evidence to suggest that there was an order to use stun grenades and / or tear gas and it is likely that such an order came from Maj Gen Mpembe. The basis for that conclusion is as follows:

a. Capt Thupe’s evidence was that he heard Maj Gen Mpembe give an order for tear gas to be fired.\footnote{Transcript Day 104, p.11158}

\footnote{Transcript Day 227, p.27938}
b. W/O Kuhn’s written evidence is that he heard an order for tear gas to be fired;576

c. Lt Baloyi’s written evidence is that Maj Gen Mpembe first gave an order to let the protestors go and indicated that they would be disarmed at the Koppie, but then gave a subsequent instruction to delay the strikers in order to disarm them;577 and

d. The written evidence of Cst Plaatjie, Cst Mahume, and W/O Mkhabele and the contemporaneous pocket book and/or diary entries of Capt Cwinyane, Capt Mahalene, W/O Tawana, and Cst Mathava all suggest that Maj Gen Mpembe gave an order to disarm, stop or block the strikers or to fire tear gas and stun grenades at them.

2.3.3 In the oral evidence of Mr. White, the Chairperson suggested that these statements and contemporaneous notes in pocketbooks and diaries may be a part of a conspiracy to deceive, in order to protect those who discharged tear gas and stun grenades without an order to do so. However, there is simply no evidence to support this. We submit that the Commission would have to have a substantial evidential basis to dismiss a clear and consistent body of evidence as a conspiracy. In this regard, we note that the three Captains (Thupe, Cwinyane, Mahalene), one Lieutenant (Baloyi), two Warrant Officers (Tawana, Mkhabele) and two Constables (Mathuva, Mahume) came from a

576 Exhibit RRR9
577 Exhibit GGG16, paras 7 - 8
578 Exhibit HHH58
579 Exhibit HHH31
580 Exhibit HHH33
581 Exhibit HHH25
582 Exhibit HHH27
583 Exhibit HHH38
584 Exhibit HHH24
585 Transcript Day 249, pp 31310 - 31311
range of different units and from different parts of the country. Given this fact, it is not at all clear what would be the motivation for conspiring against their Overall Commander, and doing so on the very day of the incident. The SAHRC submits that suggestions of conspiracy are far-fetched.

2.3.4 That does not, of course, rule out the possibility that the witnesses were mistaken. The SAHRC submits that this would be consistent with Mr. White’s opinion on the evidence: that there was a great deal of confusion as to the orders given as the strikers moved off the railway line. In oral evidence Mr. White was challenged on this point by both the Chairperson and Commissioner Hemraj who suggested Mr. White was not familiar with the evidence of Lt Col Merafe. In fact, Mr. White confirmed that he has read all four of Lt Col Merafe’s statements and was familiar with his oral evidence where he had said that, after the dispute between him and Maj Gen Mpembe, Lt Col Merafe was clear about what Maj Gen Mpembe wanted.

2.3.5 But the fact that Lt Col Merafe was clear about his orders does not prove that all other members were equally clear about their orders. The statements, pocketbooks and diaries cited above suggest that many members were unclear as to their task and role. The Chair recalled Lt Col Merafe’s evidence that he conveyed Maj Gen Mpembe’s order to section commanders who, in turn, relayed it to members and that:

“As far as he was concerned nobody who was there as part of the group of members of the police service could have been under any misapprehension as to what had to be done.”

Given this evidence, it is notable that not a single witness statement from members present on 13 August mentions an order from Lt Col Merafe or from

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586 Transcript Day 249, pp 31304 - 31306
587 Transcript Day 249, pp 31308 – 31310; 31333
588 Transcript Day 249, pp 31306 - 31307
a section commander. All witnesses who identified the person who gave the order state it was Maj Gen Mpembe.

2.3.6 The SAHRC submits the following two possible explanations for the dispute of fact over who gave the order for tear gas and stun grenades:

a. It is possible that Maj Gen Mpembe gave the order and now denies having done so, realizing that it was unnecessary in the circumstances and was the spark which caused five deaths; or

b. It is possible that Maj Gen Mpembe did not give the order, but that there was a lack of clarity in passing the wishes of Maj Gen Mpembe down to the frontline members, so that a number of members believed there to have been an order when there was not.

2.3.7 On the basis of a complete lack of evidential support, the SAHRC does not accept the possibility of a conspiracy to deceive from a number of members from disparate units.

2.3.8 If the Commission concludes that Maj Gen Mpembe did give an order to disarm or stop the strikers, or did give an order to fire tear gas and stun grenades (which we submit is more likely on the evidence), then he can be subjected to very serious criticism. As Mr. White explained in evidence, a disarmament operation carries very high risks and requires careful planning. With only a dynamic plan in the mind of Maj Gen Mpembe, and no prior briefing of members, a decision forcibly to disarm the crowd would have been very dangerous indeed.\(^{589}\)

2.3.9 By contrast, if the Commission concludes that Maj Gen Mpembe did not give an order to disarm or stop the strikers, and did not give an order to fire tear

\(^{589}\) Transcript Day 249, pp 31316 - 31317
gas, then it appears there was a significant failure in command and control, given that 10 members fundamentally misunderstood the dynamic plan that ought to have been communicated to them. As Mr. White explained, when there is no written plan but only a dynamic plan in the mind of the commander, it is vital that the plan is communicated clearly to everyone on the front line. In his words: “if the people at the front end don’t know what the strategy is, there is no strategy”\(^{590}\).

2.3.10 Either way, we submit that the operation of 13 August was distinguished by inadequate command and control. Either Maj Gen Mpembe gave an order to disarm that carried with it unacceptably high risks with no planned mitigation, or members were left unclear of their orders and consequently acted contrary to orders. In the latter case, Maj Gen Mpembe may not be blameworthy on a personal level (he may have communicated his intentions to his commanders and it may have been their failure to cascade the information clearly), but responsibility still lies with him as the Overall Commander of the operation\(^{591}\). Either way, the SAPS failed to command and control the operation in such a way as to minimize the risk of death and / or serious injury and therefore breached the principle of prevention / precaution outlined in Part Two.

\(^{590}\) Transcript Day 249, pp 31312 - 31313

\(^{591}\) See SO.262, para.9
SECTION 3: The use of lethal force by the SAPS on 13 August 2012

Section 3.1: Is there prima facie evidence to justify the use of lethal force by the SAPS on 13 August?

3.1.1 There is circumstantial evidence to suggest that shots fired by SAPS members on 13 August might have been justified in legitimate self and / or private defence. Two police members were hacked to death by strikers, so if SAPS members were firing their weapons in order to ward off such attacks, or any other imminent threat to life, the principle of necessity is likely to have been satisfied.

3.1.2 However, as set out above in Part Four section 4, in order to benefit from the defence of private and self-defence, a shotist must also satisfy the principle of proportionality. Similar to the statements of shotists on 16 August, the statements of those who fired live rounds on 13 August are – in general – so lacking in detail that most do not satisfy the principle of proportionality and some do not even establish necessity.

3.1.3 Three strikers were shot dead by SAPS members. There is an obligation on the SAPS to justify every shot fired that may have led to those deaths, particularly in circumstances where i) the CCTV footage appears to show SAPS members firing pistol rounds at fleeing strikers, as highlighted by Adv. Chaskalson SC and ii) the circumstances of the death of Mr. Sokhanyile remain suspicious. A failure of the SAPS to justify every round fired leaves the Commission with no other option but to consider referring shotists for prosecution for attempted murder and / or reckless discharge of a firearm.

3.1.4 As set out in Part Four above, the Commission must review all the statements of all shotists on 13 August in order to determine whether “all and any use of

592 See Exhibit Z2
force” by the SAPS was justified in the circumstances. Accordingly, the SAHRC does not make submissions on every statement, but highlights the following:

a. The initial statements of Cst Mguye\textsuperscript{593} and Cst Sekweleya\textsuperscript{594} are dishonest. The circumstances in which those two members fired live rounds, as described in their supplementary statements\textsuperscript{595}, bears no resemblance to the description in their initial statements. The SAHRC submits that where it is clear that facts provided in a statement to the Commission were knowingly false, the Commission will need to consider whether it is appropriate to refer the relevant members for possible prosecution\textsuperscript{596}.

b. The statement of Cst Ntshingila\textsuperscript{597} suggests that during the pursuit of a striker who had fled in possession of a police R5 rifle a) an order to fire live rounds was given by an unknown SAPS member, and b) rounds were fired in an indiscriminate fashion at a “group of 10 individuals” rather than at any specific target who posed an imminent threat. The SAHRC submits that where a member has failed to distinguish between a threat and non-threat, but has admitted firing simply towards “the crowd”, “the mob” or similar, the Commission will need to consider whether it is appropriate to refer the relevant member for possible prosecution\textsuperscript{598}.

c. The statements of Sgt SN Cebekhulu\textsuperscript{599}, W/O Mogale\textsuperscript{600} and Cst Yende\textsuperscript{601} provide explanations for their initial decision to fire live

\textsuperscript{593} Exhibit HHH30
\textsuperscript{594} Exhibit HHH29
\textsuperscript{595} Exhibits QQQ7 and QQQ8
\textsuperscript{596} See further at Part Fifteen below
\textsuperscript{597} Exhibit ZZZZ2.80: Statement of Cst Ntshingila
\textsuperscript{598} See further at Part Fifteen below
\textsuperscript{599} Exhibit ZZZZ2.38: Additional Statement of Sgt Siphiwe Ntokozo Cebekhulu, paras 2 - 3
\textsuperscript{600} Exhibit ZZZZ2.54: Statement of W/O Mogale
\textsuperscript{601} Exhibit ZZZZ2.116: Statement of Cst Yende
rounds, but provide no justification for the proportionality of firing, respectively, 10, 13 and 11 further rounds. The SAHRC submits that where a member has failed to justify each round fired, the Commission has no *prima facie* basis to conclude that the shots fired were proportionate and will therefore need to consider whether it is appropriate to refer the relevant members for possible prosecution.\(^602\).

\(^{602}\) See further at Part Fifteen below
SECTION 4: ACCOUNTABILITY FOR THE EVENTS OF 13 AUGUST

Section 4.1: Statements of officers and public statements by the SAPS

4.1.1 The SAPS response to the events of 13 August does not demonstrate a willingness to engage in reflection and to identify mistakes made or to hold itself accountable for deaths caused.

4.1.2 First, in the Provincial Commissioner’s press statement on 16 August, she described the incident as follows:

“They showed interest of leaving, although they indicated that they are not going to lay down their weapons, and they were leaving. Our cops were trying to assist the move. All of a sudden they turned and advanced to the police. In that advancement confrontation started, and that’s when we lost two of our cops and three members from the public, of those members that were there. Very unfortunate, very sadly.” (emphasis added)

4.1.3 The Provincial Commissioner omitted to say that prior to the attack on police members:

a. The protestors were moving peacefully to the Koppie before the police fired tear gas and stun grenades at them;

b. SAPS members fired tear gas at the crowd without authority and without warning, contrary to standing orders; and

c. SAPS members threw stun grenades into the crowd, without authority and without warning, contrary to standing orders.
4.1.4 The claim that the strikers “all of a sudden” turned and advanced towards the police was simply untrue. In fact, as the Provincial Commissioner admitted in evidence, she did know about the stun grenades and tear gas used before the attack by strikers, but did not include that information in her press briefing\(^{603}\). But she was not the only person to gloss over that fact: her claim of a sudden unprovoked attack was repeated in the statements of the majority of those members on the ground on 13 August who had given statements\(^{604}\).

4.1.5 Secondly, there appears not to have been any attempt to understand, investigate, debrief, learn from or otherwise discuss the incident of 13 August. There was no substantive debriefing session. There was no investigation into the alleged threats on the life of Maj Gen Mpembe. There was no investigation into why members fired tear gas and stun grenades without authority, and no disciplinary action in this respect. Consequently, those – like W/O Kuhn – who had sparked the incident on 13 August by firing tear gas and stun grenades were redeployed on 16 August. Tragically, W/O Kuhn would then spark the shooting at Scene 1 on 16 August as well.

4.1.6 So the failure of the SAPS to turn the lens on itself and to identify mistakes made is not a failure limited to this Commission. It was the approach of the SAPS after 13 August as well. It is not the approach adopted by an organization committed to continuous improvement and committed to taking every step to protect the life of its own members, as well as others to whom it owes a duty of utmost care.

\(^{603}\) Transcript Day 179, pp 21458 – 21472

4.1.7 Finally, the circumstances of the death of Mr. Sokhanyile went unmentioned in Exhibit L, in the statements of SAPS members (see, for instance, the initial statements of Sekgweleya, Mguye, and Vermaak), and in the SAPS opening statement. Only after the cross-examination of Lt Col Vermaak were the circumstances made a little more clear, in light of new evidence submitted by the SAPS apparently in order to discredit Lt Col Vermaak. Lt Col Vermaak claims to have informed the SAPS of the circumstances of Mr. Sokhanyile’s death at a very early stage in the Commission proceedings. So why were they not disclosed to the Commission? The SAHRC submits that the evidence of a cover-up is clear. The SAHRC defers to other parties to make submissions on what the evidence as a whole reveals in relation to Mr. Sokhanyile’s death.
PART EIGHT:

THE SAPS OPERATION FROM 13 – 15 AUGUST 2012
SECTION 1: A NARRATIVE OF THE EVENTS OF 13 – 15 AUGUST

1.1.1 The events of 13 August, in particular the deaths of W/O Monene and W/O Lepaku, caused a step-change in the approach of the SAPS. The Provincial Commissioner, Maj Gen Mbombo, immediately contacted the National Commissioner and briefed her about the incidents\(^{605}\). The Deputy Provincial Commissioner for the North West, Maj Gen Naidoo, contacted the Head of Specialised Operations in the ORS, Maj Gen Annandale, to inform him of what had taken place\(^{606}\).

1.1.2 Maj Gen Annandale left Pretoria with the Section Head of the NIU, Brig Tsiloane, and headed to Marikana\(^{607}\). He contacted Brig Fritz of the STF and requested him to send Lt Col Scott to Marikana. Lt Col Scott arrived around 19:30 and prepared a briefing on the area with assistance from Mr. Sinclair of Lonmin\(^{608}\).

1.1.3 The National Commissioner, accompanied by the Provincial Commissioner of Gauteng, Lt Gen Petros, arrived at Marikana at some stage during the evening. Maj Gen Mbombo, Maj Gen Mpembe, Maj Gen Naidoo, Maj Gen Annandale, Brig Tsiloane and Lt Col Scott briefed them. Other police commanders who had been operationally deployed that day also attended the initial briefing\(^{609}\).

1.1.4 After the initial police briefing the National Commissioner met with Lonmin mine management. Thereafter a second meeting was held at 23:00 with the operational officers of the SAPS, also attended by the National Commissioner\(^{610}\).

\(^{605}\) Exhibit GGG5: Statement of Maj Gen Mbombo, para.13.3  
\(^{606}\) Exhibit GGG1: Statement of Maj Gen Annandale, para.3  
\(^{607}\) Exhibit GGG1: Statement of Maj Gen Annandale, para.4  
\(^{608}\) Exhibit FFF8: Statement of Lt Col Scott, para.4  
\(^{609}\) Exhibit FFF18: Statement of Lt Col Scott, p.2  
\(^{610}\) Exhibit FFF18: Statement of Lt Col Scott, p.2
1.1.5 Lt Col Scott commenced a planning process late that evening and continued early into the following morning. He was provided with some assistance from Mr. Sinclair and from Lt Col Merafe.

Section 1.2: The events of Tuesday 14 August

1.2.1 On the morning of Tuesday 14 August the number of SAPS members present at Marikana increased substantially. On the morning of 13 August, there were around 120 members deployed at Marikana. By the morning of 14 August that number had increased to more than 500 members, including large numbers from POP, TRT, NIU, STF and K9 units from around the country. A JOCCOM meeting was convened at which a strategy of visible policing was adopted. The available commanders were then briefed on the sector patrol approach and deployed as divided, into the separate patrol zones. Lt Col Scott proposed a mission statement which would provide guidelines for the operational deployments and which was accepted by the senior management at the JOC.

1.2.2 Shortly afterwards, on the morning of 14 August, Maj Gen Mbombo had a meeting with Mr. Mokwena, the Executive Vice-President of Human Capital and External Affairs at Lonmin. Mr. Mokwena informed the Provincial Commissioner, *inter alia*, that the trade union, AMCU was behind the strike action and requested Maj Gen Mbombo to ensure that appropriate arrests are made and encouraged the Provincial Commissioner to take a hard line against the strikers.

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611 Exhibit L: SAPS Presentation slide 42
612 Exhibit L: SAPS Presentation slide 64
613 Exhibit GGG12: Statement of Gen Mpembe, p.9
614 Exhibit HHH20: Statement of Lt Col Scott p.38
615 Exhibit FFF18: Statement of Lt Col Scott, p.3
616 Transcript Day 178, p.21344, per Maj Gen Mbombo
617 Exhibit JJJ192: transcript of meeting between the Provincial Commissioner and Lonmin on 14th August 2012
1.2.3 A further JOCCOM meeting was held at 14:00 with various police commanders at which the operational strategy was set out. This strategy was based on Lt Col Scott’s strategy divided into phases 1 through 6\textsuperscript{618}. Following the JOCCOM – stage 1 of the plan as drawn up by Lt Col Scott was implemented by the SAPS. Stage 1 involved a sector policing strategy combined with negotiation with the striking mineworkers to disarm and disperse from Koppie 1.

1.2.4 Negotiators were deployed at around 15:20 and engaged with a group of five mineworkers who demanded to speak to Lonmin management\textsuperscript{619}. At around 17:03, the body of Mr. Twala was discovered near the Koppie and the strikers allowed the police to land a helicopter and to conduct an investigation on the murder scene\textsuperscript{620}. Negotiations continued shortly thereafter until around 18:20 when the strikers dispersed from the Koppie\textsuperscript{621}.

\textit{Section 1.3: The events of Wednesday 15 August}

1.3.1 On Wednesday 15 August, the number of SAPS members present increased again to around 750 members\textsuperscript{622}. Negotiations continued between SAPS negotiators and the representatives of the strikers at Koppie 1\textsuperscript{623}.

1.3.2 At about 13:00, Mr. Mathunjwa, the President of AMCU, Mr. Zokwana, the President of NUM, and a contingent from the SAPS led by Maj Gen Mpembe arrived at the LPD offices\textsuperscript{624}. Maj Gen Mpembe met with Peter Kwadi, Senior

\textsuperscript{618} Exhibit HHH20: Statement of Lt Col Scott pp 42 - 52
\textsuperscript{619} Exhibit HHH14: Statement of Lt Col McIntosh, paras 2 - 6
\textsuperscript{620} Exhibit HHH14: Statement of Lt Col McIntosh, para.8; Transcript Day 24, p.2642, Transcript Day 76, p.8148 and Transcript Day 102, p.10909
\textsuperscript{621} Exhibit HHH14: Statement of Lt Col McIntosh, paras 7 – 10
\textsuperscript{622} Exhibit L: SAPS presentation slide 115
\textsuperscript{623} Exhibit HHH14: Statement of Lt Col McIntosh, paras 12 – 19; Exhibit GGG12: Statement of Maj Gen Mpembe, para.32
\textsuperscript{624} Exhibit OO16: Witness Statement of Abram Mojela Kgotle, para.8.4
Manager of Employee Relations at Lonmin and requested his assistance to liaise with the relevant union representatives.\(^{625}\)

1.3.3 A meeting was convened between Maj Gen Mpembe, Capt Moolman, and the union representatives\(^{626}\). Maj Gen Mpembe indicated that the purpose of the meeting was to discuss a plan to approach Koppie 1 and address the mineworkers. Maj Gen Mpembe expressed concern about the situation and stressed that he needed everyone’s help to urge the workers to disarm and disperse\(^{627}\). Maj Gen Mpembe was specific in his instructions to those attending the meeting that the representatives of both unions, AMCU and NUM, should address the workers and inform them to disarm, disperse and to go back to work\(^{628}\).

1.3.4 Maj Gen Mpembe emphasised that the meeting at Koppie 1 was an operation of the SAPS and would take place in accordance with the SAPS plan. There were to be three delegates per union. The vehicles transporting the delegates would drive to an identified spot where the delegates were expected to transfer into Nyalas. The Presidents of AMCU and NUM would then address the strikers through loudhailers\(^{629}\). At around 18:00, Mr. Mathunjwa and Mr. Zokwana met with and addressed the strikers at Koppie 1 in accordance with the plan.

1.3.5 Upon their return Mr. Zokwana reported to Maj Gen Mpembe, Maj Gen Annandale and Maj Gen Naidoo that the strikers were not receptive and would not listen to him. Maj Gen Mpembe stressed that he needed Mr. Zokwana’s assistance in identifying those who were carrying dangerous

\(^{625}\) Exhibit KK: Witness Statement of Peter Fanyana Kwadi, para.8.1  
\(^{626}\) Exhibit GGG12: Statement of Maj Gen Mpembe, para.33  
\(^{627}\) Exhibit NN: Statement of Joseph Mathunjwa, para.37; Exhibit KK: Witness Statement of Peter Fanyana Kwadi, para.8.2  
\(^{628}\) Exhibit GGG12: Statement of Maj Gen Mpembe, para.34; Exhibit OO15: Witness Statement of Barnard Olefile Mokwena, para.7.3  
\(^{629}\) Exhibit KK: Witness Statement of Peter Fanyana Kwadi, para.8.5
weapons so that the SAPS could conduct an effective cordon and search operation to take the weapons. He emphasized that an operation to forcibly disarm the strikers at the Koppie was not an attractive option because it would cause “bloodshed”. Mr. Mathunjwa told Majs Gen Mpembe, Annandale and Naidoo that he had informed the strikers that he would speak to mine management and would provide feedback to them the following day. Mr. Mathunjwa was confident that the strikers would lay down their weapons at 09:00 on the morning of 16 August and would return to work.\(^630\).

1.3.6 At the same time as the meetings between Majs Gen Mpembe, Annandale, and Naidoo with Messrs. Zokwana and Mathunjwa, the SAPS NMF meeting took place. The NMF forms part of the executive meetings of the SAPS.\(^631\) After the NMF, an extra-ordinary session of the NMF was held that same evening to discuss the labour unrest and situation at Marikana. Maj Gen Mbombo briefed those in attendance at the meeting of the unrest in Marikana. The members of the extra-ordinary session endorsed a decision to disarm the strikers on 16 August 2012.\(^632\)

\(^{630}\) Exhibit GGG4: recording of debriefing by Maj Gen Mpembe

\(^{631}\) Exhibit HHHH1: Witness Statement of Gugulethu Lethoko, p.1

\(^{632}\) Exhibit HHHH11.1: minutes of the extra-ordinary session of the NMF 15\(^{th}\) August 2012
SECTION 2: THE NEW JOCCOM STRUCTURE – WHO WAS IN CHARGE?

Section 2.1: A shift from a provincial to a national operation

2.1.1 The SAHRC submits that after the events of 13 August, the operation turned from a provincial operation into a national one. Although Maj Gen Mpembe remained Overall Commander in name, in reality the Provincial Commissioner took over overall strategic command, with Maj Gen Annandale taking over day-to-day command responsibility. In addition, the planning of the operation was passed to Lt Col Scott, from National Head Office.

2.1.2 Evidence for the submission that Maj Gen Annandale was de facto in charge of the day-to-day operations includes the following:

a. Lt Col Scott’s evidence was that he believed that Maj Gen Annandale was in charge until 16 August when he was informed that Maj Gen Mpembe was the Overall Commander. Even though SO.262 allocates responsibility for planning to the Overall Commander, he reported to Maj Gen Annandale and never to Maj Gen Mpembe;  

b. Within Lonmin, Mr. Sinclair, Mr. Botes, and Mr. Seedat were all of the view that Maj Gen Annandale was in charge of the operation from 14 August onwards;

c. Lt Col Tsiloane’s evidence was that when Maj Gen Mpembe ordered him to accompany him to the helicopter on 16 August, Maj Gen Annandale “allowed me to go” and

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633 Transcript Day 140, pp 15235 - 15239  
634 Transcript Day 267, p.33934  
635 Transcript Day 265, pp 33403 - 33404  
636 Transcript Day 293, pp 38391 - 38392  
637 Exhibit ZZZZ3.646: Statement of Brig Tsiloane, p.1
d. Exhibit SS3 states that the Overall Commanders were “PC and Maj Gens”.

2.1.3 Given the clear evidence that Maj Gen Annandale’s role was substantially greater than the “chief of staff” role claimed, the SAHRC submits that the SAPS efforts to downplay his role in the operation was intended to hide the shift from a provincial to a national operation, and the national level of accountability which comes with that.

Section 2.2: Absence of POP expertise

2.2.1 Paragraph 4.3.2 of the POP Policy Document on Crowd Management states that “the planning and operational command of public order operations must always be entrusted to commanders of public order units, as they are trained and usually experienced in such matters”. The SAHRC submits that neither the planning nor the operational command of the Marikana operation was entrusted to commanders of public order units. We submit that this failure contributed to the catastrophic outcome of 16 August 2012.

2.2.2 In terms of operational command, the JOCCOM leadership in charge of the operation at Marikana lacked sufficient expertise in public order policing. As Mr. White noted when reviewing the training records of the leadership:

“7.3.16 I note that aside from Maj Gen Annandale, who had undertaken Crowd Management training in 2000, none of the other senior command (Provincial Commissioner, Maj Gen Mpembe, Maj Gen Naidoo, Brig Calitz, Brig Fritz) had undergone any public order policing

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638 Exhibit L: SAPS presentation slide 67
639 Exhibit FFF1
640 Exhibits GGG17.1 – GGG17.7
641 Exhibit JJJ178: Final Statement of Gary White MBE, paras 7.3.16 – 7.3.19
training since the 1980s. That is clearly a breach of SAPS policy\textsuperscript{642}, but it is also very concerning for three reasons.

7.3.17 First, the international approach to, and philosophy around, public order policing has changed fundamentally since the 1980s. I am aware that a number of SAPS policy documents emphasise this point; they point out the South Africa specific changes that have taken place since the 1980s and which have altered the framework on which POP policing is based\textsuperscript{643}. In those circumstances, it is concerning that the only training in POP policing that many of the senior leadership had taken was training in an approach that is likely to be significantly outdated.

7.3.18 Secondly, even if the training received in the 1980s remains valid, that training would have been directed at junior officers and/or non-commissioned members and undertaken by the officers concerned when they were young in service and junior in rank. It is highly unlikely that it would provide assistance in understanding how to command and control a major POP operation, which involves the co-ordination of multiple units. In order to reach the level where I was placed in charge of major public disorder events, I was required to undergo extensive training in the command of such operations. That training involved desk-top planning for multi-phase and multi-unit operations as well as simulated deployments under time pressure. I undertook a week-long specialist course before I was put in charge of any major operation and updated my knowledge and skills regularly, through further training, both classroom and practically based.

7.3.19 Thirdly, I understand from my legal team that the SAPS has claimed that although many of the senior leadership had no up to date

\textsuperscript{642} Exhibit FFF1: Public Order Police – Policy Document on Crowd Management, para.4.3.2

\textsuperscript{643} See for example section 1 of Exhibit FFF1: POP Policy Document on Crowd Management
POP training, they were all highly experienced in POP operations and that experience is sufficient. I disagree. Experience is undoubtedly useful and necessary in order to command a major POP operation. However, it is not sufficient. Unless you are properly trained in what is considered as best practice, you can never be sure if your experience is still relevant. Over time, laws change, tactics change and equipment changes. Professional police officers, even highly experienced officers need to refresh their training to ensure they remain fit for purpose and contemporary in their knowledge. In the UK context, commanders of public order operations must be both occupationally and operationally competent. ‘Occupational competence’ requires the completion of a set of specific training modules, continuing professional training and development, and yearly reaccreditation. ‘Operational competence’ requires not only experience in the role, but confirmation by other commanders that the officer’s performance in the role was and is in accordance with national standards.  

2.2.3 The SAHRC urges the Commission to accept Mr. White’s opinion on this point. It is clear that the operational command was directed by the Head of Specialised Operations, Maj Gen Annandale, with assistance from others, none of whom had received up-to-date training in public order policing or crowd management.

2.2.4 Moreover, it is clear that the planning of the operation was not entrusted to a commander of a public order unit. Lt Col Scott was an STF specialist. He was, in his own words, a member of a unit which is “the last bastion within the police when it comes to dealing with the most extreme high-risk situations where there’s precision policing necessary” 645. He had no knowledge of SO.262 646. He was the recipient of awards not for his ability to plan for crowd situations, but

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644 Exhibit JJJ178.13: Keeping the Peace, paras 4.13 – 4.20
645 Transcript Day 139, p.15029
646 Transcript Day 135, p.14319
for his part in foiling a cash-in-transit heist in which 11 of 12 of the criminals were shot dead by STF members\textsuperscript{647}. When considering the recklessness of the plan that was finally approved by the JOCCOM on 16 August 2012, this is relevant. Lt Col Scott’s background was in high-risk situations where firearms would ordinarily be required. When he was forced to plan for a tactical operation under significant time pressure, it is no surprise that firearms were at the heart of that plan.

2.2.5 The SAHRC does not suggest that Lt Col Scott had nothing to contribute to the planning process or should not have been a specialist advisor within that process. Clearly, there were significant risks posed by some armed and violent members of the crowd and Lt Col Scott’s expertise would have been valuable to inform contingencies against these risks. But he was a wholly inappropriate choice to lead the planning team in an operation which was quintessentially a crowd management operation. As Mr. White noted in his supplementary statement: “An increase in the violence or unpredictability of a situation does not lessen the relevance or applicability of established crowd management principles.”\textsuperscript{648}

2.2.6 The SAPS claim that Lt Col Scott was provided with substantial assistance by POP members in his planning task is clearly false in respect of the plan produced at the 13:30 JOCCOM on 16 August, but it also seems overstated in respect of the planning process prior to that date. Lt Col Merafe is highlighted as the key POP member who contributed to the plan. He appears to have had some input on the evening of 13 August and morning of 14 August, but his four statements are entirely inconsistent on what input he made to the plan\textsuperscript{649}. His most contemporaneous statement makes no reference to contributing to the plan and describes himself as having been briefed on the

\textsuperscript{647} Transcript Day 139, pp 15032 - 15033
\textsuperscript{648} Exhibit BBBB4, para.3.2.5
\textsuperscript{649} Exhibits GGG15, QQQ1, QQQ2, QQQ3
plan on the morning of 14 August by Lt Col Scott\textsuperscript{650}. It is clear that on the morning of 14 August he was confused as to the nature of the plan for barbed wire, which suggests he was not intricately involved in the planning overnight\textsuperscript{651}. And it is also clear that after the morning of 14 August, he had nothing further to do with planning\textsuperscript{652}.

\textsuperscript{650} Exhibit QQQ2
\textsuperscript{651} Exhibit QQQ3: Statement of Lt Col Merafe, para.6
\textsuperscript{652} Exhibit QQQ3: Statement of Lt Col Merafe, para.6
SECTION 3: THE DEPLOYMENT OF PARAMILITARY UNITS

3.1.1 On the evening of 12 August, some members of the TRT and NIU were deployed at Marikana. But it was the events of 13 August that caused their numbers to swell substantially. By 16 August, SAPS members from specialist paramilitary units including the TRT, NIU and STF outnumbered POP members by around three to two. Exact deployment numbers are unclear: the SAPS have provided varying numbers in different documents, but it appears that on 16 August 2012 there were:

- Around 200 POP members present;
- Around 165 TRT members present;
- Around 110 NIU members present; and
- Around 22 STF members present.

3.1.2 The SAHRC does not criticize the decision to deploy tactical units alongside POP units. As Mr. White said in his Final Statement:

“Given that officers had already been killed and there was information to suggest that the protestors had access to dangerous weapons, the decision to engage assistance and support from various specialist branches of the SAPS cannot be criticized”.

Like Mr. White, the SAHRC acknowledges that the SAPS faced a very dangerous and threatening situation.

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653 See Spreadsheet of SAPS members present on 16 August 2012, produced by the SAHRC and provided to the SAPS in October 2013, unexhibited but attached at Annexure C. We submit that this is more accurate than Exhibit L, slides 136 – 145. But if the Exhibit L numbers are used, the proportion of POP to specialist units is even worse.

654 Exhibit JJJ178: Final Statement of Gary White MBE, para.6.3.4
3.1.3 However, the SAHRC does question the decision to deploy such a large number of members from specialist paramilitary units armed with assault rifles and without access to less-lethal means. We submit that in a challenging crowd situation, the priority should have been to deploy as many POP members as possible, supplemented by members of specialist units for tactical support. But the numbers deployed appear to suggest the opposite: members of specialist units armed with R5 rifles were to the fore, and were supplemented by POP members with access to less-lethal ammunition.

3.1.4 This may not have been by design; it may have been the result of inadequate POP capacity in the North West and across the country, as discussed in Part Five above. In any case, the effect was to place almost 300 officers armed with R5 rifles into a crowd situation. David Bruce expressed his concern with this approach as follows:

"Thus, in addition to the ordinary policing units at Marikana, SAPS personnel now included members of a number of other specialized units. Importantly, these included paramilitary units trained and armed in order to be able to deal with ‘medium’ and ‘high risk’ situations such as hostage situations, confrontations with terrorists, and cash-in-transit gangs armed with automatic weapons. These are units, in other words, who are used for deploying what the SAPS has now come to describe as ‘maximum force’.

One of the consequences of the killings on the Monday, then, was to change the mix and make-up of the police units deployed at Marikana. Nor is this a simple matter of adding additional capacity: members of units, whose tactics and weaponry differ from those of the rest of the force, think about themselves and their work in ways that are markedly

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655 Exhibit FFF14: “Mampoer - Marikana and the doctrine of maximum force”, p.6
different from police officers whose work is more mundane. The police deployed in Marikana by the Tuesday, or at least some among them, would be seeing the miners through the prism of training and operational experience more suited to confrontation with armed gangs than with crowds – however militant and aggressive – of striking workers.

Instead of allowing time to find other ways of resolving the situation, the SAPS leadership decided to bring the situation to a head. In doing so, they realized that there was strong potential for this to lead to bloodshed. Nevertheless, the presence of the specialized units meant they could be confident of getting the upper hand.”

3.1.5 The SAHRC submits that Mr. Bruce’s assessment is accurate. National management responded to the crisis of 13 August by sidelining Maj Gen Mpembe, inserting the Head of Specialist Operations as the man in day-to-day charge, inserting a tactical firearms specialist as the chief planner, and by deploying 300 members from paramilitary units on the ground. It was consistent with the default “more police, bigger guns” approach criticized in the NDP.

3.1.6 In oral evidence, Mr. de Rover recalled that in respect of the decision to disarm the strikers on 16 August “[Maj Gen Mpembe’s] voice did not prevail in what the SAPS decided to do”⁶⁵⁶. Indeed. But it appears his voice was muted well before 16 August.

⁶⁵⁶ Transcript Day 286, p.37066
SECTION 4: WAS THERE UNDUE POLITICAL INTERFERENCE IN THE POLICING OPERATION BETWEEN 13 – 16 AUGUST?

4.1.1 The SAHRC does not intend to set out in detail a comprehensive schedule of contact between politicians and police between 13 – 16 August. Needless to say, the telephone records of Gen Phiyega, Maj Gen Mbombo, Minister Mthethwa, along with the telephone records and emails of now Deputy President Ramaphosa, indicate that there was substantial political engagement with the policing operation at Marikana.

4.1.2 But there is nothing wrong with political engagement. We do not suggest that it was inappropriate for Minister Mthethwa to make contact with the National Commissioner or the Provincial Commissioner after the events of 12 and 13 August and to keep abreast of developments as they happened. Nor do we suggest that it was inappropriate for Cyril Ramaphosa, in his role as non-executive Director of Lonmin, to make contact with the Minister of Police and the Minister of Department of Mineral Resources to express his concern at the developing situation at Lonmin, and to request their help.

4.1.3 What would have been inappropriate, and potentially unlawful, is for Mr. Ramaphosa, Minister Mthethwa, or Minister Shabangu to have sought to dictate operational policing decisions, or otherwise sought to influence those decisions for improper purposes. Accordingly, the SAHRC is not concerned about the fact of political engagement with the policing operation at Marikana, but it is concerned at the content of that engagement.

4.1.4 Two pieces of evidence are particularly concerning. The first piece of evidence is the recording of the Provincial Commissioner's meeting with Mr. 

657 Exhibit ZZZZ11
658 Exhibit ZZZZ11
659 Exhibit CCCC1.8
660 Exhibit JJJJ3
661 Exhibit BBB4
Mokwena on 14 August 2012, which suggests that the policing operation may have been driven, in part, by unlawful, improper political purposes. The key part of the transcript is set out below:

“PROV COMMISSIONER : ... Because I think even when we were trying to talk about it last night, she asked me a question that says you know, we, well, this one I am not sure, because the Lonmin shareholders I don’t know much about them.

MR. MOKWENA : Yes.

PROV COMMISSIONER : But when I was speaking to Minister Mthethwa he mentioned a name to me that is also calling him, that is pressurising him, unfortunately it’s a politically high...

MR. MOKWENA : It is Cyril.

PROV COMMISSIONER : Cyril Ramaphosa, yes. Now...

MR. MOKWENA : He is a shareholder.

PROV COMMISSIONER : Now remember now when I was talking to the National Commissioner last night she says to me, ‘Look, Gen who are the shareholders here?’, So I said I don’t 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 said she got it? Remember Cyril was in the appeal committee of Malema, remember?

MR. MOKWENA : Yes.

PROV COMMISSIONER : And he was very strong in terms of the decision that was made.

MR. MOKWENA : Yes.

PROV 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 would- and after that we ourselves as the police, we managed to, you know, manage

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662 Exhibit JJJ192bis
the situation after Malema came. Now our discussion with the National Commissioner was surrounding this thing that says is this thing now happening such that again Malema come and defuse this thing, so that it becomes as if Malema has taken charge of the mining - the mine.

MR. MOKWENA : Yeah.

PROV COMMISSIONER : The mine...Once again remember Malema’s view that the mines should be...

MR. MOKWENA : Nationalised.

PROV 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 defusing. Hence I just told these guys that we need to act such that we kill this thing.

MR. MOKWENA : Immediately, yes “

4.1.5 The transcript suggests, in clear terms, that the police operation at Marikana was influenced by political considerations entirely unrelated to the policing need to uphold the law and restore order. The SAHRC submits that the Provincial Commissioner’s explanation, in oral evidence, of this part of the meeting was wholly unsatisfactory. To the extent that the Commission accepts our submission that irrelevant political considerations were taken into account when determining the course of the policing operation, the Commission is asked to find that the Provincial Commissioner acted unlawfully.

4.1.6 But the criticism goes further. In Part Nine below, the SAHRC submits that the decision of the extraordinary session of the NMF to disarm the strikers on 16 August was unnecessary and reckless in circumstances where alternative options were available to the SAPS. Nonetheless, the decision was taken on

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663 Transcript Day 180, pp 21535 - 21565
15 August with a clear deadline: come-what-may, the strikers had to be disarmed by 16 August.

4.1.7 Why the rush? No satisfactory answer has been given. The initial claims of an ‘escalation’ of the threat have been abandoned by the SAPS and replaced by a suggestion simply that time was up. But why? Why not wait longer, and allow negotiation to continue? The SAHRC submits that political considerations may provide a large part of the answer. The Provincial Commissioner was under pressure to “kill this thing” and “end the matter”, possibly in part for good policing reasons, but clearly, in part, for bad political ones.

4.1.8 The second piece of evidence that raises concerns of political interference in the policing operation is the body of evidence of pressure placed on those in political power by Mr. Ramaphosa, particularly throughout 15 August 2012.664 As noted above, there was nothing wrong with Mr. Ramaphosa expressing his concern to Mr. Zokwana, to Minister Mthethwa, to Minister Shabangu, or to the ANC Secretary General Gwede Mantashe. There was nothing necessarily wrong with his meeting with Minister Shabangu and there may not have been anything wrong with Minister Shabangu indicating that she would discuss his concern with President Zuma665. After all, 10 people had died in the course of three days; it was a matter of national concern.

4.1.9 However, the content of Mr. Ramaphosa’s communication does not appear to have been limited to the expression of concern. As the recording of the Provincial Commissioner’s meeting with Mr. Mokwena shows, it appears there was ‘pressure’ from Mr. Ramaphosa for the police to take a particular stance and particular course of action. That is confirmed by the emails Mr.

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664 See Exhibit BBB4 in particular
665 See Transcript Day 272, pp 34660 - 34666
Ramaphosa sent on 15 August where he indicates he has requested that the police act “in a more pointed way”\textsuperscript{666}.

4.1.10 On the evidence available, it is not possible to know whether Mr. Ramaphosa’s efforts on 15 August had any impact on the decision-making within the SAPS, but that possibility cannot be discounted. By the end of 15 August, the extraordinary session of the NMF had taken a decision to act in a more pointed way by disarming the strikers the following day. There is no firm evidence linking one to the other but given the failure of the SAPS to comply with its discovery obligations, and given the mysterious disappearance of the audio recording of the NMF meeting, the Commission can have no confidence that there was no link. We submit that this is a matter on which the Commission should adopt a lower standard of proof and reach conclusions simply on the basis of a “reasonable suspicion”.

\textsuperscript{666} Exhibit BBB4
PART NINE:

THE OPERATION OF 16 AUGUST

THE PRINCIPLE OF PREVENTION/ PRECAUTION AND
INTELLIGENCE, DECISION MAKING, PLANNING, AND BRIEFING
SECTION 1: INTRODUCTION

1.1.1 As set out in detail in Part Two above, international law dictates that the lawfulness of the use of lethal force must be assessed against the principles of necessity and proportionality. But that is not the end of the matter. Satisfying the principles of necessity and proportionality will be sufficient to justify the acts of the individual law enforcement official who uses lethal force, but it will not be sufficient to justify that use of force if it takes place within a planned operation. Where lethal force is used as part of a planned operation commanded by senior officers, the operation itself must additionally comply with the principle of prevention / precaution.

1.1.2 The SAHRC frames the obligation as follows:

The principle of prevention/ precaution requires those in command of policing operations in which higher levels of force are anticipated as a possibility to plan and command those operations in such a way as to minimize the risk that lethal force will be used.

1.1.3 In oral evidence, Mr. de Rover agreed to that proposition. He said that the principle “goes to the heart of accountability”667.

1.1.4 The principle of prevention / precaution is the foundation for Mr. White’s evidence. He explained his approach in oral evidence and, although lengthy, it bears repeating because it is fundamentally important to an understanding of why Mr. White focused on matters of intelligence, planning, briefing, command and control, decision-making and accountability668.

“3 MS LE ROUX: Now, Mr. White, you’re obviously aware that the SAPS’ case before the Commission

667 Transcript Day 285, p.36980
668 Transcript Day 248, pp 31338 - 9 and pp 31342 - 31343
5 is that all deaths on the 16th were caused by individual
6 members making their own judgment to fire shots in self or
7 private defence. So what is the relevance for the
8 Commission of assessing Intelligence, planning, briefing,
9 tactical issues such as in your statement, you referred to
10 the rationale for moving in or the deployment of the TRT
11 and command and control, why should the Commission be
12 concerned about those questions when the SAPS’ case is a
13 self defence, a private defence case?
14 MR. WHITE: Well, I think the very simple
15 answer to that is that if police officers are in a position
16 where they act in private defence and again, well, if they
17 were justified in doing so it is certainly not a matter for
18 me, that’s a matter for the Commission, but the fact means
19 that police officers find themselves in a position where
20 they had to exercise their judgment, I don’t think that you
21 can isolate that question and just simply then say, yes or
22 no, was it justified? I think from the point of view of
23 the organisation you then have to say, why were those
24 officers there? You know it was the Police Service,
25 because those officers to be in that particular place at
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1 that particular time, individual officers have to be able
2 to give a kind of, if they fired a shot you know what was
3 it that they fired at, the circumstances in which they
4 fired it and it is up to someone other than me to decide
5 whether or not it was justified.
6 The reason I say that in looking at the 16th, I’m
7 looking at issues of Intelligence, planning, briefing and
8 the same issues that I’ve highlighted before, is that the
9 question for the organisation and the question for people
10 in command positions is, why were they in that position?
Why did Officer X find himself/herself in that position where therefore they had to fire their gun, because that I think is part of understanding what happened and whether or not it could have been avoided.

MR. WHITE: There is a legal basis [for this approach] Chair, and it comes from R v McCann which went to the European Court of Human Rights which was the case where the British Army, SAS shot three people in Gibraltar and the implications of that, therefore legally are that what’s my understanding of the case is that the individual soldiers who shot, the Human Rights Court found in their favour that they couldn’t be criticised as such for what they did, but the criticisms were aimed at the people who had been involved in planning. In other words why were they put in the position that they were put? So that’s a legal basis, however there is a procedural basis as well and certainly in the context that I worked in and the Police Service in Northern Island have their own Code of Ethics and 4.2 of the Code of Ethics says that when commanders are planning operations they will do so with regard to minimising the use of force. Now again if you look at something like [standing] order 262, here it talks about trying to avoid use of force at all costs. So the reason that I think this question is being asked is, it comes back to this point about in looking at the situation that happened on the 16th, either at scene 1 or scene 2, it is not sufficient to just simply say, was the officer X justified yes or no in the
16 circumstances that he/she is in at that time. Yes, that’s
17 a very important question to ask.
18 CHAIRPERSON: It is not the only one.
19 MR. WHITE: Absolutely it is not the only
20 one.”

1.1.5 Accordingly, the overwhelming majority of Mr. White’s evidence to the Commission relates not to the decision of any individual to pull the trigger, but to whether that individual ever should have been in the position where he felt compelled to pull the trigger. His conclusion, set out at paragraph 10.1.3 of his Final Statement is as follows:\footnote{Exhibit JJ178, para.10.1.3}:

“Even if there was conclusive evidence that every shot fired [on 16 August] was fired in justifiable self or private defence, my opinion is that this operation represents a serious failure of policing\footnote{Mr. White amended the original wording of this sentence when he noted in oral evidence that the operation was not simply a failure of public order policing; “it’s a serious failure of policing, full stop” Transcript Day 250, p.31486}. With better preparation, planning, leadership and execution, a situation in which more than 100 SAPS members felt compelled to fire live ammunition is likely to have been avoided.”
SECTION 2: FAILURES IN INTELLIGENCE AND INFORMATION MANAGEMENT

2.1.1 In his Final Statement Mr. White noted that it is a fundamental principle of public order policing that good policing requires good intelligence\(^{671}\). It is clear that the intelligence available to the SAPS on 16 August 2012 was sparse and inadequate.

2.1.2 Maj Gen Annandale and Lt Col Scott, amongst others, acknowledged the inadequacy of the intelligence available to the SAPS\(^{672}\). Maj Gen Annandale conceded that the police wanted much more intelligence than the “limited” intelligence available\(^{673}\). Lt Col Scott noted that the intelligence was “extremely limited and vague”\(^{674}\). Indeed, at the meeting with the National Commissioner on night of 13\(^{th}\), he recalled that the National Commissioner had asked: “how can we run an operation when we don’t have intelligence?”\(^{675}\).

2.1.3 In his Final Statement, Mr. White criticized the SAPS for the absence of intelligence gathered to support those who were constructing operational plans which might involve the use of considerable force\(^{676}\). In oral evidence, Mr. White noted that he was “shocked”, “extremely surprised” and found it “extremely odd” to find in the document purporting to be the sum total of all intelligence gathered in the week of 9 – 16 August only two or three pieces of what he would describe as “actionable intelligence”\(^{677}\).

2.1.4 The SAPS claim is that they did their best, gathering whatever intelligence was available in difficult circumstances. They explain that the hostile situation

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\(^{671}\) Exhibit JJJ178, para.6.2.1
\(^{672}\) Transcript Day 182, p.21993, per Maj Gen Mbombo
\(^{673}\) Transcript Day 202, pp 8406 - 8408
\(^{674}\) Transcript Day 140, p.15128
\(^{675}\) Transcript Day 140, p.15117
\(^{676}\) Exhibit JJJ178, section 6.2
\(^{677}\) Transcript Day 162, pp 31296 - 31297 and pp 31353 - 31354
made it almost impossible for informants to infiltrate the striker group and that their failure to gather actionable intelligence was due to the situation rather than any failing on their part. The questioning of Mr. White on this point by Commissioners suggested that the Commissioners might share that view.

2.1.5 So are Mr. White’s criticisms in relation to intelligence valid, or is it unreasonable to have expected the SAPS to have gathered more than two or three actionable pieces of intelligence during the week of 9 – 16 August? We submit the former. As Mr. White made clear, he was fully aware of the difficulties experienced by members of the CIU in the climate of intimidation and hostility prevailing at Marikana. As an officer with extensive experience of policing hostile, intimidating environments in Northern Ireland, it would have been extremely surprising if he were not sympathetic to those difficult circumstances. But his criticisms were not that the SAPS had failed to make efforts to gather intelligence: it was that there had been a breakdown in feeding through the information to Criminal Intelligence. He summarized the point thus:

“13 I think I’ve been very open in
14 accepting I understand that because in the world that I
15 live in there are huge challenges sometimes with gathering
16 intelligence. I fully accept, I’m sure lots of efforts
17 were made, but I have been able to point to a number of
18 specific instances where actually it seems to me there has
19 been some sort of a breakdown, even set aside the fact that
20 there were difficulties, there has clearly been some type
21 of breakdown in relation to the information which may have
22 been available not ultimately coming basically to inform
23 TT5.”

678 Transcript Day 248, pp 31352 - 31353
679 Transcript Day 251, p.31625
2.1.6 Examples of the breakdown that Mr. White refers to include the following:

a. On 11 August 2012, Brig Engelbrecht received a report from an intelligence handler that there were going to be attacks that night by a group of around 2,500 individuals against NUM supporters. He forwarded this information to Maj Gen Mpembe with the intention that visible policing would be deployed. No increase in visible policing took place and a march on that day resulted in the deaths of Mr. Fundi and Mr. Mabelane;

b. On 14 August, Brig Engelbrecht was provided with the names of some of the strikers visible in video footage of the incident on the railway line on 13 August. What was done with that information is entirely unclear and it does not appear to have entered the criminal intelligence log;

c. During the week of 9 – 16 August, Brig Victor interviewed witnesses, security officers and members of the public with a view to obtaining intelligence information identifying possible witnesses and suspects. None of the information received through these interviews appears to have been fed through to Crime Intelligence or the planning team;

d. Lt Col Scott confirmed that none of the information received by the members reviewing footage and identifying individuals was fed back to him prior to 16 August 2012.

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680 Exhibit LLL6: Statement of Brig Engelbrecht, paras 2 – 4 highlighted by Mr. White at Transcript Day 248, pp 31296 - 31298
681 Exhibit LLL6: Statement of Brig Engelbrecht, para.6
682 Exhibit ZZZZ3.664: Statement of Brig Victor highlighted by Mr. White at, inter alia, Transcript Day 250, p.31606
683 Transcript Day 140, pp 15118 - 15119
e. Lt Col Scott requested feedback on the attitudes of the area’s population on 14 August 2012, but received nothing back in response to this request;  

f. An STF observation team was tasked by Lt Col Scott to set up a post on Koppie 3. However, their feedback was that this would not be possible for a range of reasons, including the fact that strikers were moving between Koppies 1 and 3. This information – which, if Mr. X’s evidence is to be believed, may have been of some significance – never found its way to Criminal Intelligence and was therefore not investigated any further; and  

g. Despite the co-operation of Lonmin and SAPS intelligence capacity, it appears that the intelligence gathered by Lonmin was not fed through to the SAPS Criminal Intelligence log. In evidence Mr. Botes said that: “we did receive a lot of information from our sources, but not who was targeted next”. It is clear that Lonmin had a source who was able to mix with the strikers, and who received valuable information.

2.1.7 Accordingly, Mr. White’s criticism is not that nothing was done to gather information; it is that nothing was done with the information that was available.

2.1.8 Further, Mr. White emphasized that the key point to his criticism of the absence of intelligence was that the decision to implement a high-risk disarm
and arrest operation on 16 August was taken in the absence of meaningful intelligence. He said:\footnote{Transcript Day 251, pp 31620 - 31621}:

\begin{quote}
“14... the
15 overriding issue in relation to intelligence is this: that
16 this is a very, very significant operation involving
17 hundreds and hundreds of police officers, heavily armed,
18 potentially going to interface with thousands of people,
19 many of whom are armed and some of whom seem to have a
20 particular intent.
21 The intelligence that the police had at the time
22 - so irrespective of the difficulties and how hard they
23 tried and all of that - the intelligence that the police
24 had at the time that they were making the decision to go
25 and developing the plan was effectively this: there were

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1 around 3 000 or thereabouts people on the Koppie. They are
2 armed with dangerous and traditional weapons and they’re
3 prepared, basically they will not give those up and they
4 will resist the police, and yet with the very sparse - I
5 think was the terminology that Mr. Semenya used yesterday
6 and I used it as well – with that, the very sparse amount
7 of intelligence available, that’s where it’s at.
8 So irrespective of how we got to that point, that
9 is the intelligence that they had and yet given that that
10 was the intelligence, they decided at 3:30 that they were
11 going to go and carry out this operation. That is my chief
12 point in relation to the issues of intelligence, that it
13 was, yes, it was very limited, and for all the reasons that
14 we’ve talked about, but given that that’s what the
15 intelligence was, that’s what they, you know, they then
16 responded in the way they did…”

2.1.9 As the Chairperson noted\textsuperscript{689}, the SAPS had reasonable prospects of receiving further intelligence if they had waited beyond 16 August. On the evening of 15 August, Mr. Zokwana had undertaken to make efforts to identify the ringleaders of the strikers; additionally, the detectives were in the process of identifying strikers from the video and photographic footage available. A further day or two might have borne sufficient intelligence to allow a targeted cordon and search to confiscate weapons. Instead, in the absence of any substantial intelligence except for the likelihood of confrontation, the SAPS decided to commence a forcible disarmament plan that was bound to lead to conflict.

2.1.10 In conclusion, the SAHRC does not contend that the inadequacies of intelligence management amount to a breach of the principle of prevention / precaution on their own. Inadequacies in the intelligence did not, on their own, lead to the deaths of 34 individuals on 16 August. However, those inadequacies form an important part of the context of the SAPS decision to forcibly disarm the strikers on 16 August and must be taken into account when assessing that decision and the failures to pursue alternative options. The SAPS have admitted failures in their intelligence, information and risk assessment\textsuperscript{690}, but have failed to acknowledge the consequences of those failures on their decision-making.

\textsuperscript{689} Transcript Day 249, pp 31358 - 31359
\textsuperscript{690} Exhibit YYYY1: SAPS Lessons Learned, para.1; Exhibit LLL1: Final Interim Report, para.3.5
SECTION 3: FAILURES IN DECISION MAKING - THE ORDER TO DISARM THE STRIKERS

Section 3.1: The decision to disarm the strikers: the facts

3.1.1 The central criticism that Mr. White leveled at the SAPS operation of 16 August was the decision to implement a tactical DDA operation on the afternoon of 16 August 2012. He said:

“The key issue is that the decision to implement Stage 3 at the time chosen appears unjustified by the situation on the ground, carried significant risks, and was likely to escalate, rather than de-escalate conflict. I think it was a fundamental error.”

3.1.2 The SAPS case for many months was that the decision was taken by the command leadership in response to an escalation of the threat from the strikers on the ground. Key witnesses who supported this case included:

a. Maj Gen Annandale, who claimed to have been very surprised to hear that the Provincial Commissioner had told the National Commissioner on 15 August that disarmament would take place on 16 August and insisted that it would not have been possible for the National Commissioner and Provincial Commissioner to have made a change to the plan that stage 3 would only take place on escalation of the threat. Further, he claimed that the decision to proceed to a DDA phase was made by the Overall Commander, Maj Gen Mpembe, and agreed by the Provincial Commissioner around midday on 16 August; and

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691 Exhibit JJJ178: Final Statement of Gary White MBE, para.7.5.4
692 Transcript Day 82, p.8662 and p.8672
693 Transcript Day 83, p.8761
b. Maj Gen Mpembe, who claimed that he had taken the decision to move to the disperse, disarm, arrest phase, in light of the factors set out in paragraph 17 of his supplementary statement. When it was put to him that the decision was made on the 15th, he stated, in unequivocal terms that it was his decision and it was taken on the 16th.

3.1.3 It is now clear that those claims were false. It is also clear that Maj Gen Mpembe and Maj Gen Annandale knew that the claims were false at the time they made them. Mr. de Rover’s evidence was that he had been informed of the NMF decision by a third party and that both Majs Gen Mpembe and Annandale had confirmed to him that the information was true prior to 8 March 2013. He also confirmed that both Majs Gen Mpembe and Annandale believed the decision to have come from the executive. Accordingly, it is clear that both knowingly gave false evidence to the Commission.

3.1.4 The decision to disarm the strikers on 16 August 2012 was not taken by the command leadership on the ground on 16 August. It was taken the evening before, on 15 August 2012, at an extraordinary session of the NMF for the SAPS. The extraordinary session was made up of:

a. The National Commissioner, Gen Phiyega;

b. The Provincial Commissioner, Maj Gen Mbombo;

c. The Divisional Commissioner Operational Response Services, Gen Mawela;

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694 Exhibit HHH3. See also Transcript Day 106, pp 11438 - 11444
695 Transcript Day 112, p.11967
696 Transcript Day 285, pp 36925 - 36927
697 Transcript Day 286, p.37083
698 Exhibit JJJ177: Minute of the Extraordinary Session of the NMF
d. The Deputy National Commissioner Operational Services, Gen Masemola; and

e. A number of Provincial Commissioners from other provinces.

3.1.5 At the close of the NMF meeting, the National Commissioner requested those members to remain behind to discuss the situation at Marikana. The Provincial Commissioner, Maj Gen Mbombo, spoke on the situation at Marikana. The National Commissioner also spoke, as did Gens Mawela, Masemola and Petros. At the close of the meeting, the members “endorsed the proposal to disarm the protesting masses”.

3.1.6 As confirmed by the National Commissioner, the proposal was time-limited: the disarmament operation would take place the following day, on 16 August 2012. The Provincial Commissioner said that the decision to disperse, disarm and arrest was not dependent on an escalation of any threat, and that disarmament was to take place forcibly on 16 August 2012 if it did not take place voluntarily.

3.1.7 Maj Gen Mbombo’s evidence was that she communicated that decision by telephone to the operational leadership of the Marikana operation, including Majs Gen Mpembe, Annandale and Naidoo, on the evening of 15 August. That appears to be borne out by the telephone records for the Provincial Commissioner. Capt Adriao confirmed that he was contacted by the

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699 Transcript Day 178, pp 21353 – 21356, per Maj Gen Mbombo; Transcript Day 288, p.37417, per Gen Phiyega
700 Exhibit JJJ177: Minute of Extraordinary Session of the National Management Forum
701 Transcript Day 288, p.37395
702 Transcript, Day 180, p.21616
703 Exhibit LLL1: Supplementary Statement of Lieutenant Gen Mbombo, para.42; Transcript, Day 180, pp 21618 – 21619
704 Transcript, Day 180, pp 21575 – 21579
705 Exhibit LLL3
Provincial Commissioner at around 22:00 on 15 August, after the NMF meeting had concluded, to arrange a media briefing for the following day. That was the 09:30 media briefing at which the Provincial Commissioner would announce that: ‘today we will end this matter’.

3.1.8 Accordingly, the evidence suggests that, as of the evening of 15 August, it was clear to the operational leadership that disarmament would need to take place on the following day, come-what-may.

3.1.9 Hard as the National Commissioner might have tried to insist that the decision taken by the extraordinary session of the NMF was not hidden from the Commission, it is absolutely clear that it was. That conclusion is based on the following facts:

a. Exhibit L contains no reference to the decision of the extraordinary session of the NMF;

b. The SAPS hard drive purporting to contain all material relevant to the Commission process contained no reference to the decision;

c. The National Commissioner failed to disclose anything about the decision during her 16 days of oral evidence in 2013;

d. Majs Gen Mpembe and Annandale denied that the decision had been taken on the 15th, despite their knowledge of the extraordinary session of the NMF;

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706 Exhibit ZZZZ3.1: Statement of Capt Adriao, confirmed by Maj Gen Mbombo at Transcript Day 178, p.21348
707 Transcript Day 288, pp 37419 - 37429
e. The minutes of the meeting were disclosed only on specific request of the Commission, after the Commission was informed of the decision via a third party; and

f. The recording of the session has mysteriously disappeared\textsuperscript{708}.

3.1.10 The reasons for hiding the decision from the Commission are clear: the decision of the extraordinary session of the NMF was imposed on the operational leadership at Marikana, contrary to their existing plans and contrary to their considered view on the risks of disarmament. But for that decision, it is unlikely that the SAPS would have launched a tactical disarm, disperse, arrest operation on 16 August, and unlikely that the catastrophic killings of 16 August would have occurred.

Section 3.2: The decision to disarm the strikers: impact on the existing plans of the operational command at Marikana

3.2.1 The consequence of the decision of the extraordinary session of the NMF cannot be understated. It is clear that the operational leadership of the Marikana operation would never have made the decision to disarm the strikers on 16 August without an order from above. In light of the order from the extraordinary session of the NMF, the operational leadership had to alter their planning in a fundamental way. None of the existing plans drawn up by Lt Col Scott and discussed in the JOCCOM catered for the forcible disarmament of several hundred armed strikers. The strategy of the operational leadership prior to the decision of the NMF is set out below.

3.2.2 First, the primary strategy adopted by the SAPS was one of negotiating out the situation, alongside visible policing. Encompassed in “Phase 1” and “Phase 2” of the plan developed by Lt Col Scott on Tuesday 14\textsuperscript{th} August, the

\textsuperscript{708} Transcript Day 270, p.34384 and Statement of Brig Mahlelela, unexhibited and attached in Annexure C
strategy incorporated visible policing and sector patrolling around the informal settlement and near the hostels. Near the Koppie where the strikers gathered, increasing numbers of police were deployed in a visible display of force. But crucially, police negotiators sought to engage with the strikers to talk their way to a solution. Mr. White was candid in praising the SAPS efforts at negotiation on 14 and 15 August 2012.  

3.2.3 On the evening of 15 August, there was some hope that a negotiated solution could be found. Mr. Mathunjwa informed Maj Gen Mpembe that he believed the strikers would disarm voluntarily at 09:00 on the morning of 16 August. Although Mr. Mathunjwa’s optimism was not shared by all of the JOCCOM leadership, the SAPS had committed to allowing the possibility of voluntary disarmament by 09:00 on 16 August.

3.2.4 Secondly, the SAPS had planned two potential tactical options to resolve the situation. According to Lt Col Scott, those tactical options would only be considered, “if all other options to resolve the situation without force were exhausted”. They included:

a. A tactical option to encircle the Koppie with barbed wire, at daybreak, when there was an expectation that there would be no more than 50 strikers on the Koppie, who could be processed and disarmed through a single exit. Subsequently, a filter line would be set up to disarm any strikers as they arrived at the Koppie. It is clear that that option was the prevailing tactical option until the morning of 16 August. That option was not available to the SAPS on the morning of 16 August.

709 Transcript Day 250, pp 31515 – 31517 and Transcript Day 283, p.36657
710 Exhibit GGG4: Debriefing by Maj Gen Mpembe
711 Exhibit HHH20: Consolidated Statement of Lt Col Scott, paras 8.33 – 8.34; Exhibit LLL6: Statement of Brig Engelbrecht, para.7
712 Exhibit HHH20: Consolidated Statement of Lt Col Scott, para.6.27
713 Transcript Day 134, pp14279 – 14286 and pp 14305 – 14307; Transcript Day 137, p.14615 and Transcript Day 140, p.15138, per Lt Col Scott
because it would need to be conducted by 06:00 in the morning, and they had committed to allowing the possibility of voluntary disarmament at 09:00. A tactical engagement before 09:00 would have been a significant breach of trust and contrary to the spirit of cooperation they were seeking to encourage;

b. A possible option to conduct a cordon and search of the hostels and the informal settlement to seize dangerous weapons from strikers. Although plans were drawn up for a cordon and search operation, and authority was given by the Provincial Commissioner, the SAPS were not in possession of sufficient intelligence to implement the cordon and search by 16 August. There were hopes that Mr. Zokwana and Lonmin would soon provide some useful intelligence to assist a cordon and search, but that was not expected to arrive by the morning of 16 August.

3.2.5 Accordingly, the command leadership did not have available to them, on the evening of 15 August, a prepared, workable plan to disarm the strikers on 16 August. In particular, there was no plan prepared to disarm the strikers while 3,000 people were present on the Koppie.

3.2.6 Indeed, not only was there an absence of a plan for disarmament in these circumstances, there appears to have been strong opposition to such a plan. At around 20:00 on 16 August, Majs Gen Mpembe, Naidoo and Annandale met with Mr. Zokwana at Marikana, and explained in clear terms why forcible disarmament was not an option and why further intelligence was required in

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714 Transcript Day 135, pp 14305 – 14307, per Lt Col Scott
715 Exhibit HHH18: Cordon and Search
716 Transcript Day 224, pp 27715 - 27718 (cross-examination of Lt Col Vermaak)
717 See Mr. Zokwana’s agreement to seek to assist Maj Gen Mpembe with information on the location of weapons: Exhibit GGG4
718 Brig Engelbrecht and Brig Victor were engaged with Lonmin seeking to identify strikers from photographs and video: see Exhibit LLL6: Statement of Brig Engelbrecht and Exhibit ZZZ3.664: Statement of Brig Victor
order to allow the police to carry out a cordon and search of individual houses. Maj Gen Mpembe pleaded with Mr. Zokwana as follows:

"I cannot go there and disarm people. It would be bloodshed. So then I need to (inaudible) and go in a specific house, disarm. That is the only way... I need to be told, I need to go to the house because that is the only way. Eating this elephant bit by bit because me going there to the mountain, disarming people, it is going to be bloodshed. It is going to be bloodshed. That one I can assure you. Those blankets they have and those things I saw being cut by police officers in front of me, they did that. So now that is what I am saying the leadership are calling upon... You have to give me to say which houses, which people and I need statements, I need evidence that I should now start doing my work...

... as I am saying I need to beat this elephant. If you were there President you could count how many people, between 3 to 4000, so if you charge those people with the number of police you have with what they have cut the people, they are also psyched up, definitely anyone would come up with that whatever thing, they will have to act and we are also not prepared to use less bullets and I know that you do not want us to shoot-shoot. Here it is that the police are shooting, are killing people and we do not want to go that route but at the same time we are also not prepared that our members should die but we have a duty to disarm.

...

... I cannot go to the mountain, it is not – has never been strategically in my training. I have not [been] taught... How do I disarm somebody with an axe and I have a firearm. It will never work. There is no training in the whole world to be like that."

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719 Exhibit GGG4: Debriefing by Maj Gen Mpembe
3.2.7 Tragically, at exactly the same time as Maj Gen Mpembe was saying these words, the extraordinary session of the NMF was held. Maj Gen Mpembe was saying in clear terms that forcible disarmament would cause bloodshed. The extraordinary session of the NMF decided in equally clear terms that forcible disarmament would take place the following day.

3.2.8 In his examination-in-chief by Adv. Ngwane, Maj Gen Mpembe was asked repeatedly what had changed between the evening of 15 August, when he made these comments, and 16 August, when the disarmament operation commenced\textsuperscript{720}. Maj Gen Mpembe gave several answers. What he did not say was the simple truth: the fundamental change was that he had received an order from the National Commissioner and Provincial Commissioner that the strikers must be disarmed on 16 August, come-what-may.

3.2.9 The SAPS argue that Maj Gen Mpembe’s words spoken to Mr. Zokwana have been misconstrued; that he was speaking rhetorically and in exaggerated terms to persuade Mr. Zokwana to assist with intelligence. It is claimed that he did not genuinely believe that a disarmament operation was ill advised or high-risk. With respect, that is nonsense. Maj Gen Mpembe admitted himself that he foresaw the risk of bloodshed if a disarmament operation was to take place, even if he did not anticipate the level of bloodshed caused on 16 August\textsuperscript{721}. But more revealing was Mr. de Rover’s answer when the Chairperson put Maj Gen Mpembe’s words to him. He said\textsuperscript{722}:

"16 MR. DE ROVER: Yes, Chair, and one of the 17 problems is that the approach of Marikana had never been 18 field tested so – and the reality of it actually is that 19 that’s such a dangerous situation, you could not even 20 countenance the idea that you go and train that because of

\textsuperscript{720} Transcript Day 242, pp 11236 - 11237 and Transcript Day 106, pp 11371 - 11380
\textsuperscript{721} Transcript Day 106, pp 11370 - 11371 and Transcript Day 111, pp 11902 - 11910
\textsuperscript{722} Transcript Day 286, pp 37075 - 37066
the risk that is involved in it. The other thing is, in part it wasn’t imagined, so how can you prepare for the unimaginable? So it puts up big questions in terms of preparedness. I know that Gen Mpembe was and is still very passionate and emotional about his assessments and reading and I think in the end his voice did not prevail in what SAPS decided to do. His opinion is known and he shared it, I know that he made it known to people but his voice did not prevail.

MS LE ROUX: Mr. De Rover, the Human Rights –

CHAIRPERSON: Sorry, sorry. He had an acute appreciation for the doctrine of situational appropriateness.

MR. DE ROVER: Ja.”

3.2.10 If Mr. de Rover’s evidence is accepted, then Maj Gen Mpembe appears to have been less than candid with the Commission. It seems that Maj Gen Mpembe did not only share his concerns of bloodshed with Mr. Zokwana, but with other members of the SAPS command. But his concerns were ignored, with catastrophic consequences.

Section 3.3: The decision to disarm: was it foreseeable that an operation to forcibly disarm the strikers could lead to deaths and/or serious injuries?

3.3.1 Mr. White’s evidence was that any plan to disarm and arrest significant numbers of people on 16 August was inherently high risk. He considers that the risk of violent confrontation was eminently foreseeable. The SAHRC submits, further, that it was foreseeable that a plan to forcibly disarm the

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723 Exhibit BBBB4: Supplementary Statement of Gary White MBE, para.2.3.7
strikers might result in death or serious injury. The 12 pieces of information canvassed below confirm that the SAPS were aware of that risk as well:

a. On 13 August 2012, police use of force against the strikers had resulted in retaliation from the strikers and had left five people dead;

b. Lt Col Scott’s view was that:

“There was bound to be conflict again should the police use force to defuse the situation with the protestors that armed as they were and with their emotions running as high as they did at the time”;

c. The available intelligence suggested that the strikers had been taking muti and believed the police could not shoot them. It is irrelevant whether this is true or not, what is relevant is that the police believed it to be true;

d. That information was taken over into the planning where the risk assessment noted the strikers as having “a mindset of invincibility”;

e. The police had information to suggest that there were firearms within the possession of the strikers on the Koppie;

f. None of the JOCCOM members who gave evidence to the Commission seriously thought that the so-called ‘militant group’ would voluntarily disarm and disperse when asked to do so;

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724 Exhibit HHH20: Consolidated Statement of Lt Col Scott, para.6.10
725 Exhibit TT5: Criminal Intelligence Information: Lonmin Platinum Mine: Marikana Labour Unrest
726 Exhibit JJJ50: Operation Platinum Mine: Marikana 13 August 9OPS Platinum Power Point Presentation), slide 7
727 JJJ107: Consolidated Statement of Brig Calitz, para.55
g. The intelligence on 16 August noted that many of the mine workers were in possession of dangerous weapons which they would decline to surrender, and they were prepared to fight if their demands were not met, including by resisting police;  

h. There were reports of serious threats made by strikers to the SAPS from the evening of 15 August into the morning of 16 August;  

i. Maj Gen Mbombo was recorded on 14 August stating that if the strikers do not surrender “then it’s blood”. Her oral evidence was that she was warned on the morning of 16 August that there was a risk of the TRT using live ammunition, and therefore a risk of injury and death, in a tactical option to disarm the strikers;  

j. Lt Col Scott’s oral evidence was that he was mindful that a tactical option could elicit a violent response from the strikers and it was important not to send SAPS members “into a blatant death trap”, so he proposed sending a line of TRT members in support of POPs so they could use their sharp ammunition against any life-threatening attacks;  

k. On the morning of 16 August, Brig Van Zyl requested four mortuary vans to be delivered to Marikana in advance of the operation; and  

l. At around 12:50 on 16 August, Brig Calitz requested 4000 rounds of R5 ammunition from Lt Col Merafe. Lt Col Merafe’s evidence was

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728 Exhibit TT5: Criminal Intelligence Information: Lonmin Platinum Mine: Marikana Labour Unrest  
729 Exhibit L: SAPS Presentation  
730 Exhibit 192bis: Transcript of Provincial Commissioner and Lonmin Meeting, p.7  
731 Transcript Day 181, pp 21719 - 21728 and pp 21661 - 21662.  
732 Transcript Day 140, p.15150  
733 Exhibit JJJ183: Statement of Ms Ngake and Exhibit ZZZZ3.357: Statement of Brig Van Zyl  
734 See Exhibit KKK4: Cellphone Records of Contact between Brig Calitz and Col Merafe at this time
that he had never before been asked to provide anything approaching that much ammunition in advance of a public order operation. Lt Kgoadibana, who delivered the ammunition, was told it was needed because “they were busy with an operation [at Marikana]”\textsuperscript{736}.

3.3.2 As set out above, these 12 pieces of evidence were put to Mr. de Rover in cross examination and he was asked if he agreed that the SAPS should have foreseen the risk of injury or death in the operation of 16 August. His answer was nothing short of a ‘game-changer’ in the Commission’s understanding of what happened at Marikana. He said\textsuperscript{737}:

\begin{quote}
“10... in the face of what you say, how can anyone decide that you are going to do that if what, if I just accept at face value that each of those 12 points is true, you can't implement an operation on that. Now you have been given an order, international law says if an order is manifestly unlawful and if you have a reasonable opportunity to refuse it, you should do so. That for me now is a $64 000 question. Is the order that was given to the police that I will take came from the executive, from government, is that order an unlawful order? Can you now, on the basis of what you know because you're now asking the police to resolve a situation of which they could have demonstrated to the executive that it would likely produce this result, then you have that problem and I recall your Deputy President in answer to a question of Mr. Mpofu, qualifying Marikana as a collective failure. It’s really a Page 37072
\end{quote}

\textsuperscript{735} Although Brig Calitz denies this, Col Merafe ‘s diary (Exhibit HHH26), and oral evidence (Transcript Day 217, p.26695 and pp 27137 - 27141), along with the evidence of Lt Kgoadibana, strongly weigh against Brig Calitz

\textsuperscript{736} Exhibit ZZZZ4.10: Statement of Lieutenant Kgoadibana

\textsuperscript{737} Transcript Day 286, pp 37071 - 37072
1 pity that he wasn’t drawn to qualify that because I think
2 that part of the answer that you need, one, to unearth the
3 structures behind what happened and how that happened is to
4 get clarity why, in the face of such overwhelming evidence
5 as you now present and that you hold the police were aware
6 of when they were making that decision and trying to
7 operationalise it, why didn’t they refuse to do it, because
8 if it originated from within the police itself it would
9 have been simple to stop that.”

3.3.3 The SAHRC will let others argue over whether the order to disarm came from
the executive or from the extraordinary session of the NMF. The SAHRC
notes only the following:

a. Mr. de Rover stated that Majs Gen Mpembe and Annandale shared
his view that the order came from the executive 738;

b. Members of the executive were, without doubt, closely engaged in
the events at Marikana and the police response to those events 739;

c. The timing of the decision of the extraordinary session of the NMF
followed a build-up of pressure on members of the executive, and a
promised discussion of the issue by Cabinet members 740; and

d. The Minister of Police appears to have been sufficiently involved to
have been informed that the operation on 16 August was about to
commence 741. The changing evidence of the National Commissioner,

738 Transcript Day 286, p.37083
739 See Part Eight, section 4 above
740 See Part Eight, section 4 above
741 Exhibit FFF3: Statement of National Commissioner, dated 12 March 2013 contains the following at
p.7: “On the afternoon of August the 16th, 2012, I received a call from Lieutenant-Gen Mbombo who
informed me of the decision to implement stage 3 of the plan, which information I relayed to the
in this respect, suggests an attempt to insulate the Minister rather than an attempt to explain a simple mistake.\footnote{\textit{Minister.}” Exhibit EE: minutes of JOCCOM meeting at 13:30 on 16 August 2012 notes the same, and the same appears in Exhibit JJJ168: handwritten JOCCOM notes\footnote{See cross examination of the National Commissioner by Adv Burger SC: Transcript Day 72, pp 7603-7627 and Transcript Day 73, pp 7628 - 7661}.

3.3.4 The SAHRC is unable to submit that the order did come from the executive, but there is sufficient \textit{prima facie} evidence of this possibility that the Commission must consider it properly. In any case, what is clear is that the order was imposed on the command leadership of the Marikana operation from above. And, according to Mr. de Rover, the order carried with it such obvious risks as to raise serious questions as to whether it was lawful.

\textit{Section 3.4: The decision to disarm: responsibility of those who took the decision}

3.4.1 The evidence establishes clearly that those who took the decision to disarm the strikers at the extraordinary session of NMF did so without reference to the commanders on the ground, without reference to the available intelligence, and without knowledge of the plan to disarm or any steps that would be taken to mitigate risks. It is clear that none of the commanders of the Marikana operation were consulted on their view on the potential risks of forcible disarmament. The National Commissioner’s evidence was that the plan was not discussed at the extraordinary session of the NMF. She was not aware that there was no disarmament plan in existence that could be implemented on the 16th.\footnote{Transcript Day 288, pp 37398 - 37400 and 37403 - 37404}. The Provincial Commissioner’s evidence was that she, and by extension all the decision makers, were unaware of the up-to-date intelligence\footnote{Transcript Day 181, pp 21660 - 21664}.

3.4.2 Both the National Commissioner and the Provincial Commissioner claimed not to require this information before taking the decision to disarm because
they had a team who would operationalise the decision\textsuperscript{745}. In essence, they said that they gave an order to disperse, disarm and arrest, but it was the Overall Commander’s responsibility to work out how to do that\textsuperscript{746}.

3.4.3 The SAHRC submits that this attitude expressed by two of the most senior officers in the country is incorrect, misguided and illustrates a seriously disturbing lack of accountability. It is wrong-headed because it failed to engage with the fundamental problem that arose at Marikana: any plan to forcibly disarm a large group of strikers carried unacceptably high risks. As Maj Gen Mpembe had said: “\textit{there is no training in the world for that}”. There was no way to satisfactorily mitigate the risks associated with an order to disarm a group who were armed and intent on retaining their arms.

3.4.4 Mr. White also rejected this argument and said, in relation to the Provincial Commissioner’s responsibility\textsuperscript{747}:

\textit{“2.2.8 I make no criticism of the Provincial Commissioner for delegating the responsibility to create the tactical plan to her subordinates. That is, in my view, entirely appropriate. However, she cannot delegate responsibility for the consequences of her decisions. The Provincial Commissioner was clearly making the key command decisions in respect of the Marikana operation and others were responding to her direction. In those circumstances, it remains incumbent upon the person setting the overall direction to understand the potential consequences of the orders given. In my opinion, the Provincial Commissioner needed to satisfy herself that the plan met her strategic intention and direction and mitigated the known and foreseeable risks of potentially lethal conflict.”}

\textsuperscript{745} Transcript Day 181, pp 21666 - 21669, per Maj Gen Mombo; Transcript Day 288, pp 37406, 37411 – 37412, per Gen Phiyega
\textsuperscript{746} Transcript Day 187, pp 22631 - 22632
\textsuperscript{747} BBBB4: Supplementary Statement of Gary White MBE
3.4.5 The SAHRC submits that the same applies to all the other members of the extraordinary session of the NMF who took the decision to disarm, without knowledge of any of the risks of disarmament or planned mitigation. The circumstances were such that the members of the NMF must have been aware of the volatile and dangerous situation at Marikana, which the SAPS had claimed to be unprecedented. They must have been aware of significant risks in any tactical option. And by failing to engage with the commanders on the ground, and by failing to inquire into alternatives, the members of the extraordinary session of the NMF gave an order that could not be operationalised without unacceptable risks. In the circumstances, all members of that session bear significant responsibility for the catastrophic outcome of 16 August.

**Section 3.5: The decision to disarm: were there alternatives?**

3.5.1 The SAPS contend that

> "Once the attempts to have the armed protestors voluntarily disarm failed, the only method of de-escalating potential violence and further acts of criminality by the protestors was to go tactical."

3.5.2 Both Mr. White and Mr. de Rover disagree. Mr. White’s view was that unless all other options had been properly considered and discounted, a plan to forcibly disarm the strikers was not consistent with the SO.262 requirement to “avoid the use of force at all costs” and carried unacceptable risks.

3.5.3 Mr. White noted that any number of alternative options were available to the SAPS, including maintaining the stage 2 negotiation strategy that, according to Lt Col Scott appeared to be working, or implementing the lower

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748 SAPS Points of Disagreement with Mr White, dated 01.06.2014, para 3.12, not exhibited but attached at Annexure C
risk encirclement strategy early on the morning of 17 August. In cross-
examination Mr. White was challenged on both suggestions. In relation to his 
suggestion that the stage 2 negotiation strategy could have been maintained, 
the line of questioning was revealing\(^\text{749}\):

\textit{“8 MR. SEMENYA SC: Page 75, at the top of 
9 the page you talk about one of the options being to 
10 maintain stage 2. 
11 MR. WHITE: Indeed. 
12 MR. SEMENYA SC: For how long? 
13 MR. WHITE: Well again that’s an open 
14 question. It depends upon what else is happening. So for 
15 example the issues that you referred to earlier on about is 
16 it possible to get Lonmin to step up to their 
17 responsibilities of potentially coming to the Koppie or 
18 whatever other negotiation can take place, but the point is 
19 that stage 1 and stage 2 had effectively brought a 
20 temporary, potentially a halt to the violence. I think 
21 that’s a success. 
22 MR. SEMENYA SC: So you can’t tell us how 
23 long stage 2 reasonably ought to have been maintained 
24 beyond the duration that it was maintained? 
25 MR. WHITE: No. But I did give a 
Page 36722 
1 suggestion again based on Colonel Scott’s own 
2 interpretation of the facts that potentially you could have 
3 then taken an alternative course of action, say for example 
4 on the morning of the 17th. 
5 MR. SEMENYA SC: And you say that there 
6 was also an opportunity perhaps to re-engage negotiations.}

\(^{749}\) Transcript Day 289, p.37622
7 Do you have any evidence indicating a possibility that
8 Lonmin was going to change its position?
9 MR. WHITE: No, I don’t, nor do I have any
10 evidence to suggest they wouldn’t.
11 MR. SEMENYA SC: Sorry?
12 MR. WHITE: Nor do I have any evidence to
13 suggest that they wouldn’t. You know in negotiations
14 things change. Sometimes people maintain a position for a
15 long period of time, sometimes they change. I mean that’s
16 the nature of negotiation.”

3.5.4 Adv. Semenya’s objection to Mr. White’s suggestion that the stage 2
negotiation strategy could have been maintained was not that it had failed.
In light of Lt Col Scott’s evidence that “the police presence was working”\textsuperscript{750} that line of argument would have been difficult. Instead, the line of cross-
examination seemed simply to suggest that enough was enough. Time was
up. The strike had gone on too long. The SAPS had run out of patience and
surely it was permissible for them simply to end the matter. But Mr. White’s
view was supported by Mr. de Rover, who said, when asked whether the
decision to move to a tactical option was consistent with the requirement to
avoid the use of force at all costs\textsuperscript{751}:

"16 If you are, in answer to that question on 262 I
17 would consider that part of trying your damnedest, if that
18 word is permitted in this setting, to avoid the need
19 to deploy and put a stop to it because inevitably when you
20 stop talking, things become confrontational, and I’ve
21 worked long with the United Nations; the core principle in
22 any relationship is that we try and maintain constructive
23 dialogue, however futile, because for as long as we’re

\textsuperscript{750} Exhibit HHH20: Consolidated Statement of Lt Col Scott, para.7.34
\textsuperscript{751} Transcript Day 286, pp 37091 - 37092
24 talking, we’re not fighting, and even if we agree to
25 disagree, and rather than focusing on the essence of a
Page 37092
1 problem my tactic has always been to make it bigger because
2 if you make it bigger there is a bigger chance that you’ll
3 actually find some common ground, something that you can
4 agree on, and not that you whittle it down to that
5 essential key point that you forever will differ of opinion
6 on.”

3.5.5 To the extent that the SAPS seek to argue that they were entitled to put an end to a gathering that had simply gone on too long, the SAHRC urges the Commission to reject this approach robustly. Situational appropriateness must always dictate a police response. Law enforcement must not come at any cost. Sometimes the police must tolerate breaches of the law if the only way to enforce the law would cause unacceptable harm. In circumstances where an offensive tactical option carries high risks of causing death or serious injury, all alternatives must be explored before that option is adopted. And if the alternative is to wait, contain and negotiate, then so be it.

3.5.6 Once again, Mr. de Rover agreed with this proposition. It was put to him that Bishop Seoka could have been given more time with the strikers, that more pressure could have been brought to bear on Lonmin to talk to the strikers at the Koppie752, that time should have been allowed for further intelligence to be gathered to support a cordon and search plan. He said that anything that could have avoided the tactical option should have been considered. He noted that he could think of many alternative possibilities but – in a display

752 Although Maj Gen Mpembe appears to have made genuine attempts to encourage Lonmin to speak to the strikers, and although messages were passed to Lonmin by the negotiation team, the transcript of the meeting of the Provincial Commissioner, Maj Gen Mbombo, with Mr. Mokoena (Exhibit JJJ192bis) suggests strongly that the highest levels of the SAPS encouraged a hardline approach to the strikers and placed no serious pressure on Lonmin to talk to them.
of understatement – said that there was “pressure on the timing” which prevented these from being considered\textsuperscript{753}. This undue pressure on the timing was imposed by the decision of the extraordinary session of the NMF, without regard to the situation on the ground.

\textsuperscript{753} Transcript Day 286, pp 37093 - 37094
SECTION 4: FAILURES IN PLANNING

4.1.1 Mr. White’s evidence in relation to the failures in the planning of the operation of 16 August 2012 is comprehensive. It is fully referenced and lucidly explained in his final and supplementary statements. As noted in his supplementary statement, his criticisms of the planning of the operation, as set out in his Final Statement, were based on the assumption that the order to disarm the strikers came from within the operational leadership. In light of the evidence that the decision came from above, the criticisms of the plan, as set out in his Final Statement, must be read in that context.

4.1.2 We emphasize that our submissions on this point are short because we rely on Mr. White’s detailed evidence, which should be read in full alongside these submissions. Here, we set out only a summary of the key criticisms that emerge from his written and oral evidence, providing references to each, and supporting evidence from other witnesses.

4.1.3 It is clear that the decision to disarm the strikers, taken at the extraordinary session of the NMF, without reference to the operational commanders and contrary to any pre-existing plan for the Marikana operation imposed significant time pressure on the SAPS which had direct consequences on the quality of the planning for the disperse, disarm and arrest operation. As Mr. White noted in his supplementary statement\(^\text{754}\), Lt Col Scott’s evidence was that the limited time available to plan the operation:

a. Prevented the preparation of a detailed written operational plan\(^\text{755}\);  

b. Did not allow any challenge process to take place\(^\text{756}\),

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\(^{754}\) Exhibit BBBB4, para.2.3.3  
\(^{755}\) Transcript Day 140, pp 15181 - 15182  
\(^{756}\) Transcript Day 140, p.15164 and p.15182
c. Prevented the operational commander from informing him about the change to his plan to rolling out the barbed wire consecutively instead of doing so simultaneously\textsuperscript{757}; and

d. Meant that he did not engage in contingency planning in as much detail as he would normally\textsuperscript{758}, in particular in relation to risk analysis and Koppie \textsuperscript{3759}.

4.1.4 While the SAHRC accepts that the decision of the extraordinary session of the NMF imposed an unreasonable, unnecessary and dangerous time-pressure on the operational command at Marikana, we do not accept that all failures in respect of planning the operation can be attributed to that decision, or to the time pressure it created.

4.1.5 First, the evidence is that the operational command did not at any stage “push back” against the order from the extraordinary session of the NMF. As Mr. de Rover noted, the order carried such obvious risks that he questioned whether it was an unlawful order that the operational command should simply have refused to follow. At a bare minimum, the operational command should have explained to the Provincial Commissioner and to the National Commissioner, in unequivocal terms, the risks that the order carried and explained to them that – on the basis of those risks – they would request four mortuary vans in advance of the operation. This information might have swayed even the most cavalier of decision makers. As Mr. White noted\textsuperscript{760}:

“I have criticized the Provincial Commissioner for failing to properly inform herself of the potential risks of operationalizing the order she

\textsuperscript{757} Transcript Day 140, pp 14575 - 14576
\textsuperscript{758} Transcript Day 137, pp 14557 - 14558
\textsuperscript{759} Transcript Day 137, pp 14634 - 14635 and Transcript Day 140, p.15177
\textsuperscript{760} Exhibit BBBB4: Supplementary Statement of Gary White MBE, para.2.3.8
gave, and failing to inquire into the planned mitigation for those risks. But it is also important to highlight that if the operational leadership had genuine concerns about operationalizing her order, and needed more time (which – on the basis of Lt Col Scott’s evidence - they clearly did) they ought to have said so. In this respect, I note that while the Provincial Commissioner appears to have conveyed the need to disarm the strikers before the end of 16 August, her evidence was that she would have listened to her commanders if they had told her that the order created problems, and she would have been open to a postponement of the action until Friday 17 August."

4.1.6 Secondly, the absence of a comprehensive written operational plan, as required by SO.262, cannot be explained solely by the time pressure under which the operational leadership were operating. It is entirely unclear why Lt Col Scott was unable to produce even an outline plan during the morning of 16 August. Although he may only have had a few hours between the failure of the strikers to disarm voluntarily at 09:00 and the JOCCOM at 13:30, the minutes of the 06:00 JOCCOM record the need for a contingency in the event that the strikers did not lay down their arms, and Mr. White’s view was that he should have been able to produce something in that time.

4.1.7 Despite initial claims that there was a written plan, it is now clear there was not. Lt Col Scott briefed the 13:30 JOCCOM with the Stage 2 plan from the 06:00 JOCCOM meeting, and then briefed members at FHA1 at 14:30 using a single Google Earth image, with no writing on it. As illustrated in his cross-examination, the ‘plans’ relied on by Mr. de Rover when producing his

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761 Transcript Day 181, p.21716
762 Exhibit TT4, p.3
763 Exhibit BBBB4: Supplementary Statement of Gary White MBE, p.12, footnote 51
764 Transcript Day 77, pp 8256 - 8257, per Maj Gen Annandale; Transcript Day 123, p.12654
765 Transcript Day 106, pp 11462 - 11463, per Maj Gen Mpembe
766 Transcript Day 128, p.13455
evidence also turned out to be ‘reverse engineered’\(^\text{767}\), undermining the credibility of his evidence in relation to planning.

4.1.8 The absence of a comprehensive written operational plan did matter. It was suggested to Mr. White that such a plan was not required because a ‘disperse, disarm, arrest’ order is well known to POP members. But this was no ordinary POP ‘disperse, disarm, arrest’ operation. As Lt Col Scott noted\(^\text{768}\):

“I am not aware that the SAPS has ever been confronted with a situation of the kind with which members were confronted on the ground on 16 August 2012. The plan or strategy that I prepared and proposed for adoption by the JOCCOM was the first of its kind. Neither the crowd management strategies for which Standing Order 262 provides, nor the hostage management strategies were appropriate in isolation. I thus had to devise what I considered at the time to be an appropriate plan for an unprecedented situation, being on which had to encompass the principles of Standing Order 262 but moving beyond the restrictions of the Standing Order to effectively plan for the disarming of the protestors while considering the protection of the police officials and the community in the area when dealing with a belligerent armed group numbering up to 3000 persons who were choosing to contest the request to disperse and/or disarm, demonstrating a clear defiance towards the law and the enforcers of the law with aggressive action should they be approached – as demonstrated on Monday 13\(^{\text{th}}\) August 2012.” (emphasis added)

4.1.9 Any argument from the SAPS that a DDA plan is ‘commonly implemented’ or ‘run-of-the-mill’ and therefore there was no need for a written plan is fundamentally undermined by Lt Col Scott’s evidence that the plan was “the

\(^{767}\) See plans emailed on 10 September 2014, in response to Adv. Budlender’s request to see the plans Mr. de Rover had relied on in preparing his evidence, not exhibited but attached at Annexure C.

\(^{768}\) Exhibit GGG39: Statement of Lt Col Scott, para.6
first of its kind” devised specifically for “an unprecedented situation”. Mr. White addressed this argument directly in his supplementary statement, where he noted769:

“2.3.11 As a general point, this approach appears to contradict the requirement of SO262 for a comprehensive written operational plan, as well as the requirement for unit commanders to prepare detailed written plans on their specific tasks. At paragraph 6.6.4 of my Final Statement I set out the importance of plans provided by unit commanders to ensure that briefing has not only been given, but also understood. So on a general basis, I consider that SAPS policy does not support the contention made at 3.10 of Annexure GW8(a). But I have a particular disagreement with the SAPS response in the specific context of the operation at Marikana.

2.3.12 The SAPS have described the situation they were facing as ‘unprecedented’. The decision to move to a proactive, tactical phase to disperse, disarm and arrest potentially hundreds of people within a crowd numbering in the thousands, meant that this was the most high risk stage of the whole operation. It involved the co-ordination of a range of units including the POP, TRT, NIU, STF, K9, Mounted Unit, Air Wing, and other supporting units including medical and fire teams. It was important that these various disciplines worked in harmony. In order to be able to do this it was vitally important that each unit and each officer understood their role, but also the role of others as well. The absence of a written plan increases the risk for instructions and directions to be misheard or misunderstood, both in relation to what each unit should be doing, but also in relation to what other units should be doing. There is significant evidence to suggest that a

footnote

769 Exhibit BBBB4, paras 2.3.11 – 2.3.12
number of people within the operation had misunderstood what was required of them."

4.1.10 Thirdly, the time pressure under which the operational leadership was operating does not explain the absence of any POP input into the final stage 3 DDA plan. Despite continual protestations to the contrary, it is absolutely clear that there was no POP input into the final DDA plan approved at the 13:30 JOCCOM. Lt Col Scott’s evidence was that he was not familiar with SO.262. Nonetheless, the DDA plan was devised by him on 16 August without material input from others. To the extent he had discussed the possibility of a DDA plan with Maj Gen Annandale that discussion was “basically a sentence of this is the next option we must look at”. The evidence indicates that the stage 3 DDA plan was first discussed by the command leadership at the 13:30 JOCCOM on 16 August. There were no POP members in attendance. Accordingly, the plan was devised by an STF specialist, with no input from POP commanders. Mr. White described this as “a very serious error”. Even under the time pressure imposed by the decision of the extraordinary session of the NMF, POP input was required by SO.262 and should have been central to the planning process. It is entirely unclear why POP commanders were not tasked to sit with Lt Col Scott through the morning of 16 August and/or were not called to the 13:30 JOCCOM.

4.1.11 Once again, the absence of POP input into the plan mattered. It may have resulted in very significant changes to the approach adopted. On one point that is absolutely clear: no-one present in the JOCCOM highlighted the

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770 Transcript Day 77, pp 8229 - 8330, 8413 per Maj Gen Annandale; Transcript Day 123, pp 12658 - 12663 and Transcript Day 125, p.12967
771 Exhibit HHH20: Consolidated Statement of Lt Col Scott, para.34.3
772 Transcript Day 135, p.14341, per Lt Col Scott
773 Transcript Day 135, p.14304
774 Exhibit EE contains an attendance list; Lt Col Scott confirmed their absence from the 13:30 JOCCOM (Transcript Day 135, pp 14317 - 14320)
775 Exhibit JJJ178: Final Statement of Gary White MBE, para.6.4.10(c)
problem with the plan to roll-out the barbed wire simultaneously, a point that any POP commander could have pointed out.\footnote{Exhibit BBBB4: Supplementary Statement of Gary White MBE, para.2.3.9. See below at Part Eleven for the consequences of this}

4.1.12 Fourthly, the absence of any challenge process to the plan cannot be explained by the time pressure imposed by the decision of the extraordinary session of the NMF. Mr. White set out his experience of a formalized “challenge process” during the planning for any large scale operation.\footnote{Exhibit JJ178: Final Statement of Gary White MBE, paras 6.3.8, 6.4.9} Lt Col Scott confirmed that, in his experience, the SAPS would also normally adopt a challenge process. But he confirmed that there was no challenge process at the 13:30 JOCCOM, there were no challenges to the plan he proposed, and no material input from others.\footnote{Transcript Day 135, pp 14317 - 14320 and Transcript Day 140, pp 15164 - 15170} As Mr. White noted, the absence of a challenge process would not be significant if the plan that was adopted was unimpeachable, but given the serious tactical problems contained in the plan, the absence of any challenge to the plan is inexplicable.\footnote{Exhibit JJ178: Final Statement of Gary White MBE, para.6.3.10}

4.1.13 Fifthly, the time pressure imposed by the decision of the extraordinary session of the NMF does not explain a fundamental tactical error in the plan adopted by the JOCCOM: the plan to follow POP members with a ‘baseline’ of up to 60 TRT members, each armed with an R5 rifle and each with a discretion to fire sharp ammunition in response to any perceived threat to life.

4.1.14 Mr. White’s view was that any plan to forcibly disarm the strikers would carry high risks and would be inconsistent with the SO.262 requirement to “avoid the use of force at all costs”. However, he considered that the specific plan adopted increased those already high risks to a completely unacceptable level.
4.1.15 On the basis of the available intelligence, and based on the experience of 13 August, resistance and/or confrontation from the strikers was foreseeable, and the planned response to that resistance was for a line of 60 TRT members to “respond proportionately” with their R5 rifles. In oral evidence Mr. White addressed this as follows:780

“1... So going
2 back to the time that I'm looking at the evidence in
3 relation to my provisional statement, that at this meeting
4 including very senior people, Scott lays out this plan and
5 the plan basically says, to paraphrase, that the POPS will
6 go forward to disperse. The POPS officers basically, if
7 they come under threat, then they will retreat to their
8 Nyalas and if they can’t or if the Nyalas, I think he said
9 something about potentially being burned, then the TRT were
10 going to follow on behind them. Given the intelligence
11 that we do have, which is that here are all of these
12 people, potentially 3 000 and 300, the 300 who are separate
13 who are, as has been described by some police officers, the
14 warrior group who have certain intent, but even beyond that
15 the 3 000, there are a lot of them who are armed as well
16 with traditional weapons. And the intelligence is that if
17 you try and take the weapons off, they will resist. So the
18 plan, as I said, the POP officers going forward and I think
19 I made comment, the fact that with what I would call
20 proactive sort of defence in terms of things like water
21 cannon and rubber rounds and whatever, but they were going
22 forward in a line with no shields. And I made the point
23 very quickly that, you know, those shields do not offer

780 Transcript Day 248, pp 31404 - 31406
24 ballistic protection and I think actually how I termed it
25 was I said I wouldn't like to be standing behind one if
Page 31405
1 someone was throwing a spear at me or swinging a machete or
2 whatever, but I would much rather have the protection of a
3 shield than not having any protection. Therefore it seems
4 to me that we’re sending these officers forward into a very
5 difficult situation where it’s clearly anticipated that
6 there is likely to be confrontation. The intelligence
7 tells us this and it seems that when they are engaged, they
8 will make way, they will move out of the way for their own
9 protection and then the TRT will follow up. And the bit
10 that really, really surprised me was – and I kept looking
11 at different statements which talked about then, and the
12 TRT will engage the crowd proportionately. Now my
13 understanding is the TRT are realistically only armed with
14 R5 rifles. They don't carry the less lethal options that
15 you use in crowd control. So the talks about the TRT and
16 following them the NIU and the STF will engage the crowd
17 proportionately. And I kept looking for someone to say, so
18 what does that mean? Let's put this into, forgive my
19 terminology here, let's put this into plain English. If
20 they only have R5 rifles – so what we’re talking about is
21 shoot people. That seems to be what's going to happen and
22 this is the bit – the challenge process, that I think that
23 this plan creates, if it's not an inevitability, a high
24 likelihood that there are going to be very high levels of
25 force used in this.
Page 31406
1 trying to plan for, the what-ifs, the POP are to go forward
2 and try and disperse people but then if they don't
3 disperse, if they resist as the intelligence says that they
4 will, then following on behind the POP is the TRT line and 
5 the very fact then that the tactic is that you have 60 
6 people lined up armed with R5 rifles, as I understand is 
7 the weapons that they use, I just simply wondered that the 
8 JOC – and this is dealing with this issue of planning and 
9 the challenge process – at what point did someone say, 
10 let’s just be clear here, what are we asking the TRT to do? 
11 If they have – so we’re basically saying we’ll line up 60 
12 people and if they’ve already sort of, you know, got to the 
13 position where the POP have moved out of the way, they will 
14 engage with them proportionately. 
15 [14:46] What does that mean? What is the position we’re 
16 putting these police officers in? What do we think they’re 
17 going to do? I see that as the challenge process, which 
18 didn’t happen, and to be honest with you, I was actually 
19 shocked in terms of reading the evidence.”

4.1.16 In this context, it is worth repeating the evidence of the National 
Commissioner, when asked about the plan. She said: 

“25 I think we had a good plan, the plan was 
Page 7128 
1 disrupted. And it is important therefore that... 
2 ... I take all those issues into context because 
3 your pre-empted success is then disrupted. So it would be 
4 narrow of me to just look at that and use it to read into 
5 the outcome. The outcome was unintended because of the 
6 disruption.”

781 Transcript Day 286, pp 7127 - 7128
4.1.17 The “disruption” to which the National Commissioner referred repeatedly in her evidence appears to have been the perceived attack on police by the strikers. But, on the assumption that there was an attack on police at Scene 1 – but noting again that the evidence supports only a finding that there was no attack – such an attack was foreseeable, foreseen and planned for. And the planned response was for a line of TRT members to shoot the strikers with R5 rifles. The plan was not disrupted. The plan was implemented – perhaps not in the place they expected – but certainly in the manner planned. In the words of Brig Calitz\textsuperscript{782}: “From the planning to the execution was 110%. Exactly how we plan it and it is not often that this happens in this large group. I have to congratulate you.”

4.1.18 It is in this context that we return to Mr. White’s criticism of the absence of oversight or challenge to the planning process. In his view even a short challenge process\textsuperscript{783}: “is very likely to have highlighted the significant and foreseeable risks associated with the plan for the TRT to back up the POP and to respond to acts of violent confrontation by the strikers.” But no challenge process took place.

4.1.19 Finally, the timing of the decision to implement the plan – taken just prior to the 13:30 JOCCOM – can only be blamed partly on the externally imposed time pressure. Although the operation needed to be completed before the end of the day, the decision of the Provincial Commissioner was taken while Mr. Mathunjwa was still speaking to the strikers at the Koppie and while Bishop Seoka was offering to speak again to the strikers. As long as talking solutions existed, they should have been attempted. The Provincial Commissioner’s decision was made regardless.

\textsuperscript{782} Exhibit GGG30: Video of Brig Calitz Briefing 18 August 2012
\textsuperscript{783} Exhibit BBBB4: Supplementary Statement of Gary White MBE, para.2.3.6
4.1.20 Moreover, although the Provincial Commissioner was informed of potential risks of death and/or serious injury\textsuperscript{784}, she chose to leave the JOCCOM without a briefing on the plan and without any knowledge of the planned steps to mitigate the risks of which she had been informed\textsuperscript{785}. She gave the order to proceed to stage 3 without any knowledge of what stage 3 entailed.

4.1.21 The SAHRC submits that such an omission from a person holding the office of Provincial Commissioner was grossly negligent.

\textsuperscript{784} Transcript Day 181, pp 21719 - 21728 and pp 21661 - 21662

\textsuperscript{785} Transcript Day 187, pp 22631 - 22635
SECTION 5: FAILURES IN BRIEFING

5.1.1 As Mr. White noted in his Final Statement\textsuperscript{786}:

“6.6.1 Effective briefing in an operation of this type is essential. Officers need to understand exactly what is required of them, what they are required to do, what they are entitled to do and what they should not do. There is an old adage in planning for operations that ‘if the people on the front line don’t know what the strategy is, then there is no strategy’. That adage is reflected in the SAPS document ‘Crowd management for Platoon Commanders - Briefing and Debriefing’\textsuperscript{787} which notes: “A good briefing is as important as a good plan, because if there is no clarity and common understanding during the briefing, the operation is doomed to failure.””

5.1.2 In both his Final and Supplementary Statements, Mr. White provides a well-evidenced opinion in relation to the failure by the SAPS properly to ensure that the people on the front line understood the plan. In particular, he highlighted:

a. The problematic nature of the briefing by Lt Col Scott, where he briefed from the back of a van, with 20 commanders crowded around a small laptop screen, and spoke to a single Google Earth plan. The commanders were provided with no written material to take away with them and did not take any notes. The gridded maps provided that morning in relation to the Stage 2 deployment no longer described the situation on the ground because Nyala 6 had moved\textsuperscript{788}. Despite it being the first time the DDA plan was described, Lt Col Scott

\textsuperscript{786} Exhibit JJJ178: Final Statement of Gary White, para.6.6.1  
\textsuperscript{787} Exhibit GGG25, p.1  
\textsuperscript{788} Transcript Day 135, pp 14329 - 14330 and p.14338
did not recall any questions being asked by commanders at the briefing; and

b. The absence of any detailed written plans furnished by unit commanders on their specific tasks. As Mr. White noted, their absence is important: the provision of detailed written plans from section commanders allows the overall commander to confirm that each commander has fully understood his or her role in the operation. It is a means to ensure that not only has the briefing been given, but also that it is understood. In the absence of these plans, there is no way to be sure that a briefing has been properly understood.

5.1.3 The Commission is urged to review Mr. White’s evidence on the inadequacy of briefing in detail. Here, we simply highlight some of the more significant examples of misunderstood or absent briefing:

a. Lt Col Vermaak was never briefed on the operation prior to his deployment as the ‘eye in the sky’. Consequently, when the operation commenced, he believed he was still implementing a plan to encircle the strikers in the Koppie.

b. The operators of the JHB water cannon, W/Os Dicks and Kruger did not attend the briefing in advance of the operation and were not provided with a radio. This explains why the JHB water cannon was so delayed in deploying prior to the events at Scene 1 and why W/Os Dicks and Kruger were surprised to find barbed wire preventing them from driving straight to the Koppie.

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789 Transcript Day 140, pp 15226 - 15227
790 Exhibit JJJ178: Final Statement of Gary White, paras 6.6.3 – 6.6.4
791 Transcript Day 205, p.25299
792 Transcript Day 205, p.25300 and p.25391
793 Exhibit UUUU8.2: Supplementary Statement of W/O Dicks, and Exhibit KKK39.2: Supplementary Statement of W/O Kruger
c. There was significant misunderstanding over the purposes of the barbed wire:

i. Brig Calitz did not understand that Lt Col Scott’s intention was for the barbed wire to be rolled out simultaneously. Consequently, a key aspect of Lt Col Scott’s plan was not implemented and Lt Col Scott was not informed that it would not be implemented, so could not amend the plan;

ii. Col Makhubela, who was in charge of the barbed wire nyalas, appears to have believed its purpose was to encircle the Koppie. That view was shared by others; and

iii. Capt Thupe appears to have believed the purpose of the barbed wire was to channel the strikers towards the informal settlement.

d. Capt Kidd was unsure of the role the water cannons would play in the operation because he did not pay attention to that part of the briefing. Consequently, at Scene 2, as the water cannons sought to drive the strikers towards the west of Koppie 3, Capt Kidd’s TRT members blocked what Mr. de Rover described as “the intended pathway out of the Koppie”.

794 Transcript Day 154, pp 17257 - 17249, per Brig Calitz
795 Transcript Day 137, pp 14560 - 14561, pp 14565 - 14566 and pp 14573 - 14576, per Lt Col Scott
796 Exhibit GGG9: Initial Statement of Colonel Makhubela, paras 2 and 6
797 Exhibit KKK6: Statement of W/O Kgosana, para.5; Exhibit KKK6: Statement of Cst Seeko, para.5;
Exhibit KKK23: Statement of Cst Njephe para.4
798 Exhibit RRR1: Initial Statement of Lt Col Thupe, para.3, confirmed in oral evidence at Day 227, pp 28037 - 8
799 Transcript Day 233, pp 29083 - 29084
800 Transcript Day 286, p.37157
5.1.4 Once again, the time pressure imposed by the decision of the extraordinary session of the NMF contributed to the problems with briefing highlighted above. But it did not cause them. Even under time-pressure, the SAPS can be expected to have ensured a clear, properly understood briefing in advance of an operation involving more than 600 members from multiple units. The failure to do so led to fatal misunderstandings during the operation. In particular, it meant that that:

a. One of two water cannons – which were crucial elements of a less-lethal force continuum available to the SAPS – was completely unprepared for the operation and failed to contribute at all to the force continuum prior to the TRT shooting at Scene 1; and

b. The eye-in-the-sky, Lt Col Vermaak misunderstood the plan and directed units into a lethal encirclement of Koppie 3.
SECTION 6: CONCLUSION ON THE PRINCIPLE OF PREVENTION / PRECAUTION IN
RELATION TO INTELLIGENCE, DECISION MAKING, PLANNING, AND BRIEFING

6.1.1 The principle of prevention / precaution requires those in command of policing operations in which higher levels of force are anticipated as a possibility to plan and command those operations in such a way as to minimize the risk that lethal force will be used. The SAHRC submits that the SAPS failed entirely to observe this principle. In summary, we say that for the following reasons:

   a. The decision to order the forcible disarmament of the strikers on 16 August was – in the circumstances – reckless, and involved no consideration of how to minimize the risk of lethal force;

   b. The failure of the commanders on the ground to ‘push-back’ on, or question, that order was negligent, and was not consistent with the requirement to minimize the risk of lethal force;

   c. The commanders on the ground failed to plan properly for the operation and the plan they devised was likely to require the use of lethal force; and

   d. The commanders on the ground failed to brief properly for the operation and consequently crucial participants in the operation were fatally unprepared.

6.1.2 Consequently, we submit that – irrespective of whether the Commission finds that the use of lethal force by individual shotists on 16 August justified – every one of the 34 individuals killed at Marikana on 16 August were killed unlawfully on the basis of a breach of the principle of prevention / precaution. As Mr. White said:
15... if police officers are in a position
16 where they act in private defence and again, well, if they
17 were justified in doing so it is certainly not a matter for
18 me, that’s a matter for the Commission, but the fact remains
19 that police officers find themselves in a position where
20 they had to exercise their judgment, I don’t think that you
21 can isolate that question and just simply then say, yes or
22 no, was it justified? I think from the point of view of
23 the organisation you then have to say, why were those
24 officers there?

6.1.3 The answer is simple: the officers were there because of a reckless order
from the extraordinary session of the NMF, recklessly implemented by the
commanders on the ground. As Mr. White said\textsuperscript{801}:

\begin{quote}
“With better preparation, planning, leadership and execution, a
situation in which more than 100 SAPS members felt compelled to fire
live ammunition is likely to have been avoided.”
\end{quote}

\textsuperscript{801} Exhibit JJJ178: Final Statement of Gary White MBE, para.10.1.3
PART TEN

THE EVENTS OF THE AFTERNOON OF 16 AUGUST: SCENE 1
SECTION 1: A NARRATIVE OF THE LEAD UP TO SCENE 1

Section 1.1: The events of 15:42:35 – 15:53:50

1.1.1 The SAHRC, in conjunction with the representatives of the Families for 36 of those killed by police on 13 and 16 August 2012, instructed a video expert, Mr. Dagan, to synchronise all the available video and photographic material available of events between 15:42:35 to 15:55:20 to an ETV timecode. Mr. Dagan’s explanation of the process is set out in his affidavit. The products of the synchronizing and editing process are Annexures V1 – V5. In Part Four, section 7 above, the SAHRC has addressed the SAPS objections to this video material and has set out why the evidence is completely reliable.

1.1.2 In what follows below, the SAHRC set out the conclusions to be drawn from the objective evidence visible in Annexures V2 – V5. Only where the evidence does not derive from Annexures V2 – V5 is a footnote reference provided.

1.1.3 After the departure of Mr. Mathunjwa at around 15:39:00, some strikers started to move away from the Koppie in various directions. At 15:42:35, although most strikers remained on the Koppie, a number of strikers were still leaving the Koppie in various directions, including towards the west as well as towards Nkaneng.

1.1.4 Nyala 1 started to unfurl its barbed wire at around 15:42:30. It completed its roll-out at around 15:43:30. Nyala 2 did not start to unfurl its wire for another three minutes, setting off at 15:46:30.

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802 Exhibit UUUU10.13.
803 Exhibit UUUU10.2 – UUUU10.6: Video Annexures V1.1-V1.11, V2, V2 (a), V2 (b), V3, V4 and V5
804 Exhibit JJ10.4539 (taken at 15:38:28), which shows Mr. Mathunjwa’s vehicle starting to leave the Koppie.
1.1.5 Just before Nyala 2 started to roll out its barbed wire, strikers on Koppie 1 started to move off the Koppie in large numbers, apparently in response to the preparations of Nyala 2. Most of the strikers on Koppie 2, and the lead group of strikers in front of Koppie 2, stayed put.

1.1.6 Nyala 2 completed its roll-out at around 15:47:45. Shortly afterwards, at around 15:48:20, the lead group, led by Mr. Noki, started to move slowly in a north-easterly direction away from the Koppie and towards the north of Nyala 5. There was no barrier between the lead group and police at this stage because Nyalas 3, 4 and 5 had not yet started to deploy their wire.

1.1.7 At 15:50:08, two minutes and 23 seconds after Nyala 2 had completed its roll-out, Nyala 3 started to deploy its barbed wire. At that time, the front of the lead striker group was adjacent to Nyala 5, and walking around the northern side of it. The front of the lead group of strikers was around 140 metres away from Nyala 3 at this stage, and therefore around 140 metres away from the nearest deployed barbed wire.\footnote{805}

1.1.8 At 15:50:53, Nyala 3 completed the roll out of its barbed wire. By this stage, the entirety of the lead striker group had passed Nyala 5, and were walking towards the point at which the road to Nkaneng passes the kraal. The front of the lead group of strikers was around 70 metres away from Nyala 4 at this stage, and therefore was around 70 metres away from the nearest deployed barbed wire.\footnote{806}

1.1.9 At 15:51:28, 35 seconds after Nyala 3 had completed its roll-out, Nyala 4 started to deploy its barbed wire. The front of the lead striker group was more than 70 metres away from Nyala 4 at this stage, and was approximately 25 metres from the point at which the road to Nkaneng passes the kraal.\footnote{807}

\footnote{805} Measurements made on Google Earth against the animated positions shown in Annexure V2(a)
\footnote{806} Measurements made on Google Earth against the animated positions shown in Annexure V2(a)
\footnote{807} Measurements made on Google Earth against the animated positions shown in Annexure V2(a)
The front of the group was to the north east of Nyala 4 and therefore had passed well beyond the intended barbed wire line.

1.1.10 At around 15:51:46, video footage of the lead group shows the members of that group walking perpendicular to a number of police nyalas, including Papa 5. At around 15:51:49, a photograph taken from the road to Nkaneng shows the crowd moving directly towards that road and not towards police. There is no evidence of any movement of the group towards police prior to the point at which Nyala 4 cut off the strikers at the kraal.

1.1.11 At around 15:51:57, Nyala 4 drove in front of the lead striker group and cut off their route to the east. At 15:52:03, Nyala 4 stopped at the kraal. At exactly the time that Nyala 4 stopped at the kraal, Papa 11 started moving towards the north-western side of the kraal.

1.1.12 Five seconds after Nyala 4 reached the kraal, video footage shows Nyala 4 with some strikers behind it, moving northwards. That footage shows no confrontation between police and strikers. Between 15:52:08 – 15:53:13, police resources were being directed to the other side of the kraal. Papas 7 and 18 followed Papa 11 around to the north-western side of the kraal. The lead striker group was also moving northwards around the western side of the kraal.

1.1.13 Between 15:52:13 and 15:53:21, the lead group of strikers continued to move northwards around the western side of the kraal. The STF Casspir; POP Casspir; Nyala 6; and Papas 1, 2, 4, 5 and 9 followed Papas 11, 7 and 18 around the kraal. They formed a line of nyalas which created a channel between the kraal and the nyalas\(^{808}\).

\(^{808}\) Annexure KKK52: Movement of SAPS relative to the Strikers 15:53:13 to 15:53:50
1.1.14 During this period, the TRT members ran forward from the staging area to form a basic line across the road to Nkaneng. As they formed this line, they cocked their firearms.

1.1.15 At 15:53:17 – 15:53:30, the lead group moved slowly towards the gap between the STF Casspir and the northern corner of the kraal. There is no evidence of any attempt to approach or attack the POP members to their left. By contrast, they visibly kept distance from those members. During this period, Papa 5 joined the line of nyalas on the northern side of the kraal.

1.1.16 At 15:53:30, a stun grenade was discharged behind the front of the lead group and in close proximity to Papa 11. It appears to have exploded about a third of the way back from the front of the lead group and may have split the group at this stage. It appears that a front group of only around 37 individuals continued forward, away from the direction of the stun grenade.

1.1.17 At 15:53:36, as the group of 37 strikers moved westwards, POP members fired rubber bullets at them from their northern side. The strikers’ pace sped up in response. At 15:53:39 a stun grenade exploded above the lead group and an individual within that group fired a single pistol shot in the direction of POP members, which hit the ground immediately behind the POP Casspir. At the sound of the stun grenade and pistol shot, the speed of the strikers increased further and individuals started to run south-west, in the direction of the TRT line.

1.1.18 At 15:53:40 and 15:53:41 two tear gas canisters were discharged. They both landed behind the front of the lead group, one to the right and the other to

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809 Exhibit UUUU10.13: Affidavit of Yoav Dagan, paras 43 – 48. Also see Annexure V1.6 (Al Jazeera camera) at 15:54:11:19. Only 21 seconds after the TRT volley commenced, there are less than 10 people visible in the position that the group of 300 were previously, suggesting that many of that group had moved away prior to the shooting. This is supported Exhibit ZZZZ3.77: Statement of W/O Erasmus who notes at paragraph 4 that “die myners opgesplit” before “en reguit op ons lyn van verdediging afgestorm”
the left rear of the group. The movement of the members of the front group continued away from the tear gas, and towards the line of the TRT. Further tear gas canisters may also have been discharged at 15:53:40 and 15:53:44, but neither of them released any tear gas in front of the lead group.

1.1.19 At 15:53:40, the JHB water cannon arrived at the kraal and sprayed water for the first time. It was not at any stage directed towards the lead group of strikers. At 15:53:46, the NW water cannon sprayed water for the first time. It was not at any stage directed towards the lead group of strikers.

1.1.20 At 15:53:50, the SAPS, led by a line of TRT members, opened fire at the approaching group. A volley of fire continued for at least 12 seconds.

1.1.21 Four seconds into the volley, multiple calls for ceasefire commenced. Although the volley of shots ceased after 12 seconds, individual shots continued – for unexplained reasons – for much longer. At least four R5 rounds were fired more than one minute after the commencement of the volley. In total, 328 rounds of ammunition were fired at the crowd, killing 17 and wounding many more.

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810 Exhibit JJ198: Initial and Supplementary affidavits of Katherine Scott
811 Exhibit FFF8: Discharge List 16 August 2012
SECTION 2: THE ROLL-OUT OF BARBED WIRE

2.1.1 The SAPS claim that a movement of the protestors towards the line of barbed wire could not have been anticipated. But a movement of protestors towards an area where barbed wire was due to be laid was anticipated. As Lt Col Scott noted, one of the questions he considered was “what do we do then should the crowd stand up and move towards you, noticing that you are now closing off the police area.”

Mr. White’s view was that it was a reasonable planning assumption that:

“If a crowd anticipated that the police were attempting to block them off from a positive attraction point, or trying to hem them in, then it is entirely reasonable to assume that the crowd are likely to try to circumvent the wire before it is fully deployed.”

According to Lt Col Scott, a simultaneous, speedy and fluid roll-out of barbed wire was crucial to his plan in order to mitigate the anticipated risk of strikers approaching and seeking to breach the police line.

2.1.2 However, Brig Calitz did not understand from his briefing that simultaneous deployment of the barbed wire was intended so ordered the wire to be rolled out consecutively. Col Makhubela, whose initial statement suggested that the purpose of the barbed wire was to encircle the protestors, was aware of Lt Col Scott’s intention to roll out the barbed wire simultaneously, but chose not to follow the plan because he believed the terrain would make a simultaneous deployment difficult and potentially dangerous.

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812 Transcript Day 137, p.14576
813 Re-exam Statement of Gary White, response to question 1(c), not exhibited but attached as Annexure C
814 Transcript Day 137, pp 14560 - 14566
815 Transcript Day 154, pp 17248 - 17249
816 Exhibit GGG9, paras 2 and 6
817 Exhibit ZZZZ3.228: Consolidated Statement of Lt Col Makhubele
2.1.3 Crucially, no-one informed Lt Col Scott that the plan had been changed to roll-out the wire consecutively.\textsuperscript{818} Lt Col Scott’s evidence is that had he been told of the change to the plan he would have considered alternative ways to mitigate the risks of the strikers approaching the police line.\textsuperscript{819} Under cross-examination by Adv. Chaskalson SC, Lt Col Scott accepted that the change to his plan – without reference to him as the planner – increased the risks of execution dramatically. That interaction is set out as follows:\textsuperscript{820}:

\begin{verbatim}
7 MR. CHASKALSON SC: But once your
8 instruction for a simultaneous rollout was overridden
9 without reference to you, the plan became much, much
10 riskier because there was now going to be a period of 10
11 minutes where there wouldn’t be a barricade, where the
12 protesters would see that the police are preparing tactical
13 action against them and they would be likely to respond.
14 You accept that?
15 COLONEL SCOTT: Yes.
16 MR. CHASKALSON SC: And from your
17 perspective as a planner you wanted that barricade up
18 quickly to prevent the protesters crossing the barricade.
19 COLONEL SCOTT: That is correct, yes.
20 MR. CHASKALSON SC: So you anticipated
21 that there was a risk that if there wasn’t a barricade the
22 protesters would cross it, for whatever reason, be it to
23 attack the police or just to go home to Wonderkop and
24 Nkaneng.
25 COLONEL SCOTT: Yes.

Page 14590
\end{verbatim}

\textsuperscript{818} Transcript Day 137, pp 14573 - 14574, per Lt Col Scott
\textsuperscript{819} Transcript Day 137, pp 14575 - 14576
\textsuperscript{820} Transcript Day 137, pp 14589 - 14590
MR. CHASKALSON SC: So once a decision is taken, without reference to you as planner, to change what is in fact an important piece of your plan, the risk in implementation of the plan is dramatically increased. You accept that?

COLONEL SCOTT: Yes.

2.1.4 In the event, the execution of the roll-out – even on the understanding that the wire was to be rolled out consecutively – was disorganised. The evidence is that Nyala 4 commenced its roll-out 35 seconds after Nyala 3 had completed its own deployment. So it is clear that a reasonably swift transition between nyalas was possible. However, the SAPS have given no explanation for why there was a three-minute gap between Nyala 1 completing its deployment and Nyala 2 commencing, and a two minute 23 second gap between Nyala 2 completing its deployment and Nyala 3 commencing.

2.1.5 Mr. White, after first reviewing the footage of the rollout, commented as follows:

“The choreography of the implementation of Stage 3 of the plan was shambolic. Lt Col Scott claims that the intention was for the barbed wire to be rolled out simultaneously by all six Nyalas. In fact, it was rolled out consecutively, with large gaps between each Nyala moving. In total, it took 9 minutes and 30 seconds to roll out the barbed wire behind Nyalas 1 – 4. In my experience of crowd behaviour, an action by police provokes a reaction by the crowd. It is entirely unsurprising that the crowd moved off the Koppie during these 9.5 minutes...”

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821 Exhibit UUUU10.3 (1 – 3): Video Annexures V2, V2(a) and V2(b)
822 Exhibit JJ178: Final Statement of Gary White MBE, para.7.5.6
823 Exhibit HHH20: Consolidated Statement of Lt Col Scott, para.9.4.1.3
2.1.6 At the commencement of the roll-out of barbed wire, some strikers began to disperse in various directions, including along the road to Nkaneng. They were not prevented from doing so. At around 15:48:20, just under six minutes after Nyala 1 had commenced the roll-out of barbed wire, the lead group of strikers started to move off the Koppie in the same direction as other strikers had been permitted to move only minutes earlier. At the time the lead strikers started to move only Nylas 1 and 2 had deployed their barbed wire, so the wire barrier in place did not even stretch half way across Koppie 1, let alone come anywhere near the lead striker group, which was between Koppies 1 and 2.

2.1.7 According to Lt Col Scott, the original plan for a simultaneous roll-out would have taken between 1.5 – 2 minutes for all six Nylas to deploy their wire. Had that original plan been implemented, there would have been a clear and distinct barrier between the SAPS and the strikers well before the lead group moved away from the Koppie. Lt Col Scott conceded that we would not have had Scene 1 at the kraal if the original roll-out plan been implemented. As Mr. de Rover acknowledged, the first disruption of the police plan was the police failure to roll-out the barbed wire in accordance with the plan.

2.1.8 A further question related to the rolling out of the barbed wire relates to the giving of a warning. The original SAPS case was that a warning before deploying the barbed wire was both not necessary under SO.262, and inappropriate because it was a defensive measure which should take the strikers by surprise. Mr. White’s response to that suggestion was unequivocal:

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824 Exhibit UUUU10.3 (1): Video Annexure V2 at 00:10 – 00:13; and 01:32 – 02:01
825 Exhibit UUUU10.3 (2): Video Annexure V2 (a) at 05:40
826 Transcript Day 137, p.14702
827 Transcript Day 137, p.14578
828 Transcript Day 286, p.37099
829 Exhibit HHH20: Statement of Lt Col Scott, para.13.5.1; Transcript Day 78, p.8288 per Maj Gen Annandale
830 Exhibit JJJ178: Final Statement of Gary White MBE, para.7.5.5
“The failure to give a warning to the crowd before rolling out the razor wire, and the failure to explain the purpose of the razor wire, may well have caused fear and confusion amongst the crowd. Given the presence of loudhailers and the time available to produce signage or printed notices to explain the actions, I do not understand why the SAPS failed to give such a warning. The suggestion that a warning was not required because the razor wire was a “defensive” action is illogical. By failing to communicate the purpose of this action, the police left it for the crowd to interpret.”

2.1.9 Brig Calitz suggested in his supplementary statement – and in his oral evidence – that the crowd had been told of the purpose of the barbed wire. He suggested that the purpose of the barbed wire was explained to Mr. Noki over the loudhailer around 10:00 after Mr. Noki had approached Nyala 6. Brig Calitz notes that the explanation was given over the loudhailer and “this explanation was also loud enough for the striking group to hear”\(^{831}\). He also claimed that he had explained the purpose of the barbed wire again when Mr. Noki had approached Papa 1 at some time between 12:00 and 14:30\(^{832}\). Once again, the explanation is claimed to have been made over the loudhailer to Mr. Noki and audible to all of the strikers. A third explanation is alleged to have taken after Nyala 1 had rolled out its wire, and before Nyala 2 had started deploying\(^{833}\).

2.1.10 What is clear is that many of the strikers did not understand the purpose of the wire. The bundle of statements taken by IPID from injured and arrested persons – as well as other strikers – contain 137 statements that refer to the barbed wire ‘enclosing’, ‘trapping’, ‘encircling’, or ‘surrounding’ the

\(^{831}\) Exhibit JJ107, para.81

\(^{832}\) Exhibit JJ107, para.81 and Transcript Day 156, pp 17716 - 17717

\(^{833}\) English Transcript Day 156, pp 17717 - 17720
strikers\textsuperscript{834}. Further, many of the police, including Col Makhubela\textsuperscript{835}, whose role it was to command the barbed wire roll-out, also misunderstood the purpose of the barbed wire and believed it was to ‘encircle’ or ‘trap’ the strikers\textsuperscript{836}.

2.1.11 The SAHRC has no reason to doubt that explanations were given to Mr. Noki, as claimed. But the suggestion that these explanations must have been heard by the crowd as a whole is nonsensical. There were 3,000 people on the Koppie, frequently making a lot of noise. An explanation given over a loudhailer from Papa 1, which was more than 80 metres away from the strikers, is very unlikely to have been heard and understood by all the strikers on the Koppie unless they were alerted to the importance of the message and it was clearly directed to the crowd as a whole. What is clear is that by failing to explain the purpose of the wire to all of the crowd, and simply assuming that they would hear the explanation given to Mr. Noki, the SAPS ran the risk that the roll-out of barbed wire would be misinterpreted; a risk that clearly eventuated.

2.1.12 On the basis of the ‘no surprises’ approach advocated by Mr. White, this was an error.

\textsuperscript{834} See the list of these Statements in Annexure G
\textsuperscript{835} Exhibit GGG9: Initial Statement of Col Makhubela, paras 2 and 6
\textsuperscript{836} See, for example Exhibit KKK6: Statement of W/O Kgosana, para.5, Exhibit KKK6: Statement of Cst Seeko, para.5, Exhibit KKK23: Statement of Cst Njephe para.4
SECTION 3: ALLEGED INCIDENTS 1 AND 2

3.1.1 The SAPS case on the movement of the strikers from the Koppie to kraal is set out in Exhibit L, slides 194 – 204. Those slides present a false case designed to suggest that the strikers made several attempted ‘attacks’, labeled incidents 1 and 2, prior to the time that the police fired 328 live rounds into the crowd. In fact, there were no prior ‘attacks’ and alleged incidents 1 and 2 never took place.

3.1.2 Our submissions on this point are limited because we submit the video of evidence contained in Annexure V2 and animated in Annexures V2 (a) and (b) is conclusive. However, the following points arising out of those video annexures are worthy of note:

   a. Maj Gen Annandale alleged that the crowd on 16 August moved towards the barbed wire as it was deployed. His evidence was that never before in the SAPS experience has a crowd of people moved towards barbed wire as it was deployed. However, his evidence that this is what happened on 16 August was false. In fact, when the barbed wire was being deployed, the lead group walked outside of the intended line of barbed wire and to the north of Nyala 5. At 15:50:10, when the strikers passed Nyala 5, the strikers were around 140 metres from Nyala 2, which – at that stage – marked the end of the deployed barbed wire line. In short, at no stage did the strikers move towards the barbed wire as it deployed. They moved away from it.

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837 Exhibits UUUU10.3(1 – 3)
838 Footnote reference’s are not provided for each point that follows. Where the point arises out of the video annexures V2, V2(a) and V2(b), the evidential basis for the submissions made is found in those videos and no footnote is provided. Where the point arises out of other evidence, a footnote is provided.
839 Transcript Day 78, pp 8280 - 8281 and Transcript Day 79, pp 8429 - 8431
840 Measurements made on Google Earth against the animated positions shown in Annexure V2(a)
b. In respect of alleged incident 1, not a single SAPS witness gave written or oral evidence supporting the SAPS version described in Exhibit L. The only witness to give oral evidence in relation to the alleged incident was Brigadier Calitz, who – despite rejecting the Exhibit L version – still claimed that there were two ‘attack’ incidents prior to the shooting incident at Scene 1; the first as, or just before, Nyala 4 began to deploy barbed wire, and the second as Nyala 4 arrived at the kraal\(^841\). It is clear that both versions are false for the following reasons:

i. At the time of, or immediately before, Nyala 4 set off, the front of the lead group was 70 metres away from Nyala 4 and within 25 metres of the kraal\(^842\); and

ii. Further, there is continuous footage of Nyala 4 in the enhanced version of the Rowland Headgear footage\(^843\) which shows no approach of any strikers towards it in the minutes leading up to 15:51:28, the time it started to deploy its wire. While the original Rowland Headgear footage\(^844\) was opaque and difficult to interpret, the enhancements carried out by Mr. Dagan allow the identification of Nyala 4 and any groups of people. None approach Nyala 4 at the times alleged by the SAPS.

c. In respect of alleged incident 2, the SAPS case is that strikers were moving to attack the police before Nyala 4 cut off the strikers with its barbed wire. The video and photographic evidence available between 15:51:40 and 15:51:51 shows the contrary. It shows:

\(^841\) Transcript Day 158, pp 17971 - 17974
\(^842\) Measurements made on Google Earth against the animated positions shown in Annexure V2(a)
\(^843\) Exhibit UUUU10.2(1): Video Annexure V1.1
\(^844\) Exhibit CC37
i. The strikers were moving directly towards the road to Nkaneng, which ran between Papa 5 and the kraal. They were not moving towards any police vehicles or members; and

ii. The strikers were not displaying their weapons or walking in a hostile or ‘attacking’ manner.

d. In respect of alleged incident 2, the SAPS case is that there was a confrontation between members of Nyala 4 and the strikers at the time it cut off the strikers’ route.

i. The video and photographic evidence available between 15:52:08 and 15:52:13 shows that, only five seconds after Nyala 4 had stopped at the kraal, there was no confrontation taking place near Nyala 4, and, instead, the strikers and police vehicles were already moving around the kraal; and

ii. In oral evidence, Capt Loest, Lt Col Classen and Capt Thupe’s evidence was that they were unaware of any confrontation between police and protestors at the point where Nyala 4 met the kraal.  

iii. The claims in slides 201 and 202 of Exhibit L that Papa 5 carried scars from sharp point ammunition fired by strikers at alleged incident 2 were shown to be false.

e. In respect of alleged incident 2, the SAPS claim that the strikers were repelled by water cannon, tear gas and stun grenades. That evidence has been proved to be false for the following reasons:

845 Transcript Day 236, pp 29494 - 29500 and Transcript Day 229, pp 28445 - 28446
846 Exhibit JJJ94; Transcript Day 138, pp 14912 - 14923
i. At the time Nyala 4 reached the kraal, both the NW and JHB water cannons were more than 120 metres away from the strikers. They first time any spray was used by either water cannon was more than 90 seconds after alleged incident 2 took place\textsuperscript{847};

ii. The objective video and photographic evidence contains no evidence of tear gas and stun grenades around the time that Nyala 4 reached the kraal\textsuperscript{848}. The improved Rowland Headgear footage\textsuperscript{849} clearly captures tear gas as a large plume of white smoke, and captures stun grenades as two separate, smaller plumes of smoke. The camera was focused on the scene of alleged incident 2 throughout the period when tear gas and stun grenades might have been expected to be seen. Nothing resembling tear gas or stun grenades is visible, although dust and exhaust fumes are visible in the air. Similarly, the FLIR IR camera clearly captured stun grenade explosions as white flashes. The camera was focused on the scene of alleged incident 2 throughout the period when tear gas and stun grenades might have been expected to be seen. Nothing resembling a stun grenade explosion is visible in the footage\textsuperscript{850}, and

iii. Brig Calitz is the only person to have given oral evidence on the use of tear gas and stun grenades at alleged incident 2. Under cross examination by Adv. Chaskalson, he conceded

\textsuperscript{847} Exhibit UUUU10.4: Video annexure V3

\textsuperscript{848} Exhibit UUUU10.5: Video annexure V4

\textsuperscript{849} Exhibit UUUU10.2(1): Video annexure V1.1

\textsuperscript{850} Exhibit UUUU10.2(2): Video annexure V1.2
3.1.3 The overwhelming weight of the evidence, taken together, is to support a finding that there were no ‘incidents 1 or 2’ as alleged by the SAPS. The first and only time that the lead striker group found itself in a situation of confrontation with police was when they rounded the kraal, some time after having been blocked by Nyala 4.

3.1.4 The unavoidable conclusion from the video and photographic material is that the strikers were clearly heading towards Nkaneng when they were blocked by Nyala 4. They were not attacking police. The police argue that any striker who wanted to get to Nkaneng but wanted to avoid confrontation would have moved directly northwards from the Koppie, and joined up with Nkaneng from an entrance to the west of the settlement. That is undeniably a route into Nkaneng, but the SAPS case is based on a flawed assumption. The SAPS case assumes that a striker leaving the Koppie would have anticipated that he would not be permitted to pass down the road to Nkaneng. However, that assumption is flawed because:

a. Many strikers were permitted to pass down that road in the minutes before the lead striker group moved in that direction, and Nyala 6 moved to the south of that road in an apparent attempt to facilitate dispersion down that road;

b. In the 3.5 minutes between the time the group moved from the Koppie until Nyala 4 cut them off at the kraal, no police resources blocked the road or crossed the road. Until Nyala 4 reached the kraal, all police resources remained on the southern side of the road to Nkaneng thereby suggesting an unfettered route down that road;

\[^{851}\text{Transcript Day 158, p.18015}\]
c. Nyala 4 did not start deploying its wire until 15:51:28, when the front of the lead striker group was 70 metres away and only around 25 metres from the kraal. Accordingly, the first indication that the strikers would be prevented from moving to Nkaneng was when the group were already very close the kraal.

3.1.5 In conclusion, the SAHRC submits that incidents 1 and 2 did not take place. Further, the overwhelming probability is that the members of the lead group were trying to head to Nkaneng, as claimed, when they were cut off at the kraal by Nyala 4\textsuperscript{852}. Further, the SAHRC submits that the SAPS know this to be the case: why else fabricate incidents 1 and 2?

3.1.6 These conclusions may be surprising. They may not accord with the version repeated by the SAPS over 22 months. However, the repetition of a false case for 22 months should not be allowed to trump the clear evidence of video presentations first shown in the 23\textsuperscript{rd} month. We urge the Commission to ask itself: how might the Commission process have differed if the synchronized and chronological video and photographic evidence was shown at the start, rather than the end, of the Commission hearings?

\textsuperscript{852} Of the bundle of Statements collected by IPID from those injured and arrested on 16 August – and from other strikers – there are 52 Statements that claim the strikers were heading towards Nkaneng. None suggest a deliberate attack on police, see Annexure G
SECTION 4: DID THE SAPS UTILISE LESS-LETHAL METHODS EFFECTIVELY PRIOR TO THE USE OF LIVE AMMUNITION AT SCENE 1?

4.1.1 The SAPS case, as set out in Exhibit L, and repeated by numerous witnesses, is that less-lethal methods were ‘ineffective’ against the lead striker group on 16 August. The proposition was repeatedly put to Mr. White in his cross-examination. The SAHRC rejects this proposition. The SAHRC submits that less lethal methods, when used, were largely effective on 16 August, but that they were either not used at all, or used inappropriately in the circumstances.

Section 4.2: Use of water cannon

4.2.1 The SAPS claim is that water cannon was first used to repel an attack by the lead striker group shortly before Nyala 4 reached the kraal and cut them off. It is claimed that it was the spray of water at the lead group that caused the group to move around the kraal and attack police from the other side. Further, the evidence of POP members who gave statements on 16 August is almost uniform in describing the use of water cannon prior to the use of tear gas, stun grenades, and rubber bullets. The SAPS case, and the statements and evidence supporting it, is false. Video Annexure V3 demonstrates conclusively that water cannon was not used until 15:53:40, or 10 seconds before the TRT volley at Scene 1, and it was not used on the lead group at all.

4.2.2 The SAHRC submits that the water cannon fiction that infects the statements of Brig Calitz, Lt Col Mere, Lt Col Pitsi and many of the POP members

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853 Transcript Day 251, p.31622 and Transcript Day 283, pp 36640 - 36652
854 Exhibit L: SAPS Presentation slide 199
855 Exhibit KKK39.1: Statements of W/O Kruger. Exhibit UUU2.6: Mr. De Rover’s Response to CALS Interrogatories, August 2014
856 See, for example, the Statements of members of Papa 4 and Papa 5, referenced in Part Four above
857 Exhibit UUUU10.4
858 Exhibit GGG13, para.17; Exhibit JJJ107, para.112
859 Exhibit ZZZZ3.311: Initial Statement of Lt Col Mere, para.4
who were present at Scene 1\textsuperscript{861} is not an accidental fiction. We submit that it is part of a concerted attempt by the SAPS to bolster its claim to have used a ‘force continuum’ against the strikers when it is clear that they did not and this is a confected effort to justify the resort to lethal force by the TRT.

4.2.3 It is possible that Brig Calitz ordered the use of the water cannons substantially earlier than they were in fact used. Mr. Botes’ evidence was that he heard an order for water cannons over the radio substantially prior to the shooting incident at Scene 1\textsuperscript{862}. So what caused the delay in deploying the water cannon?

4.2.4 The answer is clear in respect of the JHB water cannon. The operators of that water cannon, W/Os Kruger and Dicks, did not have a radio so may not have heard the first calls for their deployment: W/O Kruger’s evidence is that he did not have a radio, but overheard an instruction for the water cannon to move forward “as he was standing close to the water cannon”\textsuperscript{863}. Moreover, they had not been properly trained, having only undergone an unofficial two hour ‘crash course’ two years prior to the operation at Marikana\textsuperscript{864} and they were completely unaware that they would be required to operate the water cannon until 10 minutes before the operation commenced, and did not attend any briefing before the operation commenced\textsuperscript{865}.

4.2.5 In the event, the water cannons did not move significantly from their starting positions, and were stationary more than 100m from the kraal, until 15:52:30, more than 25 seconds after Nyala 4 reached the kraal. When they

\textsuperscript{860} Exhibit GGG28, para.5
\textsuperscript{861} A review of all the Statements submitted by POP members suggests that approximately half of the members present gave Statements alleging water cannon was used before tear gas or stun grenades and well before live ammunition
\textsuperscript{862} Exhibit GGG19: Statement of Mr. Botes, paras 56 - 59
\textsuperscript{863} Annexure KKK39.2: Supplementary Statement of W/O Kruger, paras 4 - 5
\textsuperscript{864} Exhibit HHH37: Statement of W/O Fourie
\textsuperscript{865} Exhibit UUUU8.2: Supplementary Statement of W/O Dicks, and Exhibit KKK39.2: Supplementary Statement of W/O Kruger
eventually reached the kraal, the lead group was already on the northern side of it, and any spray that the water cannons fired was directed well to the south of the lead strikers.

4.2.6 Water cannon was not *ineffective* against the lead striker group. It was simply not used. The significance of this point cannot be underestimated. In Lt Col Scott’s oral evidence, he explained why he planned to have water cannon as part of the methods available to deal with the ‘militant group’, as follows:\(^{866}\):

“It’s difficult to withstand a water cannon that’s blasting water at you. It’s going to disorganise a tightly compact group, which was my anticipated hope.”

4.2.7 This evidence was reflected by Mr. Hendrickx. Mr. Hendrickx’s view was that the two water cannons, deployed effectively and using a jet stream against the lead striker group could have stopped and pushed back the beginning of the lead group\(^ {867}\). Although Adv. Semenya SC attacked this evidence for coming so late in the Commission process\(^ {868}\), it was no different from the proposition put forward by his own witness Lt Col Scott, in August 2013.

4.2.8 In cross-examination, Mr. de Rover agreed that water cannon was an important part of the less-lethal equipment that was available to the SAPS on 16 August, particularly because, according to him, “they are one of only two means that I would qualify as mostly non-lethal”\(^ {869}\). He agreed that if he had known in advance that the operators of the JHB water cannon had not been adequately trained, had not attended the briefing, and were not aware they would be asked to operate the water cannon until 10 minutes before the operation commenced, he would have been concerned at their ability to

\(^{866}\) Transcript Day 137, p.14583  
\(^{867}\) Transcript Day 137, p.14583  
\(^{868}\) Transcript Day 284, pp 36778 - 36779  
\(^{869}\) Transcript Day 286, p.37109
contribute effectively to a less-lethal force continuum during the operation. Mr. de Rover’s concession showed that with foresight, not hindsight, there was a significant risk that water cannon would not be used properly on 16 August.

4.2.9 We cannot say for sure what the effect of water cannon would have been if it had been effectively deployed on 16 August. However, Lt Col Scott told the Commission what it was intended to do: “to disorganize a tightly compact group”. In his re-examination statement, Mr. White supported Mr. Hendrickx’s view that water cannons were capable of knocking a person off their feet. He added:

“I have considerable experience in dealing with large and violent crowds, which have been effectively controlled or at least kept back from police lines by the use of water cannon directed at the front of the crowd.”

4.2.10 The SAHRC submits that properly operated and effectively deployed water cannons would have acted as a strong less-lethal deterrent to the lead group that rounded the kraal. At best, it is likely to have disorganized the group, broken it up and caused the strikers to disperse away from the water; at least, it would have maintained distance between the police and the strikers and minimized the need for live ammunition.

4.2.11 What in fact took place is that the TRT set off for the kraal long before the water cannons did, and were lining up at the kraal and cocking their weapons when the water cannons were still 100 metres away. The water cannons – which were one of only two genuinely less lethal options available to the SAPS on 16 August – were not used against the lead strikers at all before the

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870 Transcript Day 286, p.37113
871 YYYY1: The SAPS ‘Lessons Learned’ document appears to accept this
872 Not exhibited but attached as Annexure C
TRT opened fire with sharp ammunition. On this score, the much-touted SAPS ‘force continuum’ was back-to-front.

**Section 4.3: Use of tear gas and stun grenades**

4.3.1 According to the SAPS case, tear gas and stun grenades were also used to repel the alleged attack at ‘incident 2’, and were used subsequently to prevent the strikers from moving towards the police line prior to Scene 1. Once again, the SAPS describe the use of stun grenade and tear gas as ‘ineffective’ against the strikers. The objective evidence does not support that conclusion.

4.3.2 First, as set out above, and illustrated by Video Annexure V4, there is no clear evidence of tear gas and stun grenades at ‘incident 2’ or at any time before 15:53:30, only 20 seconds before the TRT volley.

4.3.3 Secondly, the video evidence of tear gas and stun grenades, as analysed in Video Annexure V4, leads to a clear conclusion: tear gas and stun grenades had the desired effect of making the lead group of strikers move away from the gas or explosion. At no stage did the lead group of strikers move towards tear gas or stun grenades. That can be seen as follows:

   a. The first stun grenade (15:53:30) exploded near Papa 11, and behind the front of the lead striker group. It appears to have caused a split in the lead group, with 37 people continuing to move forward (away from the stun grenade) and others moving sideways or backwards (also away from the stun grenade);

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873 Exhibit L: SAPS Presentation slides 199, 203 - 204
874 Exhibit UUUU10.5
875 The evidential basis for what follows comes from Video Annexures V4 and V2
b. The second stun grenade (15:53:39) exploded above the front of the lead group, and caused that group to increase its pace;

c. Two tear gas canisters were fired at around 15:53:40 and 15:53:41. Both of those canisters were fired behind the front of the lead group and to their left and right. The members of the lead group continued to move forward (away from the tear gas) and started to cover their heads with their hands and clothing; and

d. Two further tear gas canisters may also have been fired at around 15:53:40 and 15:53:45. Neither of those canisters caused any smoke to rise in front of the strikers. Instead, they appeared to fly over the top of, and behind, the strikers.

4.3.4 Accordingly, it is not possible to say that tear gas and stun grenades were ‘ineffective’ against the strikers in the lead up to Scene 1. If the police used tear gas and stun grenades with the intention of making the strikers move away from the police, then the tear gas and stun grenades should have been discharged between the police and the strikers. Mr. de Rover’s evidence supported this. He stated that the SAPS modus operandi was to use tear gas and stun grenades to create a “barrier” between the police and protestors, in order to maintain distance between them. However, Mr. de Rover accepted that he could not see any evidence that any such “barrier” was created between the lead group of strikers and the TRT at Marikana.

4.3.5 Adv. Semenya SC has said, in respect of the strikers at Scene 1, that:

“Stun grenade would not dissuade them, teargas would not dissuade them, water cannon would not dissuade them, rubber bullets would not dissuade them”.

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876 Transcript Day 286, pp 37116 - 37117
877 Transcript Day 155, p.17422
For all the reasons set out above, that claim does not stand up to scrutiny. The reality is that less lethal means were effective, but used inappropriately. Neither water cannon, tear gas, nor stun grenades were used in a way to maintain distance, or to create a barrier, between the strikers and the TRT line. Instead, water cannon was not used at all, and tear gas, stun grenades and rubber rounds encouraged a movement of the lead group towards the TRT.

4.3.6 Let us again remind the Commission that this evidence came late in the day. It was not clear until the submission of Annexures V1 – 5 that less lethal means were used so poorly at Marikana. That creates a problem for the Commission because the stark realities of the objective video evidence submitted in the 23rd month of the Commission conflict with the SAPS version repeated over 22 months of the Commission process. Nonetheless, a falsehood is made no better through repetition and – to the extent that the falsehood influenced the Commission’s thinking for 22 months – it must not trump the objective video evidence submitted in the 23rd month.
SECTION 5: DID THE DEPLOYMENT OF SAPS RESOURCES AND ITS USE OF LESS-LETHAL FORCE UNINTENTIONALLY CHANNEL THE STRIKERS TOWARDS THE TRT?

5.1.1 Much has been said during the hearings of the Commission about the possible “channeling” of the strikers towards the TRT line. Because of the potential for misunderstanding, the SAHRC should state its case clearly: we submit that the strikers were channeled towards the TRT, but we do not contend that the SAPS did so intentionally. We submit that it was the effect of the ill-considered deployment of SAPS resources, and the inappropriate use of less lethal force.

5.1.2 The first factor which led to the channeling of the strikers towards the TRT line was the deployment of barbed wire. Mr. White noted in his Final Statement that the redeployment of Nyala 6 at around midday on 16 August fundamentally changed the configuration of resources and increased the positive attraction of Nkaneng. He noted that the original plan, where Nyala 6 would complete its deployment to the north-west of the Koppie, acted as a very clear deterrent to those who might want to move towards Nkaneng. However, after the redeployment of Nyala, he said:

“In this plan, which reflects the deployment of resources between phases 1 and 2 of Stage 3 of the amended plan, the L-shaped barbed wire represented in orange does not prevent protestors from reaching Nkaneng and does not act as a deterrent from the positive attraction point. Because the POP, TRT, NIU and STF are not yet deployed to the north of the Koppie, the L-shape ‘invites’, or ‘channels’, protestors to move towards the informal settlement until such time as the members move into position to the north west of the kraal”.

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878 Exhibit JJJ178: Final Statement of Gary White MBE, paras 6.5.18 – 6.5.20
879 Exhibit JJJ178: para.6.5.19
5.1.3 Mr. White clarified in his oral evidence that he believed this channeling effect was contrary to the intention of the SAPS, but that it was, nonetheless, the effect of redeploying Nyala 6\textsuperscript{880}. One of the most experienced POP commanders to give evidence to the Commission, Lt Col Merafe, agreed with Mr. White’s assessment\textsuperscript{881}. Moreover, one of the TRT Commanders, Capt Thupe, mistakenly believed that the layout of the barbed wire on 16 August was intended to channel the strikers towards the informal settlement\textsuperscript{882}.

5.1.4 It might be said in response that the lead group of strikers set off towards Nkaneng before most of the barbed wire had been deployed and therefore they cannot have known the ultimate shape it would take. That response would ignore the objective evidence. It is clear that the lead group of strikers, when they started to move away from the Koppie, moved directly around the northern side of Nyala 5. In doing so, they were walking around the outside of all of the police resources and – even though there was no barbed wire barrier in place between Nyalas 2 – 5 – they appear to have respected the invisible line that passed between them and demarcated the police zone\textsuperscript{883}. After the redeployment of Nyala 6, there was nothing in the arrangement of police resources to indicate that the road to Nkaneng was off-limits.

5.1.5 The second factor that led to the channeling of the strikers was the fact that many strikers were allowed to proceed down the road to Nkaneng in the minutes before the lead striker group took that same route, and while the barbed wire was being rolled out\textsuperscript{884}. Indeed, as those strikers moved along the road to Nkaneng, Nyala 6 was moved to the south of that road in an apparent effort not to prevent their dispersal\textsuperscript{885}. Consequently, prior to the

\textsuperscript{880} Transcript Day 249, p.31240
\textsuperscript{881} Transcript Day 221, pp 27288 - 27293
\textsuperscript{882} Exhibit RRR1: Initial Statement of Lt Col Thupe, para.3, confirmed in oral evidence at Day 227, pp 28037 - 28038
\textsuperscript{883} See Exhibit UUU10.3: Video Annexure V2 and V2(a)
\textsuperscript{884} See Exhibit UUU10.3: Video Annexure V2 at 00:10 – 00:13; and 01:32 – 02:01
\textsuperscript{885} See Exhibit UUU10.3: Video Annexure V2 at 01:32 – 02:01
moment when Nyala 4 set off from the single pylon towards the kraal, there was no indication that the strikers would not be permitted to pass along the road to Nkaneng. This is significant. At the time when Nyala 4 started to deploy its barbed wire, the front of the lead striker group was only around 25 metres from the point at which the road to Nkaneng passes the kraal. At that stage, there were no police resources blocking that road and no indication that they would not be permitted to take that route.

5.1.6 The third factor that led to the channeling of the strikers was the fact that the layout of barbed wire, combined with the layout of existing fencing, created a ‘funnel’ which led to the gap between the kraal and the small shack. That funnel is best shown in Exhibits KKK57 and 57.2 and in slide 16 of Exhibit OOO34.

5.1.7 The fourth factor that led to the channeling of the strikers was the positioning of the vehicles along the northern edge of the kraal. The SAHRC adopts Exhibit KKK52 as an accurate depiction of how this line of Nyalas developed and prevented any movement of the strikers to the left and towards the road to Nkaneng. According to the statement of Capt Thulo, Lt Col Pitsi gave an order for the POP Nyalas and Casspir to make a block to prevent the crowd from passing. However, the POP members failed to block, as shown in slides 11 and 12 of Exhibit KKK52. Instead, and most likely unintentionally, they formed a channel, as shown in slide 9 of Exhibit KKK52. During his cross-examination by Adv. Gotz, Capt Loest appeared to agree with this proposition. The interaction was as follows:

“18 CHAIRPERSON: The case being put is they were, in effect, channeled along that corridor to the

886 See the arrangement of strikers compared to Nyala 4 and the kraal in Video Annexure V2(a) at 15:51:28
887 Exhibit ZZZ3.628: Statement of Capt Thulo, para.6. Brig Calitz also gave evidence that he gave a similar order to block: Transcript Day 159, pp 18137 - 18139
888 Transcript Day 230, p.28473
20 right on the photograph of the kraal, by the position of
21 these vehicles.
22 CAPTAIN LOEST: No, I agree on that, Mr.
23 Chair.
24 MR. GOTZ: And so the reason that they’re
25 moving towards your line and in fact heading directly
Page 28474
1 towards you is because of the fact that they’re being
2 channeled in that direction, correct?
3 CAPTAIN LOEST: Yes, Mr. Chair, I seem to
4 agree on that point.”

5.1.8 The channel created by the POP Nyalas combined with the funneling effect of
the barbed wire and existing fencing is shown in Exhibit KKK57.2.

5.1.9 The fifth factor that led to the channeling of the strikers was the fact that as
the strikers moved around the kraal to meet up with the road to Nkaneng,
Papa 11 drove beyond the front of the lead group. From that position,
members appear to have fired rubber bullets backwards towards the
strikers. If that is correct, then those shots would have had the effect of
pushing the strikers towards the east and into the gap between the kraal and
the STF Casspir.

5.1.10 The sixth factor that led to the channeling of the strikers was the fact that the
TRT line would have been completely invisible to the strikers for most of their
movement around the kraal. At the point at which the strikers were blocked
by Nyala 4 and started to move around the kraal, the TRT members had not
lined up. As the strikers moved around the kraal, and the TRT moved into
position, the strikers’ view of the TRT would have been blocked by the high

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889 Exhibit KKK52, slide 2
890 FFF35 shows that, from Papa 11, Sgt Dzivhani fired 12 rubber rounds, Cst Khosa fired 10 rubber rounds, Cst Ngwandla fired seven rubber rounds, and Cst Malesa fired eight rubber rounds
walls of the kraal. Only at around 15:53:35, when the first strikers passed around the northern corner of the kraal, would some of the TRT have become visible. However, the line of POP nyalas would have obscured the majority of the TRT line from view\(^891\). Any intended “show of force” by the TRT would not have had the desired effect, because it would not have been seen.

5.1.11 The seventh factor that led to the channeling of the strikers was the use and effect of less-lethal means, including stun grenades, tear gas and rubber rounds. As discussed above, the first stun grenade exploded behind the front of the lead group, approximately 1/3 of the way into the lead group. It is most likely that the 37 individuals who passed the northern corner of the kraal after that explosion were moving away from the source of the explosion. Also, as discussed above, all tear gas was fired behind the lead group of protestors and further encouraged a movement away from the tear gas and towards the TRT.

5.1.12 Once the strikers reached the northern edge of the kraal, the firing of rubber rounds from the POP members in the line of POP vehicles on the northern side of the kraal also encouraged the strikers to move south-east towards the TRT. No rubber was fired from in front of the striker group. Instead, the arrangement of POP resources meant that it was fired from the side and from behind. If the intended effect of rubber is to cause strikers to run away from the source of the rubber rounds, they had their desired effect. As the strikers moved down the channel between the POP Nyalas and the kraal, they were, in effect, running the gauntlet. The discharge records for members who were in Papas 11, 7, 18, 1, 9, 2 and 4 and Nyala 6 show more than 250 rounds of rubber fired by those members at Scene 1\(^892\). The available footage suggests that most of that rubber was fired only once the lead strikers had reached the northern corner of the kraal. Al Jazeera Footage from 15:53:10 – 15:53:25

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\(^891\) See Exhibit KKK52: Presentation: Movement of SAPS Vehicles

\(^892\) Exhibit FFF35: Discharge List Scene 1
shows a number of POP members holding shotguns, but there are no images or audio of members firing their shotguns\textsuperscript{893}. By contrast, footage after 15:53:36, contains images and sound of many rubber rounds being fired\textsuperscript{894}. Once inside the channel, being shot at with rubber, the strikers:

a. Could not run away to the south-west because they were blocked by the kraal;

b. Could not run away to the north-west because there was tear gas behind them, rubber rounds fired from P11 and P7 and other crowd members blocking the route;

c. Could not run to the north-east because the POP members were lined up there; and

d. Could not stand still because they were being shot at with potentially hundreds of rounds of rubber.

So they ran south -- towards the TRT.

5.1.13 From 15:53:42 onwards, footage of the strikers shows many to be running with their heads down, sometimes with their heads covered by their hands\textsuperscript{895}. The SAPS submit that this was on instruction by the inyanga in preparation for an attack. We submit the far more likely explanation is that they were suffering from the effects of tear gas, and running from rubber bullets. This was put to Capt Loest in cross examination by Adv. Le Roux and he agreed as follows\textsuperscript{896}:

\begin{itemize}
\item Exhibit UUUU10.2(6): Video annexure V1.6 – Al Jazeera camera
\item Exhibit UUUU10.2(6): Video annexure V1.6 – Al Jazeera camera
\item Exhibit UUUU10.3(1): Video Annexure V2
\item Transcript Day 229, pp 28395 - 28396
\end{itemize}
“23 MS LE ROUX: But Captain Loest, given
that you accept on the first two propositions that people
who have been shot with rubber bullets generally move away
Page 28395
1 from where the rubber bullets are coming and people that
2 have had teargas fired at them generally have a posture of
3 looking down or touching their faces, do you accept the
4 possibility that some of the strikers coming around the
5 kraal were in the posture they were in because of the
6 effect of the rubber bullets and the teargas, that it’s a
7 possibility that some of them are in the posture we observe
8 in the videos because of rubber bullets and teargas?
9 CAPTAIN LOEST: Yes, Mr. Chair, I accept
10 that fact.”

5.1.14 Lt Col Classen confirmed in evidence that, as part of the TRT line, he and others suffered badly from the effects of the teargas as the lead group moved towards them and he was forced to shut his eyes. He conceded that the members of the lead group of strikers would have been even more affected by the gas, so that they were likely blinded by the tear gas and may well have had their eyes closed as they advanced\textsuperscript{897}.

5.1.15 A still image taken at the exact moment at which the TRT opened fire shows members of the lead group with their heads facing the ground, arms covering their heads, and some with blankets over their heads\textsuperscript{898}. It cannot credibly be submitted that this was the stance of a crowd intent on attacking police; rather, it was a crowd running from rubber bullets and tear gas.

\textsuperscript{897} Transcript Day 236, p.29514 and Transcript Day 238, pp 29906 - 29908

\textsuperscript{898} Exhibit RRR15, slide 3
5.1.16 For all these reasons, the SAHRC submits that the arrangement of resources by the SAPS unintentionally channeled the lead group of strikers towards the TRT members in circumstances where the majority of those strikers cannot possibly have anticipated or seen what faced them. That is not a matter for which the SAPS are blameless. The SAHRC submits that blame can be attached to the following failures:

a. As set out by Mr. White, the failure of the Overall Commander, or the JOC, to properly consider the possible consequences of the redeployment of Nyala 6;

b. The failure to warn the crowd before the deployment of the barbed wire, and/or the failure to inform the crowd that anyone with weapons would not be allowed to pass down the road to Nkaneng;

c. The failure to roll out the barbed wire simultaneously, as planned, or to inform the chief planner that the plan needed to be changed to roll out consecutively and therefore allow him to consider other means to mitigate the risk that the strikers might move forward on the deployment of barbed wire;

d. The failure of POP drivers to form an effective block as instructed by Lt Col Pitsi;

e. The failure of the JOCCOM to ensure that the water cannons were manned by properly trained and properly briefed operators and/or the failure of those operators to respond effectively to Brig Calitz’s order to deploy; and

f. The failure of POP members to utilise tear-gas, stun grenades and rubber bullets effectively to create a barrier between police and strikers.
SECTION 6: WAS THE LEAD GROUP OF STRIKERS ATTEMPTING TO ATTACK THE SAPS AT SCENE 1?

6.1.1 The SAHRC submits that the overwhelming probability is that the strikers were not attempting to attack the police when they moved towards the TRT line at Scene 1. The reasons for this conclusion are, in summary:

   a. The route of the strikers from Koppie to kraal is entirely consistent with an intention to walk to Nkaneng and entirely inconsistent with an intention to attack police. In oral evidence Mr. Magidiwana was challenged by the SAPS on the route he claimed was taken by the strikers, but the objective evidence shows that the route he drew on Exhibit HHH8.3 is largely correct.

   b. At no stage between the Koppie and the kraal did the strikers move towards the police or move towards the barbed wire. Consistently, they moved away from both. At no stage during the move from the Koppie to the kraal does the video or photographic evidence show the strikers wielding their weapons in an aggressive or threatening manner.

   c. Until Nyala 4 cut off the strikers at the kraal, there was no indication from the SAPS that strikers would not be permitted to pass along the road to Nkaneng. Others had been permitted to do so only minutes before and, until Nyala 4 blocked off the road, all SAPS resources were on the southern side of the road and none were blocking the route.

   d. Once blocked by Nyala 4, there is no evidence of any significant confrontation between strikers and the police. Instead, the strikers started to make their way around the kraal to join up with the road on the other side. This alternative route past the kraal was a route that had also been taken by strikers only minutes before.
e. For all the reasons set out above, the front of the lead group were then channeled into the gap between the Nyalas and the kraal, and driven towards the TRT.

f. When the strikers started to run towards the TRT line, they were running from potentially hundreds of rounds of rubber fired from the side and tear gas and stun grenades discharged behind them. They are likely to have had their eyes closed.

g. There is clear evidence of those strikers running with their heads down and / or covered by blankets, and no evidence of those strikers running with their weapons ready to attack.

6.1.2 The SAHRC accepts that there is a legitimate argument over whether the shotists at Scene 1 had a *reasonable belief* that they were under attack. But we submit that there can be no legitimate argument over the objective question of whether there was – as a matter of fact – such an attack. The video and photographic evidence is clear: the strikers were not attacking the police at Scene 1.

6.1.3 If the Commission is to reach an alternative conclusion and to find that the strikers were intending to attack the TRT at Scene 1, then the SAHRC poses the following questions that the Commission must address directly.

6.1.4 First, the Commission must explain *when* the strikers developed an intent to attack. It cannot possibly have been pre-planned at the Koppie: why avoid the police and move directly towards Nkaneng if your objective is to attack the police? So if it was not pre-planned at the Koppie, *when* did the intent arise?
6.1.5 Secondly, the Commission must determine precisely which strikers were attacking. As a shorthand, the SAHRC and other parties have used the expression ‘the lead group’ or ‘the militant group’ to describe the collection of around 300 individuals who moved together at the Koppie and appeared to be subject to a degree of organization and coordination. However, the Commission must not lose sight of the fact that the group was made up of individuals with different intentions. As set out above in Part Four, ‘de-individuation’ theory has no support amongst modern crowd psychologists. Crowd psychology has moved on substantially since the 1980s and 1990s. Without reliable evidence that de-individuation theory is applicable to the crowd situation at Marikana, the Commission cannot lawfully base any conclusions on that theory.

6.1.6 As a consequence, the Commission must accept that there were different individuals within the crowd with potentially different intentions/objectives. If the intent to attack police arose at some stage after the crowd were blocked by Nyala 4, which strikers developed such an intent? If the Commission is to conclude that all the strikers who rounded the kraal had a ‘single intent’, what evidence is there for that conclusion? By what mechanism does a single intent to go to Nkaneng transform into a single intent to attack the police? How does the Commission explain the fact that only 37 of the crowd of several hundred actually rounded the northern edge of the kraal? If the others were deterred by stun grenades and tear gas fired behind the group of 37, what does that say about single intent or a belief of invincibility?

6.1.7 The SAHRC submits that these questions illustrate the irrationality of a finding that all the strikers uniformly and simultaneously developed an intent to attack police at some stage after they were blocked by Nyala 4. In the circumstances prevailing at Marikana, a finding of ‘single intent’ would be a short cut, a time-saver, an easy way around difficult questions, but it would also be irrational and without any evidential basis.
6.1.8 Thirdly, if the intention was to attack police, why did the strikers keep their distance from POP members armed with rubber rounds\(^8\)\(^{99}\), and instead launch their attack directly at a line of TRT members armed with military assault rifles? The SAPS answer is muti. We reject that submission. There is no need to restate the arguments developed in Part Four above, but in summary:

a. The Commission must not exoticise the use of muti and equate it with irrationality;

b. The Commission cannot rely on the evidence of Mr. X in respect of the use and believed effect of muti because his evidence was so unreliable it must be rejected *in toto*; and

c. The SAPS claim that the strikers believed that the muti made them invincible is not even supported by their own witness on rituals, Prof Lamla.

6.1.9 Moreover, the following evidence is inconsistent with a belief that muti had made the strikers invincible:

a. The strikers were wearing large blankets, allegedly to protect them from rubber bullets. If they believed they needed blankets to protect themselves from rubber bullets, why would they believe they were invulnerable to sharp point ammunition?

\(^8\)\(^{99}\) Evidence of the lead group as it reached the north-western edge of the kraal, shows the group keeping distance from POP members to their right. As a small number of POP members stand outside of their Nyalas, armed only with shotguns firing rubber rounds, the strikers do not make any attempt to move towards or attack them. Instead, they step away from the POP members, and hug tightly to the kraal
b. The strikers were shot at, and hit by, rubber bullets before running towards the line of TRT. If they had already been shot at with rubber, stun grenades and tear gas, why would they still believe they were invisible? If they had already been hit by rubber bullets, why would they still believe they were invulnerable to sharp point ammunition?

6.1.10 Adv. Semenya SC urges the Commission to blame muti to explain “why the strikers walked into the line of fire”. But the SAHRC urges the Commission not to resort to irrationality and primitivism when a simpler explanation exists. The strikers did not “walk into the line of fire”. They were channeled towards the TRT who shot them. Again, we do not contend that this was intentional, but we do submit that it is what happened.

Section 6.2: What about the pistol shot?

6.2.1 Of course, the SAPS will say that our submissions ignore the fact that one striker, wearing a brown jacket, fired a pistol round in the general direction of POPs members at 15:53:40. How can our submissions be credible in the face of that evidence? There are several answers:

a. First, unless you subscribe to the untenable and discredited position that the group of 400 had a single intent, then the act of one individual does not determine the intent of the entire group.

b. Secondly, the firing of the pistol by the striker in the brown jacket does not appear to have been a premeditated act. Instead, it appears to have been a response to being shot, himself, with a rubber round\(^{900}\). While it does not excuse or justify his shooting, it remains relevant if the suggestion is that his firing of the pistol is indicative of the general intent of the group.

\(^{900}\) Exhibit UUUU10.6: Video annexure V5
c. Thirdly, the response of the other strikers to the firing of the pistol in the direction of POP members is clear: it does not precipitate a general attack on those POP members; instead, it appears to cause the strikers to increase their speed away from the situation. Once again, this is at odds with the submission that the firing of the pistol by one member is indicative of the general intent of the group of strikers to attack and kill police.

6.2.2 The SAHRC does acknowledge that the member who fired the pistol may well have developed an intent to kill or seriously injure a police member in the moments before he fired his shot, and potentially in response to being shot with a rubber round. But we repeat our submissions above. The Commission must accept that there were different individuals within the crowd with different intentions/objectives. It would be possible to conclude that the man in the brown jacket developed an intention to kill police without concluding that any of the other strikers surrounding him had this intention.

6.2.3 Such a conclusion would be consistent with events on 13 August. The available video evidence of the incident of 13 August makes it clear that, while some strikers moved to attack and kill police members in response to the tear gas and stun grenades used against them, most of the strikers fled from the scene.

6.2.4 Before concluding the point, let us also look at where the strikers fell. Exhibit UU2(1), taken exactly three minutes after the commencement of the TRT volley shows the dead and injured at that time.

a. Closest to the TRT members is a group of 11 bodies grouped together, some of whom lie across the road to Nkaneng ("the front group");
b. Behind them and to the left is a further group of bodies, piled up closely together against the kraal. That group is more clearly visible in Exhibit UU2(2) and in Exhibit JJJ5.051, where it is possible to distinguish 11 separate bodies in that pile-up ("the kraal group");

c. Two other bodies are visible at the top left hand corner of the photograph, on the other side of the kraal from the TRT ("the stray group").

6.2.5 Do the SAPS contend that the members of these three groups all shared a single intent?

6.2.6 When considering all the evidence, the SAHRC submits that the two individuals in the ‘stray group’ – Mr. Ledingwane and Mr. Mtshazi – were clearly not part of any attack and were killed by stray bullets when they were almost 100 metres away from the TRT. Their post-mortem reports show them to have been immediately incapacitated: they died where they fell901.

6.2.7 In respect of the ‘kraal group’, which included amongst it Mr Ngweyi, Mr Yona, Mr Matlapula, Mr Jijasi, and Mr Yawa, the evidence also supports the conclusion that they were not attacking. Shortly before the shooting commenced, the lead group of 37 split into two separate groups which we have described as the ‘kraal group’ and the ‘front group’. That this separation happened is clear from the Al Jazeera footage (Annexure V1.6)902, between 15:53:47:08 and 15:53:50:05, in which the ‘front group’ of 12 individuals is visible passing between Papas 2 and 4. In the footage that follows, that front group of 12 is not followed by any other individuals. So the individuals in the ‘kraal group’ appear to have stopped moving towards the police prior to the commencement of the shooting.

901 See the post-mortem reports for Mr. Ledingwane and Mr. Mtshazi summarized in Exhibit ZZZ5, Annexure I
902 Exhibit UUUU10.2(6)
6.2.8 Indeed, there is no evidence of any ‘charge’ towards the police by the ‘kraal group’ at all. The alleged charge visible in the Reuters clip is a ‘charge’ of only the ‘front group’ of 12 individuals. The Reuters footage in Annexure V1.9 shows those 12 individuals clearly moving towards police between 15:53:48 – 15:53:51. But the ‘kraal group’ appears to have stopped, or at least slowed substantially, behind them. In that footage, the ‘kraal group’ is visible as a distinctly different group at 15:53:50:21, in the background, between a man in a black top to the far left of the front group and a man in an orange top to the right of him. In the footage preceding and following that timecode, the members of that ‘kraal group’ do not appear to be moving towards police at all. They were certainly not posing any imminent threat to police.

6.2.9 But what about the front group, which included Mr Monesa, Mr Noki, Mr Zibambele, Mr Tukuza, Mr Lehupa, Mr Ntentya, Mr Sompeta and Mr Magidiwana, amongst others? This is the group visible in the Reuters footage allegedly ‘charging’ towards police lines. What evidence is there that all or a substantial number of that group was seeking to attack?

6.2.10 In reality the only evidence is that the strikers were armed and ran towards the TRT. They had been armed all week. Not even the SAPS deny that they were running from rubber bullets and tear gas. So where is the evidence of any member of that group raising a spear to attack, or moving towards POP members who were firing rubber at them? There is none.

6.2.11 If the Commission is to find that the SAPS were under attack by some or all of the strikers who rounded the kraal, what evidence will it rely on in respect of each individual? The fact that Mr. Noki had made threats? The fact that the individuals were carrying weapons? The fact that they had taken muti? All of

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903 Exhibit UUUU10.2(9)
that could have been said about the strikers on the evening of 15 August. It does not amount to sufficient support for such a finding.

6.2.12 What the Commission is left with is that the 12 individuals within the ‘front group’ were running towards police and they were carrying weapons. The SAHRC accepts that this creates reasonable ground for an argument over whether the SAPS members who fired live ammunition had a *reasonable belief* that they were under attack from these 12 individuals, but the objective evidence strongly supports the conclusion that they were not, in fact, under attack.

6.2.13 The SAHRC submits that the SAPS were not under attack from the hundreds of strikers who appear to have moved away from the kraal from around 15:53:30 in response to tear gas and stun grenades. They were not under attack from Mr. Gwelani, who was not employed by Lonmin, was not part of the lead group throughout the week of 9 – 16 August, who had not been taking muti, but was shot in the back of the head more than 200 metres from the kraal. They were not under attack from Mr. Ledingwane and Mr. Mtshazi who were shot dead more than 100 metres away from the TRT line by apparently stray bullets. They were not under attack from Mr Ngweyi, Mr Yona, Mr Matlapula, Mr Jijasi, and Mr Yawa, all individuals within the ‘kraal group’ who, having passed the northern edge of the kraal appear to have stopped or slowed their movement substantially prior to the TRT fire. And they were not under attack from individuals within the front group, including Mr Monesa, Mr Noki, Mr Zibambele, Mr Tukuza, Mr Lehupa, Mr Ntentya, Mr Sompeta and Mr Magidiwana, all of whom are shown in slide 3 of Exhibit RRR15, at the very moment the TRT opened fire, with heads down and with blankets covering their heads as they ran from rubber rounds, tear gas and stun grenades, likely with their eyes closed.

6.2.14 The SAHRC submits that the evidence allows the Commission to conclude that some of those who fired their weapons at Scene 1 may have had a
reasonable belief of an imminent threat to life, but the evidence does not allow the Commission to conclude that there was, in fact, such a threat.
SECTION 7: DOES THE EVIDENCE – WHEN VIEWED AS A WHOLE – SUGGEST THAT THE SAPS RESPONDED PROPORTIONATELY AND RESPONSIBLY TO THE PERCEIVED THREAT?

7.1.1 Let us assume that certain SAPS members had a reasonable (but erroneous) subjective belief that they were under attack, and were therefore justified in using their firearms to defend themselves against an imminent threat to life. That is not the end of the matter. As Mr. de Rover agreed, to benefit from the defence of private and/or self-defence, a law enforcement officer who discharges his firearm must not only satisfy the principle of necessity, but also the principle of proportionality. Necessity will never justify the use of disproportionate force\(^{904}\).

7.1.2 Mr. White’s evidence, based on the video and photographic material he had seen, together with the statements of all shotists at Scene 1 was that the level of response from the SAPS appeared excessive and reckless. He reached that conclusion for a number of reasons.

7.1.3 First, and core to his criticism was the decision to confront the strikers with a baseline of around 60 TRT members all armed with R5 rifles. He noted\(^{905}\):

“7.5.11 the decision to send a baseline of c.60 TRT members all armed with R5 rifles to confront the group of protestors is a decision that I simply cannot understand, especially in the context of the SO262 requirement ‘to avoid the use of force at all costs’ and the internationally accepted maxim that lethal force be used only when absolutely necessary. I have experience of commanding public order operations where intelligence has indicated that there may be protestors with firearms or explosive devices on the scene. In planning for such eventualities I have had cause to deploy officers who are

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\(^{904}\) Exhibit UUUU2.6: Mr. de Rover’s Response to CALS Interrogatories, dated 26 August 2014

\(^{905}\) Exhibit JJJ178: Final Statement of Gary White, paras 7.5.11 – 7.5.12
equipped with firearms in order to provide protection from a ballistic threat. Typically this has involved deploying specialist firearms teams at either end of a public order shield line (with officers making use of the protection afforded by armoured vehicles and ballistic shields if necessary) and, depending on the topography, situating officers who are trained as snipers. In circumstances where the officers are faced with a threat to life, emanating from firearms or explosive devices, the specialist firearms officers are trained to engage an identified target in order to neutralise the threat. Through scenario-based training and intelligence-led planning, which will include the firearms teams examining potential arcs of fire, and working out in advance their specific areas of responsibility, the potential for the use of lethal force will be minimised.

7.5.12 This is in stark contrast to an operation that was planned so that a large crowd of people would very likely be confronted by not one, but two consecutive lines of police officers, with the front line made up of c.60 members armed with lethal weapons, each of whom had discretion to fire live ammunition whenever an imminent threat was perceived. The decision to configure the tactical units in a ‘baseline’ walking towards the protestors in my view represents a reckless attitude with regards to the potential for the use of lethal force and indeed the duty of care in respect of the safety of the officers. This configuration that the SAPS implemented may explain why more than 300 live rounds were fired and why the “funnel” of fire indicated on slide 209 of Exhibit L is so wide.”

7.1.4 Mr. White’s evidence on this point cannot be emphasized enough. If 60 members armed with 60 R5 rifles all perceive the same threat at the same time, their combined response will inevitably be disproportionate. But Mr. White’s point goes further. The arrival of the line of 60 TRT members to confront the perceived threat was not an accident; it was what the plan
expected to happen. It may not have taken place exactly where the SAPS anticipated, but it was exactly what was supposed to happen if the strikers approached police members and the POP members retreated to their nyalas. As already quoted above, but repeated here for its significance, Mr. White noted in his oral evidence:

“7 ... it seems that when [POPs] are engaged, they
8 will make way, they will move out of the way for their own
9 protection and then the TRT will follow up. And the bit
10 that really, really surprised me was – and I kept looking
11 at different statements which talked about then, and the
12 TRT will engage the crowd proportionately. Now my
13 understanding is the TRT are realistically only armed with
14 R5 rifles. They don’t carry the less lethal options that
15 you use in crowd control. So the talks about the TRT and
16 following them the NIU and the STF will engage the crowd
17 proportionately. And I kept looking for someone to say, so
18 what does that mean? Let’s put this into, forgive my
19 terminology here, let’s put this into plain English. If
20 they only have R5 rifles – so what we’re talking about is
21 shoot people. That seems to be what’s going to happen and
22 this is the bit – the challenge process, that I think that
23 this plan creates, if it’s not an inevitability, a high
24 likelihood that there are going to be very high levels of
25 force used in this. In the circumstances that Scott is
Page 31406
1 trying to plan for, the what-ifs, the POP are to go forward
2 and try and disperse people but then if they don’t
3 disperse, if they resist as the intelligence says that they
4 will, then following on behind the POP is the TRT line and

906 Transcript Day 249, pp 31405 - 31406
5 the very fact then that the tactic is that you have 60
6 people lined up armed with R5 rifles, as I understand is
7 the weapons that they use, I just simply wondered that the
8 JOC – and this is dealing with this issue of planning and
9 the challenge process – at what point did someone say,
10 let’s just be clear here, what are we asking the TRT to do?
11 If they have – so we’re basically saying we’ll line up 60
12 people and if they’ve already sort of, you know, got to the
13 position where the POP have moved out of the way, they will
14 engage with them proportionately.
15 [14:46] What does that mean? What is the position we’re
16 putting these police officers in? What do we think they’re
17 going to do? I see that as the challenge process, which
18 didn’t happen, and to be honest with you, I was actually
19 shocked in terms of reading the evidence.”

7.1.5 Accordingly, the disproportionate number of rounds fired at Scene 1 by a line
of 60 TRT members may not have been intentional, but it was foreseeable.
And it was the direct result of poor planning. The SAPS may not have
expected the TRT line to ‘respond proportionately’ at or around the kraal
area, but what happened at the kraal area was part of the plan. It was
planned that the TRT would move forward in a basic line of 60 members to
‘respond proportionately’ to any threat.

7.1.6 Secondly, Mr. White noted that a number of officers, including Cst Kunene907,
Madlopho908 and Modisakeng909 made statements indicating that their
weapons were on automatic fire. A TRT commander on the scene, Lt Col
Classen, confirmed that in his view that this was grossly negligent910.

907 Exhibit ZZZZ3.152: Statement of Cst Kunene
908 Exhibits VVV6.6 and VVV6.7
909 Exhibit ZZZZ3.334: Statement of Cst Modisakeng
910 Transcript Day 236, p.29546
Thirdly, Mr. White noted that in the Reuters footage of the shooting incident, after the initial four-second burst of fire, “a large number of shots continued to be fired into what was essentially a dust cloud without sight of any specific target”. Mr. White’s view was that was reckless and unjustified. He expanded on this in oral evidence. He said:

“25 So perhaps, Chair, if we come back to scene 1. I talked about a dust cloud, imagine it as a curtain as opposed to a cloud and I know the police officers were not able to do this but if you can imagine freezing a moment in time and at a point in that video when we can’t see because of the dust what is happening, if you can imagine somebody pulls that curtain back and we can now see what’s happening and let’s say what that picture then reveals is perhaps three or four people who have been shot in the initial burst and who are now lying down because they’ve been shot, and a lot of people behind that front line who have now turned through 180 degrees and they’re running in the other direction. So I would ask the question then, would it be justified to shoot those people? Now, if the answer to that is no, and I suspect the answer has to be no because they’re no longer posing an imminent threat, then if we so pause this moment in time, pull the dust curtain back over again so that we can’t see, I simply ask the question – now that the dust cloud is back in place, is it justifiable to fire?”

911 Exhibit JJJ178: Final Statement of Gary White MBE, para.7.5.10(c)
912 Transcript Day 249, pp 31431 - 31432
7.1.8 Adv. Semenya SC cross-examined on this point, but his approach was difficult to understand. He appeared to suggest that it was justifiable to fire into a dust cloud, even without sight of a specific target, so long as the crowd had a single intent to attack police. This approach assumed, first, the existence of such a single intention (contrary to the evidence and credible crowd psychology) and, second, that intentions cannot change. It also ignored the evidence of Mr. X that, as soon as the strikers saw the first few members fall, they realized the muti was not working, turned, and ran away. To put it another way, were the shotists able to pull back the dust curtain, what would they see? Strikers running away.

7.1.9 But we do not need to rely on the evidence of Mr. X for support on this point. The video evidence speaks for itself. Part Four of Video Annexure V5 indicates two strikers in the lead group, both of whom were shot, one while adopting a surrendering stance, and the other while appearing to run away. Part Three of Annexure V5 shows eight strikers falling in the first three seconds of the volley. By 15:53:53:00, no conceivable threat exists. So before the dust curtain is even drawn, what could the shotists see? Strikers surrendering, running away, and falling down dead. But TRT members continued to fire, without pause, without hesitation, for a further nine seconds.

7.1.10 When Capt Loest was questioned on this point, his answer was that he called ceasefire as soon as he no longer perceived an imminent threat, but that he could not speak for others who perceived something different. In the abstract his answer was unobjectionable. But in practice, when the Reuters camera sees only a dust cloud, two members immediately adjacent to the Reuters camera continue to fire multiple rounds. The SAHRC submits that

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913 Transcript Day 251, pp 31683 - 31687
914 Transcript Day 253, p.31826
915 Exhibit UUU10.6: Video Annexure V5, Part Four
916 Transcript Day 229, pp 28406 - 28407 and pp 28411 - 28413
917 Exhibit UUU10.2(9): Video Annexure 1.9 – Reuters camera
they saw nothing more than the camera could see; nothing more than a dust cloud.

7.1.11 Mr. de Rover elegantly summarized the problem\(^918\):

> “Your proposition is reasonable in that force should cease when you achieve your objective, but if you never allow for a moment to see whether you [have achieved] the effect you are after, then that in itself can't be the basis on which you justify continuing it.”

And that is the problem. The video evidence is clear: at least some TRT members did not stop shooting until they heard a call for ceasefire; they did not ascertain whether the threat they may have perceived had ended; they did not pause to reevaluate the situation; they just kept on shooting.

7.1.12 Fourthly, and closely related to the previous point, Mr. White expressed his concern in relation to the continued firing of live rounds well beyond the calls for ceasefire\(^919\). Part Five of Annexure V5 contains an analysis of what are likely to be calls for ceasefire. It records the first call for ceasefire a mere four seconds after volley commences, and 14 calls for ceasefire within the first 12 seconds. Despite those numerous calls for ceasefire, the shooting continues.

7.1.13 The SAPS case in respect of the continued shooting beyond numerous calls for ceasefire is inconsistent. At one time the explanation was that a call for ceasefire takes some time to pass down a line and be heard by all officers so firing continues until the call is passed along the line\(^920\). That answer implies that officers will stop firing only when they hear a call for ceasefire. At other times, the SAPS answer is that – irrespective of calls for ceasefire – an officer

\(^918\) Transcript Day 286, p.37150  
\(^919\) Exhibit JJ178: Final Statement of Gary White MBE, para.7.5.10(c)(ii) and (d)  
\(^920\) Transcript Day 229, pp 28420 - 28421
may fire when he or she perceives an imminent threat to life.\textsuperscript{921} The SAHRC submits that the latter answer represents the law; the former represents what in fact happened at Marikana. Officers continued shooting until they heard a call for ceasefire, irrespective of whether they continued to perceive an imminent threat.

7.1.14 Mr. de Rover appears to support that conclusion. He noted that he saw evidence of ‘associative threat perception’ in Scene 1, or evidence of officers firing because they saw others firing and not because they in fact perceived the threat themselves.\textsuperscript{922} Pushed on this in cross-examination, Mr. de Rover confirmed his view that some members at Scene 1 were firing simply because others did.\textsuperscript{923} Such a use of lethal force could never be justified in law.

7.1.15 Sixthly, the evidence of Katherine Scott, forensic firearms expert, was that, after the enhancement of the audio footage in the Reuters material, she could hear at least four R5 discharges more than one minute after the TRT volley commenced.\textsuperscript{924} At the time she produced her evidence, neither the Al Jazeera footage, nor the SABC footage was available. Some of the R5 rounds identified by Ms Scott in her evidence can also be heard in that new footage as follows:

- Al Jazeera (Video Annexure V1.6) at 15:54:52 and 15:54:54; and

- SABC footage (Video Annexure V1.7) at 15:54:52, 15:54:54 and 15:55:00.

\textsuperscript{921} Transcript Day 143, p.15780, per Lt Col Scott and Transcript Day 229, p.28421, per Capt Loest  
\textsuperscript{922} Exhibit FFF11: Initial Statement of Mr. de Rover, paras 72, 77  
\textsuperscript{923} Transcript Day 286, p.37139  
\textsuperscript{924} Exhibit JJ198: Statements and Annexures of Katherine Scott  
\textsuperscript{925} Exhibit UUU10.2(6)  
\textsuperscript{926} Exhibit UUU10.2(7)
7.1.16 In his response to an interrogatory, Mr. de Rover indicated his understanding that the findings of Ms. Scott were disputed\textsuperscript{927}. However, the basis of that dispute is not clear. As set out above, the SAPS have not challenged Ms. Scott’s expertise or findings nor have they provided any expert evidence to contradict her findings. The SAHRC submits that her evidence should be accepted as unchallenged.

7.1.17 Ms. Scott’s evidence does not, in and of itself, indicate any unlawful or unjustified actions by the SAPS. However, as Mr. White notes\textsuperscript{928}:

\begin{quote}
"I have not seen a single statement which claims that there was a continuing threat beyond the initial “charge” of protestors, nor have I seen any statements claiming that any warning shots were fired after the eight second volley as a warning to any remaining protestors. It is not clear from the evidence as to what the justification for this continued use of firearms was."
\end{quote}

7.1.18 Ms. Scott’s evidence was exhibited in September 2013. Mr. White’s Final Statement, in which he made this remark, was submitted in October 2013. Since then, the SAPS have produced no statements which explain the shooting more than a minute after the volley commenced, nor have they produced any alternative explanation for them.

7.1.19 Seventhly, the statements of shotists give substantial cause for concern. This matter is addressed in more detail below in section 8 of this Part, but at this stage, two headline notes can be made.

\begin{enumerate}
\item It is common cause between experts that, in order to benefit from the defence of private and self-defence, a shotist must not only justify the first shot fired, but justify all subsequent shots. That is what the
\end{enumerate}

\textsuperscript{927} Exhibit UUUU2.6: Mr. de Rover’s Response to CALS Interrogatories, dated 26 August 2014
\textsuperscript{928} Exhibit JJJ178: Final Statement of Gary White MBE, para.7.5.10(d)
principle of proportionality requires. However, many of the shotists do not provide justification for more than their first shot. Without more, those shotists have not given the Commission any basis to conclude their actions were proportionate; and

b. The majority of members do not identify any specific target, instead admitting to shooting at ‘the crowd’, ‘the mob’ or similar. Unless the Commission reaches the untenable conclusion that the lead group had an identity of purpose and intention, the failure to distinguish between members of a crowd when firing live ammunition is unlawful. For example, Part Four of Annexure V5 shows a striker, named ‘striker 1’, throwing his arms in the air and turning his back to the TRT line. On no reasonable basis could that striker be perceived as an imminent threat to life. But a failure to distinguish between potential threats and non-threats, and instead a lumping together of the crowd as a single threat, likely led to his murder.

7.1.20 Mr. White gave evidence that it is vital that a police service makes significant investment to ensure that as far as possible only the most suitable people are given responsibility to make life-or-death judgments in relation to the use of lethal force and that their training, equipment and operating procedures all contribute towards the principles of minimum force. Unexpectedly, Mr. de Rover unwittingly applied that evidence to the SAPS, noting:

a. In relation to equipment, that R5 rifles were wholly inappropriate in policing operations and were likely to result in devastating injuries and death929; and

b. In relation to personnel, that recruitment within the SAPS was poor and the wrong people were joining930; and

929 Transcript Day 286, p.37135
c. In relation to training, that firearms training was inadequate, did not reflect real-world situations, and contained no practical training in ‘judgment’ or distinguishing between threats and non-threats.\textsuperscript{931}

7.1.21 The SAHRC submits that the consequences of these failings are visible in the disproportionate response, and catastrophic outcome, at Scene 1. Even if the SAPS may have been justified in using some live ammunition at Scene 1 on the basis of a reasonable, if erroneous, belief of an imminent threat to life, the response was massively disproportionate.

7.1.22 The law is uncomplicated. An individual is only permitted to use lethal force when the requirements of necessity and proportionality are satisfied. The Commission can only conclude that those requirements are satisfied with evidence of both necessity and proportionality in respect of every shot fired. The evidence available weighs overwhelmingly against that conclusion.

\textsuperscript{930} Transcript Day 286, pp 37135 - 37140
\textsuperscript{931} Transcript Day 286, pp 37135 - 37137
SECTION 8: DOES THE WITNESS EVIDENCE OF SHOTISTS AT SCENE 1 PROVIDE

PRIMA FACIE EVIDENCE OF PRIVATE AND SELF-DEFENCE?

8.1.1. The SAHRC submitted in section 4.3 above that the Commission must reach a conclusion on whether the use of “all and any force” by SAPS members was justified in the circumstances. The Commission must do this on the evidence available and not based on any assumptions that go beyond the evidence available. Accordingly, in assessing the witness statements of shotists, the Commission must consider the following:

a. That the SAPS case is that all lethal force used by SAPS members was justified in self and / or private defence;

b. As self and / or private defence contains a subjective element, the Commission must examine the witness evidence from every member who used lethal force to assess whether the use of all force was justified as claimed by the SAPS;

c. When reviewing the statements, the Commission needs to assess compliance with both:

   i. The principle of necessity; and

   ii. The principle of proportionality.

d. If one or both of these principles were not satisfied, then the use of lethal force was – on a prima facie basis – unlawful. The Commission would then need to consider whether the member should be referred for prosecution by the NPA.

8.1.2. The SAHRC submits that a review of the statements of shotists makes clear that the SAPS have not established – in respect of the vast majority of
shotists – that the use of lethal force was justified in legitimate self and private defence. The statement evidence confirms the video evidence: many shotists appear to have fired their weapons with no clearly identified target, and continued to fire their weapons without considering whether there was justification to do so. This recklessness is only exacerbated for those shotists firing on automatic mode.

8.1.3. The SAHRC does not intend to set out a comprehensive assessment of every statement made, but trusts that the Commission will conduct a close review of all statements of shotists. Here, we highlight specific areas of concern in relation to the statements of shotists at Scene 1 which the Commission should bear in mind when conducting its own review.

8.1.4 Category 1: Statements in which members cannot account for all shots fired. For example:

a. Cst LJ Mokhobo\textsuperscript{932}:

"I heard the sound of a shot but I did not saw where it was coming from. I then prepared my firearm but I don’t remember shooting at person or discharging a round ... When we arrived at the parade I inspected my firearm and two (2) rounds were missing. I could not tell what happened to those two (2) rounds."

b. Cst HM Madlopha\textsuperscript{933}:

"Seeing the danger coming to us, I saw a need of firing a shot as a warning, but people (the strikers) never stopped. I tried another four rounds as to try and scare those people, but not in the direction of the crowd. I just tried an open space."

\textsuperscript{932} Exhibit ZZZZ3.356: Statement of Cst Mokhobo, paras 5 - 6
\textsuperscript{933} Exhibit VVV6.6: Warning Statement of Cst Hlumbulani Mthokozisi Madlopha, para.5 and Exhibit VVV6.7: Further Statement of Cst Hlumbulani Mthokozisi Madlopha, para.2
“I had previously declared that I discharged 5 rounds with my R5 rifle at Scene 1 on Thursday 16 August 2012. Ballistics reports show that 9 cartridges are traceable to my rifle. My assumption that my magazine contained 25 rounds is incorrect. It may have contained more. My rifle was in automatic mode at that time. So it is possible that I may have discharged at least 9 rounds.”

c. Cst M Nkwe:  
“We were lining up to disarm them and I saw a group of them aggressively coming in our direction with their dangerous traditional weapons. That was when I shot 2 rounds in the ground with the intention to disperse them because I feared my life and colleagues’ lives were in danger.”

“Ballistics indicates that I discharged 5 rounds. It is possible that I discharged 5 rounds, not 2.”

8.1.5 As set out in Part Four above, a shotist who has failed to account for each round fired has failed to satisfy the requirement of proportionality. In these circumstances, the Commission will need to consider whether it is appropriate to refer that member for prosecution.

8.1.6 Category 2: Statements in which members who shot do not identify any specific target but instead admit merely to shooting, or shooting at ‘the crowd’, ‘the mob’ or similar. Many of the statements of shotists at Scene 1 illustrate this failure to identify specific targets. As there are so many examples within the statements provided, one example only is set out here for illustrative purposes:

a. Cst TR Wells:

934 Exhibit ZZZZ3.477: IPID Statement of Cst Motlalepule Nkwe, para.5 and Further Statement of Cst Motlalepule Nkwe, para.2
“When they were 8 metres away, shots were fired from the crowd in our direction. I felt my life was in danger and started shooting at the crowd in self-defence.”

8.1.8 As set out in Part Four above, unless the Commission subscribes to the untenable proposition that there was a single intent within the crowd, a member who has admitted to firing “at the crowd”, “the group” and / or “the mob” and has failed to identify a specific threat to life at which they aimed is likely to have failed to establish a lawful use of lethal force. In these circumstances, the Commission will need to consider whether it is appropriate to refer that member for prosecution.

8.1.9 Category 3: Wholly inconsistent first and second statements, which do not match ballistic evidence and undermine the credibility of the witness. For example:

a. Cst N Majombozi\(^{936}\):

“They continue to come to us to keep shooting to us. I never hesitate to shoot ... My first shot was on the ground between their legs to scare them about four shoot. Then I shoot 6 straight to them.”

“When I turned to shoot my colleagues were faster than me to shoot, I then waited for the sound of rifles listened and watched. My aim was to make sure that if the bullets of my colleagues finished I must remain with some so that I could cover my colleagues. I still stand firm and sure I didn’t shoot.”

8.1.10 The SAHRC submits that in a case such as this, where the ballistic evidence shows 10 rounds were fired, but where an initial statement claims only six rounds, it is unlikely that a member of the police force could have used lethal force in self-defence.

\(^{935}\) Exhibit ZZZZ.667: Statement of Cst Teko Robert Wells, paras 8 - 9
\(^{936}\) Exhibit VVV6.5: Statement of Cst Nyanisile Majombozi, para.4 and Exhibit ZZZZ.220: Consolidated Statement of Cst Nyanisile Majombozi, para.6
round were fired and a subsequent statement denies that any rounds were fired at all, then the shotist is likely to have failed to satisfy the principles of necessity or proportionality. In these circumstances, the Commission will need to consider whether it is appropriate to refer that member for prosecution.

8.1.11 **Category 4:** Statements that provide an inadequate explanation for what appears to be an excessive number of rounds fired. The Commission will recall the evidence of Mr. White, who testified that in his experience of the training of firearms officers, ordinarily these officers are trained to fire two shots at a target before reassessing. The training also requires that each individual round fired by the officer must be justified. Many of the SAPS shotists at Marikana fail to justify more than the first round fired, even when very many shots were fired. For example:

a. **Cst T Molatowagae**

“As they (strikers) were running upon their attack about 20 I then heard two gunshots from that group but I didn’t know who was shooting at us because they were bangled and on that situation they were running towards us so I see that my life is in danger then that situation lead me to discharge the rounds.”

“I discharged 24 rounds with my R5 rifle.”

b. **Cst SV Khuma**

“One of the miners whom I saw wearing a brown jacket was holding a long stick and a panga covered with a white cloth in his left hand and a firearm on his right hand. He fired to us whereby we were...

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937 Transcript Day 250, pp 31448 - 31449
938 Exhibit BB5: IPID Statement of Cst Thabang Molatowagae, para.3 and Exhibit ZZZ3.374: Further Statement of Cst Thabang Molatowagae, para.2
939 Exhibit UUU6.1: Statement of Cst Khuma, para.4 and Exhibit UUU6.2: Further Statement of Cst Khuma, para.2
commanded to engage. I fired to the African male who was firing at us for self-defence. That is all I can state”

“Ballistics reports show that 17 cartridges are traceable to my rifle... I cannot dispute that I may have discharged at least 17 rounds”

8.1.12 As set out in Part Four above, the SAHRC submits that a shotist who has failed to justify the firing of multiple rounds has failed to provide any evidence to support a claim that their multiple shots were proportionate in the circumstances. The Commission will need to consider whether it is appropriate to refer such shotists for prosecution.

8.1.13 In summary, we submit that the witness evidence of shotists at Scene 1 confirms the video evidence. While there may potentially be an argument that some shotists fired some rounds with a reasonable (but erroneous) belief that there were responding to an imminent threat to life, it is clear that the firing of 328 rounds at Scene 1 was a massively disproportionate use of force. In general, the statements provided by shotists confirm the disproportionate, indiscriminate nature of the firing at Scene 1.

8.1.14 The SAHRC has only referred to limited examples from the many statements in order to assist the Commission in its own comprehensive analysis of all of the statements of the SAPS members who used lethal force. Only the Commission can reach conclusions on whether it is appropriate to make recommendations for prosecution in respect of individual SAPS members following such a review.
SECTION 9: CONCLUSION ON SCENE 1 – A DISPROPORTIONATE AND UNLAWFUL USE OF LETHAL FORCE

9.1.1 The SAHRC submits that the 17 deaths and multiple injuries caused at Scene 1 were avoidable and unlawful.

9.1.2 As set out in the sections above, we submit that:

a. The lead group of strikers moved off the Koppie with the intention of heading to Nkaneng, but were blocked without warning by Nyala 4;

b. Incidents 1 and 2 did not take place as claimed by the SAPS;

c. The lead group of strikers were unintentionally channeled towards the TRT line;

d. Less lethal means appear to have been effective against the strikers, but were used inappropriately by the SAPS;

e. Only 37 strikers passed the northern edge of the kraal and moved towards police. That group split into two and only 12 strikers ran directly towards the TRT members;

f. There was no attack on the SAPS by any group of strikers;

g. While some TRT members may have had a reasonable (but erroneous) belief that there was an imminent threat to life, it is clear that some TRT members fired without perceiving any such threat;

h. Even if some members may have had a reasonable (but erroneous) belief that there was an imminent threat to life, the response to that
threat was massively disproportionate, indiscriminate and unlawful; and

i. The acts of the SAPS at Scene 1 amounted to a fundamental breach of the constitutionally-protected right to life. In respect of certain shotists that may have criminal consequences, but it is a matter for the Commission to determine whether a \textit{prima facie} case for prosecution exists in respect of each shotist.
PART ELEVEN:

THE EVENTS OF THE AFTERNOON OF 16 AUGUST (SCENE 2: COMMAND AND CONTROL)
SECTION 1: SAPS ADMISSION OF A BREAKDOWN IN COMMAND AND CONTROL

1.1.1 Exhibit L contains no reference to the breakdown of command and control in the aftermath of Scene 1, no reference to difficulties in communication over the radio, no reference to the unintentional encircling of Koppie 3, and no reference to the possibility that SAPS members were responding to friendly fire when they discharged almost 300 live rounds into Koppie 3. However, after nearly two years of evidence, all of these factors are now accepted parts of the SAPS case.

1.1.2 Given that the breakdown of command and control after Scene 1 is no longer in dispute, the SAHRC does not intend to make lengthy narrative submissions on how this came about. Instead, we set out a summary of the undisputed evidence below.

1.1.3 After the shooting at Scene 1, Brig Calitz initiated a follow-up disperse, disarm and arrest action. His evidence is that he had no knowledge of the shootings at Scene 1 and no-one else told him about it. Consequently, a SAPS dispersion line pushed westwards from Scene 1, made up of the following vehicles:\textsuperscript{940}:

a. From POPs: Papas 1, 4, 7, 9, and 18;

b. From the STF: both the STF Casspir and the STF Scorpion; and

b. Both the JHB and NW water cannons.

1.1.4 Many of the strikers fled in a westerly direction. A large group of around 200 people lined up behind Koppie 2. Others moved into Koppie 3:\textsuperscript{941}.

\textsuperscript{940} Exhibit JJJ178.3: Annexure GW6(c) – Scene 2 vehicle movement analysis, p.14

\textsuperscript{941} Exhibit JJJ178.3: Annexure GW6(c) – Scene 2 vehicle movement analysis, p.12
1.1.5 The SAPS dispersion line paused in front of Koppie 2 to allow the NW water cannon to catch up. The line then pushed further westward driving strikers in various directions. Many retreated into Koppie 3.

1.1.6 From the vicinity of FHA2, Capt Kidd responded to the sound of live ammunition and commotion at Scene 1 by ordering his TRT members to walk eastwards towards Koppie 3. He did this without instruction, contrary to the plan, and without announcing his move on the radio. Brig Fritz and Sgt Venter attempted to direct Capt Kidd’s members away from Koppie 3 and towards the north, but their instructions were not followed and the members proceeded towards Koppie 3.

1.1.7 At FHA1, Gen Naidoo heard the sound of live ammunition fire from Scene 1 and received a request for medical assistance over the radio so directed his FHA1 members to move towards the scene. However, the FHA1 members did not head towards Scene 1, and instead Gen Naidoo led a group of K9 vehicles and members towards Koppie 3 from the south. He did this without instruction, contrary to the plan, and without announcing his movement on the radio.

1.1.8 From the staging area, Lt Col Modiba responded to what he believed was a general direction made by Brig Calitz over the radio to move forward and make arrests. Brig Calitz claims he gave no orders to any unit other than

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942 Exhibit JJ178.3: Annexure GW6(c) – Scene 2 Vehicle Movement Analysis, p.15
943 Transcript Day 233, p.29124
944 Transcript Day 232, pp 29013 - 39014
945 Exhibit JJ72: Supplementary Statement of Brig Fritz, para.6.4
946 Exhibit GGG8: Initial Statement of Brig Fritz, para.6
947 Exhibit JJ108: Supplementary Statement of Maj Gen Naidoo, para.60; Transcript Day 189, p.22910
948 Exhibit MMM44: SAHRC analysis – Movement of FHA1 Convoy to Koppie 3
949 Transcript Day 191, pp 23214 - 23219
950 Exhibit MMM23: Supplementary Statement of Lt Col Modiba, para.7
the POPs. In any event, Lt Col Modiba directed his NIU members to approach Koppie 3 from the west.\textsuperscript{951}

1.1.9 The consequence was that SAPS members approached Koppie 3 from all directions:

a. POPs members and the NW water cannon approached from the north;

b. The JHB water cannon and then K9 members approached from the south;

c. TRT members approached from the west; and

d. NIU members approached from the east.

1.1.10 It is not in dispute that in the aftermath of Scene 1, and during the incidents at Scene 2, leadership was absent or lacking. There was no-one coordinating the actions of the various units at Scene 2, and no communication from the various commanders who approached Koppie 3 without instruction and contrary to the plan.\textsuperscript{952}

1.1.11 The Operational Commander, Brig Calitz, was positioned 150 metres to the north of Koppie 3.\textsuperscript{953} He claims to have been unaware of the shooting at Scene 1, unaware of the shooting taking place at Koppie 3, unaware that K9, TRT and NIU units had arrived at Koppie 3, and he claims that the limited instructions he gave were directed at POP members only.\textsuperscript{954}

\textsuperscript{951} Exhibit JJ178.3: Annexure GW6(c) – Scene 2 Vehicle Movement Analysis, pp 17 – 18
\textsuperscript{952} Transcript Day 125, p.12964 per Maj Gen Mpembe and Transcript Day 165, pp 19095 - 19097, per Brig Calitz
\textsuperscript{953} Exhibit JJ178.3: Annexure GW6(c) – Scene 2 Vehicle Movement Analysis, pp 18 - 26
\textsuperscript{954} Transcript Day 165, pp 19096 - 19097 and pp 19104 - 19113
1.1.12 The Overall Commander, Maj Gen Mpembe, was in a helicopter, above the scene, but flying too high to perceive properly what was happening\textsuperscript{955}. He did not give any orders during the operation and did not attempt to contact the operational commander or others because he claims not to have known that things were going wrong in the operation until after the events at Scene 2\textsuperscript{956}.

1.1.13 The members of the JOC, in particular Maj Gen Annandale and Lt Col Scott, did not make attempts to contact either the Overall Commander or the Operational Commander or to exert any control over the developing situation\textsuperscript{957} because they claim they were unaware that anything serious had happened until after the firing at Scene 2 was complete\textsuperscript{958}.

1.1.14 Even some unit commanders lost contact with their own members. Capt Kidd was unable to communicate with the TRT group who split off and approached the Koppie from the south-west\textsuperscript{959}. Similarly, Maj Gen Naidoo was unable to communicate with the K9 unit he had brought to the Koppie after he split off to join up with the NIU from the east.

1.1.15 Consequently, there was a complete absence of command and control at Scene 2.

1.1.16 The consequences of this breakdown in command and control cannot be underestimated. The various units surrounded and then approached the Koppie from all directions, blocking any exit route for the strikers to be dispersed. As the water cannons sprayed with the intent to drive the strikers westwards, the TRT approached from the west and formed a line blocking

\textsuperscript{955} Transcript Day 112, pp 12070 - 12071  
\textsuperscript{956} Exhibit GGG12: Initial Statement of Maj Gen Mpembe, para.51  
\textsuperscript{957} Transcript Day 138, pp 14776 - 14777, per Lt Col Scott  
\textsuperscript{958} Transcript Day 162, pp 8697 - 8699, p.8740, and p.8748, per Maj Gen Annandale and Transcript Day 137, p.14726 per Lt Col Scott  
\textsuperscript{959} Transcript Day 233, pp 29077 - 29078
what Mr. de Rover described as “the intended pathway out of the Koppie”\textsuperscript{960}. Thereafter, 295 live rounds were fired by SAPS members in and around Koppie 3. POPS members fired 58 live rounds; K9 members fired 67 live rounds; TRT members fired 55 live rounds; and NIU members fired 115 live rounds\textsuperscript{961}. Although it is alleged that the strikers fired live rounds towards the SAPS members, it is unlikely that any shots were fired by the strikers from within Koppie 3\textsuperscript{962}.

\textsuperscript{960} Transcript Day 286, p.37157
\textsuperscript{961} Exhibit FFF8: Discharge List 16 August 2012
\textsuperscript{962} See below at Part 12, section 1
SECTION 2: THREE NEGLIGENT FAILURES OF COMMAND AND CONTROL

2.1.1 As fairly admitted by the Provincial Commissioner, “if the command and control of this operation went according to plan in all levels of command, maybe people’s lives would have been spared”\(^{963}\). The SAHRC submits that, in the aftermath of the shooting at Scene 1, the SAPS are culpable for three negligent failures of command and control which led directly to the deaths of 17 people:

a. The failure to halt the operation at Scene 1;

b. The failure to retreat from Koppie 3 to allow the strikers an opportunity for negotiated disarmament; and

c. The failure to co-ordinate the various units at Koppie 3, which led to a lethal encirclement of Koppie 3 and dangerous cross-fire.

2.1.2 First, all the policing experts – and even some SAPS witnesses – agreed that the operation should have been halted after Scene 1 to allow for a process of regrouping, rethinking and replanning. Mr. de Rover’s evidence was unequivocal. He said that it “goes without saying that SAPS doctrine and experience in crowd management dictate”\(^{964}\) that a decision should have been taken to call a halt to the operation “in a bid to re-group and re-assess”\(^{964}\). In oral evidence he confirmed that view, saying: “I’ve said from the beginning, and you’ll find the reference in my first statement, the operation should have been halted after scene 1.”\(^{965}\) Mr. White shared this view. He noted:\(^{966}\):

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\(^{963}\) Transcript Day 181, pp 21838 - 21840

\(^{964}\) Exhibit FFF11: Initial Statement of Mr. de Rover, para.81

\(^{965}\) Transcript Day 286, p.37157

\(^{966}\) Exhibit JJJ178: Final Statement of Gary White MBE para.7.6.2
“7.6.2... senior officers on the ground should have reacted to the circumstances as they occurred. With 16 protestors dead, and others perceived to be a threat dispersed to the open land to the west, the operation should have been immediately paused; there should have been a regrouping of the SAPS units, and a process of rethinking and replanning before taking any further action.”

2.1.3 Secondly, having proceeded towards Koppie 3, the experts – and some SAPS witnesses – criticized the decision to make arrests while the strikers were entrenched in the Koppie. They agreed that the SAPS ought to have retreated to a safe distance and sought to re-engage in negotiations once it was clear that the strikers had gathered inside Koppie 3. Mr. White said as follows967:

“7.6.3 The overarching objective in policing is the protection of life, including the lives of police, protestors, and others. Even on the basis of pure self-defence, the police should have paused. If they genuinely believed the protestors to be intending to cause serious violence, why rush headlong into a possible ambush situation, with allegedly violent and armed protestors on higher ground at Koppies 2 and/or 3?

7.6.4... In my view, it would have been better to try to contain the crowd within the Koppies by surrounding them from a safe distance and then negotiating. If it was not considered safe to enter the Koppie because there was a risk of attack, then the decision to send members into the Koppie to make arrests placed those members at unreasonable risk and carried huge risks of the need to use lethal force. Alternatively, if it was considered safe to enter the Koppie to encircle and arrest the protestors, it would have been far preferable to utilise POP members with less lethal tactical options or dogs in the first instance to do so.”

967 Exhibit JJJ178: Final Statement of Gary White MBE, para.7.6.3 – 7.6.4
2.1.4 Lt Col Scott – an STF member trained in high-risk tactical interventions – agreed with Mr. White’s assessment. He said as follows\textsuperscript{968}:

“17... considering that they had
18 stayed in scene 2, I agree with the approach that the whole
19 operation should’ve been slowed down. Police officials
20 should’ve backed away to a safe distance and negotiations
21 should’ve been reignited or reinitiated, trying to speak to
22 them and giving the opportunity and simultaneously with
23 that negotiation happening, there would’ve been a full
24 reorganisation of what would’ve had to be a sweep through,
25 in that case, should it have been necessary. And there are Page 15294
1 certain tactics which I would’ve used for that which
2 would’ve minimised the need necessarily for force to be
3 simply sharp point ammunition...
...
10... If we get to an issue where
11 we feel that there’s a bit of a stalemate, we slow down, we
12 try to speak to our opposition, give them the opportunity,
13 allow them to know that they can’t go anywhere. This is
14 the situation. So you give them that opportunity and if it
15 does get to that point where they are really not going to
16 submit, you in the meantime are reorganising, replanning
17 your forces to a new strategy.”

2.1.5 Under cross-examination, Mr. de Rover agreed with Mr. White and Lt Col Scott. He said that it would have been preferable for the SAPS to have retreated at Scene 2 rather than using sharp point ammunition against the

\textsuperscript{968} Transcript Day 140, pp 15293 - 15294
strikers\textsuperscript{969} and conceded that – as a point of principle – law enforcement officials must consider retreat before using lethal force\textsuperscript{970}. Indeed, this is not simply a point of principle; it is a point of law: as Mr. de Rover’s publication on behalf of the ICRC ‘To Serve and To Protect’ acknowledges, the principle of proportionality requires a law enforcement to retreat where possible before using lethal force\textsuperscript{971}.

2.1.6 Finally, the SAPS accepts that the failure to co-ordinate the various units at Scene 2 led to the unintentional encircling of the Koppie from all sides. The consequence was that members on one side of the Koppie were unaware of members on the other side of the Koppie. The SAPS are now “\textit{prepared to accept that they may have been responding to ‘friendly fire’}” when they fired many of their shots in alleged self-defence\textsuperscript{972}. Once firing commenced at Scene 2, it appears to have caused a cascade of further fire, with different units responding to the shots of other units. On the police’s best case, at least nine of those killed at Scene 2 were struck by stray bullets\textsuperscript{973}. Mr. de Rover called these deaths the result of ‘incidental’ fire resulting from strikers taking cover in an area that was subject to SAPS crossfire from four directions. We submit that ‘incidental’ fire cannot be read as anything other than ‘reckless’ fire. In any case, the police evidence is that nine individuals at least were killed without posing any threat to police members. The SAHRC will submit, for the reasons explained below at Part 12, section 2, that the number is higher. We will submit that, on the evidence available to the Commission, at least 15 of the 17 people killed at Scene 2 were killed without justification.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{969} Transcript Day 286, p.37158
\item \textsuperscript{970} Transcript Day 286, p.37156
\item \textsuperscript{971} Exhibit UUU3, p.262
\item \textsuperscript{972} Exhibit FFF9, para.45.5
\item \textsuperscript{973} See the analysis of Mr. de Rover, set out in paragraphs 41 – 60 of Exhibit FFF11A
\end{itemize}
\end{footnotesize}
SECTION 3: CREDIBILITY OF THE SAPS EXPLANATION FOR THE BREAKDOWN IN COMMAND AND CONTROL

3.1.1 The explanation given by the SAPS for the breakdown in command and control after Scene 1 is that radio communication was hampered by multiple units operating on a single channel, so key information was never received by those in command positions. In particular, it is claimed that:

a. Members of the JOC were unaware of the firing of live ammunition at Scenes 1 and 2, and unaware of the deaths and serious injuries caused at Scenes 1 and 2 until after the shooting at Scene 2 had ceased;

b. The Overall Commander was unaware of the firing of live ammunition at Scenes 1 and 2, and unaware of the deaths and serious injuries caused at Scenes 1 and 2 until after the shooting at Scene 2 had ceased;

c. The Operational Commander was unaware of the firing of live ammunition at Scenes 1 and 2, and unaware of the deaths and serious injuries caused at Scenes 1 and 2 until well after the shooting at Scene 2 had ceased; and

d. The Operational Commander was unaware of the arrival at Scene 2 of the NIU, TRT and K9 members and therefore was unable to exert any control over them.

3.1.2 The SAHRC submits that – if this is true – it demonstrates astonishing negligence on the part of the SAPS. However, the overwhelming weight of the evidence suggests that the claims of ignorance are false.
Section 3.2: Credibility of claim that the JOC were unaware of the situation at Scene 1

3.2.1 Maj Gen Annandale\textsuperscript{974}, Lt Col Scott\textsuperscript{975} and Maj Gen Mbombo\textsuperscript{976} gave unequivocal evidence that they were unaware of the shooting, deaths and serious injuries at Scene 1 until after the shooting at Scene 2 had concluded. Their evidence must be rejected as false in light of the following evidence.

3.2.2 First, the Occurrence Book which recorded radio transmissions heard through the radio in the JOC notes, at 15:45: "Papa 1 reporting the group are moving to TRT members and they try to attack them. Papa 1 reporting that the people are moving around and some are down."\textsuperscript{977} Any responsible police member listening to this transmission must have been alert to the possibility that the TRT had responded to the attack on them with the only weapon at their disposal: R5 rifle.

3.2.3 Secondly, the following witnesses gave evidence that they heard the firing of live ammunition at Scene 1 through the radio:

a. Dirk Botes confirmed that he heard the shooting of live ammunition at Scene 1 through the radio in the JOC\textsuperscript{978}. Mr. Botes also confirmed that it was "obvious to everybody in the JOC that something quite serious had happened"\textsuperscript{979}.

\textsuperscript{974} Transcript Day 78, p.8339 and pp 8350 - 8351 and Transcript Day 82, pp 8697 - 8699, p.8740 and p.8748
\textsuperscript{975} Transcript Day 137, p.14726
\textsuperscript{976} Transcript Day 181, p.21804
\textsuperscript{977} FFF25, entry 1016. Also recorded by Capt Van Heerden: Exhibit KKK42
\textsuperscript{978} Transcript Day 266, pp 33641 - 33643
\textsuperscript{979} Transcript Day 266, p.33643
b. Col Moolman confirmed that she heard the shooting of live ammunition at Scene 1 through the radio in the JOC, and calls for ‘cease-fire’ following it[^980];

c. W/O Masinya confirmed that he heard the shooting of live ammunition at Scene 1 through the radio in the JOC[^981], and

d. Capt Kidd confirmed that he heard the shooting of live ammunition through the radio as he walked forward from FHA2, he confirmed that it was clear that it was the sound of R5 rifles being fired, and that anyone who was listening to the radio would have heard it[^982].

3.2.4 Thirdly, radio communication in the immediate aftermath of the shooting would have alerted a responsible SAPS member to the possibility of death or serious injury at Scene 1. That communication included:

a. A call for medical assistance that caused Maj Gen Naidoo to deploy his members from FHA1[^983]. Maj Gen Naidoo’s convoy was captured moving south past the FLIR camera at 15:56:19[^984], so it is likely the call for medical assistance was made before that time, and therefore within two minutes of the shooting incident; and

b. Lt Col Vermaak’s report that there were 18 bodies down[^985], which must have been made prior to 16:01:30[^986].

[^980]: Exhibit LLL9: Supplementary Statement of Col Moolman, para.35
[^981]: Exhibit HHH8: Supplementary Statement of W/O Masinya, para.12
[^982]: Transcript Day 232, pp 29004 - 29005
[^983]: Exhibit JJ108: Consolidated Affidavit of Maj Gen Naidoo para.60
[^984]: Exhibit MMM44, p.9
[^985]: Exhibit FFF25, entry 1018
[^986]: Exhibit KKK42
3.2.5 **Fourthly**, Lt Col Vermaak appears to have sent to Brig Pretorius a photograph of Scene 1 by Blackberry Messenger (BBM) at around 15:56.\(^{987}\) That photograph clearly shows bodies lying on the ground near the kraal, with the TRT lined up behind.

3.2.6 **Fifthly**, the telephone records of Brig Pretorius makes it clear that, as co-coordinator of the JOC, she was aware by 16:03 that something very bad had happened at Scene 1:

   a. At 16:03 she sent a text message to Mr. Molatedi at IPID\(^{988}\) saying: 
      
      "**Having operation at wonderkop. Bad. Bodies. Please prepare your members as going to be bad**"\(^{989}\); and

   b. At 16:05 she commenced a series of telephone conversations with Capt Loest\(^{990}\), who was at Scene 1 commanding the TRT members who had fired at the strikers.

3.2.7 **Sixthly**, radio transmissions made between 16:09 and 16:15 would have provided further information that a responsible member in the JOC would have understood to mean that the operation had gone badly wrong and live ammunition was being used. Those transmissions included:

   a. Lt Col Vermaak’s transmission at 16:09:30: "**JOC. Chopper. Two bodies. Two bodies at the back of the second Koppie. Two bodies**"\(^{991}\);

   b. Brig Calitz’s transmission at 16:12:15 of "**OK live fire**"\(^{992}\);

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\(^{987}\) The photograph that was sent is Exhibit JJJ11.01518. Lt Col Vermaak confirmed that he sent the photograph to Brig Pretorius at around 15:56:30: Transcript Day 205, p.25303

\(^{988}\) Exhibit KKK4: Cellphone Records

\(^{989}\) Exhibit UUUU7: Statement of Molatedi Molatedi

\(^{990}\) Exhibit KKK4: Cellphone Records

\(^{991}\) Exhibit OOO11: transcript of Exhibit CC22 – Protea Coin Chopper videos

\(^{992}\) Exhibit OOO11: transcript of Exhibit CC22 – Protea Coin Chopper videos
c. An unknown member’s transmission between 16:11:18 and 16:14:09, recorded in the handwritten notes of Capt Van Heerden, requesting medics to go in at the holding area and noting that there were “30 people lying down, some dead some injured”\textsuperscript{993};

d. An unknown member’s transmission at 16:14:56 of: “Stop shooting. Cease fire”\textsuperscript{994}.

3.2.8 In light of that evidence, the SAHRC submits that there can be no reasonable doubt that members of the JOC were fully aware of the disastrous outcome at Scene 1 before Scene 2 commenced and were aware that the operation was ongoing, with continuing use of live ammunition. The claim that the JOC did not understand that ‘bodies’ might refer to people who were dead or seriously injured simply does not stand up to scrutiny.

3.2.9 It is regrettable that Brig Pretorius was not called to give evidence under cross-examination. As a consequence, she was not pressed to explain who she spoke to before contacting IPID. It is simply not credible that Brig Pretorius would have shared information with IPID before she shared it with Maj Gen Annandale and / or the Provincial Commissioner. Indeed, we submit that it is highly likely that Brig Pretorius would have been required to seek their permission before contact IPID. Can it credibly be claimed that Brig Pretorius would have been entitled to set in chain a full-scale, independent investigation of an ongoing SAPS operation without seeking the permission – or at least informing – the Provincial Commissioner and Maj Gen Annandale? We submit not.

\textsuperscript{993} Exhibit KKK42: Annotated Version of Van Heerden’s JOC Notes Originally Contained in Exhibit JJ168
\textsuperscript{994} Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper Videos
3.2.10 Circumstantial support for this view is provided by the cellphone records of the Provincial Commissioner: one minute before Brig Pretorius sent a text message to IPID, the Provincial Commissioner sent a text message to the National Commissioner. We submit that it is likely the Provincial Commissioner was informing the National Commissioner that there had been a serious incident and that IPID were about to be contacted.

Section 3.3: Credibility of claim that Brig Calitz was unaware of the situation at Scene 1

3.3.1 Brig Calitz gave unequivocal evidence that – until 16:47 when he spoke to Maj Gen Annandale – he was unaware of live ammunition fired at Scene 1; unaware of serious injuries and / or deaths at Scene 1; unaware that the strikers retreated into Koppie 3 and were surrounded within the Koppie; and unaware of any shooting, injuries and / or deaths at Scene 2. The SAHRC submits that his evidence was false.

3.3.2 First, there is evidence that Brig Calitz was fully aware of the threat posed by strikers to the TRT line. Both Lt Col Vermaak and Maj Gen Mpembe confirmed that the radio transmission recorded in the Occurrence Book “P1 reporting the group are moving to TRT members and attack them” was made by Brig Calitz in Papa 1. Moreover, there is evidence that Brig Calitz called for members to “engage, engage” very shortly before the TRT volley commenced. If this evidence is accepted, then it is simply not credible that he would not have watched or followed-up on the outcome of that engagement.

995 Exhibit KKK4: Cellphone Records
996 Transcript Day 87, pp 19188 - 19189
997 FFF25, entry 1017
998 Transcript Day 206, p.25376, per Maj Gen Mpembe and Transcript Day 130, pp 13300 - 13034
999 Transcript Day 205, p.25312, per Lt Col Vermaak and Transcript Day 264, p.33343, per Dirk Botes
3.3.3 Secondly, the SAHRC submits that it is highly likely that Brig Calitz heard the firing of live ammunition at Scene 1 from inside his nyala:

a. 257 rounds of R5 ammunition\(^{1000}\) were fired within 50 metres of Papa 1\(^{1001}\). Even accounting for the fact that Papa 1 may have just started to move at the time of the TRT fire, it is highly unlikely that an occupant of that nyala would not have heard the cacophony of shots;

b. Others in the same nyala as Brig Calitz, Papa 1, gave statements suggesting they heard the shots fired by the TRT:

i. Lt Col McIntosh recorded the use of rubber, water cannon, tear gas, and he noted that he “heard shots being fired, shortly thereafter”\(^{1002}\). Lt Col McIntosh’s claim in oral evidence that he was referring to the sound of 2 x 9mm shots\(^{1003}\) was not credible in light of the wording of his initial statements\(^{1004}\). But even if Lt Col McIntosh’s evidence is to be believed and he was referring to 9mm shots, his evidence was that he informed Brig Calitz of these shots immediately\(^{1005}\). Brig Calitz did not admit to having knowledge of any live ammunition fired at Scene 1; and

ii. W/O Nong’s evidence was that when Papa 1 moved forward to push strikers to “the open field”, that was when he “heard the sound of firearms shooting from the back.”\(^{1006}\) Chronologically, the TRT volley commenced shortly after Papa 1 began to move.

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\(^{1000}\) Exhibit FFF8: Discharge List 16 August 2012
\(^{1001}\) Exhibit KKK54, slide 49 for position of Papa 1 at the time of the shooting. Distance measured on Google Earth
\(^{1002}\) Exhibit HHH14: Initial Statement of Lieutenant Colonel McIntosh, para.27
\(^{1003}\) Transcript Day 231, p.28664
\(^{1004}\) Exhibit TTT5, para.12 “The SAPS members then opened fire on the group that was charging them”
\(^{1005}\) Transcript Day 230, pp 28748 - 28749
\(^{1006}\) Exhibit KKK7: Statement of W/O Nong, para.21
forward. The only possible shooting W/O Nong is describing is the TRT volley.

c. The sound of the R5 volley was heard by Maj Gen Naidoo who was more than one kilometre away\(^{1007}\).

3.3.4 Thirdly, Col Moolman’s evidence is that, in response to the TRT volley, she heard a voice that she believed to be Brig Calitz calling ceasefire over the radio\(^{1008}\).

3.3.5 Fourthly, even if Brig Calitz did not hear the sound of the TRT volley from inside the nyala, and / or did not make a radio transmission calling for ceasefire, he would have heard the volley, and the call for ceasefire, over the radio. Brig Calitz’s evidence was that he was sitting next to the radio in the back of Papa 1\(^ {1009}\). The evidence set out in this Part at paragraph 3.2.3 above, shows that the sound of R5 rifle fire was heard over the radio by anyone who was listening to it.

3.3.6 Fifthly, Brig Calitz would have heard transmissions over the radio that indicated that people were seriously injured and possibly dead, including:

a. A call for medical assistance within two minutes of the shooting that caused Maj Gen Naidoo to deploy his members from FHA1\(^ {1010}\);

b. Lt Col Vermaak’s report, prior to 16:00, that there were 18 bodies down\(^ {1011}\);

\(^{1007}\) Transcript Day 190, p.23065, per Maj Gen Naidoo

\(^{1008}\) Exhibit LLL9: Supplementary Statement of Col Moolman, para.35

\(^{1009}\) English Transcript Day 154, p 17337 - 17338

\(^{1010}\) Exhibit JJJ108: Supplementary Statement of Maj Gen Naidoo, para.60

\(^{1011}\) Exhibit FFF25, entry 1018. Lt Col Vermaak’s evidence was that there was no confusion about the meaning of ‘bodies down’. In SAPS parlance, if he was referring to suspects lying down, he would have said ‘suspects’. ‘Bodies’ means dead or injured people: Transcript Day 206, pp 25375 - 25376
c. Lt Col Vermaak’s transmission at 16:09:30: “JOC. Chopper. Two bodies. Two bodies at the back of the second Koppie. Two bodies”\textsuperscript{1012}, and

d. An unknown member’s transmission between 16:11:18 and 16:14:09, recorded in the handwritten notes of Capt Van Heerden, requesting medics to go in at the holding area and noting that there were “30 people lying down, some dead some injured.”\textsuperscript{1013}

### 3.3.7 Sixthly

Brig Calitz made two radio transmissions which strongly suggest he was aware of the firing of live ammunition at both Scenes 1 and 2, including:

a. At 16:04:40 he said: “no lethal firearms now unless, unless the targets engage you”\textsuperscript{1014}. The SAHRC submits that his oral evidence on this point was dishonest. He claimed his words were: “no need for firearms now” and he was referring to shotguns firing rubber rounds\textsuperscript{1015}. If the Commission concurs with the SAHRC’s interpretation of his words, then his explanation is false and suggests that he was hiding his knowledge that lethal firearms had been used; and

b. At 16:12:12 he said: “OK live fire, live”\textsuperscript{1016}. Although Brig Calitz could not recall saying those words and was unable to confirm it was his voice, he did not deny it was him\textsuperscript{1017}. Lt Col Vermaak identified him as the speaker\textsuperscript{1018}, and the SAHRC submits that it is clearly his voice.

\begin{itemize}
\item \textsuperscript{1012} Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper Video
\item \textsuperscript{1013} Exhibit KKK42: Annotated Version of Van Heerden’s JOC Notes Originally Contained in Exhibit JJ168
\item \textsuperscript{1014} Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper Video
\item \textsuperscript{1015} Transcript Day 172, pp 20424 - 20427
\item \textsuperscript{1016} Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper Video
\item \textsuperscript{1017} Transcript Day 167, pp 19386 - 19368
\item \textsuperscript{1018} Transcript Day 210, p.25970
\end{itemize}
3.3.8 Seventhly, Brig Calitz and the members of Papa 1 had direct interactions with others who had witnessed the killings at Scene 1. In circumstances where Brig Calitz did not know why the TRT was not following behind the POPs, as planned, the evidence that Brig Calitz neither sought nor received any information during any of these interactions about any shooting, injuries or deaths at Scenes 1 and 2 strains credulity:

a. At around 16:01:35, Papa 1 drove up to and stopped by the JHB water cannon. The two vehicles were adjacent to one another for approximately 1.5 minutes, during which a radio was passed between Lt Col McIntosh and the operators of the JHB water cannon. At Scene 1, one of the operators of the JHB water cannon had stepped out of the water cannon at Scene 1 and picked up a firearm from amongst the dead and injured, but it is claimed that no information about Scene 1 was shared;

b. For around 10 minutes between 16:09 and 16:20, members of Papa 1 and Papa 5 were engaged with one another, while making arrests. Lt Col Pitsi and other members of Papa 5 had witnessed the shootings at Scene 1 and their vehicle remained stationary at Scene 1, immediately adjacent to the bodies, for 50 seconds after the commencement of the TRT fire. However, it is claimed no information about Scene 1 was shared;

c. At some time around 16:25, Brig Calitz and Lt Col Pitsi spoke near the body of Mr. Mpumza. At this stage, Brig Calitz alleges that Lt Col Pitsi

1019 Exhibit JJJ178.3: SAHRC Analysis of Scene 2 Movement, p.13
1020 Confirmed by Brig Calitz at Transcript Day 167, p.19381
1021 Exhibits KKK39.1 and 39.2: Statements of W/O Kruger
1022 Transcript Day 167, p. 19381,
1023 Exhibit JJJ178.3: Annexure GW6(c) – Scene 2 Vehicle Movement Analysis, p.12
1024 Papas 4 and 5 are visible driving away from the scene at 15:54:40 in Exhibit UUUU10.2(5)
informed him about shots fired at Papa 5 at alleged incident 2\textsuperscript{1025}, but he claims no information was conveyed to him about Scene 1;

d. At around the same time, Brig Calitz and Capt Kidd spoke near the body of Mr. Mpumza\textsuperscript{1026}. Capt Kidd had witnessed the shooting of two strikers – Mr. Mkhonjwa and a man wearing a red Arsenal shirt – on the western side of Koppie 3\textsuperscript{1027}. But it is claimed that Capt Kidd did not share this information with Brig Calitz.

3.3.9 **Eighthly**, Brig Calitz’s claim not to have heard any shooting at Scene 2 is wholly incredible in light of his radio transmission of “OK live fire, live”\textsuperscript{1028} and the fact that his vehicle was parked, with its door ajar\textsuperscript{1029}, only 150 metres away from Koppie 3 when 295 rounds of live ammunition were being discharged. Given that Maj Gen Naidoo had heard shooting from one kilometre away\textsuperscript{1030}, and the sound of gunshots at Scene 2 were audible to the media\textsuperscript{1031}, and audible on media footage\textsuperscript{1032}, more than 500 metres away at Scene 1, it is simply not credible that Brig Calitz had not heard any live ammunition from 150 metres away.

3.3.10 **Finally**, Brig Calitz’s explanation for the long delay in his finding out about the shootings and deaths at Scenes 1 and 2 is that he did not have a radio with him from the time he went to the body of Mr. Mpumza at around 16:24 until he spoke to Maj Gen Annandale by telephone at 16:47\textsuperscript{1033}. That explanation is demonstrably false. Brig Calitz is recorded making a radio transmission during the time he was allegedly without a radio. At 16:27:40, he is recorded

\textsuperscript{1025} English Transcript Day 167, p.17238 and English Transcript Day 167, p.17327
\textsuperscript{1026} English Transcript Day 166, p.17312
\textsuperscript{1027} Transcript Day 234, p.29237
\textsuperscript{1028} Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper Video
\textsuperscript{1029} Exhibit KKK45: Photos of Papa 1 at Scene 2
\textsuperscript{1030} Transcript Day 190, p. 23065, per Maj Gen Naidoo
\textsuperscript{1031} Exhibit KKK44: Al Jazeera Video Clip and Exhibits AAA: Video Evidence
\textsuperscript{1032} Exhibit JJJ194.46: Raw Footage taken for Aljazeera on 16 August 2012
\textsuperscript{1033} Transcript Day 167, pp 19405 - 19410
saying: “let them go through. This area is secure”\textsuperscript{1034}. If he had no knowledge of Scene 2 and had not communicated with anyone from inside the Koppie, how could he confirm that the area was secure?

3.3.11 In conclusion, the SAHRC submits that the overwhelming probability is that Brig Calitz was aware, before the shooting at Scene 2 commenced, that:

a. The strikers had moved towards the TRT at Scene 1;

b. The TRT had fired live ammunition at those strikers;

c. Medical assistance was required and there were many bodies down; and

d. The TRT were not following up in the dispersal action as intended because they were engaged with the situation at Scene 1.

3.3.12 While the events of Scene 2 were unfolding, the SAHRC submits that the overwhelming probability is that Brig Calitz was aware that:

a. The strikers were hiding inside Koppie 3;

b. Multiple rounds of live ammunition were being fired;

c. At least two more bodies were down at Koppie 3; and

d. At Scene 1 there were 30 bodies down, some dead, some injured.

3.3.13 The SAHRC submits that his claim to have had no knowledge of this information until 16:47 is designed to exculpate his failure to call a halt to the

\textsuperscript{1034} Exhibit CC22: Aerial Video (Coin Security) at 30:10. Lt Col Vermaak confirmed that this was Brig Calitz speaking Transcript Day 206, p.25434
operation, to order a retreat from Koppie 3, or to slow down and coordinate the movement of various units in the aftermath of Scene 1.

3.3.14 In evaluating Brig Calitz’s evidence, the Commission is reminded that he has already been shown to have provided false evidence. His evidence in support of the SAPS case on alleged ‘Incidents 1 and 2’ was clearly false\textsuperscript{1035}. But more importantly, his evidence in relation to the death of Mr. Mpumza was false, as shown under cross-examination by Adv. Chaskalson SC. Contrary to Brig Calitz’s claims\textsuperscript{1036}, he did not rush to the body of Mr. Mpumza as soon as he was informed of his shooting. Instead, he stayed where he was for three minutes\textsuperscript{1037}, allowing W/O Nong to take a further seven photographs of arrested strikers\textsuperscript{1038}, before driving in a different direction and parking more than 50 metres away from Mr. Mpumza’s body\textsuperscript{1039}. The significance of this is that Brig Calitz’s version was presented to the Commission to give the false impression of a commander responding immediately and responsibly as soon as he became aware of live ammunition and/or death during the operation. In fact, on the evidence set out above, Brig Calitz was aware of the firing of live ammunition and the possibility of deaths and serious injuries at a much earlier time, so Mr. Mpumza’s death was not a surprising or shocking event that required his immediate attention.

\textit{Section 3.4: Credibility of the claim that Maj Gen Mpembe was unaware of the situation at Scene 1?}

3.4.1 Maj Gen Mpembe’s evidence was that he was not aware of the shooting at Scene 1, and not aware of any deaths or serious injuries until he returned to the JOC at around 16:20. The SAHRC submits that his evidence is not credible.

\textsuperscript{1035} See above at Part Ten
\textsuperscript{1036} Transcript Day 164, pp 18910 - 18911
\textsuperscript{1037} Mr. Mpumza was shot at 16:19:47 (Exhibit I1). Brig Calitz’s Nyala, Papa 1, set off more than three minutes later, at 16:22:52 (Exhibit CC22 at 25:22)
\textsuperscript{1038} See Exhibit KKK18. DSC_3689 – DSC_3695 were all taken between 16:20:14 and 16:21:58
\textsuperscript{1039} Exhibit KKK17: Presentation of Various Photographs
3.4.2 First, on his own admission, Maj Gen Mpembe had a radio with him and heard the transmission from Brig Calitz that the line of strikers were “moving to attack the TRT”\(^{1040}\). The SAHRC submits that if he heard this transmission then he would have heard what followed over the radio, namely the order to “engage”, the sound of a volley of R5 shots and calls for cease-fire through the radio\(^{1041}\).

3.4.3 It might be said in response that Maj Gen Mpembe may not have heard the relevant transmissions over the sound of the helicopter. Such a response would be erroneous: one of Capt Nel’s videos shows the Protea Coin helicopter stationary on the ground without Maj Gen Mpembe or Brig Tsiloane in or near the helicopter at 15:54:09, some 19 seconds after the TRT shooting\(^{1042}\). So it is clear that Maj Gen Mpembe arrived at the helicopter some considerable time after the shooting had taken place.

3.4.4 Indeed, the SAHRC submits that the most likely explanation for Maj Gen Mpembe’s decision to go up in the helicopter was to assess the situation on the ground, having heard the firing of live ammunition over the radio. It is clear that it was not pre-planned for him to fly in the helicopter and he was supposed to stay in the JOC throughout the operation. That is why there was no police helicopter available for him and he was required to utilize the Protea Coin helicopter\(^{1043}\). Maj Gen Mpembe’s explanation for his spontaneous decision to fly – that he thought he would be in a better position to give guidance as overall commander if he could see what was happening from the sky\(^{1044}\) – does not make sense in light of the fact that he had planned to stay in JOC and only got into the helicopter around a minute after the shooting incident at Scene 1.

\(^{1040}\) Transcript Day 106, pp 11475 - 11476 and Transcript Day 127, p.13300
\(^{1041}\) See above at Part 11, section 3
\(^{1042}\) See Exhibit CC23 at 00:54
\(^{1043}\) Exhibit GGG12: Statement of Maj Gen Mpembe, para.48
\(^{1044}\) Exhibit HHH3: Supplementary Statement of Maj Gen Mpembe para.27
3.4.5 Moreover, his claim that he decided to get into the helicopter without having received any reports at the JOC of how the operation was proceeding\textsuperscript{1045} does not square with Brig Fritz’s evidence. Brig Fritz states in his initial statement that he got into his helicopter after Maj Gen Annandale informed him that a shooting had taken place at the Koppie and he wanted a situation report\textsuperscript{1046}. In his supplementary statement, Brig Fritz clarified that the report was of POP members using shotguns and pyrotechnics. That appears to be likely, given that the video evidence shows him already inside the helicopter at the time of the TRT volley\textsuperscript{1047}.

3.4.6 However, we know that Brig Fritz had already been tasked by Maj Gen Annandale to fly by the time Maj Gen Mpembe decided to do so: when Maj Gen Mpembe informed Maj Gen Annandale that he wanted to fly over the area, he was advised that “\textit{all SAPS helicopter were already deployed in the air}”\textsuperscript{1048}. Accordingly, the SAHRC submits that Maj Gen Mpembe’s evidence that he decided to fly before the JOC had received any reports of how the operation was proceeding is likely to be untrue.

3.4.7 Secondly, even if he was not aware of the shootings from reports heard over the radio in the JOC, the SAHRC submits that he would have heard on his hand radio all of the same radio transmissions as listed at Part 11, section 3 above, and would therefore have been aware that a shooting had taken place, there were bodies down, medical assistance was required, and further shooting incidents were taking place.

\textsuperscript{1045} Exhibit HHH3: Supplementary Statement of Maj Gen Mpembe, para 27
\textsuperscript{1046} Exhibit GGG8: Statement of Maj Gen Mpembe, para.4
\textsuperscript{1047} Exhibit CC23: Captain Nel’s Video Recording at 00:34
\textsuperscript{1048} Exhibit GGG12: Statement of Maj Gen Mpembe, para.48
3.4.8 Thirdly, the Protea Coin helicopter video captures Maj Gen Mpembe saying, at 16:12:41: “Hey, they are firing in the direction of the dogs. They are firing. They are firing in the direction of the dogs.”

3.4.9 Fourthly, Maj Gen Mpembe’s evidence that he returned to the JOC ‘immediately’ upon hearing reports of bodies down is false. Maj Gen Mpembe claims that “immediately when I heard there are bodies, I went to the JOC”. He identified the report that prompted his ‘immediate’ return to the JOC as the report of “two bodies at the back of the second Koppie”.

3.4.10 In fact, Maj Gen Mpembe’s helicopter did not start to return to the JOC for a full 6.5 minutes after the time of that report. When this was shown to the Commission on 27 August 2013, the Chair appeared to dismiss the relevance of the evidence and asked: “what actually turns on this point?” The SAHRC’s response is as follows:

a. Maj Gen Mpembe’s evidence was that he had no knowledge of shootings or deaths until he heard the report of ‘two bodies at the back of the second Koppie’. He then claims to have immediately returned to the JOC;

b. For all the reasons set out above, the SAHRC contends that this is false evidence. We submit it is clear that he was aware of the shootings and the possibility of serious injury and / or death from before he got into the helicopter. Far from coming as a shock to Maj Gen Mpembe, the report of ‘two bodies’ was consistent with his understand of what was

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1049 OOO11, confirmed to be the voice of Maj Gen Mpembe by Lt Col Vermaak (Transcript Day 206, pp 25428-25430)
1050 Transcript Day 113, p.12136
1051 Transcript Day 124, p.12895
1052 See Exhibit CC22 from 11:45 – 20:45. The report of “two bodies” is made at 12:10. The chopper circles around the operation for 6.5 minutes after that report, and only diverts towards the JOC at 18:40.
happening in the operation. Accordingly, he did not rush back to the JOC immediately, but continued to survey the scene for a further 6.5 minutes;

c. In this respect his evidence mirrors Brig Calitz’s evidence that as soon as he first heard of a shooting incident (Mr. Mpumza), he called W/O Nong and rushed straight to the Scene. We submit that just as Brig Calitz’s evidence was falsely constructed to give the impression of a commander acting responsibly as soon as he first became aware of the shooting of live ammunition or deaths, so too was Maj Gen Mpembe’s.

3.4.11 The SAHRC submits that the various false claims of ignorance set out above by witnesses who were in command and control positions during the SAPS operation at Marikana were deliberately constructed to avoid blame for the failure to intervene in the operation after Scene 1. The Commission will need to consider whether the false claims made under oath warrant a referral for prosecution.
SECTION 4: RESPONSIBILITY FOR THE BREAKDOWN IN COMMAND AND CONTROL

Section 4.1: To what extent can the breakdown in command and control be attributable to a failure in radio communication?

4.1.1 On the basis of the evidence set out above, the alleged failure in radio communications has clearly been exaggerated. While the SAHRC does not doubt that there were difficulties communicating on a single channel in a multiple unit operation, it is clear that the most vital and important information in relation to the shooting incident at Scene 1 – the serious injuries, possible deaths, and the need for medical assistance – was conveyed by radio.

4.1.2 In general terms, Mr. White gave evidence that communication difficulties are normal in large scale public order policing operations, but his key point was that difficulties with radio systems do not excuse a failure to communicate and a failure in command and control. He said:

7.4.2 I do not doubt that [the SAPS claims of difficulties communicating by radio] were genuine. In my experience of large public order operations, problems with radios arise very frequently. In debriefing sessions I have led after major public order operations, it is rare not to have some feedback about difficulties with the radio. When you operate on a single channel without an override button, it can be difficult to get on to the radio to send a message. When there are numerous role-players, as in the operation at Marikana, the chances of this problem arising increase. But the alternative of using two or more channels creates its own problems.

1053 Exhibit JJ178: Final Statement of Gary White MBE, paras 7.4.2 – 7.4.3
7.4.3 The key point is that this is a foreseeable problem in an operation like the one that took place at Marikana. If you do not have an override button on your radio system and you have multiple units including at least POP, TRT, NIU, STF, K9, Mounted Unit, Water Cannons, Air Wing, it is almost inevitable that there will be a problem communicating easily by radio. But that is not an excuse for failing to communicate. If you cannot communicate by radio, then alternatives need to be used, including via cell phones or in person, if necessary via a third party. If the failure of the radio system was foreseeable then a contingency should have been in place to deal with this. Radios might be problematic, but they do not justify a failure to communicate."

4.1.3 In oral evidence, Mr. White used more colorful language to describe what his response would have been if, during a public order operation, he had not been informed of multiple deaths and serious injuries because of “radio problems”. He said the following:\textsuperscript{1054}:

“25 MR. WHITE: Chair, I’d be outraged. I
Page 31468
1 used to get angry with people at work, you know we have an
2 expression in Ireland I recall about “Fit to kill dead
3 things.” You know it’s basically an expression to show how
4 frustrated and how angry you are. But it’s almost beyond
5 comprehension for me that an event of this nature, if I was
6 the senior officer on the ground and not even around the
7 end of the operation when 34 people have died. But the
8 fact that 17 people have died or potentially are dying,
9 many more are injured in the middle of an operation and I,
10 as the senior officer on the ground, don’t become aware of
11 that, not made aware of it and again question of fact, you

\textsuperscript{1054} Transcript Day 250, pp 31467 - 31468
12 know but assuming the facts that I’m not made aware of that 13 until, you know, a considerable period of time later. I 14 suppose even expressing that sort of frustration around 15 that, it’s expressing a disbelief around it. I simply 16 cannot comprehend a set of circumstances where that would 17 be the case that information of such magnitude is not 18 brought to my attention somehow.”

4.1.4 On the basis of the evidence set out above, Mr. White’s disbelief appears justified. The fact of shooting, serious injuries and deaths was communicated by radio and was understood by those receiving the radio transmissions. Accordingly, we wholly reject the suggestion that difficulties with radio communication was a causal factor in the failure to call a halt to the operation after the events at Scene 1.

4.1.5 The clearest indication that the breakdown in command and control was not caused by difficulties with radio communication is the absence of any mention of this in Exhibit L, or in the initial statements of almost all the JOCCOM members. If difficulties with radio communication were such a central part of the failure of the policing operation at Marikana, then surely the SAPS commanders would have mentioned that fact in their initial statements, and the SAPS would have included that factor as a core element of Exhibit L.

4.1.6 We do accept that difficulties operating on a single channel did cause come problems after Scene 1, in particular as the various units approached Scene 2. However, we reject the suggestion that those difficulties caused the encirclement of Koppie 3 or created the lethal situation of cross-fire. We submit, instead, that the lethal situation that was created at Scene 2 was caused by the negligence of those commanding the operation: the

1055 Brig Fritz is the only JOCCOM member who refers to problems communicating on the radio in his initial Statement Exhibit GGG9
responsibility lies with the Operational Commander, the Overall Commander, the JOC, the unit commanders and Lt Col Vermaak.

Section 4.2: Responsibility of the Operational Commander

4.2.1 If the Commission finds, as we submit, that Brig Calitz was aware of the use of live ammunition and the serious injuries and/or deaths at Scene 1, then we submit that his failure, as Operational Commander, to call a halt or pause to the operation was a direct cause of the deaths of 17 people at Scene 2. In those circumstances, the Commission will need to consider whether it would be appropriate to refer him for prosecution by the NPA.

4.2.2 However, if the Commission finds that Brig Calitz was not aware of the events at Scene 1 (which we do not accept), he was still the Operational Commander of an operation in which multiple units were tasked with different roles. It was his role to co-ordinate those multiple units. The SAHRC submits that the failure to coordinate those units at Scene 2 and to allow a lethal encirclement of the Koppie to arise must be attributable, in large part, to Brig Calitz’s negligence as Operational Commander. The examples of his negligence are set out below.

4.2.3 First, in relation to his responsibility for failing to halt the operation after Scene 1 and for allowing the encirclement of the Koppie, the SAHRC adopts the evidence of Mr. White, who said as follows:\(^{1056}\):

“2.5.11 even in circumstances where Brig Calitz was not informed of the shooting at Scene 1, and was not informed of the arrival of the TRT, K9 and NIU at Scene 2, I still maintain that he failed to exercise the command and control that was required of him as the Operational

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\(^{1056}\) Exhibit BBBB4: Supplementary Statement of Gary White MBE, para.2.5.11
Commander of an operation that combined a number of different units.

a. Lt Col Scott gave evidence that the key contingency built into his plan was the ‘reorganization line’ at the dry river-bed, where the Operational Commander was meant to stop, regroup and reassess the situation. He said:

“The police needed to stop there because it's not only a reflection to the front to see what the remainder of the protestors have done, it's also to see what's going on behind me to make a call whether all my POPS members have caught up, are they here, is there something going on, do I stop the operation temporarily or do I need to stop it permanently for that matter? So it's – to say that that was unforeseen or not planned for I did foresee that something was going to possibly occur behind that POPS line that needed to be considered. Otherwise the POPS would've just kept on pushing on and pushing on until they dispersed these people into far wider groups and the operation would've been so stretched out, what was going on behind would've been left behind. People wouldn't have been knowing what’s going on.”

b. That rationale for the reorganization line is sound, but it appears that Brig Calitz either did not understand that rationale, or ignored it. As part of the operational plan, the TRT were supposed to follow behind the POPS during the dispersal action. Once he arrived at the reorganization line, Brig Calitz realized that the TRT had not followed-up as planned. His evidence was that he called over the radio to inquire where the TRT were, but received no response. He then

1057 Transcript Day 141, pp 15284 - 15289
1058 Transcript Day 141, pp 15285 - 15286
enquired of Lt Col Vermaak and was told that the TRT members were at the kraal and “there were bodies lying on the ground”. As I understand it, he made no further inquiries about what the TRT were doing or what Lt Col Vermaak meant by “bodies lying on the ground”.

c. **Given that the purpose of the reorganization line was to assess the situation both in front and behind the line, and given that it was an important part of the plan for the TRT to accompany the POPs, I consider that the Operational Commander ought to have made further inquiries to ascertain both why the TRT had not followed up the POPs in accordance with the plan, and what Lt Col Vermaak meant by “bodies lying on the ground”. His decision to push forward without this knowledge can justifiably be criticized in light of Lt Col Scott’s description of the purpose of the ‘reorganization line’.

d. **Irrespective of the purpose of the reorganization line in the plan, Brig Calitz can also be criticized for his failure to remain in contact with those units that were intended to be part of the follow-up to the dispersal action, particularly the TRT and NIU. While it might be understandable that Brig Calitz did not actively contact Capt Kidd’s TRT unit at FHA2 (given that his unit was supposed to be stationary in front of the informal settlement to the west), and did not actively contact the K9 unit (which was not supposed to take part in the dispersal action at all), I would have expected the Operational Commander to remain in contact with the TRT and NIU units that were supposed to follow-up the POP members as part of the plan. Accordingly, Brig Calitz must be held responsible, at least in part, for his lack of awareness that the NIU had arrived at Koppie 3.”

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1059 Exhibit JJ107: Consolidated Statement of Brig Calitz, paras 116 – 117
4.2.4 **Secondly**, at Scene 2 - as Lt Col Scott agreed - Brig Calitz “took himself out of the equation”, “he wasn’t at Scene 2”\(^{1060}\). As the Operational Commander of a multi-unit operation, he positioned himself 150 metres away from Koppie 3 throughout the period when 295 rounds of live ammunition were fired by police at the strikers in Koppie 3. By doing so, he negligently left the members engaged at Koppie 3 without command or control. As Mr. White said\(^{1061}\):

> “In my opinion, Brig Calitz’s position at Scene 2 meant he was unable to exercise effective command over the resources under his command (even the ones he was aware of). His statement does not address the rationale for this decision in circumstances where members under his command were firing 295 live rounds at protestors.”

4.2.5 Mr. White notes that Brig Calitz’s statement did not address the rationale for remaining 150 to the north of Koppie 3 during the events of Scene 2. The SAHRC submits that he failed adequately to address this point in oral evidence as well.

4.2.6 **Thirdly**, from his position more than 150 metres away from Koppie 3, he failed properly to appraise himself of the situation within Koppie 3, even though it was clear that some strikers were entrenched inside the Koppie and the dispersion action was focused on the Koppie. It is clear from the following radio transmissions that Brig Calitz was aware that a significant number of strikers were hiding inside Koppie 3\(^{1062}\):

a. 16:07:58 – “LT COL VERMAAK: If they can move in, the people are caught now there in the middle of that Koppie.”

\(^{1060}\) Transcript Day 141, pp 15292 - 15293  
\(^{1061}\) Exhibit JJJ178: Final Statement of Gary White MBE, para.7.3.14  
\(^{1062}\) Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper Video
b. 16:09:43 – “BRIG CALITZ: Salmon, talk to the vehicles in the small Koppie. There are several people in the small Koppie, hiding in the small Koppie.”

c. 16:10:05 – “BRIG CALITZ: Water cannon go forward. Water cannon go forward. There’s a group hiding in the middle there.”

4.2.7 However, rather than moving into a position where he could properly appraise himself of what was happening inside the Koppie, Brig Calitz gave an order at 16:11:28 for members to get out of their Nyalas and make arrests, “under protection”. Brig Calitz conceded in cross-examination that in circumstances where the strikers were entrenched in the Koppie, hiding behind bushes and rocks and armed with dangerous weapons, it would have been preferable, with hindsight, to flush them out with water cannon. However, at 16:11:28, his order was that the water cannons should “hold back”. To the extent that he gave that order in ignorance of the circumstances prevailing at Koppie 3, we submit that was negligent. To the extent that he gave the order with knowledge that armed strikers were hiding in the rocks and bushes at Scene 2, it was reckless. As the Chairperson of the Commission put it:

“9 ...if there were people in the Koppie,
10 it was a tricky area with bushes and rocks and so on,
11 even, I can even understand highly trained STF people would
12 have had to act very carefully in making arrests because
13 they didn’t fire a shot, the STF people. I don’t
14 understand why it was necessary to give an order to engage

1063 Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper Video
1064 Transcript Day 165, p.19070, pp 19085 - 19095 and 19176 - 19182, per Brig Calitz
1065 Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper Video
1066 Transcript Day 165, pp 19094 - 19095
15 at that point, rather leave them there for the moment,
16 regroup, consider the situation carefully and then act
17 appropriately but any way that’s my problem.”

4.2.8 Fourthly, Brig Calitz failed to make proper inquiries when it became clear there was live ammunition fire at Scene 2. At 14:45 in the Protea Coin video, Brig Calitz is heard saying “live fire”. It appears to be a report of live fire rather than an order. As Mr. White noted:

“I would have expected that such a report of live fire in an operation would have immediately been followed by asking, “All call signs, take hard cover where possible” and then questions to clarify: “did any call sign see where exactly the shooting came from? Are you able to see the gunman?” This is in order to be able to provide for the protection of officers. But the radio communication moves swiftly on to directing canters.”

4.2.9 For all these reasons, the SAHRC submits that Brig Calitz acted negligently while commanding and controlling the operation at Scene 2. Even on the assumption that he was not aware of the shooting, injuries and deaths at Scene 1:

a. Brig Calitz negligently failed to use the reorganization line, as planned, to stop, regroup and reorganize his units, and to see what was happening behind him. Had he done so, he would have discovered that 17 people had been shot dead and many others wounded at Scene 1;

1067 Exhibit JJJ178: Final Statement of Gary White MBE, para.7.6.9(b)(ii)
b. Brig Calitz negligently failed to make inquiries in relation to radio transmissions of “bodies down” that would have caused any responsible police commander concerns;

c. Brig Calitz negligently failed to position himself where he could exert command and control over any of the units engaged with the strikers on the Koppie, including his own POP units;

d. Brig Calitz negligently failed to take control of a situation of live ammunition fire; and

e. Brig Calitz negligently failed to maintain contact with those units that were planned to follow the POPs towards the west. Had he done so, he would have discovered that the TRT were attending to a crime scene with 17 dead and many wounded, and he would have discovered that the NIU had approached Koppie 3 from the west and were firing live ammunition at strikers.

4.2.10 Had any one of these failings been rectified during the operation, deaths and injuries at Scene 2 are likely to have been prevented. Given those circumstances, the Commission will need to consider whether it would be appropriate to refer his case for prosecution by the NPA.

Section 4.3: Responsibility of the Overall Commander

4.3.1 As Overall Commander, Maj Gen Mpembe was responsible for all actions taken during the operation. If the Commission finds, as we submit, that Maj Gen Mpembe was aware of the situation at Scene 1 prior to the commencement of Scene 2, then his failure, as Overall Commander, to call a halt to the operation was a direct cause of the deaths of 17 people at Scene

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1068 Exhibit SS2: Standing Order 262, para.8
2. In those circumstances, the Commission will need to consider whether it would be appropriate to refer him for prosecution by the NPA.

4.3.2 However, if the Commission finds that Maj Gen Mpembe was unaware of the shooting and deaths or serious injuries at Scene 1 before Scene 2 commenced (which we do not accept), Maj Gen Mpembe was still the Overall Commander of a complex operation which demanded command and control. The catastrophic outcome of the operation must be attributable, in large part, to his failure to provide any command or control during the operation. Just like the Operational Commander, he too “took himself out of the equation”.

4.3.3 Mr. White commented on Maj Gen Mpembe’s failure to exert any command and control as follows\(^\text{1069}\):

> “7.3.7 Maj Gen Mpembe has conceded that his helicopter flew too high for him to get a good view of what was going on on the ground\(^\text{1070}\), despite the fact that the very purpose of taking the helicopter was to “get a view of what was happening”. He states that the first time he was aware of possible deaths was when Lt Col Vermaak reported that bodies were down and at this point he asked the pilot to return him to the JOC so that he could arrange for medical personnel to be at hand\(^\text{1071}\), but the video evidence suggests a long delay after hearing of the bodies before the helicopter started to return to the JOC\(^\text{1072}\). He states that as Overall Commander he could only give direction when asked for it by either JOC or the Operational

\(^{1069}\) Exhibit JJJ178: Final Statement of Gary White MBE, paras 7.3.7 – 7.3.9

\(^{1070}\) Maj Gen Mpembe, Transcript Day 112, pp 12065 - 12066

\(^{1071}\) Exhibit GGG12: Statement of Maj Gen Mpembe, para.50

\(^{1072}\) Exhibit CC24 – Protea Coin Chopper Video. The audio of “two bodies at the back of the second Koppie” comes at around 12:00. The helicopter then circles continuously for a further 6 minutes before changing course to return to the JOC.
Commander\textsuperscript{1073}. None of this accords with what you would expect of the person in command of a complex public order operation. In particular, I can find no specific direction in the evidence provided by the SAPS which would prevent him from exercising the responsibility that is surely inherent in his seniority and in his formalised role as the Overall Commander, i.e. to intervene and give orders which are likely to provide for an outcome more in line with the stated aims of the SAPS in dealing with public order situations than the outcome which prevailed at this event. Not to have done so is, in my view, a neglect of duty and the attempt to use this rationale for not intervening is an indication of him seeking to shift responsibility.

7.3.8 From the evidence available to me, it appears that the Overall Commander left the JOC in order to get a view of all what was happening, but in fact saw none of the events that are critical to this operation, before returning to the JOC in the middle of the operation in order to arrange ‘medical personnel’. Part of the operational plan had placed medical personnel in the forward holding areas and one has to question why the Overall Commander could not simply direct that they should be brought forward by use of his radio. In the UK, the role performed by Mpembe, that of ‘Tactical Commander’ (Silver), requires that the officer is positioned somewhere where he can maintain full control over the operation. I have performed this role on many occasions. In the critical times of an operation I would have expected that the officer in this role be in frequent contact with commanders on the ground ensuring that they are given appropriate direction.

7.3.9 Although there may have been difficulties communicating on a single radio channel, Maj Gen Mpembe’s written evidence is that he

\textsuperscript{1073} Exhibit GGG12: Statement of Maj Gen Mpembe, para.51
did not even attempt to make radio contact because he was waiting for someone to ask for a direction. He has also confirmed that he did not attempt to communicate by cell phone. I cannot understand why an Overall Commander would fail to take command of an operation that is obviously going wrong.”

4.3.4 At paragraph 56 of his initial statement, Maj Gen Mpembe noted that if he had been told immediately after Scene 1 (but before Scene 2) that people had been killed, he would have directed the police to do a show of force and contain the situation, without proceeding further. As the Chairperson pointed out, even on Maj Gen Mpembe’s own evidence, he had enough information to cause him to make inquiries and to intervene. The lengthy interaction with the Chair is set out in full below, and it illustrates clearly the negligence of Maj Gen Mpembe in failing to intervene in the operation.

“20 CHAIRPERSON: Now in the statement that I was quoting to you from, which is GGG12, you said this in the last paragraph 56, “I wish to state that if I’d been told immediately after scene 1, but before scene 2, that people had been killed, I would have directed that police members do a show of force and contain the situation while attending to the scene around the kraal. Effectively I would have directed that we do the same thing that I’d done on Monday, 13 August.” So you say “If I’d been told that people had been killed,” but I take it you didn’t have to be told in as many words. If you realised that people had been killed, you would have done that. Is that right?

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1074 Exhibit GGG12: Statement of Maj Gen Mpembe, para.51
1075 Maj Gen Mpembe; Transcript Day 112, p.12072
1076 Exhibit GGG12
1077 Transcript Day 127, pp 13297 - 13305
7 MAJ-GEN MPEMBE: Correct,
8 Chairperson, if I realised, or if I was made being aware –
9 CHAIRPERSON: Yes, yes, I understand.
10 MAJ-GEN MPEMBE: Yes.
11 CHAIRPERSON: Would you have only done
12 that if you’d been, if you’d realised that people were
13 actually killed, or would it have been enough for you to do
14 what you say you would have done, if you’d realised that
15 there was a very strong possibility, if not probability,
16 that people had been killed?
17 MR. NGALWANA: Perhaps the witness doesn’t
18 understand the difference between probability and
19 possibility –
20 CHAIRPERSON: Well, do you understand the
21 question, or don’t you?
22 MAJ-GEN MPEMBE: Chairperson,
23 saying with the probability or –
24 CHAIRPERSON: Yes, there was a strong
25 probability. I originally said possibility. I withdraw
Page 13299
1 that. If you’d realised that there was a strong
2 probability that people had been killed, you didn’t know
3 they actually were killed but there was a strong
4 probability, it was very probable that they were, would you
5 have also acted as you say here in paragraph 56? Or did
6 you have to know they were actually killed before you did
7 what, or before you would have done what you describe there
8 in para 56?
9 MAJ-GEN MPEMBE: Yes, Chairperson,
10 and that, as I have explained it in my statement, that it
11 was, I said it with the benefit of hindsight –
12 CHAIRPERSON: Yes, yes, no, no, I
13 understand that. So you agree with me then, or don’t you?
14 Do you agree with me that even if you hadn’t been told that
15 people had died, even if you hadn’t realised that people,
16 that definitely people had died, but there was a strong
17 probability, it was very probable that people had died,
18 would you also have acted as you’re saying here in para 56?
19 MAJ-GEN MPEMBE: Correct,
20 Chairperson.
21 CHAIRPERSON: Alright. Now in the
22 occurrence book there is an entry which I want to read to
23 you. It’s exhibit FFF25. It’s paragraph 25, and it’s note
24 1017. It reads as follows. If you want to see it, you
25 can, but it’s quite short. 15:55, I’m not sure if the time
Page 13300
1 is right, but I think it’s probably more or less.
2 “Situation report, Papa1 reporting the group are moving to
3 TRT members and they try to attack them. Papa1 reporting
4 that the people are moving around and some are down.” Now
5 I think you told us that you actually heard that over the
6 radio when you walked to the helicopter. Is that right?
7 MAJ-GEN MPEMBE: Correct,
8 Chairperson.
9 CHAIRPERSON: Now the implications of
10 that surely were clear to you. The group means the
11 strikers, isn’t it?
12 MAJ-GEN MPEMBE: Correct,
13 Chairperson.
14 CHAIRPERSON: Now originally the people,
15 the TRT were going to be behind the POP people, weren’t
16 they?
17 MAJ-GEN MPEMBE: Yes, Chairperson.
18 CHAIRPERSON: And the POP people were
going to use less than lethal force, right? Water cannon, teargas, stun grenades, and so on. Is that right?

MAJ-GEN MPEMBE: Correct,

Chairperson.

CHAIRPERSON: If those methods weren’t enough to disperse the people, deter them from advancing, then the plan was, as I understand it, the POP people were going to take refuge in the Nyalas. Is that right? And the TRT people would take over because the POP people wouldn’t be able to defend themselves against an attack by armed strikers. Do I understand the plan correctly?

MAJ-GEN MPEMBE: Correct,

Chairperson.

CHAIRPERSON: Now the fact that this report said that the group are moving to TRT members, clearly conveys that the POP people then got out of the way, the TRT people are now in the front line, and the note continues, “They try to attack them.” Now “they” obviously means the strikers, not the TRT people. Now if the strikers had tried to attack the TRT people, what would the TRT people have done in response? They would have defended themselves, I take it. Is that right?

MAJ-GEN MPEMBE: Correct,

Chairperson.

CHAIRPERSON: They would have used their assault rifles and fired at the advancing strikers. Is that right?

MAJ-GEN MPEMBE: Correct,

Chairperson.

CHAIRPERSON: I know that wasn’t intended as the first part of the plan. The first part of the plan
25 was the POP people would deal with them with less than lethal force, but obviously that is now, that stage had been passed. The TRT people would have fired their assault rifles. Some of the group would have been injured at the very least, or possibly killed. Is that right?

5 MAJ-GEN MPEMBE: Correct,
6 Chairperson.

7 CHAIRPERSON: And that’s why when the report went on, people moving around and some are down, surely that would have indicated to you that there was – to put it gently – a strong probability that people had been killed. You heard that. You agree with that proposition that I put to you?

12 MAJ-GEN MPEMBE: Chairperson, with the proposition I agree, but when it was said by Papa1, I couldn’t understand because Papa1, it was Brigadier Calitz.

16 CHAIRPERSON: Ja.

17 MAJ-GEN MPEMBE: And now to me I couldn’t understand where, now where was Brigadier Calitz by then, because if he says he’s Papa1 and he’s Brigadier Calitz, there was a confusion there.

21 CHAIRPERSON: Ja, but wherever he was, does his actual position matter? He was clearly in a position to see what was happening, and what he saw was a group of strikers advancing on the TRT members, which means the POP people had already gone, trying to attack them,

1 with obviously predictable consequence, and then after that some were down. Now surely that conveyed - being realistic about the matter - as a high degree of probability, that some people had been shot and were at the very least lying
5 injured. Isn’t that right?
6 MAJ-GEN MPEMBE: Correct,
7 Chairperson.
8 CHAIRPERSON: Well, if that’s so, why
9 didn’t you act as you say you would have acted in para 56?
10 MAJ-GEN MPEMBE: Chairperson, why I
11 was talking about Brigadier Calitz, because the policy in
12 Public Order Policing says that if the people have
13 regrouped, because that’s the, have regrouped again, you
14 should continue disarming the people. But now Papa1, that
15 report in the OB, that’s why I say if it was Papa, if it
16 was really Brigadier Calitz, then I couldn’t understand why
17 it could not have been said it’s him but with the benefit
18 of the hindsight, Chairperson, as I said he said also he
19 did not even see that people have died.
20 [12:32] CHAIRPERSON: Does it matter who it was.
21 If someone in PAPA 1 gave that report over the radio, the
22 person concerned wouldn’t have made it up, wouldn’t have
23 broadcast false information, whoever said it, who heard and
24 there was no reason to not believe it, isn’t that right?
25 MAJ-GEN MPEMBE: I think my problem
Page 13304
1 was there because when the operation is in the hands of the
2 operational commander actually he is the one because what I
3 was afraid of is to confuse the people. To give an
4 instruction where I was not there on the scene because
5 probably of what was happening that is what was my problem
6 at that time.
7 CHAIRPERSON: Ja, but you see the problem
8 is you were the overall commander. You tell us in Para 56
9 what you would have done in certain circumstances, it
10 appears that that circumstance something close to it
11 existed. You say you then issued a direction to the police
12 members to do a show of force and contain the situation
13 while attending to the scene around the kraal. Effectively
14 you would have stopped the advance to scene 2 because the
15 situation would have been frozen. The situation could then
16 have been assessed as to what was happening and then the
17 situation at scene might well have been dealt with
18 differently. That's effectively what you're saying isn't
19 it? And that would have saved - is that right?
20 MAJ-GEN MPEMBE: In a sense of
21 saying particularly for Brigadier Calitz, as I have
22 explained that with regard to Gen Naidoo and Kidd I
23 could not have done anything, Chairperson because that was
24 not reported to me.
25 CHAIRPERSON: I understand that.
26 MAJ-GEN MPEMBE: Yes.
27 CHAIRPERSON: But if tell everyone must
28 do what you said here in 56 I take it Kidd denied he would
29 have heard that too. If you’d said what you say in 56 you
30 would have done, now I take it Kidd and Naidoo would have
31 heard you also wouldn’t they?
32 MAJ-GEN MPEMBE: They could have
33 heard me yes, Chairperson.
34 CHAIRPERSON: And if that had happened
35 then there is - it's difficult to predict exactly what
36 would have happened but it does look as if some of the
37 killings at scene 2, some at least of the killings at scene
38 2 might not have happened. Is that right?
39 MAJ-GEN MPEMBE: Chairperson, I am
40 not sure. As I understand from Gen Naidoo and Captain
41 Kidd and as I’m saying, Chairperson, again it was my
17 problem to say but where was Brigadier Calitz and why it
18 was not reported by him but I was afraid of confusing the
19 members on the ground.

20 CHAIRPERSON: If you'd taken the risk of
21 confusion the results might have been different but let's
22 not take that any further.”

4.3.5 The SAHRC adopts the approach of the Chairperson as set out in this
interaction. Even if Maj Gen Mpembe did not know of the deaths and serious
injuries at Scene 1, the information he had was sufficient to cause him to
make further inquiries and to intervene to halt the operation. His failure to
do so was negligent and we submit that it was a direct contributory cause of
the deaths at Scene 2. Given those circumstances, the Commission will need
to consider whether it would be appropriate to refer his case for prosecution
by the NPA.

Section 4.4: Responsibility of the JOC

4.4.1 There is no longer any scope for argument over whether the JOC members
were aware of the situation at Scene 1 before Scene 2 commenced. They
clearly were aware. Brig Pretorius’s text message to IPID, and her subsequent
conversation with Capt Loest at 16:05 confirms without any question that
members of the JOC were fully aware of the serious situation unfolding. It
cannot credibly be claimed that Brig Pretorius shared information with IPID
that she did not share with Maj Gen Annandale or the Provincial
Commissioner.

4.4.2 Maj Gen Annandale was the most senior member of the JOC and was
responsible for command and control of the operation from within the
JOC.\textsuperscript{1078} The SAHRC submits that his failure to intervene to halt or pause the

\textsuperscript{1078} Transcript Day 169, pp 9886 - 9889, per Maj Gen Annandale
operation in light of the information of deaths and serious injuries at Scene 1 and in light of reports of continuing live ammunition fire at Scene 2 was negligent and was a direct contributory cause of death at Scene 2.

4.4.3 In his oral evidence, Mr. de Rover explained that his understanding was that the JOC could not access the commanders via the radio. However, he accepted, when pushed, that there was no evidence that the JOC had even attempted to call a halt to the operation after Scene 1 and he had never been told that such an attempt was made\textsuperscript{1079}. Indeed, in the weeks of oral evidence heard from Maj Gen Annandale and Lt Col Scott, it was never suggested by either of them that they had made attempts to halt or pause the operation in light of the information they were receiving. Nor did they give evidence that they had attempted to clarify the meaning of the deeply concerning information they were receiving. In fact, Lt Col Scott’s evidence was that no attempts were made by members of the JOC to contact the commanders on the ground\textsuperscript{1080}. Even if there were radio communication difficulties, those difficulties did not cause the failure of the JOC to intervene in the operation to slow or halt it.

4.4.4 Brig Pretorius’s evidence was that she spoke to Capt Loest at Scene 1 on three occasions between 16:05 and 16:13. She also spoke to Lt Col Stapelburg at 16:11 in relation to arranging medical assistance for the injured at Scene 1\textsuperscript{1081}. She also attempted to call Maj Gen Naidoo in relation to providing medical assistance. But – on the basis of her evidence – at no stage did she or anyone else in the JOC seek to contact any commander on the ground in order to direct them to halt or pause the operation. It simply was not any part of any attempted phone call or radio transmission.

\textsuperscript{1079} Transcript Day 285, pp 36908 - 36910
\textsuperscript{1080} Transcript Day 138, pp 14776 - 14777, per Lt Col Scott
\textsuperscript{1081} Exhibit MMM2, paras 4.1.10 – 4.1.16
4.4.5 To underscore the significance of this point, consider – hypothetically – what the JOC could have done if they had wanted to contact the Operational Commander to slow or halt the operation, but were prevented from doing so by the radio problems and because he did not pick up his cellphone. Could they be blamed for that failure?

4.4.6 Mr. White considered this question in oral evidence. He said\(^{1082}\):

“24 MR. WHITE: Chair, it just comes back to the point that I made earlier on in relation to principally that the JOC, you know what did they do first of all to stop or slow the operation, you kind of thing? What did they do, I talked about evidence that Brigadier Pretorius had given around trying to phone Officer Calitz and I appreciate that the phone didn’t pick up, because I’m sure he’s busy. Similarly with Officer Naidoo but, you know, what else was done, who else was phoned that given the magnitude of the situation, can we phone someone else who is close to Calitz? Can we phone someone who’s not that close to Calitz but has access to a vehicle that can go and tell Calitz? You know there must be ways and again I suppose it’s not for me to say exactly how, I’m asking the question, you know, well what did you do? You know it’s got to be a situation whereby, given the events that are unfolding, I just simply say well did you do? I understand Brigadier Pretorius’s evidence around trying to make two phone calls, is that sufficient, so I understand a senior officer who’s at scene 1 because there’s evidence of some of the police officers handing over firearms to him, I

\(^{1082}\) Transcript Day 250, pp 31468 - 31470
20 forget the rank, Mr. Mere or Murray, I think he’s a senior
21 POPs commander –
22 CHAIRPERSON: Colonel Mere.
23 MR. WHITE: Oh it is, thank you, Chair.
24 Colonel Mere, did anyone try and contact him because he is
25 obviously pretty stationary at scene 1? So I’m just simply
Page 31470
1 saying that I’m absolutely surprised that, you know, every
2 effort wasn’t made in order to bring this information to
3 the attention of Officer Calitz and would sort of ask the
4 question then because I haven’t seen it in written evidence
5 I haven’t necessarily seen anything further in oral
6 evidence, so am I missing something around actually what
7 people in the JOC did to bring this information to the
8 attention of principally Officer Calitz?”

4.4.7 Mr. White’s evidence was that radio problems were predictable in busy
public order operations, but communicating despite those problems was
vital. In his experience commanding public order operations, important
messages had been passed to him foot or by someone arriving in a vehicle
because he had missed it on the radio. But the key point is that the message
was always received, however it was transmitted. He concluded his
evidence on this point as follows:

“19 My criticisms are in relation to Officer Calitz, at least
20 of the resources that he knows should be with him, his part
21 of the plan, maintaining contact with them. My criticisms
22 are in relation to the JOC, the overall commander making
23 sure that given that the situation is clearly unfolding in
24 a way that it wasn’t intended to unfold and they’re hearing

1083 Transcript Day 250, pp 31471 - 31472
1084 Transcript Day 250, pp 31474 - 31475
25 instructions from Officer Calitz being given over the radio

Page 31475

1 which actually clearly suggests that the operation is
2 continuing to happen.

3 Even if they’re assuming well Officer Calitz
4 knows about what happened at scene 1 and he isn’t making a
5 judgment to say well we need to move on with the second of
6 the operation and move into Koppie 3. Surely someone else
7 must making a decision to say hold on we need to take a
8 grip of this. You know we need to stop this now and to
9 override his instruction. Or alternatively maybe they’re
10 saying clearly Officer Calitz doesn’t know therefore we
11 need to get this information to him. And I’m making the
12 point that the JOC, I would wonder where the evidence is,
13 particularly the JOC or other senior people, they all have
14 a responsibility in this. What did they do to get that
15 information to him? Or alternatively it’s the JOC, the
16 joint operational command, you know, that they didn’t of
17 themselves do something to stop this, to slow it down, to
18 pause and to reconsider.”

4.4.8 The SAHRC adopts Mr. White’s criticisms but goes further. We submit that
the failure of the JOC to intervene in the operation to halt or slow it down
was a direct contributory cause of the deaths of 17 people. The SAHRC
submits that, as the person in charge of command and control in the JOC,
responsibility for this negligent failure ultimately falls on Maj Gen Annandale.
Given those circumstances, the Commission will need to consider whether it
would be appropriate to recommend his case for prosecution by the NPA.
Section 4.5: Responsibility of the Unit Commanders

4.5.1 In relation to the lethal encirclement of the Koppie by uncoordinated units, Mr. White highlighted the responsibility of the unit commanders who led their units to the Koppie contrary to plan, without instruction and without announcing their arrival. He said:\footnote{Exhibit BBB4: Supplementary Statement of Gary White MBE, para.2.5.10}

“In relation to the arrival of the K9 and TRT unit commanders at Koppie 3, I understand that they approached Koppie 3 without any order to do so. While circumstances may dictate that unit commanders divert from their planned deployment during the execution of an operation, it is vital that this diversion is communicated to the Commander of the operation. This is even more so in circumstances such as they were at Scene 2, when the potential for a ‘blue on blue’ situation was obvious. The failure of the K9 and TRT unit commanders to announce their approach to Koppie 3 breached a basic principle of communication during multi-unit operations. If their failure to announce their approach is attributable to difficulties with the radio system, they needed to ensure an alternative means to announce their approach.”

4.5.2 In relation to Maj Gen Naidoo and Capt Kidd, the SAHRC urges the Commission to adopt Mr. White’s evidence. It was negligent for both commanders to approach Koppie 3 contrary to the plan, without instruction and without announcing their movement to the Operational Commander. In oral evidence, Mr. White highlighted that there was a back-up channel identified in the plan\footnote{Transcript Day 250, p.31466}, and it is entirely unclear why this back-up channel was not used by any of the commanders if the radio problems were as significant as the SAPS claim. In circumstances where the plan was that the dispersion would take place to the south and to the west, the decisions of
Capt Kidd and Gen Naidoo to block these routes without informing anyone was negligent. But their decisions to engage the strikers with live ammunition from these directions were beyond comprehension. On the basis of the plan, they knew that fellow SAPS members were likely to be on the north and east of the Koppie: even a moment’s thought would have alerted them to the high risk of a friendly fire incident if they started shooting from their positions. Accordingly, they are both responsible for contributing to the lethal situation of cross-fire.

4.5.3 However, in respect of Maj Gen Naidoo, his responsibility goes further. His evidence was that he led a contingent of K9 members towards Koppie 3, with no specific instructions on what they were supposed to do once they arrived, then he split off to join up with NIU members approaching from the west. He did not hand over command to any member of the K9 group, did not provide any specific instructions to them, but simply left them to manage the situation as they saw fit. In the event, they saw fit to discharge 67 rounds towards the Koppie, many of which appear to have been fired at no specific, identified target. Although Maj Gen Naidoo claimed that there was no need to hand over command or provide precise instructions because the K9 were “tactically trained”, the SAHRC submits that the particular situation into which Maj Gen Naidoo led the K9 members was not a run-of-the-mill situation for which they were prepared. We submit that it was irresponsible to lead K9 members into what Maj Gen Naidoo believed would be a firefight, only to abandon them as soon as they were engaged in the firefight. Accordingly, the SAHRC submits that Maj Gen Naidoo was negligent in that:

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1087 Transcript Day 197, pp 24165 - 24168
1088 Exhibit FFF8: Discharge List 16 August 2012
1089 See below at Part 12, section 4
1090 Transcript Day 197, p.24168
a. It was negligent to bring the K9 members towards Koppie 3 in the first place\textsuperscript{1091};

b. Having decided to bring them towards Koppie 3, it was negligent not to ensure that the operational commander and other units were aware that the K9 were approaching from the south; and

c. Having brought the K9 members to the southern side of the Koppie, it was negligent to leave them without a commander and without clear instructions.

4.5.4 The SAHRC submits that Maj Gen Naidoo’s negligence directly contributed to the situation of crossfire that is likely to have caused the deaths of at least nine strikers.

4.5.5 Other unit commanders may also bear responsibility. If the Commission is to conclude (contrary to our submissions) that the Operational Commander was unaware of the deaths and injuries at Scene 1, then responsibility for his ignorance rests with the unit commanders at Scene 1. As Lt Col Scott said in evidence\textsuperscript{1092}:

> “if the Brigadier truly didn’t know, then the fault can’t be with him, but surely with somebody that was back at the scene that should have taken the time to start informing.”

Those members included, \textit{inter alia}:

a. Capt Loest, who called Brig Pretorius in the JOC, but seeing the operation proceeding to Scene 2 and hearing live ammunition fire at

\textsuperscript{1091} See below at Part 12, section 4
\textsuperscript{1092} Transcript Day 137, p.14721
Scene 2, did nothing to bring the situation to the attention of Brig Calitz;

b. Lt Col Mere, who took part in disarming the dead and injured at Scene 1, but seeing the operation proceeding to Scene 2 and hearing live ammunition fire at Scene 2, he did nothing to bring the situation to the attention of Brig Calitz; and

c. Lt Col Pitsi, who witnessed the pile-up of bodies at Scene 1, but failed to inform Brig Calitz of any of the events at Scene 1, despite proceeding to Scene 2 and stopping within 20 metres of Papa 1 between 16:10 and 16:20.

**Section 4.6: Responsibility of Lt Col Vermaak**

4.6.1 The SAPS have sought to attribute responsibility for the breakdown in command and control to Lt Col Vermaak for his failure to command units properly from the air and his failure to provide adequate situational awareness to the JOC. While the SAHRC concurs that some responsibility must rest with Lt Col Vermaak, it is important to understand exactly what his role was on 16 August.

4.6.2 Slide 147 of Exhibit L describes Lt Col Vermaak’s tasking on 16 August as “Air Monitoring Team”, with the responsibility to “monitor gathering and provide JOC with real-time feedback... enhance situational awareness”. Slide 146 shows Brig Fritz’s helicopter as the “Air Command Post”. Brig Calitz’s evidence that he passed the responsibility for Air Command to Lt Col Vermaak was denied by Lt Col Vermaak. The SAHRC submits that the claim lacks credibility, particularly given that Lt Col Vermaak had not

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1093 Transcript Day 206, pp 25443 - 25446, per Lt Col Vermaak
attended the briefing for the operation\textsuperscript{1094}, and the fact that the claim was made for the first time on 9 January 2014\textsuperscript{1095}.

4.6.3 Nonetheless, it was Lt Col Vermaak’s responsibility to provide situational awareness and this is a task in relation to which he failed. Once again, we rely on Mr. White’s evidence in relation to the audio recording of the instructions given by Lt Col Vermaak over the radio. He said\textsuperscript{1096}:

“7.6.9. I am struck at the vague and confusing nature of the directions given. Notably:

a. There is a distinct lack of call-signs used in the communication. Mostly, directions are given to vehicles described as “the water cannon at the back”, or “that Nyala on the corner” or a variant of that sort. In my experience, this approach causes huge problems. First, those who are being spoken to do not necessarily know they are the target of the communication. Secondly, those who are spoken to do not necessarily know who is speaking to them. But most importantly, none of the other participants who are listening to the radio have any idea of what is going on. If call signs are used, then everyone listening to the radio will know that, for instance, “papa 7” is moving alongside “W2” and entering the Koppie.

b. At key points during the operation, there is a lack of clarity and lack of leadership in the communication. For instance:

i. At 11:20 in the video, Lt Col Vermaak says:

\textsuperscript{1094} Transcript Day 205, p.25299, per Lt Col Vermaak
\textsuperscript{1095} Transcript Day 165, pp 19141-19142, per Brig Calitz. Also see OOO16: Diary of Lt Col Vermaak for 9 January 2014
\textsuperscript{1096} Exhibit JJJ178: Final Statement of Gary White MBE, para.7.6.9 – 7.6.10
“Alright guys, you’ve got them in the middle... They’re going to break through, they’re going to try to break through”. But there is no indication of where “they” are going to break through and which units should be alert. If, which appears to be the case, those who were trying to break through were those who had been pushed to the west by the water cannons, some communication of that would have been helpful: “Chopper 1 to all call signs - W1 and W2 are pushing people to the west: they may try to break through.”

...  
c. There is almost no communication providing “awareness”, as was expected of Lt Col Vermaak. The kinds of communication that might have been expected would have been: “All call signs, be aware that C3 forces are approaching the Koppie from the west”; “All call signs, be aware that C2 members are now approaching the south of the Koppie”; “All call signs, be aware that C6 members are entering the Koppie on foot from the east”.

7.6.10 Heard as a whole, the available audio of the communication made by radio confirms the lack of command and control at Scene 2 and, in part, explains the confusion that appears in many of the statements of officers who were present at Scene 2.”

4.6.4 To his credit, Lt Col Vermaak accepted that this criticism was to some extent valid\textsuperscript{1097}. In his supplementary statement, Mr. White concluded that although Lt Col Vermaak could not be held responsible to the same extent as the Overall Commander, Operational Commander or the JOC, he\textsuperscript{1098}:

\begin{footnotesize}
\footnote{1097 Transcript Day 211, pp 26034 - 5}
\footnote{1098 Exhibit BBB4, para.2.5.4}
\end{footnotesize}
“Should shoulder some of the blame for the absence of command and control at Scene 2. His responsibility was “to provide real time feedback over the police radio into the JOC to enhance situational awareness”, which would have included providing information about the movements of various units. His communication over the radio was often confused and confusing, and only part of that can be attributed to his lack of briefing on the updated Stage 3 plan.”

Section 4.7: To what extent did the breakdown in command and control contribute to the outcome of the operation of 16 August?

4.7.1 The breakdown of command and control after Scene 1 was not simply the result of an unfortunate cascade of circumstances beyond the control of the SAPS. It was not the result of a radio system that was not up to task. It was the result of recklessness and/or negligence on the part of those in command of the operation. Regardless of the knowledge of individual commanders, no reasonable police service acting responsibly would have allowed a situation to develop such as that which arose at Scene 2.

4.7.2 The SAHRC submits that the breakdown in command and control after the events at Scene 1 was a direct cause of 17 deaths at Scene 2. In the aftermath of Scene 1, any competently commanded operation would have been halted or paused. Similarly, once it was clear that the armed strikers had retreated into Koppie 3, any competently commanded operation would have ensured a withdrawal of SAPS members away from the Koppie to allow negotiations to commence.

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1099 Lt Col Vermaak’s evidence was that during the actual operation, he was under the impression that he was implementing the encirclement plan (Transcript Day 205, p.25300). That is why he was directing nyalas to encircle K3 (Transcript Day 206, p.25391)
In a thoughtful article on the causes of the Marikana massacre, policing expert David Bruce referred to the work of sociologist Randall Collins in describing the circumstances of Scene 2 as “a forward panic”, akin to the killings by Japanese soldiers of civilians at Nanking in 1937 and the 1968 murder of Vietnamese villagers by American infantrymen at My Lai in 1968. According to Collins, a forward panic occurs after a period of prolonged confrontation between two groups where tension and fear has built up and escalates in the final moments, driven by an emotional rush of adrenalin.

If a “forward panic” is the best description of what took place at Marikana, there was an additional lethal ingredient in the mix: the members who pushed forward, high on adrenalin and armed with military grade rifles, did so in the absence of any command or control. They were – in essence – free agents, with no-one to stop them from firing nearly 300 rounds at the strikers.

The SAHRC puts its case simply: 17 people were killed at Scene 2 and many more seriously injured because the SAPS failed to meet the most basic standards of command and control after the events of Scene 1. There can be no doubt that the command and control of the operation amounted to a gross breach of the standards required by the principle of prevention / precaution, and consequently all 17 deaths caused at Scene 2 amounted to a breach of the constitutionally protected right to life. That breach may also have criminal consequences: the Commission will need to consider whether the negligence of the JOC, the negligence of the Overall Commander, and the negligence of the Operational Commander warrant referral for prosecution by the NPA.

1100 Exhibit FFF14: “Mampoer - Marikana and the Doctrine of Maximum Force”
PART TWELVE:

THE EVENTS OF THE AFTERNOON OF 16 AUGUST (SCENE 2 USE OF LETHAL FORCE)
SECTION 1: THE PRIMA FACIE EVIDENCE OF DISPROPORTIONATE FORCE AT SCENE 2

1.1.1 The Commission does not know what happened at Scene 2. It will never know. All we can be sure of is that a breakdown in command and control led to a lethal situation where the SAPS surrounded Koppie 3 from all sides, and fired 295 live rounds in and around the Koppie. Seventeen individuals were killed and more than 30 injured.

1.1.2 The lack of certainty of the events at Scene 2 can be attributed to a number of factors: the failure of the SAPS properly to record the operation; the failure of the SAPS to provide statements which provide anything near the level of detail one would expect from a police service seeking to account for the killing of 34 people; the failure of the SAPS to identify which statements are alleged to account for which death; the inability – on account of the splintering of R5 ammunition within a body – to match bullet to firearm; and the refusal of state pathologists to allow any detailed independent investigation of the bodies. The result is that the Commission can only reach prima facie conclusions in respect of the deaths and injuries caused at Scene 2.

1.1.3 However, for the reasons set out in Part Eleven, the SAHRC submits that the SAPS should never have been anywhere near Koppie 3. They ought to have paused or halted the operation after Scene 1. Further, having continued with the operation after Scene 1, and realizing that strikers were entrenched in Koppie 3, they should have retreated from Koppie 3 to allow negotiations to commence. Even if the Commission were to able find that all 17 deaths at Scene 2 were justified in legitimate self and / or private defence (which they were not), the SAHRC submits that every single death was avoidable. Under the international law principle of precaution / prevention, every single death at Scene 2 was unlawful.
1.1.4 The SAHRC has not engaged in detail in the ballistics and forensic evidence at Scene 2, but commends the work done by the legal representatives of the family of Mr. Ledingwane. In deference to their work, we do not set out a detailed analysis of the ballistics and forensic evidence at Scene 2 in these Heads. Instead, we make broad submissions on the conclusions the Commission can and should make in respect of Scene 2.

**Section 1.2: The majority of those who retreated to Koppie 3 were not members of the ‘lead group’**

1.2.1 The SAPS have suggested that those who retreated to Koppie 3 and did not disperse were part of the lead group of strikers intent on attacking police, and it is claimed that they moved to Koppie 3 in a pre-meditated plan to ambush the police. That suggestion must be rejected. The convincing evidence of Mr. Mtshamba was clear: he was no part of the lead group, had not been taking muti, but he ran to hide in Koppie 3 having witnessed the shooting incident at Scene 1 and seeing the police approaching from the east\(^1\). The SAHRC submits that his story is likely to be the story of the majority of those who hid in Koppie 3. The following evidence is pertinent:

a. Video Annexure V1.6 (Al Jazeera camera)\(^2\) at 15:53:36 shows the front of the lead group passing the northern corner of the kraal. In the background of the shot, around 20 people are visible standing on Koppie 3, more than 500 metres away. Accordingly, it is clear that many people on Koppie 3 were not part of the lead group and moved there before Scene 1 even took place;

b. Exhibits JJ6.1200 – JJ6.1204 are photographs of the crowd who lined up behind Koppie 2 and retreated into Koppie 3. A close analysis of

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\(^1\) Exhibit MMM50; Transcript Day 275 pp 35127 - 35131, pp 35141 - 35143 and pp 35193 - 35196

\(^2\) Exhibit UUUU10.1(6)
these photographs shows the majority of the people photographed are unarmed; and

c. Of the 17 shot dead at Scene 2, nine had no evidence of scarification marks and no other evidence of having taken part in any rituals\textsuperscript{1103}. To the extent that it is alleged that the lead group was made up of strikers who had taken muti, that was clearly not the case for the majority of those killed at Scene 2.

\textit{Section 1.3: On the balance of probabilities, the strikers fired no shots towards police}

1.3.1 Maj Gen Naidoo alleges that he saw a striker with an R5 rifle at Koppie 3 as he moved over the rocks\textsuperscript{1104}, but the SAHRC submits that Maj Gen Naidoo was mistaken. No R5 was recovered by the SAPS from any striker. Moreover, by the time Maj Gen Naidoo allegedly saw the rifle, the Koppie was already surrounded and all the strikers within the Koppie at that time were subsequently disarmed and arrested\textsuperscript{1105}. The chances that a striker was able to escape the Koppie with an R5 rifle after the time at which he was seen by Maj Gen Naidoo are so small as to be discounted. As such, we submit that there was no R5 rifle in the possession of strikers at Scene 2.

1.3.2 The SAPS did recover three pistols at Scene 2 within the possession of dead, injured or arrested strikers. One had a completely loaded cartridge and appears not to have been discharged at all. Of the other two, a maximum of 12 rounds were missing from the cartridges\textsuperscript{1106}. Accordingly, the recovery of the pistols raises the possibility that strikers had discharged a maximum of 12 rounds at police at Scene 2.

\textsuperscript{1103} Exhibit KKK10: SAPS Summary of Forensic Experts Reports
\textsuperscript{1104} Exhibit JJJ108, para. 71 and Transcript Day 189, p.22935
\textsuperscript{1105} See exchange between Maj Gen Naidoo and Adv Chaskalson SC in Transcript, Day 190, pp 23292 - 23299
\textsuperscript{1106} Exhibit L: SAPS Presentation slide 264
1.3.3 However, no 9mm cartridges were found by the crime scene investigators that could be associated with these weapons. It is, of course, correct that the cartridges found by crime scene investigators are not conclusive: at Scene 2, only 40% of all SAPS cartridges were found\textsuperscript{1107}. However, there is a clear distinction to be made. Police rounds at Scene 2 were fired from all parts of the veld surrounding Koppie 3, as well as within Koppie 3 itself. Accordingly, the police cartridges were spread across a very wide area, much of which was not the main area of focus for crime scene investigators. By contrast, any rounds fired by strikers would have been discharged \textit{within} the Koppie, \textit{near} the locations were bodies were found, and therefore in the heart of the focus area for the crime scene investigation. The SAHRC submits that it is far more likely that cartridges from rounds fired by strikers would have been found by the crime scene investigators. This submission is supported by the much higher ratio of rounds to cartridges at Scene 1. At Scene 1, where all SAPS rounds were fired within a close search area, 72% of cartridges were found\textsuperscript{1108}.

1.3.4 Accordingly, the SAHRC does not dispute the fact that some SAPS members may have \textit{believed} they were under fire from strikers, but we submit that the more likely explanation is that most, if not all, of those members were mistaken and were, instead, taking friendly fire from units on the other side of the Koppie of which they were unaware.

1.3.5 The SAHRC submits that:

a. On the balance of probabilities, no shots were fired by strikers at police at Scene 2;

\begin{flushright}
\scriptsize
\textsuperscript{1107} Exhibit FFF8: Discharge List 16 August 2012
\textsuperscript{1108} Exhibit FFF8: Discharge List 16 August 2012
\end{flushright}
b. Even if that conclusion is wrong, the overwhelming probability is that
the strikers fired no more than three or four shots at police. The SAPS
found 72% of SAPS cartridges when they were closely focused at
Scene 1 and 40% of the SAPS cartridges when they were distributed
over a much wider area at Scene 2. On those ratios, it is simply not
credible that the strikers could have fired more than three or four
rounds without a single cartridge being found, particularly when
those rounds would have been fired in the heart of the focus area of
the crime scene.

Section 1.4: The SAPS failed to use the less-lethal means available to them and – on
a prima facie basis – responded to any perceived threat irresponsibly and
disproportionately

1.4.1 At 16:11:28, shortly after the shooting at Scene 2 had commenced on the
eastern side, after Lt Col Vermaak had announced that there were two
bodies at the back of the second Koppie, and immediately after Lt Col
Vermaak had announced that the strikers were encircled in the Koppie, Brig
Calitz gave an order for the water cannons to “hold back” and for members
to alight from their vehicles and make arrests1109. The water cannon spray
essentially ceased around that time. No tear gas was used to flush out the
strikers from the Koppie1110. Only four SAPS members used rubber
rounds1111. But 58 SAPS members fired a total of 295 rounds of live
ammunition at or around the Koppie.

1.4.2 Prima facie, the failure properly to utilize less-lethal means at Scene 2,
compared to the huge number of live rounds fired by SAPS members, points
to a disproportionate, unlawful use of force. That is particularly so given that
it is unlikely that any shots were fired at the SAPS by strikers.

1109 Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper Videos
1110 Exhibit FFF8: Discharge List 16 August 2012
1111 Exhibit FFF8: Discharge List 16 August 2012
1.4.3 The following factors also suggest that the SAPS responded disproportionately to any perceived threat:

a. First, the radio transcript appears to indicate failed attempts by SAPS members to call for ceasefire and/or to deescalate the situation\textsuperscript{1112}:

i. At 16:14:56, an unknown member is heard calling “\textit{Stop shooting. Cease fire!}”;

ii. At 16:15:45, an unknown member is heard saying: “\textit{They are coming. They surrender but they never throw their pangas and their… they want to come out. They want to come out. They never throw their pangas and their sticks}”;

iii. Despite these transmissions, the firing by SAPS members continued.

b. Secondly, supplementary statements from the members of Papa 11 suggest that the firing of live ammunition by NIU members passing over the southeast of the Koppie with Maj Gen Naidoo was unjustified. The position of Papa 11 in relation to the NIU members passing over the Koppie is shown in Exhibit MMM45. The incident described in the supplementary statements is captured in that exhibit\textsuperscript{1113}. W/O Mamabolo – whose account is confirmed by W/O Mathava, W/O Dzivhani, Cst Zondi, and Cst Khosa, and in part by W/O Malesa, records the following\textsuperscript{1114}:

\textsuperscript{1112} Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper videos

\textsuperscript{1113} Exhibit MMM45: SAHRC Analysis of the Movement of K9 and NIU Members on Foot at Koppie 3, pp 10 - 24

\textsuperscript{1114} Exhibit KKK60: Supplementary Statement of W/O Mamabolo's, ZZZZ3.74: Supplementary Statement of W/O Dzivhani, Exhibit HHH57: Supplementary Statement of Cst Zondi, Exhibit ZZZZ3.131: Supplementary Statement of Cst Khosa and Exhibit ZZZZ3.277: Statement of W/O Mathava
“At the time that we arrived at the Koppie the firing of live ammunition was still occurring. There were a number of police officers who were busy arresting the protestors and made them to lie on the ground as we passed the two nyalas and the water cannon. I am not able to state from which unit the arresting officers were.

We parked our Nyala such that the police and the arrested protestors were separated. I got out of the nyala on the side of the police who were on top of the boulder firing live ammunition towards the direction of the protestors. I expected the members to notice me and I shouted at them “seize fire and stop fire”. I raised my hands to indicate to the police to stop and seize fire but the shooting continued. As the shooting of live ammunition described above continued I observed Gen Naidoo emerging on top of the boulder from the same direction that the firing occurred with a pistol in his hand but I am not in a position to state whether or not he shot...

Once the shooting of live ammunition stopped I observed some of the protestors coming out of the bushes and behind the boulders/rocks with their raised hands... I did not see any protestors shooting at the police using fire arms or attacking the police with dangerous weapons.”

c. **Thirdly**, although the STF members were the most highly trained, specialist unit at Marikana, and most capable of dealing with a situation where the strikers had entrenched themselves in Koppie 3, their commander determined that it was too dangerous for the
members to enter the Koppie\(^{1115}\) and none of the STF members discharged their firearms. By contrast, less highly trained members from the K9 unit, who were completely ill-prepared for the situation at Scene 2, approached Koppie 3 from the same direction as the STF, did not seek hard cover, and fired 67 rounds towards the Koppie\(^{1116}\).

d. **Fourthly**, as set out below at Part 12, section 4, the statements of some shotists at Scene 2 indicate a reckless disregard for life, a failure to identify any clear target before shooting, and a failure to consider the possibility that shots might strike one of the many innocent strikers hiding in the Koppie.

e. **Finally**, there is evidence that the SAPS used banned SSG pellets at Scene 2\(^{1117}\).

\(^{1115}\) Exhibit FFF10: Statement of Lt Col Gaffley, para.11  
\(^{1116}\) Exhibit MMM45: SAHRC Analysis of the Movement of K9 and NIU Members on Foot at Koppie 3 and Exhibit FFF8: Discharge List 16 August 2012  
\(^{1117}\) Exhibits MMM51.1 – 51.7: Photographs of SSG Cartridges at Scene 2
SECTION 2: JUSTIFICATION FOR THE USE OF LETHAL FORCE - THE SAPS CASE

Section 2.1: The SAPS have failed to make a case for justification in respect of 12 of 17 of those killed at Scene 2

2.1.1 The SAHRC reminds the Commission of our submissions in Part Two, namely that that the sole legal burden to prove the lawfulness of any killing by police rests on the police themselves. However, in respect of the deaths caused at Scene 2, the SAPS has failed to identify, in respect of each individual killed at Scene 2, which SAPS member provides a justification for the death. Instead, it has simply provided a pile of opaque statements from shotists providing vague and imprecise evidence in respect of the circumstances in which they fired their weapon. In essence, the SAPS has refused to make a case in respect of the deaths at Scene 2 and instead leaves it to the Commission to determine what happened. The SAHRC submits that, without identifying statements of members which justify each death, the SAPS has failed to justify “all and any use of force” at Scene 2.

2.1.2 The single exception to this general approach is the evidence submitted by Mr. de Rover in paragraphs 40 – 61 of Exhibit FFF11A, where he set out his understanding of what took place at Scene 2, on the basis of a detailed walk-through with SAPS members. Mr. de Rover’s analysis suffers from very significant problems, as set out in Part Four section 6, but it remains the only evidence submitted by the SAPS which seeks to explain the cause – and justification – for each death at Scene 2. It is as close as we get to a “SAPS case” in respect of Scene 2.

2.1.3 Mr. de Rover’s conclusions are devastating for the SAPS. He concluded that at least nine of those killed were not the intended target of fire. They were likely hiding in a part of the Koppie which they believed gave them cover from the live fire but were struck by “incidental” shots fired at another
target. Mr. de Rover spoke in more detail about this in his oral evidence where he said\textsuperscript{1118}:

“there were, when that police action happened
4 there were 300 people there. Now you go there on Monday,
5 you just walk around there and tell me where those 300
6 people are going to be and where they can find cover. So
7 whilst listening and just listening and hearing policemen
8 say that there was something of a threat and they shot at
9 that threat and missed, I now picture these rounds
10 travelling through that area and you, on Monday, the
11 foliage there is distinctly different although the
12 ballistics report will give you an idea but the ballistics
13 report also shows you the evidence of how far and
14 penetrating those rounds were. Now, there is a very
15 unfortunate term in humanitarian law that calls situations
16 like that collateral damage and I’m loathe to employ that,
17 but from the stories and the reality and the geography on
18 the ground, the fact is that shots were fired allegedly in
19 self-defence. That remains to be seen and tested, whether
20 that is true. Those shots missed and then continue on
21 their path.
22 [12:27] And the worst part of it is that in that centre
23 area of Koppie eventually you have shots from four
24 directions travelling through, and I can’t remember the
25 exact number I said, but that might have been in excess of
Page 37160
1 150. Now put 300 people there, because that would have
2 been the most likely spot where they would have thought
3 themselves safe; you have sight cover and fire cover, but

\textsuperscript{1118} Transcript Day 286, pp 37159 - 37160
4 you do not have fire cover for fire from all directions.
5 You’d have it at best for two, but not for four, and that’s
6 why I’m saying that tragic as that is, I’m mindful of the
7 fact that the number because then of what you have there,
8 at least 150 rounds flying through and there are nine
9 deaths there that can’t be linked to an individual shotist,
10 that could have been much higher, and I think that the
11 position in which people were found and the injuries they
12 suffered, my reading is that that – and I’m not an expert
13 on that, so please discount if you disagree, but there
14 would have been normal interactions going on. So we are
15 facing each other. I’m bending to pick something up and at
16 that moment a round strikes the top of my head, and I
17 realised that standing there and that took my breath away.
18 It’s terrible.”

2.1.4 Mr. de Rover’s evidence was that the following people were killed by
incidental shots¹¹¹⁹:

- a. Body D – Tokoti Mangcotywa;
- b. Body E – Raphael Janeyeke Liau;
- c. Body G – Thabiso Mosebatsane;
- d. Body H – Mafolisi Mabiya;
- e. Body I – Ntandazo Nokamba;
- f. Body J – Fezile David Samphendu;

¹¹¹⁹ Emailed response to CALS from Mr. de Rover, dated 10 September 2014, not exhibited but
attached at Annexure C
g. Body K – Mpumzeni Nxande;

h. Body L – Stelega Meric Gadlela; and


2.1.5 Mr. de Rover gave no evidence in respect of the circumstances in which those who died on the way to hospital were killed, namely Telang Vitalis Mohai, Modisaotsile Van Wyk Sagalala, or Molefi Osiel Ntsoele. The SAPS have also made no attempts to justify their killings.

2.1.6 Accordingly, the only people for whose killings Mr. de Rover, or the SAPS, have sought to provide a justification are:

a. Body A – Amele Mdizeni;

b. Body B – Thabiso Johannes Thelejane;

c. Body C – Thobile Mpumza;

d. Body N – Makhosondile Mkhongwa; and

e. Body O – Nkosinathi Xalabile.

Section 2.2: The justification provided by the SAPS for the killing of Mr. Mdezeni (Body A) and Mr. Thelejani (Body B) is false

2.2.1 Mr. de Rover’s understanding is that Mr. Mdezi and Mr. Thelejane were likely shot by members of the NIU who were approaching Koppie 3 from the east. It is alleged that they were members of a group of protestors who were “charging towards them, brandishing traditional weapons and throwing
“rocks” and were shot by aimed shots from NIU members\textsuperscript{1120}. This account reflects slide 241 of Exhibit L. However, it is clear that the account is false.

2.2.2 Mr. Mdezi and Mr. Thelejane’s bodies were both found at the foot of a steep rock\textsuperscript{1121}. They were each shot in their right side\textsuperscript{1122}. They are both likely to have died where they fell\textsuperscript{1123}. Both were shot by R5 rounds. The nearest R5 cartridges were found more than 40 metres away from their bodies\textsuperscript{1124}. There is no conceivable way they were shot while “charging” at the NIU, and – in the absence of any evidence that either were in possession of a firearm – there is no conceivable way that they posed an imminent threat to the person who shot them.

2.2.3 Lt Col Modiba – who was the commander of the NIU unit who responded to the alleged ‘charging’ - was unable to assist the Commission in identifying the justification for Mr. Mdezeni’s or Mr. Thelajane’s deaths. He did not know how they were killed but confirmed that if they were shot where they fell they were no part of the group who allegedly charged the NIU\textsuperscript{1125}. No statement from NIU members who discharged their weapon provides an explanation for their deaths.

2.2.4 The SAHRC submits that on the basis of the forensic, ballistic and witness evidence, the ‘SAPS case’ on the justifiability of the deaths of Mr. Mdezeni and Mr. Thelejane is false. It is most likely that both Mr. Mdezeni and Mr. Thelejane were also shot by ‘incidental’ or ‘reckless’ rounds, a possibility accepted by Lt Col Modiba\textsuperscript{1126}.

\textsuperscript{1120} Exhibit FFF11A: Supplementary Statement of Mr. de Rover, para.53
\textsuperscript{1121} Exhibit ZZZ5: Naidoo – Steyl report, Annexure B
\textsuperscript{1122} Exhibit ZZZ5, Naidoo – Steyl report, Annexure J
\textsuperscript{1123} Exhibit ZZZ5, Naidoo – Steyl report, Annexure J
\textsuperscript{1124} Exhibit ZZZ5, Naidoo – Steyl report, Annexure D
\textsuperscript{1125} Transcript Day 242, p.30617
\textsuperscript{1126} Transcript Day 244, p.30810
2.2.5 That leaves only three bodies for whom the SAPS have provided a justification.

Section 2.3: The justification provided by the SAPS for the killing of Mr. Xalabile (Body O) is not supported by the evidence

2.3.1 Mr. de Rover states that Mr. Xalabile was probably shot by an NIU member who noticed that a K9 member was about to be hacked on the head by Mr. Xalabile, who was wielding a panga\textsuperscript{1127}. This does not accord with any of the incidents recorded in Exhibit L. The closest account in Exhibit L appears to be that the NIU team fired at “an armed protestor hiding in the bushes who emerged charging at them”, or that the NIU members “who had opted for higher ground on top of the rock on the southern side were allegedly shot at by a protestor” and returned fire\textsuperscript{1128}.

2.3.2 Mr. Xalabile was shot in the southeastern part of the Koppie\textsuperscript{1129}. The forensic analysis shows that he was shot from above by two R5 rounds, from the direction of the top of the rocks where cartridges were discovered from the rifles of Csts Ngwaleni, Dubeni, Mokhele, Sefanyetso and Lt Ndlela\textsuperscript{1130}. None of their statements provide an explanation for the death of Mr. Xalabile:

\begin{itemize}
\item[a.] Cst Ngwaleni initially claimed only to have fired five rounds while he was part of the basic line approaching Koppie 3\textsuperscript{1131}. After ballistics evidence showed he had fired 25 rounds, he submitted a further statement claiming that his rifle must have been on automatic mode\textsuperscript{1132}. His evidence is transparently dishonest. The ballistics evidence shows Cst Ngwaleni to have fired in at least two different
\end{itemize}

\textsuperscript{1127} Exhibit FFF11A: Supplementary Statement of Mr. de Rover, para.55
\textsuperscript{1128} Exhibit L: SAPS Presentation, slide 243
\textsuperscript{1129} Exhibit ZZZ5, Naidoo – Steyl report, Annexure B
\textsuperscript{1130} Exhibit ZZZ5, Naidoo – Steyl report, Annexure J and Annexure D
\textsuperscript{1131} Exhibit ZZZ7.1: IPID Statement of Cst Ngwaleni
\textsuperscript{1132} Exhibit ZZZ7.2: Further Statement of Cst Ngwaleni
locations, at least 60 metres away from each other\textsuperscript{1133}. His statements admit to shots fired on the approach to the Koppie, but do not admit to firing at least a further eight rounds from on top of the rock where his cartridges were found;

b. Lt Ndlela appears to have given a similarly dishonest statement\textsuperscript{1134}. While he admits to firing shots, all shots are claimed to have been fired while approaching the Koppie, and not from on top of the rocks where his cartridges were found;

c. Cst Mokhele gives a statement most closely related to the account given by Mr. de Rover\textsuperscript{1135}. He claims to have fired four shots on his approach to the hill, and then says that when he was clearing the hill, he witnessed a protestor attacking a police member. He then says that he fired a single shot towards the lower body of the striker “but he ran away”\textsuperscript{1136}. This account also appears dishonest. Four cartridges were found from Cst Mokhele’s weapon on top of the rock at Scene 2. Cst Mokhele accounts for only a single round fired from that location;

d. Cst Dubeni admits to having fired a single round from the top of the rock, but claims to have fired the shot in the air\textsuperscript{1137}, and

e. Cst Sefanyetso also admits two rounds “to clear the bushes” but claims not to have hit anybody because there was no-one there when he arrived to check\textsuperscript{1138}.

\textsuperscript{1133} Exhibit ZZZ5, Naidoo – Steyl report, Annexure C
\textsuperscript{1134} Exhibit MMM25: Manuscript Statement of Lieutenant Ndlela
\textsuperscript{1135} Exhibit ZZZ6: Statement of Cst Mokhele
\textsuperscript{1136} Exhibit ZZZ6, para.7
\textsuperscript{1137} Exhibit MMM54: Statement of Cst Dubeni para.8
\textsuperscript{1138} Exhibit ZZZZ3.559: Statement of Cst Sefanyetso
2.3.3 Setting aside the dishonesty that infects these statements, the consequence is that none of the members who might have been responsible for the death of Mr. Xalabile provide an account that could justify that death. No other members provide an account that could justify that death. So we are left with no justification by the SAPS for his death.

2.3.4 That leaves only two bodies for whom the SAPS have provided a justification.

Section 2.4: The justification provided by the SAPS for the killing of Mr. Mkhongwa (Body N) is questionable in light of the evidence

2.4.1 Mr. de Rover sets out the circumstances of Mr. Mkhongwa’s death at paragraph 50 of Exhibit FFF11A. He states that TRT personnel approaching from the west came under attack from protestors who charged at them with spears and other traditional weapons. He then states that “the protestors continued their attacks on the TRT and sent out two of their number to physically attack the police. In these skirmishes the individual identified as “Body N” dies”. That account is provided in similar terms in slide 236 of Exhibit L, and is reflected in paragraph 11 of Capt Kidd’s consolidated statement.\textsuperscript{1139}

2.4.2 Mr. Mkhongwa was wearing a white and brown striped shirt and he was shot next to an unidentified man who was wearing a red Arsenal shirt. He was shot by two 9mm rounds which entered his left side. The pathologists conclude that he was likely shot from the direction where cartridge cases AA13 – 24 were found.\textsuperscript{1140} Those cartridge cases belong to W/O Batsi and Cst Letswalo.\textsuperscript{1141} They were standing with Sgt Mahlatisi and Cst Palaelo.\textsuperscript{1142}

\textsuperscript{1139} Exhibit UUU2
\textsuperscript{1140} Exhibit ZZZ5, Naidoo – Steyl report, Annexure J
\textsuperscript{1141} Exhibit ZZZ5, Naidoo – Steyl report, Annexure C
\textsuperscript{1142} See Exhibit UUU13: Additional Statement of Sgt Mahlatisi, para.3
2.4.3 Cst Letswalo provides the only account that is consistent with the SAPS explanation of Mr. Mkhongwa’s death\textsuperscript{1143}. He states in his initial statement that two of the miners – one wearing a red top and one wearing a white shirt – came out of the Koppie and moved towards him. He claims that they were less than seven metres away and holding spears when he fired four rounds in their direction in self-defence. However, in his subsequent statement, he makes no mention of the person wearing red, and states only that a person wearing a white shirt came towards him and that he fired four rounds in the direction of the person wearing a white shirt\textsuperscript{1144}. It is notable that in his initial statement, Cst Letswalo did not identify any particular act that indicated an imminent threat, other than the fact that the man was carrying a spear and came to his direction. In his subsequent statement, he alleged that the man “charged” at him.

2.4.4 Cst Letswalo’s version is not borne out by the ballistics evidence: the nearest cartridge from his firearm was found more than 20 metres away from Mr. Mkhonjwa, not seven metres as claimed\textsuperscript{1145}. Moreover, his evidence is inconsistent with the versions of those other members who were standing adjacent to him:

a. W/O Batsi provided four statements\textsuperscript{1146}. In his first statements he admitted only to firing four rounds, but in light of ballistic evidence he was force to concede that he had fired 12 rounds. Nonetheless, his version is that a crowd of strikers ran out of the Koppie towards the police, amongst which was the man in the red football t-shirt. He fired at the man in the red football t-shirt. He makes no mention of Mr. Mkhongwa at all;

\textsuperscript{1143} Exhibit ZZZZ3.175: Initial Statement of Cst Letswalo, para.3
\textsuperscript{1144} Exhibit ZZZZ3.175: Initial Statement of Cst Letswalo, para 3
\textsuperscript{1145} Exhibit ZZZ5, Naidoo – Steyl report, Annexure D
\textsuperscript{1146} Exhibit ZZZZ3.18: Statements of W/O Batsi
b. Cst Pelaelo provided two statements\textsuperscript{1147}. He notes that a group of between 30 – 40 strikers charged out from the Koppie, led by the man in the red football t-shirt. He admits to firing a number of shots at the man in the red t-shirt, but makes no mention of Mr. Mkhongwa at all. He notes that immediately after he fired the shots a nyala came from his right and stopped near him; and

c. Sgt Mahlatsi provided two statements\textsuperscript{1148}. In his initial statement he claimed that a group of around 40 people carrying spears and knobkerries approached his position and forced themselves to his direction. When “\textit{all of these people were closer to me}” he decided to fire a few rounds “\textit{in their direction}”\textsuperscript{1149}. In his subsequent statement, he claimed only that a single person charged in his direction, wearing a red t-shirt. He makes no mention of Mr. Mkhongwa.

2.4.5 Lt Col Vermaak confirmed that the first time he noticed the body of Mr. Mkhongwa was shortly before 16:09:17, when he started to contact the JOC in respect of the “\textit{two bodies}” at the back of the second Koppie\textsuperscript{1150}. His evidence of the circumstances of his death – considered alongside the objective evidence – is as follows:

a. At 16:07:58, he announced that the strikers were “\textit{caught now there in the middle of the Koppie}”\textsuperscript{1151},

b. At 16:08:42, he announced “\textit{Alright guys, you’ve got them in the middle}” before saying “\textit{They’re going to break through. They’re going to try to break through}”\textsuperscript{1152}.

\textsuperscript{1147} Exhibits UUU14 and UUU15
\textsuperscript{1148} Exhibits UUU12 and UUU13
\textsuperscript{1149} Exhibit ZZZZ3.213: Initial Statement of Sargent Mahlatsi, paras 4 – 6;
\textsuperscript{1150} Transcript Day 211, p.26042 and pp 26047 - 26048
\textsuperscript{1151} Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper videos
\textsuperscript{1152} Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper videos
c. His evidence was that the group of strikers were at the edge of the dry dam and looked as though they were moving as a large group to the west. He was unaware that Capt Kidd’s TRT members were on the ground in the direction to which the strikers were moving\textsuperscript{1153}. He confirmed that from the air he could see that the group of strikers who were moving were running away from the water cannon spray that had pushed them from the east to west of the Koppie \textsuperscript{1154}. He saw the group “\textit{break through}” to the dry dam, but then they ran straight back into the bushes\textsuperscript{1155}. Only then did he notice the two bodies of Mr. Mkhonjwa and the man in the red Arsenal t-shirt\textsuperscript{1156};

d. At 16:09:17, he started to announce to the JOC that there were “\textit{two bodies}” at the back of the second Koppie\textsuperscript{1157}.

2.4.6 Consistent with the evidence of Cst Pelaelo, Papa 9 is visible stopping immediately adjacent to the scene of the shooting at 16:08:58\textsuperscript{1158}. Accordingly, it seems likely that the shooting took place at some stage between 16:08:42 and 16:08:58.

2.4.7 Noting the inconsistencies (and dishonesty) within and between the statements, the SAHRC submits that the weight of the witness evidence points to the fact that Mr. Mkhongwa did not burst out of the Koppie alone. Instead, he appears to have been a part of a crowd of people who did so and was shot alongside the man in the red Arsenal shirt.

2.4.8 Taken together, the SAHRC submits that the evidence suggests the following:

\textsuperscript{1153} Transcript Day 211, p.26039
\textsuperscript{1154} Transcript Day 211, pp 26042 - 26043
\textsuperscript{1155} Transcript Day 211, p.26040 and p.26065
\textsuperscript{1156} Transcript Day 211, p.26042, pp 26046 - 26048 and pp 26051 - 26052
\textsuperscript{1157} Exhibit OOO11: Transcript of Exhibit CC22 – Protea Coin Chopper videos
\textsuperscript{1158} Exhibit CC22 at 11:28
a. Both the JHB and NW water cannons were spraying Koppie 3 from the north and from the south, moving in a westerly direction. The intention of that spray was to drive the strikers out of the Koppie to the west. As Mr. de Rover acknowledged, that was “the intended pathway out of the Koppie”\textsuperscript{1159};

b. However, Capt Kidd’s TRT had approached the Koppie from the west, without instruction and contrary to order from Brig Fritz, and failed to announce their arrival at the Koppie over the radio or otherwise;

c. Capt Kidd’s TRT members were unaware that the water cannons were seeking to drive the strikers in a westerly direction, partly because Capt Kidd had not paid attention during the briefing on what the water cannons were supposed to do during the operation\textsuperscript{1160}. Consequently, the TRT were not expecting the strikers to be driven in their direction;

d. At around 16:08:42 a large group of strikers were gathered in the Koppie near the eastern edge of the dry dam, and were being sprayed by the NW water cannon. They broke out towards the west. Shots were fired by the TRT members, killing Mr. Mkhongwa and injuring the man in the red Arsenal shirt.

2.4.9 Accordingly, the SAHRC submits that there are significant doubts in respect of the SAPS case on the killing of Mr. Mkhongwa. The only member who potentially provides a justification for the killing of Mr. Mkhonjwa is Cst Letswalo. His statement claims he shot the man in the white shirt when he was seven metres away. The ballistics shows he was more than 20 metres away. His statement fails to mention that Mr. Mkhonjwa was part of a crowd

\textsuperscript{1159} Transcript Day 286, p.37157
\textsuperscript{1160} Transcript Day 233, pp 29080 – 29085, per Capt Kidd
who broke out of the Koppie, a fact clearly evidenced by Lt Col Vermaak, but also by the evidence of those members who were with Cst Letswalo. And fundamentally, the statements provided by Cst Letswalo fail to identify any act by Mr. Mkhongwa that indicated any imminent threat, other than the fact he ran out of the Koppie carrying a spear. On the basis of the objective evidence that is unsurprising, given that he was part of a crowd running away from the spray of the water cannons.

2.4.10 It is not for the SAHRC to prove that Mr. Mkhongwa’s killing was unjustified. It is for the SAPS to prove it was justified. And on the basis of the evidence submitted, we submit that that remains entirely unclear. Accordingly, the SAPS are left with only one body for whom a *prima facie* justification has been provided.

*Section 2.5: The justification provided by the SAPS for the killing of Mr. Mpumza (Body C) is questionable*

2.5.1 In deference to those parties who have engaged closely with the evidence in relation to the death of Mr. Mpumza, the SAHRC does not make submissions on the circumstances of his death. Suffice to say that the SAPS account suffers from significant contradictions. Nonetheless, the SAHRC accepts that – on a *prima facie* basis – the SAPS have at least sought to provide a justification for his death and have provided witness evidence from Cst Sebatjane and Cst Mabe.

*Section 2.6: Conclusions*

2.6.1 It is not the Commission’s role to second-guess the SAPS case or to provide it with the benefit of the doubt. The law requires the SAPS to justify any deaths they cause: otherwise, that death is unlawful. The simple point is that the SAPS killed 17 people at Scene 2. The onus is on the SAPS to provide a justification for those 17 deaths. On the most favourable interpretation of
the SAPS case, they have provided arguable justifications for only two of those 17 deaths: the deaths of Mr. Mkhongwa and Mr. Mpumza. However, even in respect of both of those deaths, significant doubts remain as to their justification.

2.6.2 Let us not understate the significance of that fact. If the Commission is to take the SAPS case at its very highest it could not find that any more than two of 17 deaths were justified. In circumstances where the National Commissioner has refused to acknowledge that mistakes were made at Marikana and where Capt Kidd says that the TRT would do nothing differently in future, that is an astonishing conclusion.

2.6.3 In respect of the 15 deaths for which no defensible justification has been evidenced, the SAPS case at its highest is that they are all ‘unexplained’ or the result of ‘incidental’ or ‘reckless’ fire. And that conclusion ignores the evidence of intentional unlawful killing of strikers by SAPS members.
SECTION 3: EVIDENCE OF INTENTIONALLY UNLAWFUL KILLING BY SAPS MEMBERS

3.1.1 Forty strikers who were injured and / or arrested on 16 August allege that strikers were shot by police while surrendering or injured at Scene 2. A list of those statements is provided in Annexure G. The Commission is urged to read every one of those statements. Although this has been an inquiry which has focused predominantly on the evidence of police, the evidence of those who were shot or arrested is vital and must not be dismissed without good reason. When 40 of those injured and / or arrested make the same or similar allegations in statements taken at or shortly after the time, and in circumstances where many were seriously ill as a result of gunshot wounds, is it really credible that all 40 colluded to produce a false account? The SAHRC submits not.

3.1.2 Mr. Mtshamba gave oral evidence on the horror he witnessed at Scene 21161 and the SAHRC submits that he was a credible witness. If the Commission is to reject his evidence, it cannot be on the basis simply that he did not remember exactly the position and number of wounds of those whom he saw shot. His evidence was clear: he witnessed at least three strikers shot multiple times while surrendering at Scene 21162. And his evidence is supported – in similar terms – by 40 others.

3.1.3 Importantly, it is not just the injured and arrested who allege that there were deliberate and unlawful killings at Scene 2. Whoever the Commission chooses to believe, both Sgt Myburgh1163 and W/O Swarts1164 provided evidence suggesting that there was an unlawful killing of an injured striker at Scene 2.

1161 Transcript Day 275, pp 35138 - 35143
1162 Exhibit MMM50, paras 26 – 28
1163 Exhibit FFF7: Statement of Sgt Myburgh
1164 Exhibit LLL14: Statement of W/O Swarts
3.1.4 The SAHRC regrets the fact that neither Sgt Myburgh nor W/O Swarts were called to give evidence: it is difficult to comprehend on what basis their evidence of potential murder was not considered a priority by the Commission in circumstances where 40 of the injured and arrested had made similar allegations.

3.1.5 Nonetheless, the short point is that the Commission has in its possession evidence from both the injured and arrested and from the SAPS itself that strongly suggests that there were unlawful and deliberate shootings of injured or surrendering strikers at Scene 2. Exactly who were the victims of these unlawful shootings will never be clear. But that should not prevent the Commission from concluding that, on the balance of probabilities – or on the basis of a reasonable suspicion - at least some of those who died were shot unlawfully while surrendering or injured.
SECTION 4: IS THERE A PRIMA FACIE CASE TO RECOMMEND PROSECUTION AGAINST INDIVIDUAL SHOTISTS?

4.1.1 As set out in Parts Two and Three above, the decision on whether there is a prima facie case to recommend prosecution against any individuals under paragraph 1.5 of the Terms of Reference lies with the Commission alone. But a fundamental problem with the Commission’s task in considering the justifiability and proportionality of shots fired at Scene 2 is the same problem the Commission faces in respect of much of the evidence relating to the week of 9 – 16 August: the statements provided by SAPS members are woefully lacking in detail and prevent any proper understanding of the circumstances in which lethal force was used. There are 15 bodies for whom there are no clearly corresponding statements explaining the circumstances of the deaths. But there are the following further problems with the SAPS statements in relation to Scene 2.

4.1.2 First, there is the obvious problem of the multitude of statements alleging that strikers were firing live ammunition at SAPS members. For the reasons set out above at Part 12, section 1, it is unlikely that any shots were fired by strikers towards the SAPS at Scene 2. But even if some shots were fired by strikers, it is impossible to reconcile the sheer number of statements alleging live ammunition fire from strikers with the complete absence of any 9mm cartridges linked to strikers’ firearms. On the most favorable interpretation for the SAPS, many of its members must have mistakenly believed they were facing live ammunition fire from strikers, when in fact they were facing live ammunition fire from fellow SAPS members.

4.1.3 Lt Col Modiba’s evidence was revealing. He accepted that his written evidence was wrong to state that shots were “fired from the group” because he conceded that, while he definitely heard the firing of live

1165 Exhibit ZZZ2.2, para.7
ammunition, it was not clearly coming from any particular striker\textsuperscript{1166}. The SAHRC submits that many of the shotists are likely to have conceded the same point had they been called to give evidence.

4.1.4 That raises a very serious clear question in relation to the steps taken by SAPS members to identify the threat that faced them. Mr. de Rover’s evidence was that SAPS firearms training does not include judgment training, which trains members to differentiate between threats and non-threats\textsuperscript{1167}. The SAHRC submits that the absence of such training may have played itself out at Scene 2, where SAPS members fired their weapons in response to fear, rather than in response to identified threats. That may be understandable on a human level, but it remains unlawful.

4.1.5 Secondly, there are many examples of members who claim to have responded to a firearms threat, but failed to identify any specific individual who was carrying the firearm. Statements by K9 members, in particular, confirm the absence of any identified target at the time when the member fired live ammunition. For example:

a. **Cst Molangoanyane** (K9), who discharged 12 x 9mm rounds at Scene 2, states as follows\textsuperscript{1168}:

“As we got close +/- 60 metres from a hill, I heard a gun shot from a hill, it was right in front of me. I then got down and alerted my colleagues that green bush in front of me that’s where gunshot comes. I started to use my pistol shooting in that bush, other TRT members also shot in that bush.”

\textsuperscript{1166} Transcript Day 244, pp 30842 - 30849

\textsuperscript{1167} Transcript Day 286, pp 37135 - 37136

\textsuperscript{1168} Exhibit MMM6: Statement of Cst Molangoanyane, p.1. Subsequent Statements do not qualify or add to the circumstances of fire
The SAHRC submits that this statement suggests a reckless disregard for the right to life because:

i. He states that he ‘heard’ a gunshot from in front of him;

ii. He did not identify any person holding a firearm but appears to have assumed that he was behind a bush; and

iii. He fired at the bush, reckless to the possibility that there may be innocent strikers behind the bush.

b. Cst Mutsi (K9), who discharged 18 x R5 rounds at Scene 2, states as follows\(^\text{1169}\):

“At that stage, they then fired shots from the bush where they entered and shots were fired in our direction and I couldn’t take cover cos it was just an open space then I shot rounds to the direction where the shots were coming from with an R5 rifle on kneeling position. I then saw TRT members on my left hand side shooting to the bush trying to retreat as they indicated that there are peoples shooting at them from the bush I then decided to shoot to give cover to TRT members cos it was difficult for them to shoot going backwards and I shot till they took cover with the police bakkie. I am declaring that I am not sure as to how many people did I shoot...”

The SAHRC submits that this statement suggests a similarly reckless disregard for the right to life because:

\(^{1169}\) Exhibit MMM7, paras 8 – 10. His initial and subsequent Statements do not qualify or add to this Statement
i. Even if he reasonably believed he was taking fire from the strikers, he failed to identify any particular individual holding a firearm. He simply shot “in the direction where the shots were coming”, which appears to have been into a bush;

ii. Further, he continued to fire live rounds in that direction not because he identified a specific and imminent threat to life but because he decided “to give cover to TRT members cos it was difficult for them to shoot going backwards”; and

iii. He fired in the direction from where he believed shots to have come, reckless to the possibility that there may be innocent strikers hiding within the bushes in the same direction.

c. Cst Dintwe (K9), who fired 4 x 9mm rounds at Scene 2, states as follows:

“+/- 30 metres towards second small Koppie a fired shot was fired at us by miners hiding behind the rocks and trees. Quickly took cover with Potchefstroom Flying Squad bakkie. W/O Mentesh of Phokeng K9 whose dog got loose as he tried to catch it. Then [indecipherable] heard another shots fired from where the miners had hidden. As I was nearby projectiles were flying over us and with my 9mm pistol fired four shots to the direction of where shots were aimed at us”.

The SAHRC submits that this statement also suggests a reckless disregard for the right to life because:

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1170 Exhibit MMM17, paras 5 - 6
i. He states that he ‘heard’ shots in front of him and projectiles flying over him;

ii. He did not identify any person holding a firearm; and

iii. He fired “in the direction of where the shots were aimed at us”, reckless to the possibility that there may be innocent strikers in that direction.

d. Cst Kwele (K9), who fired 3 x 9mm rounds at Scene 2, states as follows:\textsuperscript{1171}:

“At the time I approach that Koppie, because it was rocky and lots of bushes, the group of people came out and in the bushes. They wanted to attack us, and they were having pangas, assegai and spears. Immediately they shoot at us with pistols (fire arms) and I heard (bullet) projectiles flying. I moved backwards and they continue shooting I went down (or lie down) on my stomach. I then take out my fire-arm and fired 3 x times to their direction in the bush. I was crawling to take cover at the back of the bakkie. These people they were almost +/- 40m from us. I don’t know whether I hit them, as I was crawling to take cover.”

The SAHRC submits that this statement too suggests a reckless disregard for the right to life because:

i. If he did identify any person holding a firearm, he treated the strikers as a collective mob;

\textsuperscript{1171} Exhibit MMM16, pp 1 – 2. His initial Statement does not add to or qualify the circumstances of using lethal force
ii. He fired in “their direction”, rather than aiming at the specific firearms threat, and apparently without looking where he was shooting because he was crawling to take cover; and

iii. He was reckless to the possibility that some of the strikers near the perceived shotist might have been innocent bystanders and/or that by not looking where he was shooting, he might miss his intended target and injure or kill another.

4.1.6 To understand the circumstances in which these K9 members were firing their weapons, pages 4 - 6 of Exhibit MMM45 provides a clear picture. The K9 were approaching from the south, firing rounds towards the ‘killing zone’ where a large crowd of strikers had gathered. Reckless fire in these circumstances may well have been lethal. The Commission will need to consider in respect of these – and all – shotists at Scene 2, whether the evidence justifies a recommendation for prosecution by the NPA.

4.1.7 Thirdly, there is clear dishonesty in many accounts. Two examples were provided above in respect of the location of fire for Cst Ngwaleni and Lt Ndlela1172. To those examples could be added the initial statement of Gen Naidoo, who initially claimed to have fired his weapon while approaching Koppie 31173. His account changed1174 only when ballistics evidence showed a cartridge from his weapon was found on top of the rock on the Koppie1175.

4.1.8 Similarly, there is gross inconsistency in the initial and subsequent statements of many members, for example:

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1172 See Part 12, section 2 above
1173 Exhibit DD, first paragraph of p.6
1174 Exhibit JJJ108, para.76
1175 Exhibit MMM31
a. In his initial statement, **Cst Mentesh** stated: “While I was trying to put [the dog] in police bakkie, shots still fired. I took out my service pistol fired a shot above” 1176.

In his subsequent statement his account of firing live ammunition is completely different1177.

“I spotted a person behind a rock with a pistol in his hand fired towards me and that bullet hit the ground next to me. I pulled out my pistol and fired one shot towards the direction that person was hiding himself”.

b. **W/O Makubela’s** first statement states that he fired shots at people at scene 2 and one fell down as a result1178. In his subsequent statement says that he only fired warning shots into the ground at scene 21179.

c. In **Cst Mlombo’s** initial statement, there is gross inconsistency in the meaning of the words as initially written, and as re-written1180. The handwritten version of his initial statement contains a crossed-out section that reads: “We could not clearly see who was firing the shots since they were taking cover with big stones on the hill”. That sentence is replaced by “We could not clearly see who was firing the shots since they were charging at us in big numbers”. The wording in his second attempt reflects the SAPS case; the wording in his first attempt does not.

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1176 Exhibit ZZZ3.310, Statement of Cst Mentesh  
1177 Exhibit ZZZZ3.10: Additional Statement: Statement of Cst Mentesh  
1178 Exhibit ZZZZ3.228: Statement of W/O Makubela  
1179 Exhibit ZZZZ3.228: Additional Statement of W/O Makubela  
1180 Exhibit ZZZZ3.324: Statement of Cst Mlombo
4.1.9 The SAHRC sets out these examples to illustrate that the Commission will need to form its own view on the credibility of some statements made by shotists. It cannot be assumed that honest accounts have been given and where there is evidence of clear dishonesty, the Commission may need to consider reference for prosecution on this basis alone.

4.1.10 The examples of the problems within the statements are set out above as an *introduction* for the Commission, *not* as a conclusion. It is ultimately for the Commission to reach conclusions on whether “all and any force” used by the SAPS on 16 August 2012 was justified in the circumstances. The Commission must engage with *all* of the statements of shotists in order to reach its own conclusions on whether force was justified and to decide upon references for prosecution by the NPA. The SAHRC has set out in Part 4, section 3 and Part 10, section 8 the approach that needs to be adopted in reviewing those statements.
PART THIRTEEN:

MEDICAL ATTENTION AND MANAGEMENT OF THE CRIME SCENE
SECTION 1: FAILURE TO PROVIDE TIMELY MEDICAL ATTENTION TO THE INJURED VICTIMS AT SCENE 1

1.1.1 It is not in dispute that there was almost an hour’s delay between the volley of live ammunition at Scene 1 and the arrival of medical attention to the wounded. The volley commenced at 15:53:50. The first ambulances were filmed by ETV arriving at Scene 1 at 16:51\textsuperscript{1181}. During the 58 minutes between the shooting and the arrival of the medics, no members of the SAPS provided any first aid care to the injured, and footage of the scene during that 58 minute period shows SAPS members standing around the bodies chatting and, at times, laughing\textsuperscript{1182}.

1.1.2 It is impossible to be sure how many people were wounded and waiting for medical attention during that time, but photographs in the immediate aftermath suggest around 30 were rendered incapacitated, of which 17 died.

1.1.3 Of the 17 who died, the medico-legal opinion of Prof Boffard is that three deaths were potentially preventable: Mr. Sompeta, Mr. Ledingwane, and Mr. Mdze. Of those three, Prof Boffard’s view is that\textsuperscript{1183}:

   a. Mr. Ledingwane is unlikely to have survived even with early medical care;

   b. Mr. Sompeta is likely to have survived with early medical attention provided he was taken to a hospital capable of performing a laparotomy to stop his bleeding; and

   c. Mr. Mdze is likely to have survived with early medical attention. Indeed, his life is likely to have been saved with the application of a

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\textsuperscript{1181} Exhibit KKK55: ETV footage
\textsuperscript{1182} Exhibit KKK55: ETV footage
\textsuperscript{1183} Exhibit MMM10: Medico legal Report by Prof K.D Boffard
simple tourniquet as he exsanguinated from a wound in his upper arm.

1.1.4 The SAHRC submits that the failure of the SAPS to ensure that medical treatment was provided at an early stage is very likely to have been a direct cause of Mr. Mdze’s death, and may have been a direct cause of Mr. Sompeta’s death.

1.1.5 Further, the failure of the SAPS to provide medical attention or even simple first aid to those who died meant that those individuals who were not killed immediately were denied a dignified death. Footage in the aftermath of the shooting shows a number of individuals struggling for breath and clearly in immense pain as they died\footnote{Exhibit KKK55: ETV footage; Exhibits JJJ194.23 – JJJ194.55: Al Jazeera footage}. To leave them to die in this manner was, in our submission, also a breach of their right to human dignity, protected by section 10 of the Constitution.
SECTION 2: WHO IS CULPABLE FOR THE FAILURE TO PROVIDE TIMELY MEDICAL ATTENTION?

Section 2.1: Responsibility of Maj Gen Naidoo

2.1.1 In Wasilewska & Kalucka v Poland\textsuperscript{1185}, the European Court of Human Rights found that a failure to provide adequate medical attention to those injured in a police operation may amount to a breach of the right to life. We submit that the same principles apply to the Constitutional right to life.

2.1.2 Responsibility for the failure to provide timely medical attention rests primarily with the SAPS as a corporate entity. The SAHRC submits that in circumstances where the SAPS anticipates it may need to use higher levels of force, there is an obligation on the SAPS to take steps to provide medical attention to those who are injured in the event that the SAPS need to use force. Accordingly, to the extent that we set out the specific responsibility that rests on Maj Gen Naidoo that is not intended to detract from the overall responsibility that lies with the SAPS.

2.1.3 Paramedics were factored into the SAPS plan and were placed under the control of Maj Gen Naidoo at FHA\textsuperscript{1186}. Almost immediately after the shooting incident at Scene 1, Maj Gen Naidoo received a radio transmission from Lt Col Vermaak seeking the deployment of the medics to the Scene\textsuperscript{1187}. Had Maj Gen Naidoo deployed the medics immediately to the Scene, then it is likely that Mr. Mdze would have lived, and it is possible that Mr Sompeta would also have lived.

2.1.4 Maj Gen Naidoo’s explanation for his failure to take medics to the Scene is as follows. He claims that he was unaware of the route from FHA1 to Scene 1

\textsuperscript{1185} Application Nos. 28975/04 and 33406/04, (23 February 2010)
\textsuperscript{1186} Exhibit L: SAPS Presentation slide 142
\textsuperscript{1187} Exhibit JJJ108: Consolidated Affidavit of Maj Gen Naidoo, para.60
because he had never been down the road between FHA1 and the power station before. He relied on his driver, Lt Col Tongwane to lead the convoy to Scene 1, but they ended up getting lost. As they drove around the south west of the main power station, they heard gunshots at Koppie. He therefore ordered the medics to hold back so he could assist with eliminating the firearms threat at Koppie. He moved forward to Koppie with some K9 members and ended up getting dragged into what he perceived to be a firefight at Scene 2.

2.1.5 The SAHRC submits that his account is false. In judging his evidence, the Commission is reminded that Maj Gen Naidoo has already been shown to have provided false evidence on a number of other matters, including in relation to where he fired rounds at Scene 2. We submit that Maj Gen Naidoo led his convoy away from FHA1 not to provide medical assistance to the injured at Scene 1 but to assist in the dispersion action to the west. That is why his convoy moved directly to Koppie 3. We set out below the reasons in support of that submission. The Commission is also referred to the SAHRC’s presentations in Exhibits MMM41, MMM42, MMM43 and MMM44, as well as the SAHRC presentation on the movement of Maj Gen Naidoo between 15:19:23 – 15:38:50.

2.1.6 First, it is clear that Maj Gen Naidoo’s evidence that he had never driven down the road between FHA1 and the power station was false. His AVL records show that he had driven along that road less than 20 minutes before

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1188 Transcript Day 190, pp 23095 - 23100, per Maj Gen Naidoo
1189 Transcript Day 190, p.23116
1190 Transcript Day 189, p.22913
1191 Transcript Day 190, pp 23135 - 23139
1192 Transcript Day 191, p.23250 and Transcript Day 197, p.24168
1193 See above at Part 12, section 4
1194 SAHRC Presentation on the movement of Maj Gen Naidoo between 15:19:23 and 15:38:50
Not exhibited, but attached as Annexure C

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the shooting incident at Scene 1\textsuperscript{1195}. Further, contrary to his evidence that he had never been to IRA1, it is clear that he had been at IRA1 less than 30 minutes before the shooting incident at Scene 1, and had stopped to speak to Lt Col Classen who was stationed there. Lt Col Classen had asked Maj Gen Naidoo the directions to the staging area, and Maj Gen Naidoo had provided them to him (and he had not told Lt Col Classen to drive around the west of the power station)\textsuperscript{1196}.

2.1.7 Secondly, his evidence suffered from a fatal inconsistency. In his statement and in evidence in chief he confirmed that the reason for driving around the western side of the power station was because his group had soft skinned sedans and bakkies so he had to use that road\textsuperscript{1197}. In cross-examination, he claimed it was because they had taken a wrong turn. When this inconsistency was put to him, he had no satisfactory answer\textsuperscript{1198}.

2.1.8 Thirdly, his claim not to have been aware of the main road crossing the veld towards Scene 1\textsuperscript{1199} is likely to be false, given that – only 20 minutes before the shooting incident at Scene 1 – he had followed immediately behind a convoy of 13 vehicles from IRA1 that had turned down that very road\textsuperscript{1200}.

2.1.9 Fourthly, his claim that he instructed Lt Col Tongwane to lead the medics to Scene 1 is likely to be false in light of Lt Col Tongwane’s explanation of the purpose of the convoy’s movement: “At about 15:30 we formed up a convoy to proceed to the mountain to give a back-up to the other groups which were already at the mountain”\textsuperscript{1201}.

\textsuperscript{1195} SAHRC Presentation on the movement of Maj Gen Naidoo between 15:19:23 and 15:38:50, pp 4 – 5 Not exhibited, but attached as Annexure C
\textsuperscript{1196} Transcript Day 236, pp 29526 - 29529, per Lt Col Classen
\textsuperscript{1197} Exhibit JJJ108: Consolidated Statement of Maj Gen Naidoo para.62; Transcript Day 189, p.22912
\textsuperscript{1198} Transcript Day 197, pp 24140 - 24145
\textsuperscript{1199} Routes 1 and 2 as shown on p.2 of Exhibit MMM43
\textsuperscript{1200} SAHRC Presentation on the movement of Maj Gen Naidoo between 15:19:23 and 15:38:50, p.12 Not exhibited, but attached as Annexure C
\textsuperscript{1201} Exhibit MMM18: Affidavit of Shadrack Tongwane
2.1.10 Fifthly, his claim that the convoy was diverted from its original destination at Scene 1 by the sound of shooting from Koppie 3 is clearly false. We say that for the following reasons:

a. The analysis of the movement of the FHA1 contingent does not support Maj Gen Naidoo’s claims\(^\text{1202}\). In particular:

i. The convoy idled for at least three minutes at the south west corner of the power station, well before any shooting had started at Scene 2, without making any attempt to continue towards Scene 1;

ii. The convoy then idled for a further three minutes at the north west corner of the power station, well before any shooting had started at Scene 2, without making any attempt to continue towards Scene 1;

iii. Maj Gen Naidoo and the K9 members moved forward towards Koppie 3 at exactly the same time as – and in line with – the POP vehicles, which pushed forward to the Koppie. Their respective movement has the appearance of coordination; and

iv. At the time that Maj Gen Naidoo and the K9 vehicles started to move to the Koppie, the NIU members Maj Gen Naidoo claimed to be engaged at Koppie 3 were in fact at the foot of Koppie 2.

b. The analysis of the statements provided by FHA1 members who were part of Maj Gen Naidoo’s convoy show\(^\text{1203}\):

\(^{1202}\) Exhibit MMM44: CALS Analysis: Movement of FHA1 Convey to Koppie 3

\(^{1203}\) Exhibits MMM41.1, MMM41.2, MMM41.3
i. None of the members in the FHA1 contingent mention that they moved from FHA1 with the immediate intention to provide medical attention;

ii. All of the members who say that Maj Gen Naidoo ordered them to move towards Koppie 3 say that this happened before any shots were heard at Koppie 3; and

iii. All of the members who approached Koppie 3 are consistent that the shooting only commenced once they had started to approach Koppie 3. Maj Gen Naidoo’s claims that W/O Breedt and Cst Van Zyl supported his evidence\(^\text{1204}\) are simply wrong. They do not. W/O Breedt explicitly says\(^\text{1205}\) he was walking on foot when he heard shots fired so it is clear he was already approaching Koppie 3 when the shots were fired. Cst Van Zyl refers in his statement\(^\text{1206}\) to hearing shots fired at Scene 1\(^\text{1207}\), and then later he refers to moving towards Koppie 3 and hearing shots fired only after his vehicle got stuck on a rock while driving towards Koppie 3\(^\text{1208}\).

c. Since the submission of Exhibit MMM41.1, Capt Arlow has submitted a statement which states that Maj Gen Naidoo briefed the K9 that they were moving from FHA1 with the intention to sweep the Koppie for firearms. He confirms that shots were fired after they had started to move forward on foot towards the Koppie\(^\text{1209}\).

\(^{1204}\) Transcript Day 198, p.24212
\(^{1205}\) Exhibit FFF15, Annexure A, paras 3 – 4
\(^{1206}\) Exhibit MMM39.39: Statement of Cst Van Zyl
\(^{1207}\) Exhibit MMM39.9, para.3
\(^{1208}\) Exhibit MMM39.9: para.5
\(^{1209}\) Exhibit ZZZZ3.5: Statement of Capt Arlow
2.1.11 Accordingly, there is not a single statement from any member in the FHA1 convoy that supports Maj Gen Naidoo’s version. By contrast, many of those statements explicitly contradict his version.

2.1.12 The SAHRC submits that Maj Gen Naidoo did receive an instruction to deliver medics to Scene 1 but chose instead to engage in a frolic of his own and take part in the dispersal action at Scene 2. All of the evidence, except Maj Gen Naidoo’s own version, points to this conclusion. We submit that, but for his failure to deliver the medics to Scene 1, Mr. Mdze at least is very likely to have lived.

2.1.13 However, even if the Commission does not accept the SAHRC’s submission and accepts Maj Gen Naidoo’s account to be truthful, he still bears responsibility for his failure to deliver the medics to Scene 1. The simple point is that he was tasked with one thing: to get the medics to Scene 1. He had heard the sound of a volley of live ammunition fire immediately before the call for medical assistance, so whatever he might have said in evidence, it must have been clear to him that there might have been deaths and/or serious injuries. Even if the Commission were to find that it was reasonable for him to divert from his original task to deal with a perceived firearms threat in Koppie 3, Maj Gen Naidoo has provided no adequate explanation for why he did not instruct the medics to get to Scene 1, with another escort, via an alternative route, while he investigated the firearms threat.

2.1.14 Accordingly, the SAHRC submits that – irrespective of his reasons for diverting from the task to deliver medics to Scene 1 – it was negligent for him to divert from that task without ensuring that someone else delivered the medics to Scene 1. His failure to fulfill his tasking and to instead engage in a frolic of his own at Scene 2, led directly to the death of Mr. Mdze, at least. If the Commission accepts either of these alternative submissions, then it will need to consider whether the circumstances merit a reference for prosecution to the NPA.
Section 2.2: Responsibility of TRT and NIU Unit Commanders

2.2.1 The failure of the TRT and NIU commanders at Scene 1 to provide even the most basic first aid to the injured is a matter of grave concern. Of even greater concern, however, was the reasoning for this failure as expressed by Capt Loest. He claimed that SAPS members should be cautious in providing first aid care because it would leave them open to possible legal claims\textsuperscript{1210}. This attitude is not only wrong-headed, but also contrary to SAPS policy on crime scene management\textsuperscript{1211}. It may also have contributed to the death of Mr. Mdze, who lost his life due to the failure of SAPS members to apply a basic tourniquet.

2.2.2 Mr. White’s evidence on this point bears repeating. He said\textsuperscript{1212}:

\textit{“8.1.3 In the PSNI, all officers are trained in basic first-aid. Specialist firearms officers receive additional training in administering first-aid for those with bullet wounds. This is done on the principle that if you provide an officer with a firearm, you increase the likelihood that gunshot injuries might arise, therefore to mitigate this the police should provide those officers with the basic first-aid skills to assist any person that they have been forced to shoot with that firearm. Footage from the recent high-profile murder of a soldier in Woolwich, London is instructive\textsuperscript{1213}. Firearms officers are seen shooting both suspects but, within a matter of seconds, those same officers provide urgent first-aid attention to those suspects and, by doing so, may have saved both of their lives.”}

\textsuperscript{1210} Transcript Day 230, p.28498, per Capt Loest
\textsuperscript{1211} Exhibit MMM49.1: Policy on Crime Scene Management
\textsuperscript{1212} Exhibit JJJ178: Final Statement of Gary White MBE, paras 8.1.3 – 8.1.4
\textsuperscript{1213} http://www.buzzfeed.com/gavon/intense-new-videos-of-woolwich-attackers-being-shot-by-polic
8.1.4 The contrast with the footage from Scene 1 at Marikana is striking. There, 52 officers shot firearms at a crowd of protestors. They proceeded (not unreasonably) to disarm the wounded protestors, but then appear to have left them unattended for nearly an hour before medical attention arrived. It will be a matter for medical experts to deduce whether any of the dead might have been saved with immediate first-aid.

8.1.5 In planning an operation where there is a high likelihood of the use of force, it is a matter of good practice and recognised as in compliance with human rights standards, that adequate first aid arrangements should be factored into the plan. I am told by my legal team that the training records of those who were within the TRT line at Scene 1 show only two have records of any such training. If the training records provided to the SAHRC are complete, and this conclusion is correct, then this is a significant omission and one which, if not addressed, is bound to lead to more avoidable deaths.”

2.2.3 The SAHRC has submitted an analysis of the training records of those who discharged firearms on 16 August 2012. Those records reveal a distinct lack of first aid training for TRT members. However, in respect of NIU members it is understood that first aid is part of basic training. Accordingly, Lt Col Modiba found it difficult to explain away the failure of the NIU to provide any first aid to the wounded at Scene 1.

2.2.4 The SAHRC submits that that failure not only caused the death of Mr. Mdze, but was an affront to the dignity of those who died slow and painful deaths and who could have been made more comfortable through the application of basic first aid.

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1214 Exhibit LLL18: – LLL25: CALS Analysis of Training and Disciplinary Records
1215 Transcript Day 242, p.30560, per Lt Col Modiba
1216 Transcript Day 242, pp 30562 - 30566
SECTION 3: FAILURE TO PROPERLY MANAGE THE CRIME SCENE AT SCENE 2

Section 3.1: The failure to manage the crime scene adequately at Scene 2

3.1.1 The SAHRC has not engaged closely with the evidence of crime scene tampering at Scene 2. Suffice to say that it is clear that the SAPS explanation is inadequate. Adv Chaskalson’s presentation including the ‘spinning-top firearm’\(^{1217}\) is sufficient to indicate that there appears to have been a deliberate attempt to plant weapons on victims rather than simply an attempt to replace weapons from locations from which they were taken. In our submission, this adds to the weight of evidence suggesting the absence of an accountability culture within the SAPS. However, we leave it to other parties to develop that point.

3.1.2 A further point of concern in relation to the crime scene at Scene 2 is the evidence that many individuals, including those who were seriously injured and possibly already dead had their hands cable-tied behind their backs. Photographs of Mr. Mdizeni show his hands behind his back as though they had been tied, and also show evidence of cable ties next to him. The likely conclusion is that his hands were tied, despite the fact the he was immediately incapacitated after being shot\(^{1218}\). Evidence from the pathologist suggests that Mr. Xalabile also died while his hands were cable-tied behind his back. The report records\(^{1219}\):

“Note: absurdity for person with such injuries, in pain, fully capable of movement and not immediately incapacitated, to adopt such posture – suggests manacling after injury; also suggests that handcuffs were removed prior to photography.”

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\(^{1217}\) Exhibit MMM27  
\(^{1218}\) Exhibit ZZZ5: Naidoo - Steyl Report, Annexure J  
\(^{1219}\) Exhibit ZZZ5: Naidoo - Steyl Report, Annexure J
3.1.3 To the extent that the Commission finds that Mr. Mdizeni and Mr. Xalabile were cable-tied as they died, the SAHRC submits this was a negation of their basic humanity by the SAPS and an affront to their dignity.

3.1.4 Who bears personal responsibility for these acts is unclear. What is absolutely clear is that the SAPS – as a corporate entity – failed to control the crime scene at Scene 2 and permitted inhuman suffering by the victims of SAPS force which amounted to a breach of the Constitutional right to respect for human dignity.
PART FOURTEEN:

CONCLUSIONS
SECTION 1: CONCLUSIONS

1.1.1 In light of the above, the SAHRC submits that the overwhelming weight of the evidence before the Commission supports findings that:

a. The SAPS engaged in a deliberate attempt to mislead the Commission;

b. The SAPS is plagued by a lack of accountability in general as an organisation, and has confirmed its unwillingness to accept responsibility for causing 37 deaths;

c. The SAPS operation of 13 August 2012 involved an unjustified use of force in the circumstances, and created a foreseeable and avoidable situation of conflict, resulting in the deaths of strikers and police officers. As a consequence of inadequate command and control, the operation did not comply with the principle of prevention / precaution and the three deaths caused by the SAPS were consequently unlawful breaches of the right to life;

d. The response by the SAPS to the events of 13 August 2012 was inappropriate in that it escalated the policing operation by deploying heavily armed tactical teams in lead roles, when the situation remained one requiring competent crowd management policing;

e. The decision making, planning, briefing and command of the operation of 16 August failed to meet the most basic standards demanded by the principle of prevention / precaution and created a situation in which the risk of avoidable deaths and injuries was foreseeable and foreseen. Consequently, all of the deaths of 16 August were an unlawful violation of the right to life;
f. At Scene 1, there was no attack on police. To the extent that some members may have had a reasonable belief of an imminent attack, others did not. In any case, the SAPS response to any perceived threat was grossly disproportionate;

g. At Scene 2, all but two of the deaths were unlawful because they have not been justified by the SAPS. There is continuing uncertainty in respect of the remaining two deaths.

1.1.2 With respect to the issues identified for determination by the Commission in Part Three above, the SAHRC submits as follows in this regard, based on the overwhelming weight of the evidence before the Commission:

a. Were the SAPS sufficiently prepared for the outbreak of violence and disorder at Marikana in August 2012? In particular, were the POP units in the North West adequately trained and resourced?

No

b. Was the immediate response of the SAPS to the outbreak of violence between 9 – 12 August 2012 adequate, and did the SAPS take all reasonable steps during those days to de-escalate the situation?

No

c. Was the spontaneous operation to intercept the crowd on the railway line on 13 August conducted adequately by the police? In particular:

i. Was the order to disarm the strikers appropriate in the circumstances?

No
ii. Was the command and / or briefing of the operation adequate?

No

iii. Was use of tear gas and stun grenades by the SAPS authorized and justified in the circumstances?

It was clearly not justified. Whether it was authorized is a matter which remains unclear.

iv. On the balance of probabilities, was the attack on the police by the strikers pre-mediated, or was it a spontaneous response to the use of force by police?

Spontaneous

v. Is there sufficient evidence to conclude, on the balance of probabilities, that each live round fired by SAPS officers was fired (a) in justifiable self-defence; and (b) responsibly:

No

1. If not, which shotists, rounds, and / or victims cause particular concern?

The majority of shotists have failed to establish a case of self and private defence in respect of each and every round fired. The Commission will need to review for itself all statements by shotists, before reaching a conclusion in respect of each.
2. Is there a prima facie case to recommend prosecution against particular shotists or others?

This is a matter for the Commission to determine after a review of all the evidence, but there are significant concerns in relation to a number of shotists which merit careful consideration by the Commission.

d. After the events of 13 August, was the command of the operation entrusted to the appropriate officers?

No. Neither the command nor the planning of the operation was entrusted to a POP commander as required by SO.262, and those both planning and in command of the operation were untrained in public order policing.

e. After the events of 13 August, were adequate steps taken to ensure that those who were involved in the incident of 13 August were fit and capable of continuing to perform their duties?

No

f. After the events of 13 August, was the SAPS operation at Marikana subject to undue political influence? If so, to what extent did that undue political influence affect the course of the operation at Marikana?

There is evidence of political involvement in the decision-making at Marikana and there is evidence suggesting that improper political considerations may have influenced the policing decisions. However, the extent to which this political influence affected the course of the operation is unclear. It is a reasonable inference from all the
evidence that political pressure contributed to the poor decision-making that resulted in the decision of the extraordinary session of the NMF and its operational consequences.

g. After the events of 13 August, did the SAPS leadership and / or command take all reasonable steps to oversee and plan the operation in a way that ensured that the risk of the need to use lethal force was minimized? If not, to what extent can the outcome of the operation on 16 August be attributed to failures of the SAPS leadership and / or command in overseeing and planning the operation?

No. The catastrophic and failed outcome of the operation of 16 August 2012 is directly attributable to the failures of the SAPS leadership in their decision-making, planning and briefing, as well as the collapse in command and control by the operational commanders.

h. Was the decision to move to a tactical option on 16 August justified in the circumstances? Was that decision consistent with the SO.262 imperative to “avoid the use of force at all costs” and was it calculated to minimize the risk of the need to use lethal force?

No on all three scores. It was a decision that carried unnecessarily high – foreseeable and foreseen – risks of avoidable death and injury.

i. Was the SAPS briefing of the operation of 16 August adequate? In particular, was the briefing sufficiently clear to ensure that the plan was fully understood by those members who were to implement the plan?
No. And this inadequate briefing resulted in proven confusion and demonstrable misunderstanding of the plan from operational and unit commanders, contributing to the failure of the operation overall.

j. What, as a matter of fact, took place on or near the Koppie between 15:42:00 and 15:55:30. In particular:

i. Did the lead group of strikers make several attacks on police lines before rounding the kraal, as alleged by the SAPS?

No

ii. Were water cannon, tear gas and stun grenades used to repel these attempts, as alleged by the SAPS? If not, when were these less-lethal methods utilized by the SAPS?

No. Water cannon was not used until 10 seconds before the TRT volley, and it was never used against the lead striker group. Tear gas was not used until 10 seconds before the TRT volley, and all tear gas was discharged behind the lead striker group. Stun grenades were not used until 20 seconds before the TRT volley, and all stun grenades were discharged behind or above the lead striker group. These less-than-lethal measures were both used inappropriately against the lead group of strikers, in fact driving them forward towards the TRT line.

iii. Was less-lethal force ‘ineffective’ against the advancing strikers, as claimed by the SAPS?

No
iv. Did the arrangement of SAPS resources, and the use of less-lethal force have the effect of channeling strikers towards the TRT line?

**Yes**

v. Does the evidence suggest, on the balance of probabilities, that the lead group of strikers moved off the Koppie with an intent to attack police?

**No**

1. If not, did some or all members of the lead group develop such an intent at some stage before they rounded the kraal?

   **There is no evidence before the Commission showing this.**

2. If not, did some or all members develop that intent at some stage after they rounded the kraal?

   **There is no evidence before the Commission showing this, save for the video footage of a single striker firing a single shot from a handgun. Moreover, to the extent that only 37 strikers passed the northern corner of the kraal, only 12 proceeded to run towards the TRT line.**

k. Is there sufficient evidence to conclude, on the balance of probabilities, that each live round fired by SAPS officers at Scene 1
was fired a) in a reasonable belief that the officer’s life was in imminent danger, and b) responsibly?

No

i. If not, which shotists, rounds, and / or victims cause particular concern?

The majority of shotists have failed to establish a case of self and private defence in respect of each and every round fired. The Commission will need to review for itself all statements by shotists, before reaching a conclusion in respect of each.

ii. Is there a prima facie case to recommend prosecution against particular shotists?

This is for the Commission to determine following its review of all the evidence before it regarding the conduct of all shotists. However, there are significant concerns that arise from the objective video evidence and the statements of shotists which merit careful consideration by the Commission.

I. Was the SAPS command and control of the operation on 16 August adequate?

No

i. Can blame be attached to those in command of the operation for:

1. A failure to halt the operation after the shootings at Scene 1?
2. The failure to coordinate the various units that surrounded Koppie 3?

3. The decision to engage the strikers in Koppie 3 rather than retreat and negotiate?

4. The failure to call a cease-fire at Scene 2?

5. The failure to manage the crime scene adequately at Scene 2?

6. The failure to ensure medical attention was provided to the injured victims at Scene 1?

Yes to all

ii. To the extent that difficulties with radio communication may have contributed to some of these failures, do these difficulties provide a complete explanation for the SAPS?

No

iii. In relation to those aspects on which blame cannot be attached to the commanders of the operation, are other SAPS members blameworthy for any of these failures?

Yes

iv. To the extent that command and control is found to be inadequate, to what extent did that contribute to the outcome of the operation of 16 August 2012?
The failure of command and control directly led to the 17 deaths and many injuries at Scene 2. The Commission will need to consider whether the evidence as a whole merits recommendations for prosecution in relation to those commanding the operation.

m. Is there sufficient evidence to conclude, on the balance of probabilities, that each live round fired by SAPS officers at Scene 2 was fired a) in a reasonable belief that the officer’s life was in imminent danger, and b) responsibly?

No. In fact, the SAPS have only put forward a defensible explanation for two of the 17 deaths at Scene 2. Even in respect of those deaths there are substantial doubts. Moreover, there is clear witness evidence suggesting reckless gunfire by SAPS members at Scene 2.
PART FIFTEEN:

CONCLUSIONS AND RECOMMENDATIONS
Section 1: Accountability and the Duty to Investigate

1.1.1 As set out in Part Two above, the duty to investigate breaches of the right to life in both domestic and international law requires an investigation that is meaningful, leads to accountability, and combats impunity. The SAHRC submits that, in respect of this Commission, accountability can be achieved only through a combination of measures, including at least:

a. Findings of fact which establish the circumstances in which 44 individuals lost their lives between 9 - 16 August 2012;

b. Findings on the lawfulness of the use of all and any force by the SAPS;

c. Findings on the lawfulness of each death caused by the SAPS;

d. Findings in respect of the individuals or groupings who (independently of any criminal responsibility) bear professional and moral responsibility for the deaths caused by the SAPS;

e. Recommendations on systemic reform of the SAPS;

f. Recommendations on compensation for the victims of the tragedy;

g. References for prosecution and / or further investigation where the Commission determines that a prima facie case for prosecution exists.

1.1.2 In these Heads of Argument, the SAHRC’s primary focus has been on measures (a) – (d). Our submissions have been driven by a human rights approach which requires a police service to plan and command operations in such a way as to minimize to the greatest possible extent the risk of the need to use lethal force. Our core submission is that in respect of the deaths of both 13 and 16 August, the SAPS failed to satisfy this requirement at the
most basic level. Accordingly, we submit that the Commission must find that all 37 deaths were unlawful and amounted to breaches of the constitutionally protected rights to life, human dignity and freedom and security of the person.

Section 2: Recommendations on systemic reform of the SAPS

2.1.1 In respect of measure (e) above, the SAHRC attaches at Annexure B the recommendations of Gary White MBE. We urge the Commission to adopt all of these recommendations, which are fully justified and based on a very careful engagement with the huge body of evidence before the Commission.

2.1.2 Further, we attach at Annexure A the recommendations of the Commissioners of the SAHRC, provided on the basis of the submissions made in Parts One – Fourteen above, and in light of the SAHRC’s constitutional role and long-term engagement in the progressive realization of a human rights culture in South Africa.

2.1.3 We do not repeat all of the content of those Annexures here, but summarise key proposed recommendations for systemic reform of the SAPS:

   a. The SAPS should implement the pre-existing recommendations for reform, contained in the NDP 2030 and in the 2011 policy: “Policy and Guidelines: Policing of Public Protests, Gatherings and Major Events” and its implementation plan;

   b. The SAPS should reform its accountability mechanisms and review its leadership at all levels of the organization;

   c. The SAPS should take specific steps to reform the training of SAPS members. It should introduce a continuing professional development framework to ensure continuous training and take steps to
fundamentally reform its training in human rights, as well as the use of firearms, to ensure a human rights, judgement-based approach to policing;

d. In respect of public order policing, the SAPS should conduct strategic reviews into the planning, briefing and command and control models utilized in major public order operations in order to ensure that their models comply with best practice;

e. The SAPS should conduct a review of all existing Standing Orders and policy to ensure that all are consistent with the human rights framework contained in South African law and in internationally accepted standards; and

f. An Implementation Oversight Body should be set up and mandated to oversee the implementation of recommendations proposed by the Commission and endorsed by the President.
Section 3: Recommendations on compensation

3.1.1 In respect of measure (f) above, the SAHRC sets out in Annexure A its proposed recommendation for the compensation of all victims of the Marikana tragedy. Importantly, the SAHRC urges the Commission to recommend that compensation is paid on the basis of loss not liability. The President should be asked to publish a formula for compensation of all of those who lost family members, all of those who were injured, and all of those who were arrested and allegedly abused by the SAPS in the week of 9 – 16 August 2012.

3.1.2 Further, beyond traditional measures of compensation, recommendations should be made to ensure the provision of psycho-social support to all victims of the Marikana tragedy, and measures should be encouraged to assist in the economic development of the wider community of Marikana.
Section 4: Recommendations for prosecution and / or further investigation

4.1.1 As set out above, recommendations for prosecution and / or further investigation form an important part of the Commission’s role in ensuring accountability and combatting impunity for violations of human rights. It is open to the Commission to make recommendations for both individual and corporate prosecutions. Depending on the Commission’s factual conclusions, and its view on causation, a prima facie case may exist for a wide range of offences, from culpable homicide to offences under sections 9 and 38 of the Occupational Health and Safety Act (No 85 of 1993).¹²²⁰

4.1.2 However, as discussed in Part Three, only the Commission can determine whether a prima facie case for prosecution of any individual or grouping exists, based on all the evidence. Consequently, in the preceding sections of these Heads of Argument, the SAHRC has highlighted evidence that may be relevant to establishing such a prima facie case, but leaves the decision on these matters to the Commission and makes no specific recommendations for the prosecution of named individuals or groupings.

¹²²⁰ In the United Kingdom, after the shooting dead of an innocent man by United Kingdom police (Jean Charles de Menezes), a prosecution for corporate manslaughter was unsuccessful, but a prosecution for a breach of sections 3 and 33 of the Health and Safety at Work Act 1974 was successful
Section 5: Conclusion

5.1.1 The effects of the tragedy of 9 – 16 August 2012 remain for all involved. But the SAHRC trusts that after two years of evidence, the Commission is now in a position to help the healing process by reaching meaningful findings on the events of that week. The Commission has promised “Truth, Restoration, Justice”. We have no doubt that it will fulfill its promise and ensure accountability for the catastrophe that occurred at Marikana.