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## IN THE MARIKANA COMMISSION OF INQUIRY

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### SAPS WRITTEN SUBMISSIONS

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A: **QUO VADIS SOUTH AFRICA – POST MARIKANA**

*“ ... the tragedy that has occurred at Marikana has to be approached as a collective failure, by many role players, many stakeholders. And I don't think that many who had some role to play can say that they do not bear any form of responsibility. I think the responsibility has to be collective and as a nation we should dip our heads and accept that we did fail the people of Marikana, particularly the families and the workers and those who died. We did fail them.”<sup>1</sup>*

*“We are dealing here with the legacy of apartheid and colonialism and largely the legacy of migrant labour system which is deeply embedded in the history of our country which has taken hundreds of years to develop to the level where it is and I still hold the view that*

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<sup>1</sup> Transcript:Day272,p34648,lines6-14 (Deputy President, Mr Ramaphosa)

*collective action needs to be taken to rid our country of this inhumane system of migrant labour".<sup>2</sup>*

1. The Commission offers us a platform to ask very pertinent questions on what factors contributed to the calamitous outcome that was Marikana – the death of forty four (44) persons, injuries to scores of others, intimidation of workers and the wanton damage to property. Important as it must be that the Commission establishes what bullet was responsible for which death; how some persons were hacked to death, it would be of limited value if this process is not used to examine the full picture which produced those tragic outcomes. More importantly, this Commission must help us to establish what corrective measures are needed to help South Africa avert another Marikana in the future.
2. It is instructive to note that the Terms of Reference are not confined only to the events of 13 to 16 August 2012. They require an examination of the conduct of the various role players from the members of the Executive; members of the South African Police Service; trade unions, their officials and members; Lonmin, its officials and the striking employees. All these role players, acting responsibly, must help South Africa avoid public protests resulting in death, injury or damage to property.

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<sup>2</sup> Transcript:Day271,p34478,lines15-22 (Deputy President, Mr Ramaphosa)

3. The place to start is to accept a common understanding of what constitutes acceptable public order discourse for South Africans. It must also be plain to understand what impedes the achievement of peaceful protests. It must be accepted by all that what we want is a South Africa that is able to offer those who want to exercise their constitutional right of assembly, to do so and to do so, within the constraints placed on the exercise of that right by the Constitution and the law.
  
4. There must also be a common understanding of what militates against the attainment of peaceful protests and assemblies. We must agree that the South Africa we do not want is one where public dissent, be of a social, economic, political or labour nature is expressed by groups of persons bearing weapons and bent on conflict and mayhem; that we do not deserve a South Africa that looks with complicit acquiescence at public display of criminal conduct; where industrial disputes which can be resolved through negotiation and dialogue are left to fester until police intervention is inevitable; where capital can, for commercial reasons, ignore its legal obligations designed to ameliorate the working, social and living conditions of employees and hope to subdue disaffection through police intervention; where those who hold political oversight do not take accountability for some of the protests spawned by political grievance; where civil society does not express outrage when law and order is disregarded and where the police are forced to go above the public order tools of law enforcement with resulting deaths and injury to persons; where unions can, with ease abdicate leadership and the responsibility flowing from the wrongful conduct of their members.

5. Capital plays an important role in the economy of the country. With that accepted, the right of capital to participate in the economy must answer to its duty to resolve industrial grievances through negotiation principally. The role of capital in such a democratic discourse is one which appreciates its responsibilities imposed by law. In this case being mining, the responsibility of capital is to conduct its business within the prescripts of the Constitution and the relevant legislation. More importantly, and directly, Lonmin was obliged to comply with its legal obligations set out in the Mining Charter and its Social Labour Plan. The obligations under the Social Labour Plan are intended to ameliorate the living and working conditions of the employees; to restore the dignity of workers eroded by past practices of over-crowded single sex hostels. Further, in an orderly conduct of business, capital, appreciating its leverage in negotiations, must always prefer dialogue as a tool for resolving industrial conflict.
  
6. The role of labour and its place in the economy is equally important. Our labour legislation provides a healthy framework for the inter-play between labour and capital. It recognises the importance of the constitutional right to fair labour practices, which includes the right of every worker to form and join a trade union; to participate in the activities and programs of a trade union and to strike. The Constitution also entrenches the right of trade unions to organise and to form and join a federation. Within that legal framework, trade unions should be expected to conduct their affairs with mutual tolerance, educate their members on what constitutes responsible conduct in the

expression of an industrial grievance and dissatisfaction about conditions of employment. Trade unions are to promote an environment where employees can freely subscribe to their union of choice and where employees can exercise their right to offer or withdraw their labour without fear of harm. Trade unions should not be able to distance themselves with ease from the consequences which follow upon the conduct of their members. More importantly, where trade unions can reasonably foresee that their members intend to engage in unprotected industrial action with the known possibilities of intimidation of employees who choose not to strike and possibilities of violence producing deaths, injuries and damage to property, there must be consequences if they do not intervene.

7. Peaceful public protest also accepts the constraints placed on the police in their management of public protests and assemblies. The police are the only state agent under the Constitution with the responsibility to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their properties. In discharging this responsibility, the police must do so with strict compliance with the policy mandated by the Constitution; the proper training that they must receive to enable the fulfilment of their responsibilities and there must also be full adherence with the prescripts of the applicable Standing Orders and National Instructions. With respect to public order policing, the law requires crowd management to be done in accordance with the democratic principles of the Constitution and acceptable international standards. In this regard, the use of force in public order operations must be avoided at all costs and members

deployed for the operation must display the highest degree of tolerance. Where the use of force is unavoidable to diffuse public disorder, the law demands that the force used must be proportional. The force must also be discontinued when the goal has been achieved.

8. Public order policing recognises that those who participate in public protest and assemblies are doing so in pursuance of legally permissible conduct. For that reason, the law authorises public order police to use non-lethal methods to diffuse conflict that may arise in such public protests and assemblies. It is notable therefore that the law authorises the police, where other methods prove ineffective or inappropriate, to use firearms and other weapons in the dispersing of persons, if in a gathering or demonstration, any person hinders, obstructs or interferes with persons who participate in a gathering or demonstration, kills or seriously injures, or attempts to kill or seriously injure, or shows a manifest intention of killing or seriously injuring, any person; or destroys or does serious damage to, or attempts to destroy or to do serious damage to, or show a manifest intention of destroying or doing serious damage to, any immovable property or movable property considered to be valuable.<sup>3</sup>
  
9. What then should be the role of Parliament, the Executive, the media, civil society and individuals?

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<sup>3</sup> Regulation of Gatherings Act No 205 of 1993, section 9(2)(d)

10. Parliament has a responsibility to provide a legal framework that enables all stakeholders in public gatherings and demonstrations to achieve the constitutionally protected right of peaceful protest and assembly; the Executive (national, provincial and local) should occupy sufficient proximity to the people to be able to influence the conduct of the public before public disorder is threatened or present.
  
11. The media must be responsible in reporting about incidents of public disorder. Where the conduct of the police warrants a damning verdict, then so must the media report, and conversely, those who participate in public disorder must receive public censure when so warranted. A one-sided account which correctly condemns improper police action but not the unlawful display of weapons and attacks on the authority of the state will yield a society that does not make the type of introspection which should follow, if disastrous outcomes are to be avoided.
  
12. Members of the public must be willing to accept that their protest must occur within the confines of applicable laws and that the exercise of their constitutional rights to assembly and protest are only acceptable when done peacefully and unarmed. Society must discourage and reject even the practice of the carrying of traditional weapons during public protests. There must be a proper place for the education of the public that it is imperative to express outrage at conduct in public protests and assemblies which involve violence and lawlessness. It is the sound confluence, inter-play and balance

of all these factors which will assist us to navigate out of these treacherous situations.

13. The South African Human Rights Commission (SAHRC) has the power to mediate, conciliate or negotiate to resolve any dispute emanating from a violation or threat to any human right.<sup>4</sup> Civil society organisations are also vital instruments that can be used in the education of our communities on what constitutes responsible social or political dissent. Religious institutions and leaders; community organisations and leaders and dispute resolution bodies are other resources that we all can look to in diffusing conflict and strife. The evidence was that the Netherlands would lose one (1) member of the police service dying in the line of duty in a given ten (10) year period. South Africa on the other hand, between the period 2008 and 2013, has lost eight hundred (800) members of the police service who died in the line of duty.<sup>5</sup> This is outrageous and requires correction to place South Africa in line with other democratic and constitutional countries.

14. The Commission also had the benefit of a policing expert's<sup>6</sup> opinion whose observations, we submit, bear relevance to the events at Marikana. He told us that he gave much thought on how to avoid another Marikana. He said he was aware of a number of people who endeavoured to intervene, like Bishop Seoka. His view was that there was actually an opportunity on 14 and 15

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<sup>4</sup> South African Human Right Commission Act No 40, of 2013, Sec14

<sup>5</sup> Transcript:Day286, p37167, line7-11 (Mr De Rover)

<sup>6</sup> Transcript,Day286, p37090,lines17-25; p37091,lines1-15 (Mr De Rover)

August 2012 for institutions like the SAHRC, which has a mandate to act in those typical situations but did not.

15. The Commission needs to look closely at the various factors in the South African context which helped produce the calamity that was Marikana. We need to examine the role of the Executive to see how, acting responsibly and within the limits of the Constitution, it should or should not participate in resolving or removing any stress factors that conduce to unrest, and when unrest manifests, what responsibilities must repose on it to resolve those. We also need to look at whether civil society, properly directed, could be educated to frown upon any and all forms of violence. The role of civic bodies, community organisation and leaders, religious institutions and leaders, can create deadlock breaking mechanisms which may prove important, if we are to avoid what happened in Marikana. There clearly would be socioeconomic factors which conduce to civil disaffection. There must be government programmes, closely monitored, which incrementally address the legacies of our past. A properly manned, trained, experienced and better resourced POP units will therefore be able to do its proper crowd management function which does not result in loss of lives, injury or damage to property. But ultimately, all forms of civil disaffections are to manifest free of any weapons display or violence.
  
16. In the final analysis, we cannot throw the police, with the resource constraints they have, at every incident of social strife. A recommendation that each and every police officer who discharged their firearms in Marikana, together with

those who were in control and command, must face criminal prosecution, holds a dangerous risk. The whole edifice of policing discipline may crumble. It will have a chilling effect and will create the risk that when members of the police service are called upon to attend to a public disorder incident, such as a lawful instruction to disperse, disarm and arrest armed strikers, they will then elect not to, for fear of criminal prosecution. It is more so, when public order police are to contain violent public disorder incidents without the use of teargas or stun grenades which, other parties contend, were the triggers for the violent attack by armed strikers on the police in Marikana.

## **B: THE APPOINTMENT OF THE COMMISSION**

17. On 17 August 2012, and following the tragic events in Marikana during the period 9 to 16 August 2012, the President appointed a Commission of Inquiry (“the Commission”)<sup>7</sup> with the mandate to enquire into, make findings, report on and make recommendations concerning -

17.1. The conduct of Lonmin PLC (“Lonmin”), in particular: (1) whether it exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between Lonmin and its labour force on the one hand and Major Generally among its labour force on the other hand; (2) whether it responded appropriately to the threat and outbreak of violence which occurred at its premises; (3) whether it by act or omission created an environment which was conducive to the creation

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<sup>7</sup> Proclamation No. 50, 2012 published in the Government Gazette No. 35680 of 12 September 2012 - the President was exercising his constitutional powers in terms of section 84(2) (f)

of tension, labour unrest, disunity amongst its employees or other harmful conduct; (4) whether it employed sufficient safeguards and measures to ensure the safety of its employees, property and the prevention of the outbreak of violence between any parties; (5) to examine Major Generally its policy, procedures, practices and conduct relating to its employees and organised labour; and (6) whether by act or omission it directly or indirectly caused loss of life or damage to persons or property.

17.2. The conduct of the South African Police Service, in particular: (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; (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; (3) to examine the role played by SAPS through its respective units, individually and collectively in dealing with this incident; and (4) whether by act or omission it directly or indirectly caused loss of life or harm to persons or property.

17.3. The conduct of the Association of Mineworkers and Construction Union (“AMCU”), its members and officials and in particular: (1) whether it had exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between itself and Lonmin and/or NUM or any other parties; (2) the extent to which it has exercised effective

control over its membership and those persons allied to it in ensuring that their conduct was lawful and did not endanger the lives and property of other persons; and (3) whether by act or omission it directly or indirectly caused loss of life or damage to persons or property.

17.4. The conduct of the National Union of Mineworkers (“NUM”), its members and officials, in particular: (1) whether it had exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between itself and Lonmin and/or AMCU or any other parties; (2) the extent to which it exercised effective control over its membership and those persons allied to it in ensuring that their conduct was lawful and did not endanger the lives and property of other persons; and (3) whether by act or omission it directly or indirectly caused loss of life or damage to persons or property.

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

18. In the discharge of its mandate, the Commission heard fifty six (56) witnesses. Twenty eight (28) of these witnesses were members of the SAPS. In addition, Mr X and Mr Cees De Rover also testified as witnesses called by the SAPS. The hearings spanned a total of 293 days. The Commission also admitted exhibits numbering from exhibit A to exhibit ZZZZ. It also conducted

inspections *in loco*; made rulings: for the two (2) phases in which the Commission was to conduct its investigation; the reversal of that ruling and one relating to the receiving of a witness' evidence *in camera*. The Commission also received representations through seminars; witness statements; and recommendations from the three (3) policing experts who testified.

**C: APPROACH IN THE CONDUCT OF COMMISSIONS**

19. It is important to allude to the principles relating to, the purpose of commissions of inquiry; the procedure applicable to commissions; and the receipt and treatment of evidence in contrast to those of other *fora* such as criminal courts, civil courts and inquests. The value of a commission of inquiry is that it serves as an important tool of government to interrogate matters of vital public interest and importance; it provides the means of arriving at a balance between public and private good; it assists the government to formulate policy; it enables an examination of conflicting expert opinions; it tests the strength of opposition to a project by giving more individuals and groups an opportunity to express their views. Public inquiries provide public authority with a more precise appreciation of the public's requirements and expectations and from a citizens point of view, commissions of inquiry provide an opportunity to participate in the process of decision-making which affects their lives.<sup>8</sup>

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<sup>8</sup> AJ Middleton; Notes on the nature and conduct of commissions of inquiry: South Africa, Comparative and International Law Journal of Southern Africa 1986, vol. 19, p252 *et seq.*

20. In explaining the nature of a commission's function, Van den Heever JA, Chairperson of the Durban Rights Commission, stated "*the proper function of a commission of inquiry is to find the answers to certain questions put (by the State President) in the terms of reference. A Commission is itself responsible for the collection of evidence, for taking statements from witnesses and for testing the accuracy of such evidence by inquisitorial examination – inquisitorial in the Canonical, not the Spanish sense*".<sup>9</sup>
21. It is also stated that the functions of a commission of inquiry are Major Generally not truly judicial, because there are no facts in issue to be decided judicially, therefore rules of evidence may be relaxed.<sup>10</sup> As has often been stated, a commission of inquiry is in fact nothing more than an advisory body to the executive authority.<sup>11</sup> And, as caution will dictate, a commission should not become the "*grey and penumbral arm of criminal justice*".<sup>12</sup>
22. It is also trite that "*a court of law is bound by rules of evidence and the pleadings, but a commission is not. It may inform itself of facts in any way it pleases – by hearsay evidence and newspaper reports or even through submissions or representations on submissions without sworn evidence*".<sup>13</sup>

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<sup>9</sup> Bell vs van Rensburg N.O. 1971 (3) SA 693 (C) 707H

<sup>10</sup>(1982) 45 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 390 at 393/5

<sup>11</sup> State vs Mulder 1980 (1) SA 113 (T) 120F

<sup>12</sup> (1980) 19 New Zealand Law Journal 425, at 424

<sup>13</sup> S v Sparks & Others 1980 (3) SA 952 (T) 961B-C; Bell v Van Rensburg, *supra*, 707A; S v Mulder 1980 (1) SA 113 (T) 121G

**D: LEGAL FRAMEWORK**

**The Constitution**

23. There is number of legal instruments which apply to the issues that arise in this Commission. The first is the Constitution which is the supreme law.<sup>14</sup> Most telling, the Preamble to the Constitution states that, through our freely elected representatives, we adopt the Constitution so as to, *inter alia*, heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundation of a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.
24. Entrenched in the Bill of Rights is the right of everyone to human dignity which is inherent in all of us and to have that dignity respected and protected.<sup>15</sup> Also protected under the Constitution is the right and freedom of everyone to security of the person which includes the right to be free from all forms of violence from either public or private sources.<sup>16</sup>
25. Everyone under the Constitution has the right to freedom of conscience, religion, thought, belief and opinion.<sup>17</sup> The Constitution also accords everyone the right to freedom of expression which includes, amongst others, freedom to receive and impart ideas which right does not extend to incitement

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<sup>14</sup>Section 1(c)

<sup>15</sup> Section 10

<sup>16</sup> Section 12(1)(c)

<sup>17</sup> Section 15

of violence or advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.<sup>18</sup>

26. Central to the issues which the Commission is required to address is the right of everyone to assemble and to do so peacefully and unarmed.<sup>19</sup> Of peripheral relevance in understanding the constitutional right of assembly, there are other constitutional rights that are implicated, the constitutional right to freedom of movement where this may be constrained by a migrant labour system; the constitutional right to fair labour practices<sup>20</sup> and the right to have access to adequate housing<sup>21</sup> and health care services<sup>22</sup>.
27. The Constitution prescribes that national legislation enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.<sup>23</sup> The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.<sup>24</sup> The responsibility to determine national policing policy is a constitutional responsibility of a member of the cabinet responsible for policing. She discharges this function after consulting the provincial government and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.<sup>25</sup>

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<sup>18</sup> Section 16

<sup>19</sup> Section 17

<sup>20</sup> Section 23

<sup>21</sup> Section 26

<sup>22</sup> Section 27

<sup>23</sup> Section 205(2)

<sup>24</sup> Section 205(3)

<sup>25</sup> Section 206

28. The Constitution provides that the National Commissioner, appointed by the President, has the responsibility to control and manage the police service. In doing so, she must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.<sup>26</sup> These powers are echoed in section 11 of the South African Police Service Act.<sup>27</sup>
29. The Constitution confers on the SAHRC a duty to promote respect for human rights and a culture of human rights and such powers as are regulated by national legislation.<sup>28</sup> In this regard, the SAHRC may mediate, conciliate or negotiate, to resolve any disputes or rectify any act or omission emanating from or constituting a violation of or threat to any human right.<sup>29</sup>

### **The South African Police Service Act<sup>30</sup>**

30. Section 11 of the Act sets out the powers of the National Commissioner.
31. Section 12 provides that a Provincial Commissioner shall have command and control over the Service.
32. The Act also imposes a duty on members of the police service to obey orders of their superiors or a person competent to issue such order unless the order or instruction is patently unlawful.<sup>31</sup>

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<sup>26</sup> Section 207(1) read with sub-section(4)

<sup>27</sup> No 68 of 1995

<sup>28</sup> Section 184(1)(a) and 184(2)

<sup>29</sup> Act No. 40 of 2013,Section 14

<sup>29</sup> Section 47(1)

33. In addition to the statutory prescripts that regulate matters of policing, there are a plethora of standing orders and national instructions and other instruments which inform the proper exercise of police power.

### **The Dangerous Weapons Act<sup>32</sup>**

34. Section 2(1) of the Dangerous Weapons Act provides that it is an offence to carry a dangerous weapon, unless the possessor is able to prove that he at no time had any intention of using such weapon or object for any unlawful purpose.

### **The Regulation of Gatherings Act<sup>33</sup>**

35. The Regulation of Gatherings Act is the national legislation passed to give content to the right to assemble and to express views on any matter publicly and to enjoy protection of the state while doing so. Notable, is the constitutional constraint that such right is to be exercised peacefully and with due regard to the right of others.<sup>34</sup> The scheme of the Act is designed to regulate public gatherings. To this end, the Act defines the various role players and their roles<sup>35</sup>; provides for notices of gatherings to be given to a local authority<sup>36</sup>; provides for consultation and negotiations about a planned march<sup>37</sup>; prohibits gatherings which hold a threat of serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other

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<sup>32</sup> Act No. 71 of 1968

<sup>33</sup> Act No. 205 of 1993

<sup>34</sup> Preamble

<sup>35</sup> Section 2

<sup>36</sup> Section 3

<sup>37</sup> Section 4

persons, or extensive damage to property where the police and other traffic officers will not be able to contain such a threat.<sup>38</sup> The Act also deals with the conduct of gatherings and demonstrations and notably states that no participant shall carry a firearm or dangerous weapon<sup>39</sup>; no person present at or participating in a gathering shall perform any act or utter any words which are calculated or likely to cause or encourage violence against any person or group of persons<sup>40</sup>; no person may compel any person to attend, join or participate in a gathering.<sup>41</sup> The Act empowers the police, if there is reason to believe that danger to persons and property, as a result of the gathering or demonstration, cannot be averted if the gathering or demonstration proceeds, to call upon the persons participating in the gathering or demonstration to disperse, and if they do not, to use force to disperse the persons gathered.<sup>42</sup>

36. Most significant are the provisions of section 9(2)(d) which provides

*“(d) If any person who participates in a gathering or demonstration or any person who hinders, obstructs or interferes with persons who participate in a gathering or demonstration-*

*(i) Kills or seriously injures, or attempts to kill or seriously injure, or shows a manifest intention of killing or seriously injuring, any person; or*

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<sup>38</sup> Section 5

<sup>39</sup> Section 8(4)

<sup>40</sup> Chapter 3 of the Regulation on Gatherings Act 205 of 1993

<sup>41</sup> Section 8(10)

<sup>42</sup> Section 9(2)

*(ii) Destroys or does serious damage to, or attempts to destroy or to do serious damage to, or shows a manifest intention of destroying or doing serious damage to, any immovable property or movable property considered to be valuable, such a member of the Police of or above the rank of warrant officer may order the members of the Police under his command to take the necessary steps to prevent the action contemplated in subparagraphs (i) and (ii) and may for that purpose, if he finds other methods to be ineffective or inappropriate, order the use of force, including the use of firearms and other weapons.”*

### **The Mineral and Petroleum Resources Development Act<sup>43</sup>**

37. The Mineral and Petroleum Resources Development Act (“the MPRD”) deals, *inter alia*, with the obligations that rest on the holder of a mining right.<sup>44</sup> Section 25 provides that the holder of a mining right must comply with the requirements of the prescribed social and labour plans<sup>45</sup> and must submit the prescribed annual report detailing the extent of the mining right holder’s compliance with the mining charter and the social and labour plan which addresses, amongst others, the advancement of the social and economic welfare of all South Africans.<sup>46</sup> The mining charter obliges the holder of a mining right to take measures to develop its employees;<sup>47</sup> to develop the the

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<sup>43</sup> Act No.28 of 2002

<sup>44</sup> Rules and Regulations Notices GN 83 of 20 September 2010 Government Gazette No. 33573 published in terms of The Mineral and Petroleum Resources Development Act

<sup>45</sup> Section 25(2)(f)

<sup>46</sup> Mining Charter

<sup>47</sup> Clause 2.5

mine community of which it is a part;<sup>48</sup> to improve the standard of housing and living conditions of mineworkers.<sup>49</sup>

38. Non-compliance with the Housing and Living Conditions Standards of the Mining Charter and the Social and Labour Plan constitutes a breach of the Act and the Minister may, acting in terms of section 47, suspend or withdraw the licence of mining rights.

### **The Labour Relations Act<sup>50</sup>**

39. The Labour Relations Act makes provision for an employer and trade union which enjoys majority membership of the employees employed by an employer in a workplace, or parties to a bargaining council, to conclude a collective agreement establishing thresholds of representativeness in respect of one or more of the organisational rights set out in Sections 12, 13 and 15.<sup>51</sup> The rights in sections 12, 13 and 15 are: trade union access to the work place; deduction of trade union subscriptions or levies and leave for trade union activities respectively. As we show, this provision may be the reason spawning the union rivalry and the intimidation associated with the movement of employees from one trade union to another.

### **The Common Law**

40. The common law comes into play where SAPS members rely on self and private defence. In these proceedings, where evidence is available regarding

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<sup>48</sup> Clause 2.6

<sup>49</sup> Clause 2.7

<sup>50</sup> Act No. 66 of 1995

<sup>51</sup> Act 66 of 1995, section 18

the circumstances under which strikers sustained fatal injuries as a result of police action, the evidence to sustain self or private defence must show that there was an unlawful attack or reasonable grounds for believing that the person is in danger of death or serious injury; the means used in self or private defence were not excessive in relation to the danger; and the means used were the only or the least dangerous means to avoid the danger.<sup>52</sup>

41. Regarding proportionality, our courts have said:

*“Private defence involves a choice between two evils, that is, the harm threatened by an attack upon the interests of a victim or potential victim, on the one hand, and the harm done to some legal interest of the attacker by the victim or would-be victim, in the course of repelling the attack, on the other. In making the choice, the lesser of the two evils must Major Generally be preferred, so that the victim or would-be victim may usually not inflict greater harm than that threatened by the attacker. Where the harm caused by the defence is greater than the harm threatened by the attack, then the defence will not be justified.”<sup>53</sup>*

42. The Courts have, however, also cautioned against “*arm-chair criticism*” in these words:

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<sup>52</sup> *R v Attwood* 1946 AD 331 at 340

<sup>53</sup> *Snyders v Louw* 2009(2) SACR463 (C) para15

*“Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pros and cons. Allowance must be made for the circumstance of their position.”*<sup>54</sup>

43. The Constitutional Court has described self-defence as taking place at the time of the threat to one’s own life; at the moment of the emergency which gave rise to the necessity; and under circumstances in which no less severe alternative is readily available.<sup>55</sup>
44. Ordinarily, putative private defence or putative self-defence is usually advanced as an alternative defence to private defence or self-defence, respectively. In order to establish putative private defence or putative self-defence, each SAPS member who discharged her fire-arm causing the death of another person must show that she honestly believed that her life (or property), or the life of another person, was in danger from the strikers; and as it later turned out her belief was erroneous.
45. Our Courts have articulated the putative private defence principle in these words:

*“In putative private defence it is not lawfulness that is in issue but culpability (“skuld”). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his*

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<sup>54</sup> *Union Government (Minister of Railways and Harbours) v Buur* 1914 AD 237 at 286; *R v Patel* 1959 (3) SA 121 (A) 123D-E

<sup>55</sup> *S v Makwanyane and Another* 1995(3)SA 391(CC) para138

*conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude dolus in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide.”<sup>56</sup>*

**E. ABRIDGED CHRONOLOGY OF EVENTS FROM 9 TO 16 AUGUST 2012**

46. In June 2012 Rock Drill Operators (RDOs) at Karee mine presented a demand to Lonmin for a salary increase to R12 500.00 per month. They informed Lonmin that they did not want to be represented by trade unions in the matter. At the end of July 2012 Lonmin granted the RDOs a monthly allowance and informed them that it would not grant the salary increase they demanded.
47. On 9 August RDOs took a decision to march to the offices of Lonmin on 10 August to present their demand for a salary increase to R12 500.00 per month. On the same day, Lonmin became aware of the decision of the strikers.

**10 August 2012**

48. In the morning employees gathered at Wonderkop stadium and marched to Lonmin Platinum Division (LPD) offices to speak to Lonmin management about their demand for a salary increase. The strikers were informed by Lonmin security that Lonmin management would not speak to them and that

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<sup>56</sup> See footnote 51 *supra* at p472 para 8-19, *S v Pistorius* CC 113 of 2013 unreported

they must present their demand in writing. Members of the SAPS monitored the march and the gathering at the LPD offices.

49. On becoming aware of the march of the strikers, Mr Mokoena contacted Mr Mathunjwa and informed him that employees were on an unprotected strike. Mr Mathunjwa advised Mr Mokoena to convene a meeting of the trade unions- National Union of Mineworkers (NUM), Association of Mine and Construction Workers Union (AMCU) and Solidarity. He also contacted the office of the Premier, North West Province, the office of the Mayor and the SAPS to inquire whether the march of the strikers was authorised.
50. On the same day, Lonmin issued a written warning to employees that they would be dismissed from employment if they did not report for work.
51. POP Rustenburg developed and adopted a Contingency plan to deal with the situation at Lonmin.

### **11 August 2012**

52. A crowd of about three three hundred (300) striking employees marched to the offices of the NUM. Lonmin security advised NUM officials to leave the office before the strikers arrived. Officials of the NUM refused. Armed officials and members of the NUM confronted the crowd of marchers near the offices of NUM. In the ensuing confrontation, two (2) of the marchers were shot and injured by officials and members of NUM.

53. After the confrontation with the officials and members of the NUM, the strikers gathered on the koppie at Wonderkop. On the same day, the strikers underwent rituals on the koppie with an inyanga.
54. By the end of the day, five (5) people were reported injured, at least three (3) of them wounded during the march to the NUM offices.

### **12 August 2012**

55. A crowd of armed strikers marched to the offices of the NUM. The group included people armed with spears, pangas and knobkerries. Lonmin security confronted the crowd to prevent them from reaching the offices of the NUM. The armed strikers attacked the Lonmin security officers and killed Messrs Hassan Fundi and Frans Mabelane, burnt one (1) vehicle and injured other Lonmin security officials.
56. In the afternoon members of SAPS saw about two hundred (200) naked men undergoing a ritual with an inyanga on the koppie.
57. In the afternoon, the SAPS established a Joint Operating Centre (JOC) in Lonmin property under the command of Brigadier Calitz, Head of Operational Response Service, North West.
58. In the evening and after the SAPS established the JOC, armed strikers at K4 shaft attacked Messrs Thapelo Eric Mabebe and Janse Van Vuuren who were

reporting for work. Mr Mabebe died from his injuries. Other employees were also injured. The armed strikers set fire to seven (7) vehicles and damaged others.

### **13 August 2012**

59. Early in the morning, armed strikers killed Mr Julius Langa. Mr Langa was on his way to work at Lonmin.
  
60. Later in the morning, SAPS senior officers (the Provincial Commissioner Lt General Mbombo, Major General Mpembe, Major General Naidoo, Brigadier Calitz, Lt Colonel Merafe and other senior officers) met with members of Lonmin management at Lonmin offices. In the meeting, Lonmin representatives told the SAPS officers that they did not know who the strikers were and that Lonmin had a wage agreement in place and as a result could not entertain the demand of the strikers.
  
61. On the same day, five persons were killed (2 police officers and 3 strikers) and others injured, including one (1) police officer, after Major General Mpembe and about one hundred and eighteen (118) members of the SAPS intercepted about two hundred strikers armed with spears, pangas, butcher knives and knobkerries strikers to disperse and disarm them.
  
62. On the same day, the General Secretary of AMCU, Mr Jeff Mphahlela, and the National Organiser, Mr Dumisani Ngalitsheni, met with managers of Lonmin and with the strikers.

63. In the evening senior officers of the SAPS, including the National Commissioner and Lt General Mbombo, met with managers of Lonmin.

#### **14 August 2012**

64. During the morning on, Lt Colonel Scott, Lt Colonel Merafe and other commanders of POP developed the SAPS operational plan for the period from 14 August 2012.
65. Later in the day, SAPS members saw a group of men on the koppie undergoing rituals.
66. During the day, Mr Isaiah Twala was killed on the koppie by persons among the strikers gathered on the koppie.
67. During the afternoon, a team of SAPS negotiators went to the koppie where they commenced negotiations with the strikers gathered on the koppie. Lt General Mbombo also held a meeting with Lonmin managers.

#### **15 August 2012**

68. In the morning, Lt General Mbombo attended the National Management Forum meeting (the "NMF") of the SAPS in Midrand where she remained for the day. Later in the evening, she provided a briefing to senior officers of the

SAPS, including the National Commissioner, about the events and developments in Marikana.

69. The SAPS team of negotiators and a Lonmin interpreter returned to the koppie where they continued interaction with the strikers gathered on the koppie. On arrival at the koppie they found naked men undergoing rituals with an inyanga.
70. Later in the day, Major General Mpembe met with officials of AMCU, NUM and Lonmin and requested them to address the strikers on the koppie to resolve the stand-off. The trade unions agreed to address strikers at the koppie. Lonmin refused to speak to the strikers at the koppie.
71. In the late afternoon, the SAPS escorted the officials of NUM and AMCU, including their Presidents, Messrs Senzeni Zokwana and Joseph Mathunjwa respectively, to the koppie to address the strikers. At the koppie, the strikers refused to allow Mr Zokwana to address them. The strikers afforded Mr Mathunjwa a hearing and in his address, he undertook to the strikers that he would meet with Lonmin and return to the koppie at 09:00 on 16 August 2012.
72. After the addresses to the strikers by the trade unions, the trade union officials and the police escorts returned to the JOC. The trade union representatives gave a report to of their addresses of their addresses Mr Mathunjwa gave a report of their addresses to the police in the JOC.

## **16 August 2012**

73. The SAPS 06:00 Joint Operating Centre Committee (JOCCOM) meeting decided that the SAPS would continue with negotiation and monitoring of the strikers on the koppie; with crowd management resources pre-positioned; that a contingency plan be put in place in case strikers did not voluntarily surrender their weapons that day and that there will be a further briefing should stage 3 have to be implemented.
  
74. At 09:30 the Lt General Mbombo addressed a media conference in which she stated that the police would disarm and disperse the strikers that day if they did not disarm voluntarily.
  
75. During the morning, the negotiation nyalas and barbwire nyalas were deployed to the koppie with the barbed wire nyalas pre -positioned.
  
76. Later that morning, Mr Mathunjwa and officials of AMCU addressed the strikers on the koppie. Mr Mathunjwa again addressed the strikers on the koppie in the afternoon.
  
77. Around 13:30 the SAPS convened a Special JOCCOM meeting. In the meeting, Lt General Mbombo gave an order to Major General Annandale that the police disperse, disarm and arrest the strikers on the koppie. The JOCCOM decided that the operation would commence at 15:30.

78. At 14:30 Lt Colonel Scott have a briefing to commanders about the execution of the dispersal and disarming operation.
79. At about 15:43, Brigadier Calitz gave the order to commence the operation to disperse and disarm the strikers on the koppie.
80. Thirty four (34) strikers died during the police operation

### **The involvement and role of the SAPS**

81. On 9 August 2012, the SAPS received information about a planned march to Lonmin offices on 10 August 2012. Members of Marikana Vispol and Rustenburg POP were deployed to Lonmin to monitor the march on 10 August 2012. Rustenburg POP developed a Contingency Plan which obtained from 10 to 13 August 2012.
82. The role of the SAPS from 10 to 15 August was mainly to “negotiate” with the strikers; to maintain visibility and to monitor the strikers. SAPS members patrolled the area of Lonmin on a daily basis. The SAPS positioned monitoring nyalas at the koppie, with the negotiation nyala, to monitor the strikers on the koppie.
83. On 12 August 2012, the SAPS set up a JOC at Lonmin. Different units of the SAPS were represented in the JOC. Lonmin security were also located in the JOC, but apart from the SAPS.

## The Plan

84. On 10 August 2012, POP Rustenburg developed a written Contingency Plan.<sup>57</sup> The following risks were identified in the plan: damage to property; seizure; intimidation and persons flocking together. Loss of life was not identified as a risk – there was no history of such until 13 August 2012. Neither was there any intelligence to that effect. It provided for visible policing; securing of areas; crowd management; and protection of life and property as far as possible; deployment of six (6) Marikana Vispol for patrolling and visibility at Karee mine and 14 POP for crowd management. The plan stated that working plans of “friendly force” would be available in the JOC.
85. The Contingency Plan obtained until 13 August 2012.
86. During the evening of 13 August 2012 Colonel Scott was instructed to draft a proper operational plan with the assistance of the POP commanders. The evidence is that in the planning process, the possibility of encircling the koppie was considered and abandoned on its merits. We submit that this was only one option. Elsewhere in these submissions, we address the criticism of the SAPS for not adopting other alternative options to disperse and disarm the strikers on the koppie.
87. On 14 August 2012 the JOCCOM approved the following plan: Stage 1 - Dialogue and monitor protestors; Stage 2 – A show of force with negotiation and prepositioning in case of emergency deployment; Stage 3- Tactical option

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<sup>57</sup> Exhibit SS3

– Wanted to encircle early morning when group is still manageable; Stage 4 – Process arrested protestors and handle crime scenes; Stage 5 – Intelligence driven follow-up to arrest at places of residence; Stage 6 – Cordon and search operations of hostels.

88. This plan was implemented from 14 August 2012 and members were briefed and deployed on the basis of this plan.

89. On 16 August 2012 the JOCCOM decided that stage 2 of the plan would be maintained with the following deployments<sup>58</sup>:

89.1. The negotiating team under the command of Brigadier Calitz and Lt Colonel McIntosh being the negotiator with an interpreter provided by Lonmin. They were assigned the call-sign Papa1. Their mandate as the negotiating team was to request the strikers to lay their weapons down voluntarily; to disperse on their own accord and not to return to the gathering area armed. They were to resolve their wage issues through the unions.<sup>59</sup>

89.2. The monitoring team under the command of Lt Colonel Mere with forty five (45) POP members; two (2) information officers and five nyalas. The task of the monitoring team was to monitor the atmosphere around the gathering crowd and provide feedback to the JOC.<sup>60</sup>

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<sup>58</sup> Transcript:Day189,p22896,line1-9

<sup>59</sup> Exhibit L, slide136

<sup>60</sup> Exhibit L, slide137

89.3. The defensive measure team under the command of Colonel Makhubela with fifty three (53) Public Order Police (POP) members and six (6) barbed wire nyalas. Their task was to deploy the barbed wire nyalas into their position as a pro-active placement for a defensive measure in order to protect the neutral areas against threats from the strikers. The nyala vehicles were to be pre-positioned at estimated 80m intervals from south to north starting at the power station. The line of nyala vehicles was to be positioned in front of the monitoring team and negotiating nyala line to offer defensive measure. The most northern nyala was to angle slightly towards the west to assist in protecting a possible advance by the strikers towards the informal settlement. The deployment of the barbed wire was, as a contingency action, to be done on command of the operations commander.<sup>61</sup>

89.4. Under the command of Captain Loest were seventy six (76) Tactical Response Team (TRT) members who were to deploy on foot or by soft skin vehicles with the task of protecting the police members, members of the media and other persons in and around the neutral area. The TRT members were to remain 100m behind the POP monitoring and the negotiation group. They were to secure their rear and the north flank of the neutral area with a show of force when threats become evident. They were to respond to attacks on the POP line on command from the operational commander or when the safety of POP members

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<sup>61</sup> Exhibit L, slide139

or others had been compromised to the extent where lives may be lost if no tactical response is taken.<sup>62</sup>

89.5. Lt Colonel Gaffley with call-sign Charlie 5 was tasked together with twenty (20) Special Task Force (STF) members and twenty five (25) NIU members to offer a rapid response capability in case of surprise attack on the police and the media at the neutral area. The scorpion was to be used as a visual deterrent or posture. The STF and the NIU were to respond to situations where lives were imminently threatened, to protect the police service members in the neutral area. They were also to act on the command of the operational commander. They were to respond from the south in case the north became inaccessible to enable the NIU team in Immediate Response Area 1 (IRA1) by strikers who may block them.<sup>63</sup>

89.6. With call-sign Charlie 6 was the second immediate reaction positioned at Immediate Reaction Action 2 (IRA2) with Lt Colonel Modiba in command. There were seventy four (74) National Intervention Unit (NIU) members positioned in IRA2. They were to respond to situations where lives are imminently threatened and they were to assist or protect the police forces in the neutral area on command of the operational commander. They were to respond from the far north in case the south became inaccessible by the strikers blocking their path.

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<sup>62</sup> Exhibit L, slide138

<sup>63</sup> Exhibit L, slide140

89.7. Major General Naidoo was the commander of the members who were at Forward Holding Area 1 (FHA1). He had with him 21 TRT members, 32 K9 members, 14 mounted unit members, 8 POP members, 3 detectives, 4 Local Crime Register Centre (LCRC) members, 5 medical personnel and 2 firefighters. They were to be a reserve manpower as well as handling of any medical casualties. They were to do this under the command of the JOC.<sup>64</sup> There were defined tasks for the LCRC and the Detectives, for POP and TRT, the Canine Unit (K9) had the responsibility to search vast areas for weapons which may have been hidden or abandoned by the strikers.

89.8. At Forward Holding Area 2 (FHA2) was Lt Colonel Pitsis in command and with fifty seven (57) TRT members, six (6) canine members and seventy POP members. Under the call-sign Charlie 3, they were to deploy as reserve tactical team on command of the JOC to assist the operational commander. They were to offer protection to vulnerable targets to the west of the strikers. They were also to maintain as a reserve for POP and TRT to deploy their members within the force continuum.<sup>65</sup>

89.9. Under Captain Ntoyi's command were twelve (12) NIU members. They were tasked to be a rapid response team to incidents, specifically

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<sup>64</sup> Exhibit L, slide142

<sup>65</sup> Exhibit L, slide144

wayward, where a tactical intervention is required to stabilise life threatening situations and as a show of force to dissuade violent action. Their helicopter was to remain in Pretoria on standby with a forty minute response time to Marikana. On call-out (for an emergency situation during stage 2), the NIU would provide the tactical response team and be positioned at the rear staging area at the JOC for deployment as instructed.<sup>66</sup>

89.10. The air command post under the call-sign chopper 2 was to be commanded by Brigadier Fritz. They were to direct the counter action of the tactical teams from the Immediate Response Areas as part of the solution should POP members have relinquished control and withdrawn where the threat surpassed their capability. From the helicopter, they were to provide information to JOC on wayward incidents observed from the air.<sup>67</sup>

89.11. The task to monitor the gathering and to provide JOC with real time feedback was to be done by Lt Colonel Vermaak. From the chopper, under call sign chopper 1 he was to provide real time feedback over the police radio to the JOC and to send cellular photographs to the JOC and to take still camera photographs and to provide feedback to the operational commander regarding the actions of the strikers.<sup>68</sup>

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<sup>66</sup> Exhibit L, slide145

<sup>67</sup> Exhibit l, slide146

<sup>68</sup> Exhibit L, slide147

90. On 16 August 2012 the JOCCOM, at its 13:30 meeting, approved the following tactical plan to disperse the strikers into smaller groups, encircle or isolate armed protestors, disarm and arrest as follows:

90.1. Phase 1: Enclose the neutral area with barbed wire to prevent strikers from advancing onto the SAPS and others and to assist with the direction in which the dispersion would take place.

90.2. Phase 2: Two lines to be formed as follows: POP Nyalas and water cannons to be strategically placed in front; TRT to provide protection to POP and NIU and STF and TRT rear line to sweep and clear the koppies.

91. We set out *in extenso* the deployment of the various units to refute the criticism about the planning for the operation and the briefing of members about their roles. On the contrary, the stage 3 briefing must be seen in the context that everyone was already in position with the implementation of stage 2. All that was to happen in stage 3 was to use standard operating procedures in effecting the dispersal of the strikers, disarming those who were armed and those who were to be arrested.

92. It is this plan that was to be implemented on 16 August 2012 at 15:30. As part of the plan, a search and seizure order was obtained for implementation after intelligence was gathered, including thorough arrests following tactical action.

### **SAPS Deployment**

93. At any one time, the North West province does not have sufficient members and officers in its staff compliment, including POP, to manage on its own operation as large as and of the nature of the operation in Marikana. It relies on the national office and other provinces to supply addition resources in support of large and complicated operations. This was the case with the Marikana operation.
94. The SAPS deployment in the period 10 to 16 August 2012 was as follows:
- 94.1. 10 August – 29 members and officers
  - 94.2. 11 August – 16 members and officers
  - 94.3. 12 August – 103 members and officers
  - 94.4. 13 August - 209 members and officers
  - 94.5. 14 August - 552 members and officers
  - 94.6. 15 August – 689 members and officers
  - 94.7. 16 August – 718 members and officers

**F: THE POSITION OF THE SAPS**

95. The position of SAPS in these proceedings, and specifically in relation to persons who died as a result of police action, is that their deaths, where evidence is available, occurred in circumstances of self and/or private defence alternatively putative self or private defence.
96. Ordinarily, SAPS would have had to lead evidence in respect of each and every bullet that was fired; explain the force that was used; show that such force was proportional to the threat to life and limb and that no more force was used once the threat was contained. In this regard, the Chairperson said<sup>69</sup> *“Because of the time constraints the evidence leaders did not agree to the SAPS calling all of the witnesses on its list and agreed only to the SAPS calling those SAPS members who have now given evidence. The absence of oral evidence from other shottists is the consequence of this view expressed by the evidence leaders.”*
97. In the result, the Chairperson made a ruling that *“no adverse inference may be drawn from the fact that the SAPS has not called every SAPS member who fired such a shot as a witness to give oral evidence.”* For that reason, the SAPS led the witnesses who, complemented by other evidentiary material, could give a representative account of the circumstances surrounding the deaths and injuries of the strikers which occurred on 13 and 16 August 2012.

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<sup>69</sup> Transcript:Day292,p38359,line13-25; p38360,line1-22

98. The ruling that the SAPS has a duty to justify all of the shootings by SAPS members which caused injury or death, in the context of a commission hearing, cannot be a reference to a legal duty. There being no onus bearing party in these proceedings, in the strict legal sense, the SAPS is not called upon to discharge such a duty. A commission is an investigative and not adjudicative process. Therefore the SAPS only has a “duty” to place evidence before the Commission which explains the circumstances under which the police acted. The conclusions from the consideration of the evidence may point to any justification for the police conduct or lack thereof.
99. The Chairperson also ruled that *“SAPS may discharge the duty upon it by calling witnesses to give oral evidence, by submitting written statements of witnesses, and by relying on the other evidence which is before the Commission”*. For that reason, we will also rely on the witnesses who only tendered statements and comment on the weight to be placed on such evidence.
100. Before dealing with each of the issues raised in the Terms of Reference, we deal with the context within which these submissions on behalf of SAPS will be made. We do so hereunder.

#### **The nature of the threat**

101. There is argument that the threat to the police at scene 1 was posed by the front group of the strikers who came around the kraal and that some of those

strikers who came around the kraal but were at the back of the group did not pose any threat to the police. This argument is wrong. This is so for the following reasons:

101.1. The evidence overwhelmingly shows that the members of the group that moved around the kraal were acting in concert and with a common purpose.

101.2. Even those who may not have had weapons on them, if there were any, knew that they were moving with a group of heavily armed people and reconciled themselves with that reality.

101.3. The verbal threats to the police were made on their behalf as a group.

101.4. The evidence of 13 August 2012 at the railway line shows a group moving in unison on the command of its leaders and those at scene 1 were possibly members of the group of 13 August 2012.

101.5. There is evidence that those who went around the kraal followed an instruction from Mr Noki not to run away. It appears that they followed the direction even in the face of police effort to disperse them.<sup>70</sup>

101.6. The suggestion or argument that the threat, for instance, posed by the individual who fired at the police could have been handled using a sniper, suffers from the same flaw. It is not an individual that was a threat to the police line, it was the armed group as whole acting in

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<sup>70</sup> Transcript:Day57,p6117,line24-25;p6118-p6119,line1-2

concert, with a common purpose under the leadership and direction of Mr Noki.

102. On behalf of SAPS, we submit that a factual finding should be made that the threat to the police around the kraal, if it is found that the group had intended to attack the police or that the police reasonably believed that they were under attack, was an attack by the entire group and not only elements of it.

### **The nature of the crowd on 16 August 2012**

103. There is a sharp dispute between the SAPS and some of the parties in the Commission on the nature of the crowd that was on the koppie during the period 10 to 16 August 2012. The SAPS contends that there were two distinct groups on the koppie, particularly on 16 August 2012. The one group was static, comprising by far the majority of those who had gathered on the koppie and was approximately two thousand (2000) to three thousand (3000) in number. The smaller group, approximately three hundred (300) to four hundred (400), was heavily armed with pangas, spears, assegais, bush knives and firearms.

104. The submission on behalf of the SAPS is that the measures by the SAPS to contain the larger group through public order policing techniques was possible and as the evidence demonstrates, did achieve the object of dispersing the 2000 to 3000 strikers that had gathered on the koppie on 10 to 16 August

2012.<sup>71</sup> The smaller armed group, SAPS contends, for reasons that follow, could not be contained through normal public order techniques. This is so:

104.1. The evidence is that following the confrontation between the strikers and the NUM officials on 11 August 2012 where NUM officials fired at the strikers, the strikers took a decision to either attack officials of NUM or set the office of NUM alight (the other contention is that the group was moving to the NUM office to inquire why NUM was discouraging Lonmin to speak to them).<sup>72</sup>

104.2. Some of the strikers participated in a “cleansing ceremony”<sup>73</sup> believing, as it turned out not to be the case, that some amongst them may have been contaminated by those who were believed to have been killed in the confrontation with the NUM.

104.3. Some of the strikers took a decision that an inyanga must be procured who must help them in the confrontation with anyone who would prove to be a stumbling block between themselves and their goal.<sup>74</sup>

104.4. The strikers constituted a committee of fifteen who were to take decision on behalf of the strikers and lead the strikers.<sup>75</sup>

104.5. The strikers decided to obtain the services of an inyanga and collected money for that purpose from strikers who were able and willing to

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<sup>71</sup> Exhibits L, slide191,193,198; Exhibit UU3

<sup>72</sup> Transcript:Day245,p30964,line3-14; Exhibit ZZ4

<sup>73</sup>Transcript:Day48, p5318, line 16-25; p5319, line 1-13

<sup>74</sup> Transcript:Day245,p30972;p3073,line1-12

<sup>75</sup> Transcript:Day248,p31145,line3-22

contribute or to partake. The inyanga was to perform rituals on the strikers to make them brave, invincible and inviolable.

104.6. Some of the strikers are depicted on video material as participating in rituals administered by someone. These men are seen in their nude.

104.7. The evidence is that the rituals also included instructions which are to be followed if the administered muti was to render the strikers invincible in the event of any confrontation.<sup>76</sup>

104.8. In the negotiations with the police there is a distinct group of individuals who was talking for and on behalf of the strikers.

104.9. The small group of armed strikers are seen on the video material to be acting in concert; singing together; some of the songs were inciting violence; clanking their weapons together in threatening manner.

104.10. The leader of the militant group uttered violent threats to the police including that they and the police should sign on a piece of paper that they were going to kill each other.

104.11. Some members of the militant group are seen with blankets and multiple layers of clothing which are clearly intended to cancel the effects of any rubber bullets fired at them.

104.12. The use of water cannons, teargas, stun grenades and rubber bullets towards the armed strikers were not enough to disperse them.

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<sup>76</sup>Transcript:Day245,p30977,line23-25

104.13. The evidence is that despite several attempts and requests that the group disarm, these requests were not heeded.

105. We submit on behalf of SAPS that given the nature of the group described above, the threat they posed and the means by which the threat could be contained was way above public order policing techniques as Mr De Rover testified.<sup>77</sup>

106. We submit further that the criticism that police conduct in the operation was not in line with applicable public order policing prescripts is misplaced in relation to the threat posed by the smaller group. So too is the criticism about the use of specialized units misplaced. This is so for the following reasons:

106.1. Previous use of multiple police units in public order has never shown this as inappropriate. SAPS experience is that the involvement of specialised units has been important support to the POP especially in dangerous situations.

106.2. The expert opinion is split on the desirability of using specialized units in public order management operations.

106.3. Both Mr White and Hendrickx could not say what public order measures were available to contain the threat which the militant group posed, particularly at scene 1.

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<sup>77</sup> Transcript:Day286,p37056,line14-25

106.4. All non-lethal measures did not as a matter of fact stop the militant group from confronting the police line.

107. We submit that the Commission should make a factual finding that the strikers presented two distinct groups which required different action by the police to achieve the instruction by the Provincial Commissioner that the armed strikers be dispersed, disarmed and arrested.

### **The order to disarm**

108. Lt General Mbombo issued two (2) orders in the relevant period.

109. On 13 August 2012 she gave an order to Major General Mpembe that armed strikers walking along the railway line be dispersed, disarmed and arrested. Lt General Mbombo, Major General Mpembe and other members of the SAPS saw the strikers on Lonmin CCTV after a meeting with Lonmin management.

110. On 16 August 2012 Lt General Mbombo issued an order to Major General Annandale that the strikers gathered on the koppie be dispersed, disarmed and arrested that day. She publicised this decision to the media and to the public in the 09:30 media conference that she addressed that morning.

111. There is a multi-layered criticism of the decision of the Provincial Commissioner, North West Province, Major Lt General Mbombo, to order the police to disarm the armed strikers on 16 August 2012, if the latter did not do so voluntarily. The one layer to that criticism appears to be that given the

nature of the stand-off, namely, that the armed strikers were not prepared to surrender their weapons and were prepared to resist any attempt by the police to disarm them and the resources available to the police, Lt General Mbombo ought not to have given such an instruction. The other layer to that criticism is that Lt General Mbombo when she made the decision to disarm, disperse and arrest the strikers did not have the intelligence that the armed strikers were minded to resist any attempt by the police to disarm them. The third layer to the criticism appears to be that there was relative calm by 15 August 2012 and that any offensive action would escalate and not de-escalate the conflict. The fourth layer to the criticism is that there were many other better options which could and should have been taken. Reference for instance is made to the possibility of encirclement of the koppie early in the morning of 17 August 2012; search and seizure as the first action; doing nothing at all until such time as there were signs that the violence was not going to resolve itself; that someone like Bishop Seoka could have helped resolve the conflict; setting up a filtering line before the strikers arrived at the koppie; that the police should have arrested the leaders and perpetrators of criminal acts. There are as many possible options as there would be people in a room.

112. There is no dispute that following the ten (10) deaths, two (2) of which were police members, Lt General Mbombo had the authority to issue an order that the police disarm the armed strikers. It is common cause that some of the deceased perished at the hands of some of the armed strikers. The armed strikers posed a continuing threat to public order, life and limb, and potential damage to property. The decision to have them disarmed cannot be faulted.

113. Where there are multiple options of addressing a particular problem, and each of those options being valid, the proper approach is to investigate the option that was taken and to see whether that option was executed within the disciplines of policing. It is wrong to take the approach that there was an option amongst the many which should have been taken instead. For argument sake, a criticism that the operation to disarm the strikers could have waited for another day illustrates the flaw in that approach. There was no way of knowing that the conflict would not have escalated with the “negotiations” having collapsed.
114. The criticism of the taking of the decision to disarm the armed strikers without the intelligence about their preparedness to resist conflates two distinct matters. The one being that the strikers be disarmed and the other being how they should be disarmed. It is the latter which requires the consideration of the risks attendant in the execution of that operation. The police did appreciate the risk that some of the strikers would resist being disarmed. To address that risk, the police planned to break those groups into smaller ones and the most difficult ones to be handled by the units with the tactical know-how to do that. The proper inquiry is to probe whether, given the intelligence that was available, the operation was executed with appreciation of that intelligence. The improper approach is to postulate that later days would have produced more and better intelligence.

115. The argument that any offensive action would have escalated the conflict suffers from the same weaknesses we alluded to above. It is a reasoning which is tainted by hindsight. It is also a reasoning that does not accept that by 16 August 2012, ten (10) people had been killed, scores injured and property damaged. The reasoning does not take into account that the strikers were still armed; that those who sought to go to work were at risk of losing their lives; that the employer had not seen it fit to stop the operations and diffuse the possibility of conflict between striking and non-striking employees; that Mr Mathunjwa, who the armed strikers were amenable to listen to, had resigned himself to the conclusion that the strikers were not going to disarm or at least to do so voluntarily and that Lonmin was adamant that it will not engage with the armed strikers.
116. It is most telling that no evidence was given on what the police should have done by way of de-escalating the conflict. What is in fact offered are various methods by which the tragic outcome could have been avoided. Arguments like the strikers could have been surrounded early in the morning of 17 August 2012 just offer another method by which an operation could have been done. Contentions that the police could have waited for Mr Zokwana to bring more intelligence on who the perpetrators were, and was instead not given the opportunity to give feedback, is also comprised. It assumes that Mr Zokwana would have, within reasonable time, obtained that intelligence and that whilst waiting for Mr Zokwana's feedback, no more harm or damage would have been caused.

117. Accepting that the use of teargas, stun grenade, water cannon and rubber bullets are permissible non-lethal POP measures on public order operations, the criticisms relating to the use of teargas on 13 August 2012, has two aspects to it. The one being that there was no reason for the discharge of teargas at all and the other is that it was used without command. If we look at the place where the body of Mr Jokanisi, lying almost adjacent to the gravel road separating the informal settlement from the veld where the armed strikers were walking, one would be playing blind to the evidence to hold that the strikers were not posing a threat of going into that informal settlement. Lt Colonel Vermaak said that he could see no clear reason why the teargas was used, watching from the chopper, was clearly with reference to the informal settlement on the other side of the river.

### **The use of force**

#### **The evidence and facts relevant to the use of force on 13 August 2012**

118. The first use of force by members of SAPS was on 13 August 2012. At around 12.45, Lt General Mbombo instructed Major General Mpembe to disperse, disarm and arrest a group of about two hundred (200) to three hundred (300) strikers armed with dangerous weapons. The armed strikers were seen on a close circuit television, walking along the railway line from the direction of Karee mine towards the east.

119. Major General Mpembe went with about one hundred and eighteen (118) members (VISPOL, POP, NIU and TRT) members to where the strikers were seen near the railway line. Upon reaching the group of armed strikers, Major

General Mpembe addressed the group in vernacular and tried to persuade them to hand their weapons over to the police. When the strikers refused to hand over their weapons, Major General Mpembe told them that he would count to 10 and they must hand over their weapons on the count of 10. As Major General Mpembe was counting and before reaching the count of 10, the strikers stood up and walked past the police members with their weapons.<sup>78</sup>

120. To this act of defiance, Major General Mpembe decided rather than disarming the strikers, the police will escort them to the koppie where they had intimated they intended to go.<sup>79</sup> Major General Mpembe considered that disarming the strikers held great risk and he decided against it. He ordered that the strikers be escorted and that members must ensure that the strikers did not go into the informal settlement which was ahead in the direction where the strikers said they were headed to.<sup>80</sup>

121. Lt Colonel Merafe did not agree with the decision of Major General Mpembe. Colonel Merafe was of the view that the strikers were to be disarmed there and then.<sup>81</sup>

122. Major General Mpembe telephoned Lt General Mbombo to inform her that he had decided to rather escort the armed strikers to avoid any confrontation. He was authorised to make a decision which he deemed appropriate.<sup>82</sup>

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<sup>78</sup> Exhibit Z1

<sup>79</sup> Transcript:Day104,11150,line7-15

<sup>80</sup> Transcript:Day227,p27937,line18-19;Exhibit HHH32; RRR9

<sup>81</sup> Transcript:Day216,p26637,line8-11

<sup>82</sup> Transcript:Day145,p16034,line9-16;Day178,p21304,line7-11

123. Whilst the police were escorting the strikers, Warrant Officer Kuhn discharged a teargas canister to the front right hand side of the strikers. There is conflicting evidence regarding whether an order to fire teargas was given. According to the statement of W/O Kuhn<sup>83</sup>, he fired the teargas canister on instruction of somebody. This was at the point that the armed strikers were diverting to the direction to the informal settlement. W/O Kuhn states that he does not know who gave the instruction. Major General Mpembe's evidence is that he did not give such an instruction. Captain Thupe's evidence is that it was Major General Mpembe who gave that instruction.<sup>84</sup>
124. In our submission, the conflicting evidence on who gave the instruction to discharge the teargas and stun grenade does not have any concerning materiality. If the teargas was discharged without instruction, then W/O Kuhn would have acted in contravention of the SO262; conduct which would constitute misconduct. On the other hand, if teargas was discharged on instruction of Major General Mpembe, then the conduct would be in line with the dictates of the SO262.
125. Immediately following the discharge of the teargas, a stun grenade was also discharged in the direction of the strikers. After the teargas and the stun grenades were discharged, the strikers turned and attacked members of the SAPS.<sup>85</sup> Some members fired rubber rounds and live ammunition to repel the

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<sup>83</sup> Exhibit RRR9

<sup>84</sup> Transcript:Day227,p27938,line13-16;Exhibit QQQ9

<sup>85</sup> Exhibit Z1

attack. Teargas and stun grenades were also discharged from the helicopter.<sup>86</sup>

126. The attack on the police resulted in the deaths of five (5) persons (2 SAPS members and 3 strikers), one (1) SAPS member seriously injured and an unknown number of injured strikers. During this confrontation, the strikers robbed the police of an R5 rifle, two (2) shotguns, two (2) 9mm pistol, ammunition and a hand radio.<sup>87</sup>
127. Lt Baloyi, who was injured by the strikers, explains in his statement that he fired rubber rounds while running away from attacking strikers who continued to stab him in the back. He also states that he saw another member shoot at charging strikers.<sup>88</sup>
128. Lt Colonel Vermaak testified that from the chopper he saw the strikes turn and attack the police immediately after the police discharged teargas and a stun grenade.<sup>89</sup> In response to the attack on the police, he discharged twenty (20) canisters of teargas and ten (10) stun grenades in an effort to repel the attack on the police and to disperse the attacking strikers. Lt Colonel Vermaak testified that he did this in defence of the members.<sup>90</sup>
129. Lt Colonel Vermaak testified that from the chopper he could not see why the police discharged teargas. This evidence is inconsistent with his earlier

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<sup>86</sup> Transcript:Day229,p28297,line19-25;p28298,line1-8;Day205,p25233,lines4-25;p25234,line1

<sup>87</sup> Exhibit ZZZZ15 (CAS139/08/2012);Exhibit L, slide48

<sup>88</sup> Exhibit GGG16;

<sup>89</sup> Transcript:Day205,p25233-25235,line1-10

<sup>90</sup> Transcript:Day205, p25241,lines1-9

account. In all his statements<sup>91</sup> and most significantly in his interview with the evidence leaders<sup>92</sup>, which was recorded, he said that the armed strikers were going to the informal settlement when the teargas and stun grenades were fired.

130. Lt Colonel Vermaak's account on whether the strikers were going to the informal settlement may not be a contradiction of the evidence given by the police. It is clear that in his oral evidence Lt Colonel Vermaak was referring to the informal settlement across the river<sup>93</sup> whereas the evidence of the police is that the strikers were moving to the informal settlement closed to the gravel road. Lt Colonel Vermaak accepts that W/O Lepaaku perished close to the gravel road which had a few houses on the side close to the road. The depiction of the scene is in exhibit B, crime scene pack, CAS 117/08/2012.

131. The Commission must, with respect, accept the earlier account of Lt Colonel Vermaak about the movement of the strikers over the more recent account given in oral evidence. His explanation for the change in his account is not satisfactory and the Commission should find that it is unlikely that Lt Col Vermaak would agree, at the instance of anyone, to make allegations in his statement which he knows not to be true – the conduct of Lt Colonel Vermaak before the Commission and his demeanour belie such an impression.

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<sup>91</sup> Exhibits GGG17, HHH4, HHH5, HHH6, LLL8

<sup>92</sup> Exhibit 00044

<sup>93</sup> Transcript: Day229p27623, lines15-25, p27624

132. Mr Nzuza's evidence is that the strikers were not heading to the informal settlement as the police contend.<sup>94</sup> The position of W/O Lepaaku lying next to the gravel road separating the veld where the strikers attacked the police and the informal settlement points to movement and activity in the direction of the informal settlement.
133. During the attack on the police, Constable Mguye discharged six (6) rounds from his R5 rifle. He states that he fired the rounds in defence of the members that were under attack from the armed strikers.<sup>95</sup> Constable Segweleya fired ten (10) shots with his R5 rifle and states that he did so in self-defence.<sup>96</sup>
134. Captain Thupe testified that he saw an armed striker with an R5 rifle moving in the direction of the houses depicted in Exhibit B as indicated on annexure SKT1 of his consolidated statement.<sup>97</sup> It was at this point that Captain Thupe and Constable Segweleya noticed an armed striker pointing an R5 rifle at the police. The R5 rifle did not fire and both Captain Thupe and Constable Segweleya fired at the striker.<sup>98</sup> At this stage the strikers were near the houses in the informal settlement next to the gravel road.
135. Lt Colonel Vermaak testified that upon landing the chopper, he asked Captain Loest to provide him TRT members to pursue a striker he saw running from the scene with an R5 rifle into the informal settlement. Lt Colonel Vermaak and some TRT pursued the strikers into the settlement.

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<sup>94</sup> Transcript: Nzuza

<sup>95</sup> Exhibit QQQ8

<sup>96</sup> Exhibit QQQ7

<sup>97</sup> Exhibit QQQ9

<sup>98</sup> Transcript: Day227,p27938,lines17-25,p27939,lines1-25,p27940,lines1-25;p27941,lines1-14;Exhibit HHH29

136. We now turn to deal with the fatalities which were a result of the police action.

136.1. The circumstances under which Mr Sokanyile died are set out in the statements of Constable Mguye.<sup>99</sup> In summary, he explains that after the attack on the police, Lt Colonel Vermaak ordered some members of POP and TRT to go with him to pursue a group of strikers who had run into the informal settlement across the gravel road from where the attack on the police occurred. Lt Colonel Vermaak informed the POP and TRT members that one of the strikers had an R5 rifle taken from the police.

136.2. Constables Mguye and Segweleya, both TRT members, went with Lt Colonel Vermaak in pursuit of the group of strikers with the R5 rifle. They followed the strikers on foot into the informal settlement where they saw the strikers, one of whom had an R5 rifle. They also saw the strikers carrying another striker in the informal settlement. When the striker with the R5 rifle turned around to face the police, Lt Colonel Vermaak instructed him, Constable Mguye, to shoot a warning shot which he, Constable Mguye fired to the ground in the direction of the striker with the R5 rifle. Constable Mguye fired with an R5 rifle. After Constable Mguye fired the warning shot to the ground, the strikers turned and walked away. The striker with the R5 rifle turned two more times facing the police and on both occasions Constable Mguye fired warning shots to the ground on the command of Lt Colonel Vermaak.

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<sup>99</sup>Exhibit HHH30.

136.3. At the time of the shooting, the strikers had not gone over the river in the informal settlement. POP members arrived on the scene in a nyala and when they got out of the vehicle, the strikers crossed the river. After the strikers went over the river, the striker with the R5 pointed the rifle to the direction of the police. Lt Colonel Vermaak instructed the police to shoot. Constable Mguye says that he shot one (1) round into the ground. According to him the POP members shot at the strikers with their 9mm pistols. He saw a person fall and the person was later identified as Mr. Sokanyile. He specifically states that Mr. Sokanyile is not the same person that he saw carried by the strikers earlier. R5 cartridges were found on the opposite side of the river from where Mr Sokanyile was lying. None of these cartridges could be linked to the death of Mr Sokanyile. Constable Mguye's account is confirmed by Constable Segweleya who also states that he fired shots with his R5 rifle on the order of Lt Colonel Vermaak.

136.4. Lt Colonel Vermaak has offered conflicting evidence regarding the shooting incident in which he gave orders to members of the TRT to shoot at the striker who had an R5 rifle in the informal settlement. He testified that the person that he pursued with TRT members disappeared into the informal settlement. On this account, it clearly cannot be Mr Sokanyile that he and the TRT members were pursuing. We submit that nothing turns on the contradiction – on either account, the SAPS is unable to make a submission whether or not the death of Mr Sokanyile occurred in circumstances excusable in law.

136.5. The body of Mr Mati was found in the informal settlement outside house No.C05. According to Dr Perumal Naidoo, Mr Mati died from a gunshot wound.<sup>100</sup> The opinion of Dr Naidoo rests on autopsy photographs and a post-mortem report. The post-mortem report states that the cause of death is a stab wound to the right femoral vessel.<sup>101</sup> The facts and circumstances surrounding Mr Mati's death are unknown. No evidence was given regarding his death and SAPS cannot make a submission on whether his death was justifiable or not.

136.6. After the attack on the police by the strikers, Mr Jokanisi was found lying near the body of Warrant Officer Lepaaku. In his statement Warrant Officer Rakodi<sup>102</sup> states that he witnessed a striker attacking W/O Lepaaku and that he, W/O Rakodi, shot at that striker with his 9mm pistol. The body of Mr Jokanisi was found lying next to that of W/O Lepaaku. It is fair to infer that his death must have been the result of police response to an attack on the police by him or his fellow strikers. No justification could ever be offered for the attack on the police. The use of sharp point ammunition by the police causing the death of Mr Jokanisi is justified in law – there would have been an unlawful attack on the life or limb of one or many of the police members. According to the evidence of W/O Rakodi, it is probable that he shot at Mr Jokanisi who posed an imminent threat to W/O Lepaaku

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<sup>100</sup> RRRR5

<sup>101</sup> Exhibit A, DR553/2012

<sup>102</sup> Exhibit ZZZ3.8

and the force used was proportionate to the threat. Accordingly, the death of Mr Jokanisi is excusable.

136.7. We deal with the circumstances surrounding the deaths of Warrant Officers Monene and Lepaaku and the injury to Lt Baloyi.

136.8. W/O Lepaaku and W/O Monene died as a direct result of the unlawful attack on them. The injuries they sustained are also consistent with the weapons which the strikers were carrying.<sup>103</sup> W/O Lepaaku's cause of death is multiple injuries to the head.<sup>104</sup> He suffered multiple stab wounds and scalp laceration, a fractured skull and subdural and subarachnoid haemorrhages. W/O Monene's cause of death are head injuries.<sup>105</sup> He suffered stab wounds to the chest and gunshot wounds to the neck and chest. He also suffered scalp lacerations, a fractured skull, cerebral multiple haemorrhages. These injuries could only have been inflicted by the strikers who were carrying pangas, inculas and spears.

136.9. No justification has been proffered by the strikers for their deaths.

136.10. In his statement<sup>106</sup>, Lt Baloyi says that he suffered nine (9) stab wounds, two (2) stab wound on the head, two (2) stab wounds were on his right shoulder, two (2) on his left shoulder, three (3) on his left hand, one on his stomach below the umbilical cord and one on his

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<sup>103</sup> Exhibit L, slides 52-55; Exhibit A

<sup>104</sup> Exhibit A, DR558/2012

<sup>105</sup> Exhibit A, DR 556/2012

<sup>106</sup> Exhibit GGG16

buttocks. He describes the circumstances leading up to the injuries he sustained. More pertinently, he states that within two seconds of teargas being fired and while some of the strikers were approximately 15m away from where he stood outside a nyala, some of the strikers started running towards him and he threw a stun grenade to the oncoming strikers. He ran to the nyala and upon his arrival at the door of the nyala, he realised that the strikers had caught up with him and were attacking him and other members of SAPS. He ran past the nyala with the strikers still chasing him. Whilst running, he fired rubber bullets at the strikers. He also used his shotgun to wade his way through the group of strikers whilst he was being stabbed from behind. He was hit on the head with something like a panga. He tripped and fell to the ground. The strikers started stabbing him in the chest whilst he was kicking and ducking. The strikers attempted to disarm him of his shotgun. He was stabbed below the umbilical cord with an assegai and ended up surrendering the shotgun. He later discovered that his pistol and radio were also taken by the strikers.

136.11. The gruesome attack on Lt Baloyi was clearly unlawful and no justification has been offered for this attack.

137. It becomes important to deal with the actions of the the armed strikers after the teargas and the stun grenade were discharged. According to the evidence, an attack on the police following the discharge of teargas or stun

grenade was a first for the SAPS.<sup>107</sup> This is so, given the history of the use of teargas by the SAPS over the years. Ordinarily the discharge of teargas and stun grenade would disperse a crowd.

138. The circumstances giving rise to the use of teargas and stun grenade were both reasonable and justifiable. The police had a reasonable suspicion that the armed strikers who had already shown their belligerence in refusing to disarm posed a threat to the people in the informal settlement. The march was not authorized. Further, no one on the part of the strikers has advanced any reason for the attack on the police or the stealing of R5 rifle, shotguns, pistols, ammunition and the hand radio belonging to SAPS.

139. The evidence of Mr X that the instructions given to them by the inyanga that they must first wait for the police to fire at them is the only evidence that helps to explain the attack on the police which followed immediately after the teargas and stun grenades were discharged.<sup>108</sup>

#### **The evidence and facts relevant to the use of force on 16 August 2012**

140. On 16 August 2012 at around 06:00, the JOCCOM met. Noted in the minute of the JOCCOM was that according to information received the armed strikers would refuse to surrender their dangerous weapons to the police or leave the koppie but were instead prepared to fight, including resisting the police, if their demands were not met by Lonmin. This position of the strikers was in conflict with what Mr Mathunjwa had told the police on 15 August 2012 where he had

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<sup>107</sup>Transcript:Day216,p26616,line24-25;26617,line1-2

<sup>108</sup> Transcript:Day248,p311204,lines25;p31205,lines1-25;p31206,lines1-12

intimated to the police that the strikers would surrender their weapons at 09:00 on 16 August 2012.

141. Although JOCCOM was hopeful that the strikers would disarm voluntarily, it was decided that a contingency plan be put in place to deal with the situation should the strikers have to be disarmed tactically.<sup>109</sup>
142. The JOCCOM decided that stage 2 of the plan would be maintained with the following deployments.<sup>110</sup>
143. At about 08:20 Mr Mathunjwa arrived at Lonmin and asked to discuss with Lonmin managers arrangements for the return of the strikers to work. He was informed by Mr Kwadi of Lonmin that management was not willing to guarantee that they would speak to the workers after they returned to work. Mr Mathunjwa said that this was a change from Lonmin's position the previous day when they said that they would talk to the strikers after they returned to work. The strikers did not surrender their weapons that morning.
144. At around 09:30, Lt General Mbombo addressed a media conference in which she announced, amongst others, that the strikers were going to be disarmed if they did not do so voluntarily. The evidence is that "the when and the how" were to be decided by the commanders.

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<sup>109</sup> Transcript:Day189,p22896,line1-9

<sup>110</sup> Transcript:Day189,p22896,line1-9

145. Around 10:00 police vehicles left the JOC to the koppie. At the koppie, the nyalas were positioned in accordance with stage 2 of the plan. The police pre-positioned the six barbed wire nyalas in front of the papa nyalas. Nyala 6 was positioned in a north westerly position to the other five (5) barbed wire nyalas. At this point, Mr Noki approached the nyala of Brigadier Calitz and told them that they do not want the police there. The police considered this a threat.<sup>111</sup>
146. At around 11:00, Lt General Mbombo spoke to Mr Mathunjwa on the phone and conveyed her displeasure that Mr Mathunjwa had not honoured his commitment to go to the koppie at 09:00 to speak to the strikers and that he was late for going to the koppie. Mr Mathunjwa explained to Lt General Mbombo that he had been at Lonmin offices since 08:20 and was not receiving cooperation from Lonmin management.<sup>112</sup>
147. Just after 11:00, Brigadier Calitz was informed by the driver and the commander of nyala 6 that they were threatened by the militant group.<sup>113</sup> The threat to nyala 6 was conveyed to the JOC.<sup>114</sup> Nyala 6 was then moved closer to the kraal.
148. Around 11:20, a group of strikers approached Brigadier Calitz's nyala and their leader, Mr Noki, demanded that the police remove the barbed wire. Brigadier Calitz explained to the strikers through a loudhailer that the purpose

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<sup>111</sup> Transcript:Day153,p17211,lines13-20

<sup>112</sup> Exhibit NN

<sup>113</sup> Transcript:Day153,p17212,lines9-18

<sup>114</sup> Exhibit JJJ107

of the barbed wire was to protect the police and the media. Mr Noki was aggressive and said to the police that he would not ask them again.<sup>115</sup>

149. Around 11:30, Mr Mathunjwa arrived at the JOC and was introduced to Lt General Mbombo. Lt General Mbombo again expressed her displeasure at Mr Mathunjwa's failure to speak to the strikers at the koppie at 09:00. Mr Mathunjwa told Lt General Mbombo that he was delayed by Lonmin management who did not want to meet with him. Lt General Mbombo requested from Mr Mathunjwa that he speaks to the strikers on the koppie, he should present Lonmin's position to the strikers in a manner that would not antagonise the strikers.

150. Around 11:50 Mr Mathunjwa and other AMCU officials left the JOC to the koppie. Mr Mathunjwa and the AMCU officials arrived at the koppie around 12:50. Mr Mathunjwa gave a report to the strikers that Lonmin refused to meet with him and that was the reason he did not come to the koppie at 09:00 as he had undertaken the previous night. In his address, Mr Mathunjwa told the strikers that he would go back to try again to speak to Lonmin.<sup>116</sup> After addressing the strikers, Mr Mathunjwa and the AMCU officials left the koppie.

151. Around 11:00 Major General Mpembe briefed Lt General Mbombo that he received reports that there was a change in the mood of the strikers on the koppie; that the strikers had made threats to the police and that it was clear that the strikers would not surrender their weapons. Major General Mpembe

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<sup>115</sup> Transcript:Day231,p28652,line1-2;FFF25,entry998

<sup>116</sup> Exhibit CC7-CC12

advised Lt General Mbombo that there was a risk of violence if the police did not disperse the strikers that day.<sup>117</sup> Lt General Mbombo said to Major General Mpenbe that the police should proceed with the action to disperse and disarm the strikers. She said that a JOCCOM meeting must be convened.<sup>118</sup>

152. Around 13:25 Captain Adriaio informed JOC and Brigadier Calitz that SAPS video personnel who were recording amongst the strikers have been identified as spies and that their lives were in danger. Brigadier Calitz ordered Captain Adriaio to instruct the video operators to leave the koppie.<sup>119</sup>

153. At about 13:30 a special JOCCOM meeting was convened. In the meeting, Lt General Mbombo instructed Major General Annandale to proceed with the implementation of stage 3 of the operational plan.<sup>120</sup> It was decided that the tactical operation would commence at 15:30.<sup>121</sup> It is correct that at this briefing there was no POP member present to make inputs to the plan. Notwithstanding, Major General Mpenbe, Major General Annandale and Brigadier Tsiloane, have extensive experience in POP operations. As we point out elsewhere in these submissions, stage 3 of the plan directed itself to addressing the hybrid nature of the operation. In any event, when the later briefing occurred at 14:30, senior POP members were present and pointed to no omission in the plan.

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<sup>117</sup> Transcript:Day78,p8326,lines5-18

<sup>118</sup> Transcript:Day78,p8325,line12-25;p8326-8327;

<sup>119</sup> Exhibit ZZZZ2

<sup>120</sup> Transcript:Day78,p8331,line10-12;Exhibit JJJ126; Exhibit FFF25,entry10:15;

<sup>121</sup> Exhibit TT4; Exhibit GGG1

154. Around 13:40, after Mr Mathunjwa had left the koppie, Bishop Seoka and the Major General Secretary of the South African Council of Churches arrived at the koppie. They spoke to Mr Noki and his committee members and enquired from them how they could be of assistance to resolve the situation. The strikers told Bishop Seoka and his colleague that they were on strike for a wage increase; that NUM members and Lonmin security members shot at them when they, the strikers, went to present their demand to Lonmin management.<sup>122</sup> The strikers told Bishop Seoka and his colleague that they wanted Lonmin to come address them at the koppie. The strikers also told Bishop Seoka and his colleague that they needed water and food.<sup>123</sup>
155. After addressing the strikers, Mr Mathunjwa returned to the JOC. At the JOC, Mr Mathunjwa spoke to Major General Mpembe and asked to speak to Lt General Mbombo. Mr Mathunjwa did not tell Major General Mpembe or any other member of the SAPS what it was he wanted to discuss with Lt General Mbombo. Major General Mpembe informed Mr Mathunjwa that Lt General Mbombo had left Lonmin premises. Mr Mathunjwa's evidence is that he also spoke to Mr Kwadi who told him that management was not prepared to meet with him.<sup>124</sup>
156. Around 14:15, Mr Mathunjwa left the JOC and went back to the koppie. On the way to the koppie, he sent an SMS text message to Major General Annandale that he was going back to the koppie to report to the strikers that no one was available to speak to them. At 14:28 Major General Annandale

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<sup>122</sup> Transcript:Day12,p1358,line14-18

<sup>123</sup> Transcript:Day12,p1359,lines11-13

<sup>124</sup> Transcript:Day22, p2334,lines16-25,p2335,line 1-4

responded to Mr Mathunjwa by SMS that the SAPS were available at the JOC and willing to discuss with him to find an amicable and peaceful solution. Mr Mathunjwa did not respond to this SMS from Major General Annandale.

157. At around 14:30 Colonel Scott and Brigadier Pretorius went to FHA1 to brief the commanders about implementing the tactical option. Colonel Scott briefed the commanders about the implementation of the plan using a laptop. After the briefing, the commanders went back to their positions to brief their members.<sup>125</sup> In his briefing of the POP, Brigadier Calitz explained to his members that he will give the order to commence the dispersal with the words engage.<sup>126</sup>

158. At around 14:40 Mr Mathunjwa arrived back at the koppie. He spoke to members of the SAPS and to the media and then proceeded to the koppie to address the strikers. Mr Mathunjwa addressed the strikers through a loud hailer. Mr Mathunjwa informed the strikers that Lonmin refused to speak with him. He told the strikers that the police were going to shoot them and pleaded with the strikers to leave the koppie. Some of the strikers took turns to address the strikers. Some of the strikers made threats against the police which included: that there cannot be two bulls in the kraal and either the police or strikers will have to leave the area; that those police members from the Eastern Cape will not leave the koppie and will remain at the koppie; that the police and strikers must sign a paper that they will kill each other. Some of the strikers said that they wanted the employer to come address them at the

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<sup>125</sup> Transcript:Calitz,Naidoo, Kidd & Modiba, Gaffly, Loest

<sup>126</sup> Transcript:Day154,p17304,line16-20

koppie. The strikers told Mr Mathunjwa that they were not prepared to leave the koppie and that the police should come and kill them there.<sup>127</sup>

159. At 15:30, Mr Mathunjwa was still at the koppie addressing the strikers. For that reason, the SAPS did not commence with the operation at that time and waited for Mr Mathunjwa to leave the koppie.

160. After Mr Mathunjwa left the koppie around 15:35, Mr Noki approached Brigadier Calitz's nyala again and said that they should sign a piece of paper so that the world can see how they are going to kill one another.<sup>128</sup>

**G: THE POLICE OPERATION AT SCENE 1**

161. Around 15:40 Brigadier Calitz gave the order that the barbed wire nyalas commence with unfurling of the wire.<sup>129</sup>

162. When the first barbed wire nyala commenced with the unfurling its wire , Mr Noki, again went to Brigadier Calitz's nyala and demanded to know why the barbed wire was being rolled out. He said the police will die in their hippos that day.<sup>130</sup> Colonel McIntosh responded through the loudhailer that the barbed wire was for the protection of the strikers, police and the media.<sup>131</sup>

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<sup>127</sup> Exhibit CC5-CC18

<sup>128</sup> Transcript:Day153,p17182,lines,4-13;Day231,p28643,line11-19

<sup>129</sup> Transcript:Day154,p17258,lines1-6

<sup>130</sup> Transcript:Day154,p17260,lines20-25;p17261,lines1-9

<sup>131</sup> Transcript:Day231,p28651,lines8-12

163. When the first nyala commenced unfurling its wire, most of the strikers on koppie 1 came off the koppie. Some dispersed in the western and north westerly directions, others moved to koppie 2.<sup>132</sup>
164. The first, second and third barbed wire nyalas unfurled their wires without incident.
165. When the fourth barbed wire nyala commenced with the unfurling of its wire, the small group of armed strikers who had gathered at the foot of the koppie apart from the majority of the strikers, approached the barbed wire nyala five (5) and walked alongside it as it moved with barbed nyala four (4) which was just behind it. The group of strikers was led by Mr Noki.<sup>133</sup>
166. As Nyala 4 continued to unfurl its wire, the driver realised that the armed strikers were intending to get into the police area. <sup>134</sup> He accelerated and outpaced the strikers to the northeast corner of the koppie before the strikers could cut in front of the nyala.<sup>135</sup> The armed strikers were aware of members of the TRT who were behind the line of barbed wire nyalas.<sup>136</sup>
167. After barbed wire nyala 4 succeeded to prevent the strikers getting into the police area, and upon Brigadier Calitz realising that the strikers were going around the kraal which would lead them to the police area, he ordered

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<sup>132</sup> Exhibit:UUUU10.3-V1

<sup>133</sup> Exhibit L,slide198

<sup>134</sup> Transcript:Day154,p17291,line22

<sup>135</sup> Transcript:Day154,p17293,line5-25; ZZZZ3.40; Exhibit KKK7; RRR18;

<sup>136</sup> Exhibit UUU10.3; Exhibit MMM50,para16-20

members of POP to “engage” to repel the attempt by the strikers to gain access into the police area.<sup>137</sup>

168. After Brigadier Calitz gave the order to “engage”, Lt Colonel Vermaak repeated the instruction to “engage”.<sup>138</sup> In his evidence, Brigadier Calitz explained that with the instruction to “engage”, he meant that the POP members disperse the strikers into smaller groups, encircle them and effect arrests.<sup>139</sup> Brigadier Calitz also ordered the papa nyalas to move out of the police area to block the area around the kraal where the strikers were headed which would give them access into the police area.<sup>140</sup> Following the instruction of Brigadier Calitz “engage”, members of POP fired rubber rounds, teargas, stun grenades and sprayed water to disperse the strikers from the corner and behind the kraal.

169. In accordance with the order of Brigadier Calitz, papa nyalas moved and formed up in the area of the kraal. The nyala of Brigadier Calitz also moved towards the kraal and eventually stopped between the shack and the wire fence.<sup>141</sup> POP members outside the nyalas discharged teargas, stun grenades and rubber rounds in the direction of the strikers to stop them moving towards the police area. This action of the police did not deter the armed strikers and they continued moving towards the police in a crouched tight formation.<sup>142</sup> There is a contention that the firing of teargas, stun

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<sup>137</sup> Transcript:Day154,p17290,line21;p17291,line22;Exhibit Video CC

<sup>138</sup> Transcript:Day205,p25312,line3-8

<sup>139</sup> Transcript:Day158,p18004,lines16-25

<sup>140</sup> Transcript:Day154,p17290,lines21;p17291,line22

<sup>141</sup> Transcript:Day154,p17294,line,14-17;p17295,line 19-26

<sup>142</sup> Exhibit UUUU10.3-V2; V2a - etv time 15:53:33:18

grenades and the spraying of water cannons happened later than at this stage. Nothing, in our respectful submission, turns on this difference.

170. During the movement of the armed strikers around the kraal, some of the strikers who were part of that group turned back and away from the kraal and police lines.<sup>143</sup> The head of the group of armed strikers came around the kraal and continued movement in the direction of the police line with the larger number of strikers behind them.<sup>144</sup> POP members fired teargas, rubber rounds and stun grenades at the advancing armed strikers.
171. On realizing that armed strikers were trying to gain access to the police area from around the kraal, Captain Loest called on the TRT to move in a basic line towards the kraal.<sup>145</sup>
172. In the face of the continuing advance of the armed strikers towards the police line, members of POP abandoned their positions and ran into nyalas for safety.<sup>146</sup>
173. After members of POP ran into nyalas for safety, the armed strikers continued their movement towards the TRT line. At least one (1) striker fired a shot in the direction of members of POP who were taking shelter behind nyalas.<sup>147</sup> In his evidence, Captain Thupe stated that he also heard two (2) shots being

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<sup>143</sup> Exhibit MMM50; Exhibit UUUU10.3-V2; V2a - etv time 15:53:33:13;

<sup>144</sup> Exhibit RRR17

<sup>145</sup> Transcript:Day229,p28318,line1-6

<sup>146</sup> Exhibit RRR17; RRR18;Exhibit L,slides206-207

<sup>147</sup> Exhibit RRR17; Exhibit L slide 206

fired in the direction of the TRT line.<sup>148</sup> This account is confirmed by Colonel Classen.<sup>149</sup>

174. After members of POP ran into nyalas for safety, Warrant Officer Kuhn of POP, armed with an R5 rifle, remained the only POP member between the approaching armed strikers and the TRT line. At the point that the head of the armed strikers was coming around the kraal, the north-eastern corner of the kraal, W/O Kuhn was next to the mouth of the kraal on the side of the armed striker with the footpath separating the armed strikers and the TRT line behind him.<sup>150</sup>

175. As the armed strikers continued to move in a tight crouched position towards him and the TRT line behind him, W/O Kuhn moved backwards to create distance between him and the armed strikers while he fired warning shots to the ground.<sup>151</sup> The shooting of warning shots by W/O Kuhn did not deter the armed strikers from their path as they continued moving towards him and the TRT line behind him.<sup>152</sup> Members of the TRT line also moved back to create distance between them and the advancing armed strikers and when it was clear that the armed strikers continued coming to the police to attack the police, members of TRT fired towards the armed strikers aiming at the ground and lower bodies of the crouched advancing armed strikers.<sup>153</sup> The video

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<sup>148</sup> Transcript:Day227,p27950,line17-25;p27951,line1-5

<sup>149</sup> Transcript:Day236,p29458,line9-24

<sup>150</sup> Exhibit UU3:20:13seconds

<sup>151</sup> Exhibit UU3:2-13seconds

<sup>152</sup> Exhibit UUU3

<sup>153</sup> Transcript:Day228,p28220,line13-15

evidence depicts a cloud of dust lifting from the ground in front of the advancing strikers. These were warning shots fired by members of TRT.<sup>154</sup>

176. During the shooting by the TRT, some of the strikers ran from the scene of the shooting through the kraal to koppie 2 and koppie 3.<sup>155</sup> Brigadier Calitz ordered that the papa nyalas move to disperse, disarm and arrest the strikers who were fleeing from koppie 1 and 2.<sup>156</sup> Brigadier Calitz also moved with these nyalas. The strikers fleeing to koppie 3 burnt patches of grass along the way to koppie 3.<sup>157</sup>

177. As a result of the shooting, sixteen (16) strikers were killed and another died in hospital. Thirteen (13) strikers were injured.<sup>158</sup> The deceased at scene 1 are: Michael Ngweyi (Body H); Patrick Akhona Jijase (Body K); Bonginkosi Yona (Body I); Andries Motlopula Ntsenyeho (Body J); Mzukisi Sompeta (Body G); Jackson Lehupa (Body E); Mongezeleli Ntenetya (Body F); Mphangeli Tukuza (Body D); Thobisile Zibambeke (Body C); Cebisile Yawa (Body L); Mgcineni Noki (Body B); Khanare Elias Monesa (Body A); Bongani Nqonqophele (Body M); John Kutlwano Ledingoane (Body N); Babalo Mtshazi (Body O); and Thembinkosi Gwelani (Body P).

178. The bodies of Messrs B Nqongophele; T Gwelani; JK Ledingoane, and B Mtshazi were found at the back of the kraal. They were clearly amongst the group of strikers who were attacking the police or those the police could

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<sup>154</sup> Transcript:Day236,p29458,line25;29459,line1-13

<sup>155</sup> Transcript:Day49,p5436,lines13-25;p5437,line1-4;Exhibit JJJ194.16

<sup>156</sup> Transcripts:Day153,p17336,lines4-25;p17337,lines1-2

<sup>157</sup> Transcript:Day242,p30494,line1-15;Exhibit L, slides240, 242,244,245,247 & 249

<sup>158</sup> Exhibit RRR17; SSS1

reasonably have believed were meaning to attack them. There could not have been any innocent individual amongst the attacking group. They all made common cause with Mr Noki's leadership and utterances that they were to kill the police.

179. After the shooting had stopped, Captain Loest ordered the TRT to search the strikers lying on the ground for weapon.<sup>159</sup> In his evidence, Captain Loest explained that he instructed members to search for weapons as a safety measure because at that stage he did not know what danger the persons lying on the ground posed. Captain Loest also attempted to contact the JOC by phone and by radio and only succeeded to speak with Brigadier Pretorius at 16:05.<sup>160</sup> He informed Brigadier Pretorius about the shooting by the TRT; that there were injured persons and requested that medical personnel be sent to the scene.<sup>161</sup> Captain Loest also ordered that all TRT members remain on the scene of the shooting.<sup>162</sup>

180. At 15:56 Lt Colonel Vermaak reported to the JOC from the helicopter that "bodies down".<sup>163</sup>

181. All the police members in Brigadier Calitz's nyala, including him, did not witness the shooting or hear firing by members of the TRT.<sup>164</sup> It is significant that Mr White, the expert, acknowledges the probabilities that Brigadier Calitz

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<sup>159</sup> Transcript:Day229,p28323,lines16-25;p28324,lines1-4;Exhibit SSS2.1

<sup>160</sup> Exhibit MMM22,p5,para 4.1.10

<sup>161</sup> Transcript:Day229,p28323,lines7-15;Exhibit MMM22

<sup>162</sup> Exhibit SSS1

<sup>163</sup> Exhibit FFF25,entry1018

<sup>164</sup> Transcript:Day154,p17296,line7-15;p17336,line 1

and his other members in the nyala may not have heard the burst of fire that happened at that moment. Mr White points to the background noise and the excessive engine noise of the nyalas.<sup>165</sup> To the background noise we add the three helicopters which were hovering above and no less the fact that the episode happened behind Brigadier Calitz's nyala.

182. While the TRT remained on the scene at the kraal, members of the NIU moved to koppies 1 and 2 to clear the koppies of strikers and weapons. Members of the STF also moved and in fact intercepted strikers who were heading towards koppie 2.

183. The allegation that armed strikers who went around the kraal were meaning to go to Nkaneng is simply wrong. This is so because –

183.1. The leader of the group, Mr Noki, was the one who was directing the armed strikers. According to the evidence of Mr Magidiwana, Mr Noki would have said to the armed strikers “lets just walk, you need not run, we have done nothing wrong”.<sup>166</sup>

183.2. Mr Noki did not live in Nkaneng. On the contrary his home was in the opposite direction towards Karee mine.

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<sup>165</sup> Exhibit JJJ178,

<sup>166</sup> Transcript:Day57,p6117;line24-25;p6118,line19

- 183.3. Given the landscape of the place where the armed strikers had gathered, there was ample space for the armed strikers to access Nkaneng without going through the police barricade.
- 183.4. It was a lot easier to access Nkaneng than through the very narrow channel between the kraal and the police.
- 183.5. More than 2000 of the 3000 strikers who had gathered on the koppie dispersed, including to Nkaneng, without going through the police designated area.
- 183.6. The police action of spraying the crowd with water; using teargas, stun grenades and rubber bullets to repel the armed group away from the kraal and the police members would have clearly indicated to the strikers that the police were dissuading them from going through the police area.
- 183.7. Having observed the police unfurl the barbed wire up to the point where nyala 4 reached the kraal, it would have been obvious to the armed strikers that the police were attempting to prevent them from entering the area east of the kraal.
- 183.8. The strikers were also aware of the presence of members of the TRT behind the barbed wire.

184. Brigadier Calitz had already announced that the barbed wire was intended to protect the police and the media who were all on the eastern side of the kraal.

**H: THE POLICE OPERATION AT SCENE 2**

185. At koppie 3 fourteen (14) persons died on the scene and three (3) in hospital. The names of the deceased are: Messrs Dumisane Anele Mdizeni; Thabiso Johannes Thelejane; Nkosinathi Xalabile; Tokoti Mangcotywa; Raphael Jeneveke Liau; Mpumzeni Nxande; Stelega Meric Gadlela; Henry Mvuyisi Pato; Thabiso Mosebetsane; Fezile David Samphendu; Mafolisi Mabiya; Ntandaso Nokamba; Telang Vitalis Mohai; Modisaotsile Van Wyk Sagalala; Molefi Osiel Ntsoele; Thobile Mpumza; Makhosandile Mkhonjwa. In its opening statement, the SAPS inadvertently omitted to mention the deceased Mr Ntandaso Nokamba among the list of deceased. Fifteen (15) strikers were injured. A further two hundred and seventy nine (279) strikers were arrested at scene 2.

186. The following units were involved with the operation at scene 2: POP, TRT, NIU, K9, STF and Airwing.

187. We set out the circumstances of the police action.

188. After the police commenced the operation at koppie 1, some strikers moved to koppie 2 and then koppie 3. These included strikers who were part of the

group of strikers that attempted to breach the police line (the barbed wire nyala 4 and the police line around the kraal).<sup>167</sup>

189. Some of the strikers who ran to koppie 3 left koppie 3 and ran off to Nkaneng.<sup>168</sup> Others ran in a westerly direction where they encountered police under the command of Captain Kidd. The strikers who ran in the direction of Captain Kidd were allowed to go past the police line without weapons.<sup>169</sup>

190. Around 15:30, Major General Naidoo moved from FHA1 with the members under his command and formed up on the gravel road next to the sludge dam.<sup>170</sup> While Major General Naidoo's convoy of soft-skin vehicles was parked next to the sludge dam, he heard Lt Colonel Vermaak say that "bodies down" on the radio.<sup>171</sup> He also heard that the veld was burning and that he must dispatch the fire trucks.<sup>172</sup> In response to the radio message, Major General Naidoo moved with the members under his command, including the medical personnel, in the direction of the small power station. He attempted to proceed to koppie 1 but found that the area was not navigable. His convoy made a u-turn and turned right onto the gravel road until they got to another power station and turned right at that power station.

191. At the top left corner of the power station Major General Naidoo ordered the vehicles to stop. He attempted to make contact with Brigadier Calitz without

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<sup>167</sup>Transcript:Day49p5440,line7-10;Day279,p35787,lines1-18

<sup>168</sup> Transcript:Day279,p35798,lines3-11;p35799,lines1-5

<sup>169</sup> Transcript:Day234,p29202,line18-25;Day189,p22924,line1-6

<sup>170</sup> Transcript:Day189,p22904,line18-24;

<sup>171</sup> Transcript:Day189,p22910,line4-8

<sup>172</sup> Transcript:Day189,p22911,line1-6

success. Whilst stationary there, he heard gunshot sounds to the west of where he was. He left the medical personnel at the corner of the power station and proceeded with members of K9 unit to investigate the source of the gunfire. His fear was that the police were engaging with people with firearms because there seemed to be an exchange of gunfire. Major General Naidoo and the K9 stopped and got out of their vehicles. They saw dust rising from the ground near where they were and realised that this was caused by bullets fired from the direction of koppie 3.<sup>173</sup> The area was open without cover, save for the vehicles. Members of the K9 fired shots in the direction of the bush at koppie 3. Major General Naidoo's impression was that they were returning the fire that was directed to their direction.

192. Major General Naidoo ordered that the members with him go to koppie 3 to investigate the shootings and as they approached the koppie on foot, they came upon strikers lying down hiding in the long grass and arrested these strikers.<sup>174</sup> They also saw a striker on the big boulder carrying a long rifle.<sup>175</sup>
193. While moving to koppie 3 on foot, Major General Naidoo saw a line of the NIU to the north east of koppie 3 and members under the command of Captain Kidd to the south west of koppie 3.
194. Major General Naidoo and his members joined up with the NIU to the front of the koppie on the northern side.<sup>176</sup> Major General Naidoo and some members

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<sup>173</sup> Transcript:Day189,p22929,line21-25;p22930,line1-9

<sup>174</sup> Transcript:Day189,p22929,line21-25;ExhibitMMM2 (Block6)

<sup>175</sup> Transcript:Day189,p2292,line21-25

<sup>176</sup> Transcript:Day189,p22929,line21-25;p22930,line1-9

went into the koppie on the north east side to sweep the koppie.<sup>177</sup> Other members of the NIU proceeded into the koppie to the north east side of the koppie.<sup>178</sup> At this stage Major General Naidoo had no idea how many strikers were in the koppie and it is only later that he became aware that there were more than two hundred and fifty (250) strikers inside the koppie.

195. On the koppie, and whilst he was on the big boulder, Major General Naidoo saw a striker in the bush to his left who was aiming a pistol at him.<sup>179</sup> The striker fired in the direction of Major General Naidoo. Major General Naidoo fired two rounds in the direction of the striker but does not know whether he struck anyone.<sup>180</sup> At the same time, some members of the NIU to the left of Major General Naidoo also fired in the direction of the striker who fired at Major General Naidoo.<sup>181</sup> Immediately after the shooting incident with the striker, Major General Naidoo and his members arrested some of the strikers, one of whom admitted that he shot at the police.<sup>182</sup>

196. Shortly before Major General Naidoo and his members got to koppie 3, Captain Kidd and his members approached the koppie from the south westerly side of the koppie.<sup>183</sup> Along the way they came across fleeing strikers that they called on to drop their weapons, raise their hands and pass the

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<sup>177</sup> Transcript:Day189,p22933,line23-25;Day242,p30503,line15-18;MMM25

<sup>178</sup> Transcript:Day242,p30506,line20-21;p30507,line8-13

<sup>179</sup> Exhibit MMM3-block E3

<sup>180</sup> Transcript:Day189,p22939,line16-19; Exhibit MMM30

<sup>181</sup> Transcript:Day189,22941,line1-8

<sup>182</sup> Transcript:Day189,p22939,line16-19;Exhibit MMM3 (blockE3)

<sup>183</sup> Transcript:Day189,p22922,line23-25

police line. The strikers were permitted to go through the police line after they dropped their weapons to the ground.<sup>184</sup>

197. Captain Kidd's members proceeded in the direction of the koppie and at some point were directed from the chopper of Brigadier Fritz which way to go.<sup>185</sup> As they approached towards koppie 3, they heard the sounds of bullets pass over their heads and some striking rocks near where they were moving. The bullets were coming from the direction of koppie 3.<sup>186</sup> Captain Kidd instructed the members to take cover behind rocks and bushes.<sup>187</sup> Cover was very sparse.<sup>188</sup> Some of the members ended upon the south west side and others to the north western side of koppie 3.

198. As Captain Kidd's group were taking cover facing koppie 3, a group of armed strikers, some armed with spears, came from the bushes inside the koppie in a crouched position making a "hissing" sound.<sup>189</sup> The armed strikers charged towards the members of Captain Kidd's group.<sup>190</sup> The police shouted to the armed strikers in different African languages to put down their weapons and to come out of the koppie.<sup>191</sup> The strikers ran back into the koppie and emerged again with their weapons and making a "hissing" sound as they moved towards the police. The police again called on the strikers to put their

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<sup>184</sup> Transcript:Day233,p29085,line7-21

<sup>185</sup> Transcript:Day233,p29018,line20-25;Exhibit GGG8;JJJ107

<sup>186</sup> Transcript:Day233,p29029,line18-22;Day237,p29649,line19-25;p296501-13;  
ExhibitUUU11;ExhibitUUU4;

<sup>187</sup> Transcript:Day233,p29021,line12-18

<sup>188</sup> Transcript:Day233,p29033,line6-10;Exhibit L,slide 216;218

<sup>189</sup> Transcript:Day233,p29033,line11-16

<sup>190</sup> Transcript:Day233,p29033,line11-25

<sup>191</sup> Transcript:Day233,p29036,line 3-9

weapons down and come out of the koppie.<sup>192</sup> Two of the strikers, Messrs Mkhonjwa (body N) and Gadava (the injured striker), armed with spears, broke from the group of armed strikers and charged towards the police.<sup>193</sup> In self and private defence the police fired shots at these two strikers. Mr Mkhonjwa was about 5 meters from the police when he was shot. Mr Gadava was the same distance when he was shot by the police.<sup>194</sup>

199. Other armed strikers to the south west side of the koppie charged towards members and members fired shots in their direction.<sup>195</sup>

200. Captain Kidd's members on the north western side of the koppie provided support to members of POP who were conducting arrests in that area.<sup>196</sup> It is in this area that the members encountered Mr Thobile Mpumza (body C) who was running from the south west direction of the koppie from the direction of Captain Kidd.<sup>197</sup> Mr Mpumza was confronted by members of TRT and ordered to lie down and to put his weapons down. He pretended to put down his weapons and to lie down on his hands. When Constable Sebetjane got close to him to effect arrest, Mr Mpumza jumped up and attempted to stab Constable Sebetjane with a spear. Constable Sebetjane fired at Mr Mpumza and when Mr Mpumza continued to charge at Constable Sebetjane,

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<sup>192</sup> Transcript:Day237,p29645,line11-21;Day233,p29036,line2-22

<sup>193</sup> Transcript:Day 233, Captain Kidd,p29038,line 16-25; p29039,line 1-25;p29040,line1-25 & p29041,line 1-18; Exhibit UUU11; UUU4; UUU7; UUU9; UUU10; Exhibit UUU4; UUU8; Exhibit LLL14

<sup>194</sup> Transcript:Day233,Captain Kidd,p29047,line21-25

<sup>195</sup> Exhibits LLL14

<sup>196</sup> Transcript:Day 236,p29657,line22-25;p29682,line1-7

<sup>197</sup> Day233,p29054,line1-25;p29055,lines7-25;29056-29060,

Constable Mabe also shot in the direction of Mr Mpumza.<sup>198</sup> Mr Mpumza suffered 12 bullet wounds and died on the scene.<sup>199</sup> Mr Mpumza was shot in self and private defence. Colonel McIntosh witnessed the attack on Constable Sebetjane. He testified that from where he witnessed the attack, it appeared that Mr Mpumza had stabbed Constable Sebetjane, which he found not to be the case when he arrived at the scene.<sup>200</sup>

201. After the shooting incident at the kraal, the papa nyalas, including Brigadier Calitz, regrouped and formed a line on the northern side of koppie 2 stretching up to the dry riverbed between koppies 1 & 2 and koppie 3.<sup>201</sup> On realising that the TRT line was not behind the POP, as provided in the plan, Brigadier Calitz asked Lt Colonel Vermaak to find out where they were.<sup>202</sup> Lt Colonel Vermaak flew to koppie 1 and reported back to Brigadier Calitz that there were bodies lying on the ground.<sup>203</sup> Brigadier Calitz did not understand this report to mean that people were dead.<sup>204</sup>

202. From this position, Brigadier Calitz waited for the water cannons to join the line. He saw strikers dispersing in westerly and northerly directions to koppie 3. Brigadier Calitz instructed the nyalas and water cannon to continue with the dispersal action. Some nyalas and the water cannons went in the westerly direction to koppie 3. Brigadier Calitz and other nyalas followed the larger

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<sup>198</sup> Transcript:Day236,p29657,line22-23;p29658,line1-7;Day233,p29054,line1-25;Day232,p28968,line23-25;p28969,line1-7;Exhibit WWW 5;Exhibit UUU4

<sup>199</sup> Exhibit A:DR 565.2012

<sup>200</sup> Transcript:Day231,p28668,lines4-9

<sup>201</sup> Exhibit L, slide223

<sup>202</sup> Transcript:Day155,p17570,lines9-14

<sup>203</sup> Transcript:Day153,p17341,lines5-15,Exhibit FFF25,entry1018

<sup>204</sup> Transcript:Day153,p17341,lines14-25;p17342,lines1-5

group of strikers who were dispersing in the northerly direction to koppie 3 and made several arrests.<sup>205</sup> During this action, Brigadier Calitz gave instruction that “do not shoot unless the target engages you”.<sup>206</sup> It is also during this action that he heard Lt Colonel Vermaak direct the movement of the water cannons and members on the ground.<sup>207</sup>

203. While Brigadier Calitz and his members were dispersing and making arrests, he was informed by Colonel McIntosh that a member was under attack, a reference to the incident involving Constable Sebetjane and Mr Mpumza in paragraph 210 above.<sup>208</sup> Colonel McIntosh then ran to the scene where he had seen the attack on Constable Sebetjane.

204. After the report from Col McIntosh, Brigadier Calitz heard Lt Colonel Vermaak say that the strikers were encircled. He, Brigadier Calitz, instructed members to get out of the nyalas and to “engage”. Brigadier Calitz then drove to where Mr Mpumza, Constable Sebetjane, Colonel McIntosh and other members of SAPS were.<sup>209</sup> It is at this stage that Brigadier Calitz became aware for the first that members of TRT from FHA2 were present at koppie 3.<sup>210</sup> At this stage, Brigadier Calitz was not aware of the presence of members from FHA1 and the NIU in koppie 3.<sup>211</sup> It is common cause that from his position during the dispersal action, Brigadier Calitz could not have seen the members under

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<sup>205</sup> Transcript:Day154,p17348,line3-12

<sup>206</sup> Transcript:Day154p17345,lines1-25

<sup>207</sup> Transcript:Day158,p18002,lines1-25

<sup>208</sup> Transcript:Day160,p8391,lines1-10

<sup>209</sup> Exhibit JJJ107

<sup>210</sup> Exhibit JJJ107

<sup>211</sup> Transcript: Exhibit JJJ107,para 130

the command of Major General Naidoo and Colonel Modiba respectively approach koppie 3.<sup>212</sup>

205. After he inspected the scene where Mr Mpumza was shot, Brigadier Calitz moved towards koppie 3. At about 16:47, Brigadier Calitz telephoned Major General Annandale to report the shooting of Mr Mpumza. Major General Annandale informed Brigadier Calitz about the shooting by the TRT at scene 1.<sup>213</sup> This was the first time that Brigadier Calitz became aware of the shooting. Brigadier Calitz proceeded to koppie 3 where he saw the many strikers under arrest. It is here that he saw and met Major General Naidoo for the first time.

206. Having described the circumstances surrounding the deaths of Messrs Mpumza and Mkhonjwa, we now deal with the remaining deceased who were fatally wounded in and around koppie 3.

207. The bodies of Messrs Dumisane Anele Mdizeni (body A) and that of Thabiso Johannes Thelejane (body B) were found lying on the eastern side of the koppie.<sup>214</sup> The evidence tendered in this regard was through a reconstruction done by Mr De Rover.<sup>215</sup> His evidence was that he went to Marikana with the members who were involved in the operation. He asked each of the members to place themselves where they were at the time of shooting, with each

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<sup>212</sup> Exhibit: Transcript Inspection *in loco* (Chaskalson)

<sup>213</sup> Transcript: Day 154, p17353, line 3-10

<sup>214</sup> Exhibit B – Crime Scene Pack

<sup>215</sup> Exhibit FFF11

member confirming the correct position of those who were to his left and right. The members pointed out where they were when they fired shots and their reasons for doing so.<sup>216</sup>

208. Regarding Messrs Thelejane and Mdizeni, and the position where they were found, the evidence is that they were lying in the direction from which the NIU had approached the koppie. In their approach to koppie 3, the NIU members split at the bottom of the sheer walled rock to the east of the koppie. One group turned towards the north and the other turned towards the south. The northern group kept the large rock on their left and skirted its outline. They cleared the bushes on the northern side of that rock of any remaining strikers and arrested a number of them. They also tended to the wounded at the scene of the bodies of Messrs Thelejane and Mdizeni.

209. The NIU members were not aware of the altered location of Captain Kidd's TRT to the west of the koppie. There were high velocity rounds flying over their heads, combined with 9mm rounds, fired at them by what they believe were the strikers on the east side of the koppie. This led them to believe that they were under attack. Shortly thereafter, they were confronted by strikers charging towards them brandishing traditional weapons and throwing rocks at them. NIU members fired warning shots into the ground in front of the charging strikers. This did not deter the strikers. As NIU members continued to advance, the attacks from the strikers continued. Some members of the

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<sup>216</sup> Transcript:Day285,p36884,line12-25;p36885,line1-4

NIU fired shots aimed at the attackers.<sup>217</sup> This probably accounts for the deaths of Messrs Mdizeni and Thelejane.

210. Colonel Modiba offered an opinion that the likely causes of Messrs Thelejane and Mdizeni death were members who were with Major General Naidoo on the southern side of the koppie.<sup>218</sup> This was a concession made by Colonel Modiba, having testified that when he first went past where the bodies of Messrs Thelejane and Mdizeni were found, he did not see the bodies but saw them after he had gone around the northern side of the koppie and returned to the eastern side where he had started.<sup>219</sup> In contrast, Major General Naidoo's evidence is that when he got to the boulder on the eastern side of the koppie, the bodies of Messrs Thelejane and Mdizeni were already there, together with strikers who were alive but pretended to be dead. These strikers were arrested.

211. Mindful that the account by Mr De Rover is hearsay, it nevertheless gives a more probable explanation for the deaths of Messrs Thelejane and Mdizeni, which, if true, would point to their deaths having occurred in circumstances of self and private defence and therefore excusable in law. The Colonel Modiba, even if accepted, does not give an account of the circumstances under which Messrs Thelejane and Mdizeni died. The Major General Naidoo does not bring any clarity either as to the circumstances explaining the deaths of Messrs Thelejane and Mdizeni.

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<sup>217</sup> Transcript:Day242,p30495,line5-9;p30497,line16-21

<sup>218</sup> Transcript:Day242,p30599,line15-25;p30600,line1-9

<sup>219</sup> Transcript:Day242,p30600,line2-9

212. The ballistic investigation report compiled by Mr Steyl and Dr Naidoo<sup>220</sup> gives the following picture: cartridges BB9-20<sup>221</sup>, BB21-41<sup>222</sup> and BB1-8<sup>223</sup> were all discharged by NIU members who approached koppie 3 from the eastern side and who were under the command of Colonel Modiba. This analysis shows a probable cause for the deaths of Messrs Thelejane and Mdizeni to have been the result of the action by one or more of the NIU members who moved to the koppie from the eastern side. The ballistic report is consistent with the reconstructed version of Mr De Rover.

213. The body of Mr Nkosinathi Xalabile (body O) was found on the southern side of the koppie. The only account given to the Commission is a reconstructed version through Mr De Rover. Some of the members who were with Major General Naidoo saw a striker holding a rifle on the big boulder. The members moved in a southerly direction, climbed the rocks and were fired upon from a south west direction. The NIU members shot in the south west direction from which they were shot at. Other members cleared the bushes to the south of the large rock. An NIU member witnessed how an unaware K9 member was almost hacked on the head by a protestor wielding a panga. After shouting a warning to the K9 member, the NIU member fired at the protestor who was attacking the K9 member. This is the likely explanation for the death of Mr Xalabile. If that account is accepted, Mr Xalabile was killed in private defence and his death is excusable in law.

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<sup>220</sup> Exhibit ZZZ5, Annex C

<sup>221</sup> Exhibit ZZZ5, Annex C

<sup>222</sup> Exhibit ZZZ5, Annex C

<sup>223</sup> Exhibit ZZZ3.474

214. The body of Mr Xalabile was found in the area where Major General Naidoo testified that he fired shots into in response to the strikers that was shooting at him. If the striker that Major General Naidoo shot at was Mr Xalabile, then the latter would have died in circumstances that are also excusable in law.
215. If the account given by Mr De Rover (reconstructed) and that of Major General Naidoo are not accepted, Mr Xalabile would probably have been killed in the cross fire, there being no other explanation for his death.
216. The ballistic investigation report<sup>224</sup> offers another probability regarding the circumstances explaining the death of Mr Xalabile. It shows a bullet fragment “M5” very close to the body of Mr Xalabile. Mr Xalabile died of a high velocity gunshot wound to the right side of the face. The proximity of the bullet fragment to the body of Mr Xalabile would be consistent with an action in self and private defence if he was armed and attacking and he was shot by the police member who fired the bullet that fragmented into bullet fragment M5.
217. The bodies of Messrs Thabiso Mosebetsane (body G) ; Mafolisi Mabiya (body H); Tokoti Mangcotywa (body D); Raphael Jeneveke Liau (body E); Mpumzeni Nxande (body K); Stelega Meric Gadlela (body L); Henry Mvuyisi Pato (body N); Fezile David Samphendu (body J); Ntandaso Nokamba (body I) were found inside the koppie. There is no direct evidence indicating which member was responsible for which fatality in this group of deceased persons.

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<sup>224</sup> Exhibit ZZZ, Annex C

218. The probable explanation on how the nine (9) deceased persons were killed is offered by Mr De Rover's reconstruction of events. The account is that the nine (9) deceased persons may have died not as a consequence of shots aimed directly at them but rather as a consequence of them being struck by rounds fired for other reasons, travelling through that area; rounds fired by members of POP from the north, NIU from the east, TRT and K9 from the south and TRT from the west. As many as half of all the three hundred and twenty five (325) bullets fired, (both 5.5mm and 9mm), maybe more, may have travelled through this area.
219. The ballistic investigation report shows a number of cartridges which may be a possible cause for the fire that travelled through the area where the nine (9) deceased were found. Cartridges AA39, 40, 41 & 42<sup>225</sup> were discharged by Constable Mashishi who says in his statement that he fired at the strikers who were attacking TRT members he was with on the south of the koppie.<sup>226</sup> The attackers were darting in and out of the bushes and also fired gunshots at the police.<sup>227</sup> As a result of the gunshots from the strikers, the members took cover behind a water cannon until the water cannon driver decided to drive off for fear that the gunshot would damage the water cannon, which is not an armoured vehicle and expose the occupants to harm. The members on the ground were left without cover. The movement of the water cannon is an independent confirmation that there were indeed bullets shot from the bushes

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<sup>225</sup> Exhibit ZZZ5, Annex C

<sup>226</sup> Exhibit ZZZZ3.270

<sup>227</sup> Exhibit ZZZZ3.217

into the koppie. Cartridges AA36 and 37 were discharged from the rifle of Constable Somo<sup>228</sup> who confirms the version of Constable Mashishi.

220. Cartridge AA33 was discharged from the rifle of Constable Motloheloa who was in the same vicinity as Constable Mashishi. The explanation for his conduct is contained in his statement.<sup>229</sup> He took cover behind the water cannon and confirms the account of Constable Mashishi. Both of these accounts are the reason for any of the deaths of the nine (9) deceased persons inside the koppie, and if accepted, would constitute private and self-defence.
221. Cartridge AA38 was discharged from the rifle of Constable Mabasa. He also took cover behind the water cannon. In his statement,<sup>230</sup> he confirms the version of events of Constables Mashishi and Motloheloa, which version, if accepted, would amount to private and self-defence.
222. Cartridges, AA34 and 35 and cartridges AA 30, 31 and 32, were discharged from the rifles of Constables Mlombo and Thoka respectively. In their statements, Constables Mlombo<sup>231</sup> and Thoka<sup>232</sup> confirm the account of Constable Mashishi. Constable Thoka, says that he fired three (3) rounds into the air as warning shots. Such account corroborates an exculpatory account of police action.

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<sup>228</sup> Exhibit ZZZZ3.602

<sup>229</sup> Exhibit ZZZZ3.422

<sup>230</sup> Exhibit ZZZZ3.184

<sup>231</sup> Exhibit ZZZZ3.234

<sup>232</sup> Exhibit ZZZZ3.625

223. Constable Letswalo shot four (4) rounds.<sup>233</sup> The ballistic investigation report reflects one (1) 9mm round cartridge linked to the firearm of Constable Letswalo, cartridge AA15.<sup>234</sup> Constable Letswalo states that he fired at armed strikers who were attacking the police. The person he fired at was less than seven (7) meters from him and was charging at him. After shooting at the striker, Constable Letswalo went to the striker and disarmed him of his weapon.
224. Warrant Officer Mvunge fired one (1) 9mm round whose cartridge is reflected on the ballistic investigation report, cartridge AA12.<sup>235</sup> In his statement<sup>236</sup>, he states that he fired two (2) rounds into the air. The shots must have served as warning shots.
225. Constable Ngwaleni fired twenty five (25) rounds into the air, cartridges BB7, 8, 23, 24, 27, 28, 31, 33-35, 37-40, T1-3, U1, 2, 4-6, X. He says in his statement that all the rounds were fired as warning shots to repel the attack on the police by the strikers who were armed. He also postulates that he may have fired whilst his rifle was on an automatic setting.<sup>237</sup>

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<sup>233</sup> Exhibit ZZZZ3.175

<sup>234</sup> Exhibit ZZZ5, Annex C

<sup>235</sup> Exhibit ZZZ5, Annex C

<sup>236</sup> Exhibit ZZZZ3.446

<sup>237</sup> Exhibit ZZZZ3.468

226. Constable Ngonyama describes an attack on the police by strikers armed with pangas and spears.<sup>238</sup> He feared for his life and that of his colleagues. He fired three (3) rounds (the ballistic investigation report reflects two cartridges, BB21 & and linked to his rifle). Some of the strikers surrendered to the police and were arrested. Other strikers ran back into the koppie.
227. Constable Poswa says in his statement that he fired two (2) warning shots to the ground<sup>239</sup> (cartridge BB9 was found on the scene). He and other police members arrested and disarmed some of the strikers who were attacking the police.
228. Cartridges BB10-15 were found on the scene and discharged from the firearm belonging to Constable Mandla. In his statement<sup>240</sup>, he states that he fired four (4) shots to the ground when strikers were attacking the police with spears, pangas and other dangerous weapons. The attacking strikers were about 15 meters from the police. Some of the strikers were arrested and others ran back into the koppie.
229. Constable Mokhele's<sup>241</sup> account as appears in his statement is that he fired four (4) warning shots into the air when armed strikers charged at the police. When on top of the rock, there was another attack on the police by armed strikers and he fired four (4) rounds to the ground towards the direction of the

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<sup>238</sup> Exhibit ZZZZ3.465

<sup>239</sup> Exhibit ZZZZ3.520

<sup>240</sup> Exhibit ZZZZ3.254

<sup>241</sup> Exhibit ZZZZ3.355

strikers. Inside the koppie, he saw a striker armed with a spear attempt to strike a member who was not aware of the attack. Constable Mokhele shouted to the member to alert him of the attack. When he realised that the member was not aware of the attack, he, Constable Mokhele, fired one shot at the striker. The striker ran into the koppie. The cartridges linked to Constable Mokhele's firearm appear in the ballistic investigation report as BB4, 5, 25, 29, 30, 32, V1-3.

230. Lt Ndlela says in his statement that he fired warning shots at armed strikers who charged at the police.<sup>242</sup> One armed striker attacked another member. He shouted at the striker and it appeared that the striker did not hear him. He then shot at the striker aiming for the lower part of the body. This is a probable explanation for the death of Mr Xalabile.

231. The cartridge linked to the rifle belonging to Constable Dubeni is cartridge R in the ballistic investigation report. In his statement he says that he saw three (3) strikers armed with spears and pangas storm in the direction of the police.<sup>243</sup> He shouted at the strikers to stop and they did not. When the strikers did not stop and were close to the police, he fired two (2) warning shots in the air. The strikers ran into the koppie. He went over the rock into the koppie. Four strikers armed with spears and pangas ran towards him. He shouted at them to drop their weapons and when they did not, he discharged one (1) into the air. The strikers ran away.

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<sup>242</sup> Exhibit ZZZZ3.451

<sup>243</sup> Exhibit ZZZZ3.72

232. Constable Sefanyetso's cartridges BB16-19, 21, 22, CC2 were also found on the scene. His explanation is that there were heavily armed strikers who were charging at the police.<sup>244</sup> He warned the strikers to stop but they did not. The strikers were about 10 meters from the police. He discharged his firearm to scare the attacking strikers away. Some of the strikers were arrested and others ran into the koppie. He explains that he realised afterwards that his rifle was on automatic setting.
233. Constable Nyathela has cartridge BB6 linked to his firearm at the scene. In his statement<sup>245</sup>, he says that he heard shots being fired from "the other side" of the koppie. The strikers came running out of the koppie armed. He fired two (2) warning shots into the air.
234. Sergeant Molangoanyane's cartridge, CC3, was also found on the scene. His account in the statement<sup>246</sup> is that he heard gunshots and saw gunshots coming from the bush in koppie. He shot into the bush from where the gunshots were coming. He went closer to the koppie and two (2) strikers came towards him armed with pangas. He shot at one of the strikers. The striker fell to the ground. He went into the koppie where he was alerted by a TRT member about a striker who was about to attack him with a spear. He shot at the striker and saw the striker fall. This account may probably explain the deaths of Messrs Mosebetsane and Mabiya.

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<sup>244</sup> Exhibit ZZZZ3.559

<sup>245</sup> Exhibit ZZZZ3.493

<sup>246</sup> Exhibit MMM6

235. Messrs Telang Vitalis Mohai (DR586/2012); Modisaotsile Van Wyk Sagalala (DR597/2012); Molefi Osiel Ntsoele (DR598/2012). The circumstances around the deaths of the three (3) deceased persons who died at koppie 3 have not been explained in the Commission, except that they would have sustained fatal injuries at koppie 3.

**I: GUNSHOT WOUNDS TO THE BACK OF THE BODY**

236. Some of the fatalities resulting from police action on 16 August 2012 were a result of gunshot wounds to the back of the deceased. It is argued therefore that the deaths of those victims could not have been in circumstances that are justifiable in law. This argument is erroneous, for reasons that follow:

236.1 Those at scene 1 who may have sustained gunshot wounds to their back were part of the threat that the police action was intended to contain.

236.2 At scene 1, two (2) of the deceased persons sustained gunshot wounds to the back.<sup>247</sup> Given the clear evidence that some of the members of the militant group that approached the police line turned during shooting and ran away from the scene<sup>248</sup>, a probable explanation is that the two deceased may also have possibly turned in that period.

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<sup>247</sup> Mongezeleli Mtenetya (DR584/2012); Cebisile Yawa (DR 587/2012)

<sup>248</sup> Transcript:Day50,p5436,line7-23;Day252,p31818,line11-13;Exhibit UUUU3.1

236.3 If it is found that the group that approached the police line attacked or were intending to attack the police or that the police reasonably believed that they were under attack, an injury to the back of an attacker is a neutral fact. It must mean that the person was part of the attacking group and no reasonable police member could have seen or acted on a change in direction in the eight (8) seconds of shooting and a possible turning of one individual in a group of 300 attackers.

236.4 At scene 2, six (6) of the deceased persons sustained gunshot wounds to the back of their bodies.<sup>249</sup>

236.5 One probable explanation is that some of the strikers may have been moving inside the koppie and were hit by bullets not aimed at them in particular. The version of Mr Mtshamba is that as bullets were striking the rocks where he was hiding, strikers were moving around in that area.<sup>250</sup> If this evidence is accepted, it offers a probable explanation for some of the injuries to the back.

236.6 Another probable explanation for injuries to the back is that some members of the SAPS shot at armed strikers who were about to attack

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<sup>249</sup> Thobile Mpumza (DR565/2012); Mafolisi Mabiya (DR572/2012); Stelega Meric Gadlela (DR576/2012); Henry Mvuyisi Pato (DR577/2012); Nkosinathi Xalabile (DR594/2012); Modisaotsile Van Wyk Sagalala (DR597/2012)

<sup>250</sup> Transcript:Day275,p35138,line17-23

a member who was not aware of the imminent attack.<sup>251</sup> Such a member who shot in defence of an unsuspecting member may well not have been facing the attacking striker.

236.7 A further probable explanation is that the deceased who were shot in the back may have turned in the period that the shot was discharged and before they were struck. There is evidence that some of the attacking strikers were darting in and out of the bushes as they charged at the police, firing shots and charging with spears and pangas.<sup>252</sup>

236.8 Yet another probable explanation is that the deceased may have been struck in the cross fire at a time when they had their backs to the source of the gunshot.

237. We submit that in the circumstances set out above, gunshot wounds at the back of some members of the attacking groups does not negative a defence of self or private defence, if such wounds were sustained in circumstances where the police were entitled in law to protect life and limb against an unlawful attack.

**J: CRITICISMS OF THE SAPS OPERATION**

238. During the hearing, numerous criticisms were directed at the conduct of SAPS in the operation in Marikana during the period 9 to 16 August 2012. Since all written submissions by all the parties are to be submitted simultaneously, we

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<sup>251</sup> Exhibits ZZZZ3.451; ZZZZ3.355

<sup>252</sup> Exhibits ZZZZ3.270; ZZZZ3.602; ZZZZ3.422; ZZZZ3.184

do not know whether all of the criticisms will still be persisted with in argument. We therefore deal with these criticisms without any particular order. We also reserve the right to submit written reply should any of the parties raise criticisms which are not dealt with in these submissions.

239. The one pervading criticism levelled at the SAPS operation on 16 August 2012 is that the plan to disarm and disperse the strikers on the koppie was done by Col Scott who is not a POP member. This criticism is without substance. This is so for the following reasons.
240. In the first place, both Mr White and Hendrickx were unable to identify specific POP elements which were missing in the plan.
241. The plan was presented to all the commanders, including the POP commanders, during the 14:30 briefing attracting no objection regarding its soundness.
242. Further, the criticism is blind to the fact that the strikers on the koppie comprised of two components. The one component was the large unarmed group which could typically be described as a subject of ordinary crowd management problem. In accordance with SAPS experience and expectation, this group responded to typical crowd management dispersal techniques and began to disperse, mostly in northern and western directions, as soon as the barbed wire nyalala<sup>1</sup> began to unfurl its wire. The distinct smaller armed group (the militant group) posed a different risk which was above the capacity of

POP to contain through public order management techniques. The plan therefore was to deal with the hybrid character of the strikers. As it turned out, the militant group approached the police line in concert, with the intention to attack the police.

243. Further, the evidence is that even though Lt Col Scott was not cognisant of the content of Standing Order 262, he was familiar with the principles thereof and the plan did take into account the elements of public order policing which are reflected in SO262, including taking the defensive measure of using barbed wire and the requirement to warn strikers before the police take action.

244. Another criticism is that senior leaders in the JOC, except Major General Annandale, involved in the operation did not have current POP training.<sup>253</sup> While it is correct that only Major General Annandale had current POP training, it is also true that Major General Mpembe, Brigadier Calitz, Colonels Merafe, Tseloana and Pitsi have undergone POP training, and collectively have extensive experience in crowd management, including the period after 1994 and have been involved in the planning and command of crowd management without serious incidents. The experts do not contend that the lack of current POP training as contended was a factor in the outcome that was Marikana or indeed that it in anyway had an adverse impact on the operation. There is no such evidence.

245. Another criticism is that the decision to disarm and disperse could have been deferred for later days. This criticism is advanced without offering what other

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<sup>253</sup> Exhibits JJJ178 & LLL12

day would have been appropriate for the strikers to be disarmed. The criticism rests purely on the argument that there had not been any violence since the death of Mr Twala on 14 August 2012. The criticism is also flawed when it looks at the fact that no violence was perpetrated up to the point when the operation to disarm the strikers was launched. The pertinent threat throughout the period was the fact that the strikers were armed with dangerous weapons which up to 14 August 2012 had claimed ten (10) lives and scores of injured persons. The strikers, whilst armed in defiance of lawful orders and requests by the police to disarm, and the accompanying verbal threats set out above, posed a continuing threat. According to the police plan, the later stages of the plan would also have included a search and seizure operation once intelligence had been gathered on who the criminal elements among the strikers were and where they lived. The negotiations to have the strikers disarm had failed. Mr Mathunjwa had left without indicating that there was an opportunity still to persuade the strikers differently. Lonmin had also showed its hand that it was unwilling to negotiate with the strikers on the koppie. The strikers had also rejected Mr Mathunjwa's plea to them that they disperse and there was no indication that the dangerous and tense stand-off would end or would not result in further act of criminal violence while the police kept a watch at the koppie.

246. A further criticism of the police operation is that it was executed without adequate and updated intelligence. The criticism is misplaced. The witnesses could not point to any remissness on the part of the police to gather intelligence that was available. Further, the militant group had controlled

information about its conduct by refusing members of the crowd from having any cell phones on the koppie. Mr Twala was killed for having a cell phone with airtime on the koppie. This clearly explains the limitations on intelligence gathering capacity of the police and it has not been suggested that it would have improved if the dispersal action was not carried out on 16 August 2012.

247. The police are also criticised for a plan that designated the eastern side of the koppie towards Nkaneng as a negative attraction point. The contention is that since most of the strikers lived in Nkaneng, that direction should have been the positive attraction point. The criticism is without merit. The dispersal was clearly intended to ensure that the armed strikers did not go into the settlement armed with dangerous weapons for concern about possible attacks on other residents in the settlement. There is no reasonable basis to suggest that such consideration was without merit. The north and west of the koppie offered ample opportunity for those who wanted to disperse to do so. The majority of the strikers dispersed in that direction.

248. It is also contended that the police failed to warn the strikers before rolling out the first barbed wire. This contention pays no attention to the fact that SO262 regards the rolling of the barbed wire as a defensive measure which does not require prior announcement. On the contrary, it requires that defensive measures are first put in place before a warning is given.<sup>254</sup> The evidence why this is prudent cannot be contested on any reasonable basis. Further, the criticism is wrong when on the evidence it is clear that Brigadier Calitz more

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<sup>254</sup>Exhibit SS2, clause11(2)(1)

than once explained through the loudhailer what the purpose of the barbed wire was.

249. A further criticism of the operation is that the better option to launching the disarmament and dispersal action, would have been to conduct a cordon, search and seizure operation first. This criticism is blind to the evidence that there was no intelligence on who the militant group was and particularly where they slept overnight. The evidence is also that only thirty eight (38%) percent (10%) of Lonmin employees stay in the hostels.<sup>255</sup> Further, no tactical operation could have been launched whilst the possibility existed that the strikers may, on the words of Mr Mathunjwa, have disarmed voluntarily.

250. There is also the criticism that the police should have created filtering lines along the paths leading to the koppie and disarmed the strikers on their way to the koppie. This criticism overlooks the fact that according to Mr Mathunjwa's report to the SAPS on 15 August 2012, there was the possibility that the strikers would voluntarily surrender their weapons that morning; the filtering line would have had to cater for the direction of the strikers who came from all angles to the koppie. Also, there would not have been sufficient SAPS members to form such a filtering line as would be required by the geography of the area. In any event, such a filtering line would have been futile, the armed strikers would simply not go it.<sup>256</sup>

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<sup>255</sup> Transcript:Day293,p38419,line1-5

<sup>256</sup> Transcript:Day133,p14101,lines5-21

251. It is further contended that a better option would have been to encircle the koppie early in the morning whilst the number of strikers was manageable. The following realities render the criticism without merit: (i) as it turned out, the problematic elements of the strikers were sleeping in koppie 3 and encircling koppie 1 would have achieved no purpose; (ii) Mr Mathunjwa had asked the police to not interfere with the strikers who had intimated to him that they wished to spend the last night on the koppie; (iii) Also, there was not enough barbed wire to encircle the entire koppie and in any event, the strikers would have simply gathered at a different location, as they in fact did when they no longer had access to the Wonderkop stadium.

252. A further criticism is that the police should have used nyalas to create a block between the northwest corner of the kraal and the fence. This criticism does not take into account that the decision to position the nyalas was not part of a plan, but rather a reaction within seconds to the movement of the strikers. The criticism also fails to take into account that the strikers would have been able to frustrate the block with access between nyalas and through the kraal as happened with some of the strikers. The evidence is that in normal circumstances where nyalas are used for a block, there always remains a gap between the nyalas where the strikers could have gone through.<sup>257</sup>

253. Another criticism is that water cannons were used with the effect to corner strikers in koppie 3. It is not apparent what the basis of this criticism is. There is no evidence that the water cannon had the effect alleged by Mr White. In any event, there is no evidence from the strikers that they were unable to

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<sup>257</sup> Transcript:Day177p21159,line18-p21160,line1-12

come out of the koppie because of the effect of the water cannon. The experience of POP is that water cannons are effective as a dispersal tool and there was no reason to expect otherwise.<sup>258</sup> We submit that there is no merit to this criticism. Lt Colonel Vermaak's communication with Brigadier Calitz did not indicate that the strikers were being prevented from dispersing – instead, he directed members to make arrests of the strikers that he said were surrounded.

254. Another criticism is that it was inappropriate that the NIU line, armed only with sharp ammunition was the (first) line assigned to encircle, disarm and arrest the strikers at koppie 3.<sup>259</sup> This criticism misconceives the role of the NIU in the operation. The NIU was tasked to assist with dangerous arrests and to retrieve weapons.<sup>260</sup> Koppie 3 was such a terrain – it had large rocks and bushes behind which the armed strikers hid; many of the strikers were armed with pangas, bush knives, spears and some of the strikers were armed with firearms; a large number of strikers were inside the koppie. The disarming and arrest of such strikers is not a task that the POP, with their training and armed mainly with non-lethal means, could effectively address.

255. A further criticism is that there was no plan how to deal with the strikers if they retreated to koppie 3. This police did not plan on the basis that the strikers would regroup in koppie 3. There was no such intelligence or reason to anticipate this as a possibility. In any event, the police movement to koppie 3

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<sup>258</sup> Transcript:Day155,p17419,lines1-1;Day216,p26678,lines10-18

<sup>259</sup> Exhibit JJJ178,para 6.5.21,para 6.5.26 and para 7.6.4

<sup>260</sup> Exhibit L, slide 77;80;183

was a continuation of the dispersal plan which commenced with the order of Brigadier Calitz to “engage”. The criticism is therefore without merit.

256. Another criticism is that the police failed to provide medical assistance to injured persons at scene 1 timeously. There is evidence that the plan included provision for medical personnel. These were stationed at FHA1 under the command of Major General Naidoo. We submit that the decision of Major General Naidoo to investigate the shooting at koppie 3 was not in itself unreasonable in the circumstances.<sup>261</sup> The evidence is also that as soon as Brigadier Pretorius was informed of injuries by Captain Loest, she made arrangements with Lonmin for medical personnel to be dispatched to the scene. Such medical personnel were arranged without any undue delay. Whilst the fact of the delay in the medical personnel arriving at scene 1 is serious and concerning, it is also a serious matter that medical personnel were also impeded from reaching scene 1 by strikers who threw stones at them.<sup>262</sup>

257. There is a contention that the use of lethal force at scene 1 on 16 August 2012 was excessive. This argument must be wrong for the following reasons:

257.1. The argument moves from a premise that the threat was only from the front line of the group of strikers and not the entire group of 300 to 400 armed strikers.

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<sup>261</sup> Transcript:Day189,p22913,lines14-16;p22915,lines2-5;Exhibit JJJ108 para67

<sup>262</sup> Exhibit JJJ29

257.2. The argument does not factor in a fact that by far the majority sharp point ammunition discharged was aimed to the ground.

257.3. With fifty three (53) members shooting simultaneously, in eight (8) or the contested twelve (12) seconds, in response to a perceived threat on all of them, the response of the police at scene 1 was proportional to the threat.

257.4. There is no evidence that even when it was obvious that the threat had been contained, that members of the police continues nevertheless continued to shoot at the strikers.

258. A further criticism is that the police continued to fire beyond the first call to cease fire and that such shooting could not be in self or private defence. The criticism is unfair to the evidence. The members who fired acted independently, simultaneously with firearms, many to cause considerable amount of noise with helicopters hovering above, nyalas whose engines were idling and a line of fifty three (53) - odd members. It is not clear on these facts who could or could not hear the first cease fire call.<sup>263</sup>

### **Compliance with SO262**

259. Standing Order 262 deals with crowd management during gatherings and demonstrations. The Regulation of Gatherings Act prescribes the procedures that must be followed when the constitutional right to protest, petition and exercise freedom of speech are exercised.

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<sup>263</sup> Exhibit RRR17

260. Clause 3 of the Standing Order addresses proactive conflict resolution. The clause deals with continuous information gathering; analysis of all potential problems where public safety is threatened; facilitation processes to identify factors that underlie the disorder; identification of role players and stakeholders who can play a role in resolving problems; the partnership that is to be formed with the community etc.
261. Clause 10 of the Standing Order deals with the briefing of members and states that members must be properly briefed before they are deployed to perform crowd management duties. The operational commander is obliged to personally brief all members in the command structure; ensure that all members in the command structure communicate the objectives of the operation clearly to all members deployed for the event and more pointedly, to instruct all commanders, all section leaders to furnish detailed written plans on their specific tasks.
262. The evidence is that on 16 August 2012, Colonel Scott and Brigadier Pretorius went to FHA1 at 14:30 to brief the commanders about the operation. Colonel Scott gave the briefing using his laptop. There was no written plan given to the commanders. This has become a focal point of criticism.
263. The answer to the criticism that there were no written plans as required by Standing Order 262 can be met at two levels. The one level is firstly that the operation was not purely a crowd management operation but a hybrid operation. SO262 does not address itself to such an operation. Secondly and

more importantly, Mr White and Hendrickx could not point to any public order policing measures that were to be in the plan but were omitted.

264. Ultimately, the criticism by Mr White appears to be that the tactical option should not have been embarked upon at all.
265. Standing Order 262 requires a debriefing to be held after each operation. The debriefing is to make a thorough evaluation; must concern itself with identifying all good practices as well as short comings as part of a learning process to enhance good practices and address or prevent recurrences of identified mistakes.
266. SAPS did not hold such a debriefing. The explanation for this is that it was thought advisable not to hold such a debriefing once the appointment of the Commission was made, which was to complete its work within four (4) months.
267. Regarding the operation of 13 August 2012, there is no criticism that the operation was undertaken without a written plan. It is accepted that the operation was intended to address a spontaneous and mobile public order threat.
268. Regarding the use of force in crowd management operations, the standing order provides that use of force must be avoided at all cost and members deployed for the operation must display the highest degree of tolerance. Where the use of force is unavoidable, the purpose of offensive action must be to de-escalate conflict with minimum force to accomplish the goal. The

degree of force must be proportional to the seriousness of the situation and the threat posed in terms of situational appropriateness; it must be reasonable in the circumstances; minimum force must be used to accomplish the goal and the use of force must be discontinued once the objective has been achieved.

269. The standing order provides further that force may only be used on the command or instruction of the CJOC or Operational Commander and that members may never act individually without receiving a command from their commander.
270. It is argued that the decision by the Provincial Commissioner to go tactical on 16 August 2012 can be criticized at least on two grounds, namely, that there was a relative period of calm from 15 August 2012 until the operation was launched; and that the decision was taken without any intelligence pointing to a possible resistance by armed strikers if attempts were made to disarm them.
271. The answer to the criticism that going tactical to disarm the strikers was intended to de-escalate the conflict. If we accept that the conflict had already claimed ten lives, injuries to several persons, damage to property and theft of firearms from the police, Lonmin security and Mr Twala, and that the strikers were still armed and posing a continuing threat, the decision to have them disarmed was to de-escalate that conflict.
272. We are always cautioned not to measure any conduct under scrutiny with the benefit of hindsight. The conclusion that the tactical option to have the strikers disarmed escalated the conflict is one of hindsight.

273. It can also be stated that some members involved in the operation did not give an accurate account of the number of shots that they fired. This does call for an investigation.

274. We also address specific criticism directed at the conduct of individual members.

### **BRIGADIER CALITZ**

275. One criticism levelled against Brigadier Calitz is that he positioned himself where he could not see the operation unfold.<sup>264</sup> This criticism is not correct.

276. The evidence is that at scene 1, Brigadier Calitz saw<sup>265</sup>: the barbed wire nyalas deploy; the strikers approach the line of nyalas; the attempts by the strikers to cut in front of the barbed wire nyalas; barbed wire nyala 4 race and cut-off the strikers at the corner of the kraal and the strikers movement from the corner of the kraal to move around the kraal. It is at this stage that he gave the order to the POP to “engage”<sup>266</sup>; he only left his original position as part on the movement of nyalas to block the strikers around the kraal.<sup>267</sup> Brigadier Calitz’s movement from his original position was as a result of the movement to block the strikers from coming into the police area. This movement was not unreasonable in the circumstances. It is not suggested by Mr White that Brigadier Calitz should have remained static in his original position throughout the operation.

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<sup>264</sup> Transcript: Exhibit JJJ178,para7.3.10

<sup>265</sup> Transcript:Day154,p17290,line24-25;p17291line1-8;p17292,line22-25

<sup>266</sup> Transcript:Day154,p17243,line4-12

<sup>267</sup> Transcript:Day154,p17290,line5-25

277. At koppie 3, Brigadier Calitz's movement was for the purpose of dispersing and effecting arrests. In this regard, he gave effective command to members of POP that were with him and in fact arrests were effected under his command.<sup>268</sup> In any event, the criticism assumes that the operational commander will at all times have sight of all aspects of the operation as it unfolds. This is practically impossible especially in the context of the operation at Marikana. The criticism also fails to acknowledge that the operational commander is assisted by and relies on unit commanders to direct and make decisions in the execution of the operation and to report to him.<sup>269</sup>
278. There appears to be a further criticism that Brigadier Calitz did not hear or see the shooting by the TRT at scene 1. This criticism is without merit. The evidence is that the noise factor (the nyalas and helicopters) and the position where Brigadier Calitz sat in the nyala are factors which explain why he did not hear the shooting by the TRT.<sup>270</sup> It is important that none of the persons that were in Papa nyala 1 state that they heard or saw the shooting by the TRT.<sup>271</sup> Brigadier Calitz is not called upon to provide an explanation why none of the members who were aware of the shooting notified him.
279. A further criticism is that Brigadier Calitz failed to investigate why the TRT remained behind when they were supposed to back-up POP. Brigadier Calitz testified that he enquired about the POP and was informed by Lt Colonel

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<sup>268</sup> Exhibit JJJ178,para7.3.14(b)

<sup>269</sup> Transcript:Day154,p17326,line23-25;p17327,line1-18

<sup>270</sup> Transcript:Day157,p17946,lines11-25

<sup>271</sup> Exhibit JJJ178,para7.3.12

Vermaak that they have remained behind. The armed strikers were not static and we submit that a contention that Brigadier Calitz should have paused to check on the TRT is unreasonable in the circumstances of a live and dynamic operation involving thousands of strikers, many armed with dangerous weapons. Brigadier Calitz was supported by unit commanders and he depended on them to advise him should there be a reason to pause. They did not do so. Instead, Lt Col Vermaak, who had sight of the whole area and had the opportunity to propose such a pause, did not do so and continued to direct members to continue with the dispersal action.

280. Another criticism directed at Brigadier Calitz is that he failed to keep in contact with Overall Commander or JOC during the operation. There is no merit to this criticism. The evidence is that during the entire time Brigadier Calitz was in continuous radio contact with Lt Colonel Vermaak who was directing the operation from the air. Col Vermaak informed him of the radio problem experienced by the crew of the one water cannon and he, Brigadier Calitz, provided a hand held radio to the driver. Other than this, Brigadier Calitz did not become aware that there was a Major General failure of radio communication and that any one was attempting to make contact with him.<sup>272</sup> The evidence is that through his radio communication with Lt Colonel Vermaak, the CJOC and the JOC became aware of the developing operation.<sup>273</sup> The content of this communication is recorded in the JOC Occurrence Book.<sup>274</sup>

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<sup>272</sup> Transcript:Day157,p17817,lines22-25;p17818,p1-3

<sup>273</sup> Exhibit MMM22

<sup>274</sup> Exhibit FFF25

281. A further criticism is that Brigadier Calitz failed in the command and control of the operation. This criticism is unfounded for the reasons we set out. Brigadier Calitz gave the necessary commands to members of the POP, both at scenes 1 and 2. In any event, in any operation, especially a large operation such as was the case in Marikana, the operational commander relies on the commanders to keep him informed of developments and their movements in order to exercise effective control.<sup>275</sup> The operational commander also relies on commanders to give orders to and to direct the members under their command.<sup>276</sup> The vastness and terrain of the operational area would have rendered it impossible for Brigadier Calitz to be aware of all activity. It is for this reason that he did not become aware of the presence of the other units on different sides of the koppie – Lt Colonel Vermaak had sight of the entire area of operation and was in continuous radio communication with Brigadier Calitz and yet he did not inform him of the presence of the other units around the koppie.

282. Another criticism is that Brigadier Calitz should have called a halt to the operation after the shooting at scene 1. If it is accepted that Brigadier Calitz was not aware of the shooting at scene 1, which we submit must be, the question is academic. In any event, POP policy prescribes that after any offensive action, there must be follow up to avoid regrouping, to prevent possible violence, damage to property and to effect arrests.<sup>277</sup>

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<sup>275</sup> Transcript:Day286,p37063,line6-25

<sup>276</sup> Transcript:Day286,p37063,lines6-25;p37064;lines1-3

<sup>277</sup> Transcript:Day286,p37157,lines13-21

## MAJOR GENERAL NAIDOO

283. Major General Naidoo is criticised for not taking the shortest and quickest route to take the medical personnel to scene 1.<sup>278</sup> This criticism is misplaced. The evidence is that Major General Naidoo was not familiar with the area and the driver of his vehicle, who is familiar with the area, selected the route to scene 1.<sup>279</sup> If this evidence is accepted, Major General Naidoo cannot be faulted or criticised for the selection of the route to scene 1.
284. Another criticism is that he failed to arrange for the medical personnel to proceed to scene 1 while he investigated the shooting in koppie 3. This criticism fails to take into consideration that Major General Naidoo did not have knowledge of where the gunshots came from and where they were directed to and he could not let the medical personnel proceed without guaranteeing their safety.<sup>280</sup> The concern for the safety of the medical personnel was not unreasonable in the circumstances.
285. Major General Naidoo is further criticised for his failure to inform Brigadier Calitz, Overall Commander or JOC of his movement to koppie 3. The criticism is misplaced. The evidence is that Major General Naidoo attempted to contact Brigadier Calitz without success.<sup>281</sup> He also attempted to contact Major General Annandale without success.<sup>282</sup> If the evidence about the serious failure of the communication system is accepted, it must follow that this criticism is academic.

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<sup>278</sup> Transcript:Day215,p26505,lines17-21

<sup>279</sup> Transcript:Day 215, Col Vermaak,p26506,lines 6-15

<sup>280</sup> Transcript:Day191,p23211,lines6-25;p23212,lines1-25

<sup>281</sup> Exhibit JJJ108

<sup>282</sup> Exhibit JJJ108

286. Another criticism is that as a senior officer and first member, Major General Naidoo failed to take command and control at koppie 3 after he arrived. This criticism does not take into account the following evidence: koppie 3 is a wide terrain with large rocks and boulders. It was also bushy at the time. As a result, Major General Naidoo had no way of knowing who was in the koppie, police and strikers, and how many people there were, police and strikers<sup>283</sup> and as a result, he could not exercise control over the entire area while the scene was “live”<sup>284</sup>; on arrival at the koppie, he and the members with him were forced to respond to strikers who were attacking them; the scene was vast and other members were first member in different parts of the koppie;<sup>285</sup> on arrival in the koppie, he met members of the NIU and proceeded with some and with these members, they effected arrests of some strikers; he saw that other members of NIU proceeded to other parts of the koppie with their commanders, Colonel Modiba and Lt Colonel Nkebe; when he went over the boulder, he saw that strikers had been placed under arrest. It is at about this time that Brigadier Calitz arrived at the koppie and in accordance with the plan, Brigadier Calitz assumed command. It is also at this stage that Major General Naidoo contacted the JOC and was informed of the shooting at scene 1 and he then proceeded to scene 1. In the light of the evidence, the criticism is without merit.

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<sup>283</sup> Transcript:Day215,p26514,lines1-5

<sup>284</sup> Transcript:Day215,p26536,lines9-19

<sup>285</sup> Exhibit MMM49.1 ;2 & 3

## **CAPTAIN KIDD**

287. Captain Kidd is criticised for his movement from FHA2 without a command from Brigadier Calitz and without informing him or the JOC of his movement. This criticism is wrong for the reasons we set out.
288. The evidence is that Captain Kidd moved from his position in front of the informal settlement because he heard on the radio that the police were under attack. Before he moved from his position he unsuccessfully attempted, on the radio, to contact Brigadier Calitz, Lt Colonel Vermaak and the JOC.<sup>286</sup> The decision of a police officer to investigate a shooting incident, especially where other police members are involved or indeed a report of an attack on a police member is neither unreasonable nor unlawful and cannot be faulted on any of these bases.<sup>287</sup> In any event, the movement from the position in front of the informal settlement did not in any way defeat the purpose for which Captain Kidd's members were positioned in front of the settlement. They were in a position to and in fact did disarm strikers who were headed in the direction of the informal settlement.
289. Captain Kidd testified that he did not have the telephone numbers of Brigadier Calitz, Major General Mpembe or any member in the JOC. Whilst it must be a matter of concern that someone in the position of Captain Kidd did not have essential contact information for the operation, we submit that his explanation is reasonable and must be accepted – Captain Kidd was not the assigned Commander for FHA2. He took over from Colonel Pitsi who would have had

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<sup>286</sup> Transcript:Day232,p29007,line23-25;29008,line1-10

<sup>287</sup> Exhibit UUU3

the necessary information and did not pass this over to Captain Kidd when he, Colonel Pitsi, was redeployed to support Brigadier Calitz.

290. A further criticism is that Captain Kidd's movement to koppie 3 contributed to the encirclement of koppie 3 and prevented the strikers from dispersing off the koppie. This criticism is without merit. It overlooks the evidence that many dispersing strikers from the direction of koppie 3 were permitted to go past the filtering line of Captain Kidd without weapons.<sup>288</sup> Those strikers who were armed approaching the line were ordered to drop their weapons and then permitted to go through the police line. None of the strikers who intended to disperse in the direction of Captain Kidd's line were in anyway prevented or hindered.<sup>289</sup> It is apparent from the evidence that those strikers who wanted to leave koppie 3 were able to do so. Significantly, none of the arrested strikers state that they were prevented from coming out of the koppie by this line of police. In the event that the Commission finds that Captain Kidd's line contributed to the encirclement of the koppie, such encirclement which occurred was not by design or intended, it was the result of a failure of communication and direction from Lt Colonel Vermaak, who assumed the role of directing movement and did not report this effect to Brigadier Calitz.

291. A further criticism is that the movement of Captain Kidd and his members to and position at koppie 3 on the south side at koppie 3 defeated Brigadier Calitz's intention to disperse strikers out of the koppie. We submit that this was not the case. The strikers who were in koppie 3 and intended to disperse

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<sup>288</sup> Transcript:Day232,p28995,line1-8

<sup>289</sup> Transcript:Day232,p28995,lines1-8;Day237,p29645,lines1-25

did so as per the Mr Nzuzi. Some of the strikers would have dispersed in the direction of the informal settlement at FHA2 through the TRT line. The evidence is that even when Captain's Kidd's line was close to the koppie, some strikers came out of the koppie and were permitted to go through the police line without weapons.<sup>290</sup> Further evidence is that the strikers inside the koppie were able to see that others coming out of the koppie were permitted to go through the police line without weapons and without trouble. Further, the police called on the strikers to put down their weapons and to come out of the koppie unarmed.<sup>291</sup> We submit that the strikers that remained inside koppie 3 did not intend to disperse. This is apparent from their casual movement to koppie 3 when the police commenced with the dispersal action at koppie 1 to koppie 2;<sup>292</sup> the strikers who attempted to charge at the police from inside the koppie with sharp weapons ignored calls to lay down their weapons, strikers fired at the police from inside the koppie; and the arrest by members from FHA1. These are inconsistent with an account that the strikers inside koppie 3 were innocently taking cover and were prevented by police conduct from dispersing.<sup>293</sup>

292. Captain Kidd is also criticised for his failure to brief his members when his line split into three (3) groups and for failure to ensure command of those groups.<sup>294</sup> The police work in specified groups of sections, platoons and units and each section would have a section leader who takes command of that section. This is true with the other units as well.

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<sup>290</sup> Transcript:Day233,p29078,line15-18

<sup>291</sup> Transcript:Day233,p29087,line12-16,23-25;p29088,line1-2

<sup>292</sup> Exhibit L, slides 221-223

<sup>293</sup> Exhibit JJJ108,para75;Exhibit L slides 253

<sup>294</sup> Transcript:Day233, Captain Kidd,p29077,line

293. With regard to the group that was with Captain Kidd, it must be recalled that the line was long comprising about 100 members and to retain its form on arrival on the southern side of koppie 3 would have been impossible. Naturally they divided into three three (3) groups.<sup>295</sup> When the police line arrived at the koppie on the western side, shooting from the direction of the koppie was already happening and members took cover. Captain Kidd explained that he attempted and was unable to make contact with his members over the radio after they split into three smaller groups.<sup>296</sup> If the Commission accepts this evidence it must find that any failure in this regard is not as a result of a failure to act on the part of Captain Kidd.

#### **MAJOR GENERAL MPEMBE**

294. A number of criticisms are directed at the role of Major General Mpeembe as the CJOC.

295. One criticism is that he did not provide leadership as Overall Commander; he did not attempt to communicate with the Operational Commander and in his evidence he stated that he would give direction to the Operational Commander only if he was asked for direction. Mr White states that the latter constitutes a dereliction of duty.<sup>297</sup> This criticism of Major General Mpeembe is misplaced and academic. The evidence is that there was a failure in radio communication and any attempt to communicate by radio would have been

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<sup>295</sup> Transcript: Kidd

<sup>296</sup> Exhibit GGG8,para 8

<sup>297</sup> Exhibit JJJ178,para 7.3.7

futile.<sup>298</sup> If the Commission accepts the evidence about the failure of the communication system, it must find that the criticism is misplaced.

296. Another criticism is that Major General Mpembe should have been made aware of the fundamental change to the plan with the movement of barbed wire nyala 6 from its original position to a position closer to the kraal.<sup>299</sup> This criticism is misconceived. The repositioning of barbed wire nyala 6 did not constitute a fundamental change of the plan as contended. The plan always was and remained to disperse the strikers away from Nkaneng settlement and away from the police area.<sup>300</sup> This remained the plan when Brigadier Calitz gave the order for the unfurling of the barbed wire. The criticism that the movement of nyala 6 channelled or invited the strikers towards Nkaneng does not take into account that the plan envisaged that after the barbed wire was rolled out, members of the different units would come out from behind the barbed wire and form up in a manner that would block the path to Nkaneng. The plan did not contemplate that the small group of strikers would attempt to breach the barbed wire or indeed to attack the police while barbed wire was still being laid out. There is no experience of this in South Africa.<sup>301</sup> The criticism also fails to take into account that the movement of barbed wire nyala 6 from its original position was not the result of a change of plan – it was to secure the safety of the members and that nyala.

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<sup>298</sup> Transcript:Day124,p12903,lines16-24

<sup>299</sup> Exhibit JJJ178,para6.4.10(d)

<sup>300</sup> GGG12,para27;SS3

<sup>301</sup> Transcript:Day150,p16965,lines2-11;p16966,lines1-4

297. Another criticism is that as Overall Commander, Major General Mpembe did not ensure that there was a comprehensive plan prepared by POP and that such plan submitted to the Provincial Commissioner as required by SO262.<sup>302</sup> It is common cause that there was no written plan for the dispersal action commencing 1 at 15:30. Notwithstanding, the absence of a written plan does not detract from the fact that there are no identified POP aspects which were missing from the plan implemented from 14 to 16 August 2012.<sup>303</sup> Messrs White and Hendrickx did not identify any missing POP elements.
298. Major Gen Mpembe is said not to have had a clear plan in his head on whether they were to disperse or disarm the armed strikers at the railway line on 13 August 2012. There is no doubt that Maj Gen Mpembe was certain that he would be able to convince the armed strikers to put their weapons down. It is also sound that when that did not happen he was alive to the possibility of an unplanned operation with inherent risks and decided that the armed strikers be escorted instead.
299. A further criticism is that on 13 August 2012, Major General Mpembe did not have a plan to deal with the strikers. It is not apparent on what basis this criticism is made.<sup>304</sup> The plan was to disarm and disperse the strikers. This is what the Provincial Commissioner instructed and this is what Major General Mpembe went to the railway line to do.<sup>305</sup> The instruction by the Provincial Commissioner was given to deal with a situation of unlawful conduct which

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<sup>302</sup> Exhibit JJJ178,para 6.4.10, 6.5.12, 6.5.13

<sup>303</sup> Transcript:Day284,p36663,lines3-25,Day284,p36846,lines10-25.

<sup>304</sup> Exhibit JJJ178,para6.5.32

<sup>305</sup> Exhibit GGG12

was not static and in respect of which the police did not have the luxury to delay attending to. Major General Mpembe had never been to the scene before and did not know anything about the armed strikers. At the scene, Major General Mpembe assessed the situation and the environment, the number of armed strikers and weapons they carried; the number of SAPS members and that they were outnumbered by the armed strikers; and that it would be dangerous to attempt to disarm the strikers. Major General Mpembe decided that in the circumstances, the strikers be escorted to the koppie and that they be blocked from entering the informal settlement which was ahead of them. We submit that the criticism is without merit.<sup>306</sup>

300. Another criticism is that Major General Mpembe gave conflicting orders on 13 August 2012.<sup>307</sup> There is no merit in this criticism. The evidence is that Major General Mpembe briefed the commanders that the police will escort the strikers to where they indicated they were going.<sup>308</sup> He ordered that nyalas drive to the front of the informal settlement to prevent the armed strikers going into the settlement.<sup>309</sup> These are the only orders issued by Major General Mpembe to the commanders and he did not give any other order.<sup>310</sup> None of the commanders have alleged that Major General Mpembe gave conflicting instructions. On the contrary, they confirm the testimony of Major General Mpembe that he ordered that the armed strikers be escorted and that the police ensure that the strikers did not go into the informal settlement.<sup>311</sup>

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<sup>306</sup> Exhibit JJJ178,para5.2.9

<sup>307</sup> Exhibit HHH3

<sup>308</sup> Transcript:Day104,p111150,lines7-15

<sup>309</sup> Exhibit QQQ1

<sup>310</sup> Exhibit QQQ9,para 6.13 & RRR9

<sup>311</sup> Exhibit QQQ9; HHH32; QQQ; HHH8

301. A further criticism is that Major General Mpembe's decision to leave the JOC contravened National Instruction # of 2012.<sup>312</sup> There is no demonstrable adverse consequence from Gen Mpembe's absence from the JOC. From the evidence, it is clear that Major General Mpembe would not have been in any better position if he remained in the JOC for the entire time of the operation – communication between JOC and Operational Commander was impeded by the failure of radio communication and there were no visuals of the operation from the JOC. Attempts by other members to contact Brigadier Calitz by cell phone were not successful.<sup>313</sup>

302. It also appears that there is a criticism that Major General Mpembe did not become aware of the shooting by the TRT even though he has a radio until he heard Lt Colonel Vermaak's report of "bodies down".<sup>314</sup> The evidence is that Major General Mpembe left the JOC in a helicopter to see the operation unfold from the air. He is not the only person who became aware of the possibility of injuries through Lt Colonel Vermaak's report. The evidence is that Major General Mpembe ordered that the helicopter return to the JOC after he heard Lt Colonel Vermaak's report.<sup>315</sup>

### **LT GENERAL MBOMBO**

303. Mr White appears to criticise Lt General Mbombo for leaving the JOC after she gave the order to implement stage 3 of the operation. He states that as

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<sup>312</sup> Exhibit JJJ178,para7.3.5

<sup>313</sup> Exhibit MMM22

<sup>314</sup> Transcript:Day112,p12066,lines15-25;p12067,lines1-3

<sup>315</sup> Transcript:Day112,p12066,line15-25;Day10,p1156,line1-12

the most senior person and the person who gave order to implement the operation, her decision to leave the operation area is “surprising”.<sup>316</sup> To the extent that this is intended as a criticism, such criticism misconceives the role of Lt General Mbombo and is without merit. Lt General Mbombo was not in any way in command of the operation. She does not have operational experience and relies on experienced officers to make decisions about execution and operational command.<sup>317</sup> This includes the “when” and the “how” of the execution of her instruction.<sup>318</sup> Having given her order, she had no further role in the execution of the order and the discharge of the order was a matter entirely under the control of the overall and operational commanders. The decision even to halt the operation is a matter which is under the control of the Overall Commander and Operational Commander. She was neither.

304. A further criticism is that Lt General Mbombo did not act when reports of the shooting at scene 1 came through the radio to the JOC.<sup>319</sup> Lt General Mbombo’s uncontroverted evidence is that she did not become aware of the shooting and casualties until much later. She was not at the scene of operation and did not have any sight of the operational area. It is also common cause that the JOC was unable to communicate on the radio as a result of the failure of the communication system. We submit that it follows therefore that she was not in a position to give orders to halt the operation or any other order arising from the shootings. The criticism is accordingly without merit.

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<sup>316</sup> Exhibit JJJ178,para7.3.2

<sup>317</sup> Transcript:Day178,p21393,line15-25;Exhibit LLL1,para8

<sup>318</sup> Exhibit JJJ 178,para7.3.2

<sup>319</sup> Exhibit JJJ178,para7.3.2

305. Another criticism is that Lt General Mbombo did not disclose to the Commission the “extra-ordinary NMF” meeting of 15 August 2012 and her role in that meeting. Exhibit L does not mention the meeting. This criticism fails to take into account that Exhibit L contains only facts about how the operation was carried out on from 10 to 16 August 2012. It was prepared solely for the purpose of assisting the Commission. The meeting was not a fact about the conduct of the operation and Lt General Mbombo’s explanation that the non-disclosure of the meeting was an oversight is not unreasonable in the circumstances.
306. There is a further criticism that Lt General Mbombo failed to disclose the meeting with Lonmin on 14 August 2012. The criticism is aimed at her stating that the Minister was under pressure from a well politically individual. It was her evidence that those words were not uttered by the National Commissioner but rather her own construct. She is also criticised for taking political considerations that Mr Malema should not gain credit for resolving the standoff which the armed strikers had with the police of with Lonmin. She also mentioned possibility of bloodshed when the strikers were disarmed. Her evidence was that she was under no political pressure nor did she take political considerations into account.
307. The reason that Lt General Mbombo did not make reference in any of her statements to the contact she made with the Lonmin people on the 14<sup>th</sup> of August 2012, is that she did not consider that contact to be significant. It must

be remembered that the conversation was recorded clandestinely. The mention of bloodshed the police made was not to convey a foreseeable possibility of bloodshed resulting from an operation. It was always a ploy to make Lonmin people appreciate the urgency and importance of dialogue.

### **NATIONAL COMMISSIONER**

308. One criticism directed at the National Commissioner is that she did not disclose the extra-ordinary meeting of the NMF on 15 August 2012. We address this criticism below. In summary, the evidence is that the NMF is a scheduled regular meeting of senior management of SAPS and was pre-scheduled for 15 August 2012; Lt General Mbombo used the opportunity after the NMF meeting to brief her colleagues and the National Commissioner and to request support with resources; the meeting did not make any decision pertaining to the operation in Marikana; the National Commissioner did not consider the meeting relevant to the events at Marikana and that her failure to disclose the meeting was an oversight on her part.<sup>320</sup>

309. There is no evidence that the “meeting” made the decision that the strikers would be dispersed on 16 August 2012. The persons in the meeting simply did not have the authority to make such a decision. This is a decision to be made by the provincial authorities or in appropriate cases by the President and cabinet, acting in terms of section 17 of the SAPS Act. The President did not act in terms of section 17 in this instance.

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<sup>320</sup> Transcript:Day288,p37392,lines3-25;p37393,lines1-25;37394,lines1-25

310. There is also evidence that the National Commissioner and the Provincial Commissioner held telephone conversations with the Minister of Safety and Security about the events at Marikana.<sup>321</sup> The Minister, the National Commissioner and Provincial Commissioner testified that in the normal course the Minister enquired about the situation and police respond to the situation. Such inquiries occur in the normal course whenever there are matters of policing that have occupied national interest. Marikana was such a matter which involved criminal conduct resulting in loss of life, serious injuries, assaults and intimidation of non-striking employees, and serious loss of revenue to Lonmin and its impact huge on the economy. We submit that any inquiry by and conversation between the Minister, The National Commissioner and the Provincial Commissioner such as happened is not inappropriate in any way. A failure to hold such conversation as happened would indeed be remiss and a concerning lack of interest and failure of leadership.<sup>322</sup> Any suggestion that the conversations were improper is without valid basis and is wrong.

311. The National Commissioner is also criticised for convening the session at Roots post the events at Marikana. We submit that the explanation given for the meeting is sound.<sup>323</sup> The operation at Marikana was major. It involved several hundreds of members from different parts of the country over 7 days and different police decisions and measures in that period. The explanation that such a meeting was necessary to bring together members who were involved in the operation in order to collate the evidence to be presented to

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<sup>321</sup> Transcript:Day288,p37388,lines1-25;p37389,lines1-25

<sup>322</sup> Transcript:Day286,p37079,lines1-25;p37080,lines1-25

<sup>323</sup> Transcript:Day288,p37419,lines12-19;p37422,lines1-25;p37423,lines1-25

the Commission is not unreasonable. This was the most practical way of collating evidence.

312. Another criticism is directed at the failure to conduct an evaluation of the operation in terms of clause 13 of Standing Order 262. This criticism is blind to – (i) the fact that the provision does not contemplate an investigation and evaluation such as was decided by the President; (ii) that in the immediate aftermath of the events that culminated on 16 August 2012, members involved in the operation continued in active duty at Marikana beyond 16 August 2012; (iii) the President announced the Commission of Inquiry on 17 August 2012 and the SAPS had to commence with the gathering of evidence to be presented to the Commission; (iv) The Terms of Reference announced by the President, so far as they relate to the SAPS, mirror the issues that must be considered in the evaluation contemplated in Standing Order 262; it was not expected that the Commission would not complete its work until after two years.

313. The National Commissioner is also criticised for not disclosing the constitution of the SAPS task team and its report. Her evidence was that it was an oversight. Again, the failure to mention the existence of the task team and its report cannot be sinister. The report itself does not deal with anything controversial. There could therefore be no reason to withhold the information from the Commission.

314. The National Commissioner is criticised for removing a reference to communication with the Minister of Police which appeared in an earlier draft of her statement. The sting of the criticism appears to be that she would have been instructed by the Minister on a matter that is operational. Her evidence was that she did not report to the Minister or tell anyone that she would report to the Minister. The misstatement in the draft was a typing mistake which she corrected. When she submitted what she believed to be her final statement, the earlier mistake which she attempted to correct, inadvertently reappeared. The explanation is innocent.
315. There is criticism that the National Commissioner took a position that the shooting was done in self-defence even before there was an investigation to establish the correctness of that account is baseless. A person in the position of the National Commissioner of Police is entitled to accept as true an account given by her senior personnel who were on the ground and who conveyed to her that the shootings happened as they said. In that position she had responsibility also to tell the country and the world what explanation there was for the unfortunate deaths of so many people. As it is, the investigation has taken the Commission more than two years to try and determine what exactly happened. It would have been irresponsible for the National Commissioner to say nothing until the investigation were done and completed. Further, it is within the province of IPID to investigate if any of the police conduct amounts to any criminality and if so to have those who are culpable to be prosecuted.

316. Both the National Commissioner and the Provincial Commissioner did not disclose in their statements that there was an extra-ordinary meeting held with deputy commissioners and provincial commissioners on 15 August 2012 (the Midrand meeting). The evidence of both the National Commissioner and the Provincial Commissioner is that this was an oversight. It was also their evidence that in considering Exhibit L, which did not make reference to the Midrand meeting, it was again an oversight not to realize that omission.
317. There are doubts cast whether the failure by both the National Commissioner and the Provincial Commissioner to disclose the Midrand meeting was an oversight given the fact that this meeting comprised top police officers; that it was on the eve of operation of 16 August 2012; that it was after ten (10) people had been killed, including two (2) police officers; also that the meeting endorsed the decision of General Mbombo that the strikers be disarmed the following day and to that end agreeing to make resources available; that there is no minute or audio recording of the meeting and that the flash-drive recording the meeting no longer exists.
318. In mitigation however, there was no attempt on the part of SAPS to conceal the fact that the operation was authorised by the Provincial Commissioner as she was entitled to in terms of section 13(7) of the South African Police Service Act and that all the provinces were requested to assist with their resources to help the North West province to contain the escalating unrest.
319. The non-disclosure therefore could not have a sinister intent behind it and the explanation that this was an oversight must be accepted as true.

320. During the period 27 August to 8 September 2012, members of SAPS assembled in Potchefstroom to collect the evidence and to compile a presentation for the purpose of assisting the Commission which had been appointed earlier.
321. Colonel Van Graan was appointed as a convener because he was not involved in the operation in Marikana. Various members were called upon to give account of events they knew about and the conduct of those who were under their command.
322. In the compilation of exhibit L, Colonel Scott collated all the video materials and created a chronology of events using the video material. Colonel Visser collected all the narrative that was given by the members which narrative was then included in exhibit L.
323. SAPS is criticized in the compilation of exhibit L at various levels. Firstly, the criticism is that exhibit L did not do a SWOT analysis. The explanation that SAPS gives is that in the light of the appointment of the Commission it was thought advisable not to do the SWOT analysis but rather to collate information and prepare a presentation for the benefit of the Commission.
324. Mr White does not fault for not having a review as contemplated in Standing Order 262, that is, to review the operation. What Mr White stated however is that the congregation at Potchefstroom could have made SAPS open to a charge that they are assembled there to collate a common version of events.

325. It is also stated as a criticism that earlier drafts to exhibit L include an allegation that Major General Mpembe was the one who gave an order that teargas be fired on 13 August 2012. Yet, that information is not contained in Exhibit L. Even at the stage of evidence by Major General Mpembe, it was unclear whether he did or did not give the instruction that teargas be fired. The omission cannot be said to have been done in order to conceal the evidence. The evidence of Colonel Merafe, Captain Thupe and Col Vermaak regarding this aspect was given without any reticence.
326. Some slides of exhibit L have narratives, legends and icons which were introduced later onto the exhibits after the events of 16 August 2012. Colonel Scott's explanation was that he reverse engineered the information to help better understand the evidence.
327. The extra-ordinary meeting which was held after the Nmf meeting on 15 August 2012 where Lt General Mbombo informed the meeting of her decision to have the strikers disarmed the following day in the event that they did not disarm voluntarily, is also not included in exhibit L nor was it included in the statements of the National Commissioner and the Provincial Commissioner. Both the National Commissioner and the Provincial Commissioner testified that the omission was an oversight. Colonel Scott described the purpose of exhibit L as being a presentation on the actual events in Marikana. At the time that exhibit L was compiled, the members at Roots were also not even aware of the meeting referred to as the extra-ordinary session.

328. Parallel to the meeting at Roots, a group of officers, including Brigadier Mkwanazi gathered separately to review whether the operation in Marikana complied with policies and guidelines applicable to such an operation. The work of this task team was not disclosed in exhibit L. The National Commissioner who signed the call-up for the review body testified that the omission to refer to it in her statement and Exhibit L was an oversight.
329. In compiling exhibit L, the notes that were taken were destroyed. The reason given for that by Col Visser is that exhibit L contains the information that was in the notes taken from the various groups and he did not consider it necessary to preserve the notes.

**Minute of extra-ordinary meeting (15 August 2012)**

330. On 15 August 2012 and after the sitting of the NMF, the National Commissioner called all the deputy commissioners and provincial commissioner who were present into an extra ordinary session.
331. In the extra ordinary session, General Mbombo informed the meeting about the developments in Marikana and more importantly that she had decided that the strikers will be disarmed the following day should they not surrender their weapons voluntarily as was mooted. The minute of the NMF records this extra ordinary session meeting and states that the decision of General Mbombo was endorsed.

332. The deliberations of the extra ordinary session were recorded in a minute.<sup>324</sup>  
The original flash-drive recording of the minute was lost. The evidence is that the flash-drive got lost under the custody of Brigadier Malahlela. The forensic investigation to enquire whether there was any tampering with the minute which was downloaded into Brigadier Lethoko's computer was inconclusive.
333. There is no reason to reject the innocent explanation for the record of that meeting and the flash-drive to have been misplaced and no longer traceable. The responses to the interrogatories by the members who were members in the extraordinary session also vindicates the SAPS account that there was nothing untoward.

#### **Colonel Scott's Hard Drive**

334. The evidence of Colonel Scott is that he collated all video and photographic material which was given to him by various members from day to day during the operation. This information was in the hard drive of his computer.
335. At Roots, Colonel Scott was assigned the responsibility to put together all video and photographic material in some chronology. The Colonel volunteered his hard drive to the Evidence Leaders, a gesture clearly demonstrating that there was no attempt at tampering with or concealing any relevant evidence. The hard drive revealed that some of the images were deleted. Col Scott testified that he would have downloaded them in the format and those that were not containing useful and relevant information, were deleted.

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<sup>324</sup>Exhibit HHHH11.1

### **Were the deaths from police action pre-meditated**

336. There is an unsettling lingering accusation that the deaths on 16 August 2012 were pre-meditated. This accusation is without substance or any foundation.

The accusation seems to rest on the following:

336.1. That on 15 August 2012 the extra-ordinary session of SAPS top management decided to disarm the strikers without relevant intelligence. There is an answer to this. The decision that the strikers were to be disarmed was a lawful decision. Intelligence was only relevant to address the “how” the strikers were to be disarmed.

336.2. It is also suggested that the requisition of 4000 R5 rounds points to in the direction of a foreseen possibility of such rounds being necessary. The evidence however is that when the 4000 rounds were delivered Brigadier Pretorius sent them back. The evidence is also that the rounds were requisitioned hours before 15:30 which was the planned time for the commencement of the operation.

336.3. There is evidence also that four mortuary vans were requisitioned. On this evidence it is suggested that the ordering of the hearses showed an appreciation that death was a likely consequence of the operation. SAPS' account for the ordering of the mortuary vehicles is that given the delay of the hearse in removing the body of Mr Twala on 14 August 2012, it was thought wise to put a contingency plan should any death, however caused, occurred. If the deaths were planned, surely the

police would have requisitioned dozens of mortuary vehicles considering the numbers of the armed strikers on the koppie.

336.4. During the negotiations that Major General Mpembe conducted with Lonmin and the unions, he alluded to the likelihood of violence should the police have to use force to disarm the strikers. The evidence of Major General Mpembe (the dove) was that he intended to convey the seriousness and urgency he wanted placed on resolving the impasse through dialogue.

336.5. The movement of Brigadier Calitz on 16 August 2012 where his nyala was before the commencement of the operation and that of General Naidoo from FHA1 is suggested to point to a sinister plot. The plan was that General Naidoo would move to Immediate Response Area 1 at the commencement of the operation at 15:30. There is nothing sinister in the timing of movement of General Naidoo from FHA1.

336.6. There is also evidence that on 14 August 2012 in a meeting with Lonmin officials, the Lt General Mbombo made reference to bloodshed should the police act against the strikers. Her explanation was that the reference to bloodshed was intended to convey her reluctance to have the members disarm the strikers by force.

336.7. It is also suggested that since two members of the police were killed and another injured on 13 August 2012, the operation on 16 August 2012 was to avenge the killing of the police members. On the contrary, the evidence is that the police decided that the strikers would not be

forcefully disarmed on 14 August 2012, in part, because the inference would have been easily drawn that they would be acting in revenge for the killing of their members.

337. The very fact that the commanders of the operation were informed at 14:30 that was scheduled for 15:30 negatives any suggestion of any pre-planning to kill.
338. The elaborate negotiations conducted by the police to peacefully resolve the conflict also points against any pre-planning on the part of the police to kill anyone.
339. The movement of the armed strikers around the kraal and the position of the police line near the mouth of the kraal were spontaneous events that could not have been pre-planned.
340. The movement of nyala 4 to speedily close the gap at the corner of the kraal to impede the armed strikers from entering into the police zone also contradicts any suggestion of premeditation to kill.

#### **The adequacy of the briefing and the plan**

341. There is expert opinion that the operation of 13 August 2012 when Major General Mpembe intercepted the armed strikes at the railway line was without any plan or briefing of members, in particular, on what the police would do if the strikers refused to disarm voluntarily. Whereas it is correct that no plan or

briefing was in place for that contingency, in the face of possible confrontation and the fact the members were not briefed, Major General Mpenbe decided to escort the strikers to avoid a risky confrontation.

342. The attack by the armed strikers occurred, as we now know, after the firing of the teargas and stun grenade. Historically, the discharge of teargas and stun grenades by SAPS members in public order police operations did not provoke such response as occurred, in this instance, the firing of the teargas and stun grenade was exactly the signal the inyanga had instructed the strikers to wait for before they attacked.

**Absence of video footage of the events at scenes 1 and 2**

343. There is criticism about the lack of video material to capture the events at scene 1 and scene 2. The evidence on the point is that:

343.1. Major General Annandale gave an express instruction that all the police action must be video recorded.

343.2. The video operators moved away from the koppie on instruction of Brigadier Calitz when it was perceived that their lives were in danger. Brigadier Calitz expected the video operators to move behind the police instead of leaving the operational area completely.

343.3. The drivers of the water cannons did not have any training in operating the video cameras in the vehicles.

343.4. From the evidence, it is clear that the absence of police video recordings of the operation is not a result of a failure to plan and to provide resources for the purpose. On the contrary the video camera personnel were correctly removed once their lives were threatened but without any express instruction that they must continue the filming of the events but from behind the police line. The matter may require an investigation to determine what the explanation was for those members to instead go to the JOC.

344. A further criticism is that some members involved in the operation did not give an accurate account of the number of shots that they fired and that statements provided to the Commission lack important information. While this does call for an investigation, we point out that:

344.1. Most, if not all, of the statements under criticism were provided by individual members to the IPID for the purpose of IPIG investigations. These statements were provided with the necessary caution against self-incrimination and right to a legal representation.

344.2. Other statements were provided for purposes of bail applications of strikers who were arrested during the operation.

344.3. Where members have under declared the number of shots they fired later statements were provided to the Commissions to explain the discrepancies.

345. We now address the evidence of the following witnesses.

### **The evidence of Mr X**

346. Mr X testified after the Commission had ruled that his evidence will be received in camera and through a video link. He is on a witness protection programme.

347. The evidence of Mr X should be approached with caution and be scrutinized to make sure that he did not falsely or maliciously implicate people in the commission of crimes which they did not commit.<sup>325</sup> He is also a single witness on some aspects. Mr X is also an accomplice.<sup>326</sup> On his own account, he participated in some of the violent criminal activities that occurred during the unprotected strike. Mr X implicates some strikers in the commission of some of the violent criminal activities that took place during the period 9 to 16 August 2012 in Marikana.

348. His evidence is relevant and crucial in so far as it offers the Commission a plausible explanation for the manner in which the armed strikers behaved. Past public order management operations did not provide a history of use of teargas, stun grenade being a trigger for attack on the police.

349. The evidence of Mr X can also be accepted in so far as it is corroborated by other independent evidence. Below we set out some of the independent evidence that supports and corroborates Mr X's evidence:

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<sup>325</sup> S v Hlapezula & others 1965 (4) SA 439 (A) at 440 D

<sup>326</sup> S v Hlapezula *supra*

349.1. The evidence of Mr X that Mr Dlunga possessed a firearm painted in red is confirmed by other independent witnesses.<sup>327</sup>

349.2. Lt Baloyi in his statement<sup>328</sup> confirms the aspect of Mr X's evidence which describes the attack that Mr X launched on an injured police officer. This is an officer who was running to a nyala for safety on 13 August 2012. Mr X attacked and injured a police officer on his back, who ran towards the Nyala for safety. This is the same incident where Warrant Officers Monene and Lepaaku were killed.

349.3. The evidence of Mr X that they would launch an attack against the police only after the police have acted one or another against them is confirmed by the video material which depicts a lot of commotion which immediately follows the firing of the teargas and stun grenade<sup>329</sup>; it is also confirmed by police witnesses that the attack on the police was immediately after the teargas and stun grenade were fired.

349.4. The evidence of Mr X that police were disarmed of three (3) firearms and a hand radio is confirmed by several members of the police.

349.5. The evidence of Mr Nzuzi that he arranged transport to take one of the injured strikers to hospital on 13 August 2012 echoes the evidence of Mr X.<sup>330</sup>

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<sup>327</sup> Exhibit ZZZZ15

<sup>328</sup> Exhibit GGG16

<sup>329</sup> Exhibit Z1

<sup>330</sup> Transcript:Day277,p35502,lines24-25; Exhibit AAAA1.1

349.6. During the meeting of the strikers on 10 August 2012, it was decided that threats and violence were to be used to enforce the unprotected strike. Subsequent violence confirms that to have been the case.

349.7. Mr Nzunza testified that he gave a report back at the koppie on the 13 August 2012 after the attack on members of the SAPS. Mr X testified to this as well that Mr Nzunza was one of those who gave a report.<sup>331</sup>

349.8. Mr Nzunza's evidence that he played a prominent role coincides with the evidence of Mr X on the prominent role that Mr Nzunza played in the events in Marikana.<sup>332</sup>

349.9. The evidence that in a meeting on 11 August 2012 the strikers decided to attack NUM officials and to set alight the NUM office is corroborated by the march of a heavily armed group of strikers to the NUM offices; evidence of Lonmin security personnel; the admission by NUM officials that they did in fact shoot at armed strikers; the injuries suffered by two of the strikers and the hate songs against the NUM and its officials.<sup>333</sup>

349.10. Mr Nzunza confirmed the evidence of Mr X that he was part of the delegation that fetched the inyangas.<sup>334</sup>

349.11. The evidence that monies were paid towards transport and engagement of the services of an inyanga is also confirmed.

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<sup>331</sup>Transcript:Day277,p35505,lines14-18;Day249,p35316,lines22-15

<sup>332</sup>Exhibit PPPP1; HHH21

<sup>333</sup>Exhibits ZZ2; ZZ3; YY1; XX1

<sup>334</sup>Transcript:Day277,p35462,line25-p5463,lines1-5;Day245,p30976,line1-11

Confirmation of that evidence is to be found in the statement of Mr RS Seswai and a newspaper article.<sup>335</sup>

349.12. That cuttings with razors were done on numerous parts of the body is confirmed by post-mortem reports and photographs.<sup>336</sup>

349.13. The circumstances of the death of Mr Twala are corroborated by other evidence: statements of persons who were at the koppie when Mr Twala was killed; the evidence of Mr Nzuzza that he saw Mr Twala being interrogated and that he; Mr Nzuzza, spoke to Mr Twala during his questioning; that the firearm of Mr Twala was taken by someone among the strikers.<sup>337</sup>

349.14. Mr Nzuzza confirmed that on 15 August 2012 he demanded that Mr Zokwana, President of NUM come out of the hippo to address the strikers on the koppie.<sup>338</sup>

349.15. Mr Madumbe confirmed that there was a committee of strike leaders. Mr Nzuzza also confirmed that Mr Noki was the leader of the strikers.<sup>339</sup>

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<sup>335</sup>Transcript:Day245,p30976,line12-25;Exhibits ZZZZ15

<sup>336</sup>Messrs. Thobile Mpumza; Janeveker Raphel Liau; Mafolosi Mabiya; Fexile David Saphendu; Mpumzeni Nxande; Stelega Gadlela; Micheal Ngwayi; Patrick Akhona Jigasi; Bonginkosi Yona; Andries Motlapula Ntsenyingo; Msukisa Sompeta; Jackson Lehupa; Mphangeli Tukuza; Tombisile Zibabele; Cebesile Yawa; Bongani Ngongopele; Babalo Mtsazi; Bongani Mdze; Mr. Majoli Noki;

<sup>337</sup>Transcript:Day;277,p35513,line15-25;p35514;Exhibit ZZZZ15.20

<sup>338</sup>Exhibit HHH21

349.16. The mutilation of Mr Fundi is confirmed by his brother and photographs.<sup>340</sup>

349.17. The theft of Lonmin firearms by strikers is confirmed by Lonmin.<sup>341</sup>

349.18. Mr Nzuza confirms that strikers slept on the koppie; that the strikers slept on the koppie.<sup>342</sup>

349.19. A decision was taken that the meeting area should be at the koppie for safety reasons.<sup>343</sup>

349.20. Mr Noki confronted the police during the unfurling of the barbed wire by the first Nyala. This is also witnessed by Colonel McIntosh.<sup>344</sup>

349.21. The police negotiation team and its involvement is a matter now common cause.<sup>345</sup>

349.22. The presence of Bishop Seoka at the koppie, and the fact that he did not return.<sup>346</sup> This evidence is correctly not contested.

349.23. There is independent evidence depicting multi-coloured ropes at the spot where according to Mr X rituals were performed at Koppie 3.<sup>347</sup>

349.24. The evidence that the speakers must not open their palms when speaking is depicted in the video footage of 13 August 2012.<sup>348</sup>

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<sup>340</sup>AAAA40

<sup>341</sup>Exhibit AAAA1.1, 1.2; Exhibit ZZZZ15 (CAS07/08/2012)

<sup>342</sup>Exhibit HHH21

<sup>343</sup>Exhibit HHH21; Exhibit AAAA1.2

<sup>344</sup>Exhibit HHH14

<sup>345</sup>Transcript:Day252,p31742,lines7-23

<sup>346</sup>Transcript:Day252,p31790,line19-25;p31791,lines1-6;Exhibit LLL26

<sup>347</sup>Transcript:Day245,p30979,line16-25p30980;line,p30981-30986

349.25. Mr Nzunza confirmed that Mr Noki was the leader of the strikers and that there was a committee responsible for leading the strikers.<sup>349</sup>

349.26. The setting alight and damage to a number of motor vehicles belonging to Lonmin and those that were privately owned is confirmed by various witnesses and photographs.<sup>350</sup> It is during that attack that Mr Mabebe was killed.

349.27. It is common cause that Mr Langa was killed on 13 August 2012 on his way to work by persons using sharp weapons.

349.28. That Mr Nzunza was part of the strikers that went to K3 shaft on 13 August 2012.<sup>351</sup>

349.29. That people were forced to join the unprotected strike.<sup>352</sup>

350. Applying the legal principles regarding evidence of accomplices and single witnesses the Commission should find that there is a whole body of independent evidence that materially corroborates the evidence of Mr X.

### **Mr Mtshamba**

351. Mr Mtshamba testified that while hiding inside koppie 3, he saw police shooting at an unarmed striker who was surrendering with his arms raised. He

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<sup>348</sup> Exhibit Z1

<sup>349</sup> Transcript:Day57,p6117,line24-25;p6118;p6119,line1-2;Exhibit PPPP1;

<sup>350</sup> Exhibit L, Slides 38, 39; Exhibit AAAA1.2; Exhibit GGG19; Exhibit EEEE19

<sup>351</sup> Exhibit Z1

<sup>352</sup> Transcript:Day266, p33593, p33594, line1-14; p33595, line1-11; Exhibit EEE1

described the striker being shot in three different parts of his body.<sup>353</sup> There is no post mortem report which contains the description of injuries such as described by Mr Mtshamba. There is also no evidence of an injured person bearing injuries such as described by Mr Mtshamba. Accordingly the evidence of Mr Mtshamba is unsupported and cannot be relied upon. The version that he would have seen the events unfolding at scene 1 whilst he was still standing on top of koppie 2 is simply unconvincing. The inspection in loco demonstrated that to be highly improbable. He conceded that his evidence that a striker was run over by a police vehicle and that the police fired at fleeing strikers from a chopper was not correct.

### **Mr Phatsha**

352. In his evidence Mr Phatsha conceded that it was not necessary to carry dangerous weapons during the strike. He initially admitted to having carried only one weapon and objective evidence showed him carrying two weapons;<sup>354</sup> his evidence that he was not present on the koppie on the 15<sup>th</sup> was shown to be untrue that it was cold on the 16<sup>th</sup> is simply not true - the weather report and the weather report and evidence of Bishop Seoka contradicts this;<sup>355</sup> he conceded that he was aware that some strikers slept on the koppie.<sup>356</sup> He conceded that the strikers at the stage as depicted in Exhibit L, Slide 198 were not going home to Nkaneng.<sup>357</sup> In his statement, prepared with the assistance of his legal representatives; read to him; after which he confirmed its correctness and accuracy before signing it, he had

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<sup>353</sup>Transcript:Day275.p35139,line12-25;p35140,line1-4

<sup>354</sup> Transcript:Day51,p5519

<sup>355</sup> Transcript:Day53,p5729-5731

<sup>356</sup> Transcript:Day53,5685,line5-16

<sup>357</sup> Transcript:Day52p5713,line12-13

stated that the group was going to Nkaneng, a contradiction of his oral evidence.

### **Mr Magidiwana**

353. Mr Magidiwana's evidence was also unreliable. He said that he was shot at close range by a police officer whilst lying on the ground is not supported by any video materials given the fact the entire episode was captured on video from the moment the shooting occurred. He is one amongst those who are seen on the video and were arrested from scene 1.<sup>358</sup> Ms Catherine Scott<sup>359</sup> does not record any shots fired consistent with the version of Mr Magidiwana. It was shown that his evidence that he was not on the koppie on 15 August 2012 was untruthful.<sup>360</sup> Further, his evidence that he carried only one weapon on 16 August 2012 was untruthful.<sup>361</sup>

### **Mr Nzuza**

354. He was second in command during the unprotected strike and it was expected of him to be open and honest with the Commission by providing evidence that would have assisted the Commission in making findings with regard to some of the issues the Commission is to determine. He did not do so. The less said about him and his credibility the better. He blatantly refused to answer questions.

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<sup>358</sup>Exhibit RRR17

<sup>359</sup> Exhibit JJJ198

<sup>360</sup> Exhibit EEE4; Exhibit EEE5;EEE7

<sup>361</sup> Exhibit RRR17;EEE6.9

### **The allegations of Warrant Officer Myburgh**

355. The evidence of Warrant Officer Myburgh<sup>362</sup> that he witnessed a member of the NIU (who he claimed he cannot recognize anymore), put his firearm in the holster and say to an injured striker that the latter deserved to die is difficult to believe. Being a Warrant Officer and having witnessed what must have been an execution, if the account is to be believed, one would have expected him to: (i) take down the details of the alleged NIU member; (ii) noted sufficient details to be able to identify him later and (iii) immediately reported the incident to the commander in charge at the scene.

356. Warrant Officer Swarts states in his statement that the account of W/O Myburgh is different from what he reported to him at the scene. At the scene, W/O Myburgh informed W/O Swart that he, W/O Myburgh, shot a striker inside the koppie.<sup>363</sup> It is remarkable that W/O Myburgh did not give to W/O Swarts the account about the NIU member shooting an injured striker. It is also remarkable that W/O Myburgh only gave a report about the alleged incident to Lt Colonel Vermaak in October, two (2) months after the alleged incident.

357. Further, none of the arrested and injured gave an account of a shooting such as described by W/O Myburgh.

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<sup>362</sup> Exhibits FFF7; FFF39.25A; FFF39.25B

<sup>363</sup> Exhibits LLL14 & MMM 39.25(b)

358. Notwithstanding the improbability of the allegations of W/O Myburgh for the reasons we state, the SAPS concedes that the matter ought to have been reported to IPID as the National Commissioner instructed. In this regard, the evidence is that after the allegations of W/O Myburgh were brought to the attention of the National Commissioner, she ordered an investigation and that the matter be reported to the IPID. Lt General Mbombo testified after the investigation was completed, she instructed that the matter be referred to IPID and that the statement of W/O Myburgh be submitted to the attorneys of the SAPS, as was the case with all statements with all SAPS statements.<sup>364</sup> The National Commissioner and Lt General Mbombo were under SAPS was of the impression that this was done, until it came to light in the Commission that this was not done.

359. We submit that from the evidence, it is clear that the SAPS took reasonable steps in dealing with the matter – the National Commissioner, Lt General Mbombo and Major General Naidoo met with W/O Myburgh where he repeated his allegations; as a result, the National Commissioner ordered an investigation into the matter and that the matter be reported to the IPID.

#### **The evidence of Lt Colonel Vermaak**

360. The evidence of Colonel Vermaak is at best confusing. In some respects his account of what he did on 13 August 2012 invites serious doubt about its accuracy. On his version, from the chopper, he saw one striker running from the scene with an R5 rifle belonging to the police. Upon landing, he pursued

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<sup>364</sup> Transcript:Day181, p21761,line15-21

the person who was having the police R5 rifle. He did this together with members of the TRT. His evidence is that only one round was fired by a TRT member on his instruction<sup>365</sup>. He also stated that they were in a position west from where the cartridges belonging to the police were found. The striker they were pursuing eventually disappeared in the informal settlement.

361. The account of the TRT members who were with Colonel Vermaak say in their statements that Colonel Vermaak gave them orders that they fire at an individual who was pointing an R5 rifle at them. The instruction by Colonel Vermaak to fire was given more than once. The TRT members were also joined by members of the POP and who discharged their pistols on the instruction fo Colonel Vermaak. The TRT member place themselves being with Colonel Vermaak at a point quite proximate to where the cartridges were found. The cartridges which were found almost in line with the body of Mr Sokanyile.

362. After unsuccessfully pursuing the striker with the R5 rifle, Colonel Vermaak's evidence is that two TRT members threatened the life of Major General Mpembe. He does not know who these members are. The statements of the TRT members who were with Colonel Vermaak refute that there was a threat to the life of Major General Mpembe.

363. His evidence that he spoke with General Mbombo seeking her permission Major General Mpembe from the scene as a result of the threats to the life of Major General Mpembe is denied by General Mbombo. According to General Mbombo, Colonel Vermaak said to her that Major General Mpembe was

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<sup>365</sup> Exhibit HHH29; HHH30

shocked and distressing and not providing directions to members whom he found just standing around. That was the reason for removing Major General Mpenbe from the scene.

364. It was his evidence that he told Brigadier Calitz about the threat on Major General Mpenbe's life. Brigadier Calitz has denied that Colonel Vermaak ever communicated to him the threat to the life of Major General Mpenbe. At Roots, Colonel Vermaak pointed at Colonel Merafe as the person who made threats on Major General Mpenbe's life.<sup>366</sup>

365. Colonel Merafe denied in evidence that he told Colonel Vermaak that Major General Mpenbe had accepted that he, Major General Mpenbe, gave the order for the discharge of teargas.<sup>367</sup>

366. Colonel Merafe and General Annandale denied the account of Lt Colonel Vermaak that he warned the JOCCOM about the nature of the threat that the strikers with muti would pose.

367. On the other hand, the criticisms which Colonel Vermaak made in a May 2011 an email to the Provincial Commissioner about POP capacity, appear to be correct.<sup>368</sup> Colonel Merafe confirmed the correctness of the issues raised in the letter.

368. In his evidence he concedes that POP measures and equipment could not contain the impi like strikers armed with sharp weapons.<sup>369</sup>

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<sup>366</sup> Transcript:Day217,p26704,line1-16

<sup>367</sup> Transcript:Day217,p26708,line21-25;p26709,line1-25;p26710,line1-12

<sup>368</sup> Exhibit 0003

<sup>369</sup> Transcript:Day225,p27768,line6;p27770,line20-23;p27771,line14;p27772,line1

**K: EXPERT WITNESSES**

369. It is regrettable that the mandate that was given to Mr White was that he should look at and make comment on the police conduct only. As an expert on public order policing he could have shed useful light for the benefit of the Commission on the appropriateness or otherwise of the conduct of the armed strikers. His evidence suffered another limitation being that he was unfamiliar with the South African policing environment. When he made his reports he had also not been to South Africa. His opinions therefore were a desktop criticism of the police operation and also influenced by hindsight. It is notable that Mr White could not say what public order policing measures were available to the police but were not included in the plan or implemented in the execution of the plan. We note the operational recommendations that Mr White makes which SAPS will have to consider.

370. Mr Hendrickx, though familiar with the South African public order policing environment, was also limited by the mandate he received from the Legal Resources Centre. He too was told to look into the conduct of the police only. As an expert on public order policing and being familiar with the South African environment he could also have given us an impartial account on the appropriateness or otherwise of the conduct of the armed strikers. Mr Hendrickx could also not tell the Commission what public order policing measures were available for the police but were not implemented. Save for the recommendation that the members would discharge their firearms should face prosecution and that the use of R5 rifles should be discontinued, the

recommendations that Mr Hendrickx makes appear worthy of consideration by the Commission. As we point out in these submissions the law authorises the use of any weapon in public order policing where certain given life threatening postures are taken by elements in a gathering.

371. Mr De Rover gave evidence in relation to all elements of public order policing. He was critical of the conduct of some of the police members in the operations in Marikana. He even stated that he would, given the magnitude of the problem, with 10 people having been killed by Monday 13 August 2012, he would have expected that members of the Executive responsible for policing should have been heard. He would have been expected that even Civil Society Organizations to have intervened in attempts to resolve the conflict. After going through the terrain with the police members to reconstruct the events of 13 and 16 August 2012, he was able to give a probable account on how the deceased persons could have sustained their fatal injuries, given the movement of the various units around koppie 3 in particular. SAPS will have to consider the recommendations made by Mr De Rover.

372. The evidence of Prof Lamla read in conjunction with the evidence of Mr X (particularly where the evidence of Mr X finds independent corroboration) is useful. The opinion gives an explanation why the armed strikers behaved the way they did. It is correct that the use of muti and other traditional rituals are matters on which learning is very limited. This notwithstanding the opinion of Prof Lamla should stand.

**L: LESSONS LEARNED**

373. The SAPS has submitted, as an exhibit, a document indicating the lessons learned so far. Regarding intelligence, information and risk assessment and understanding the importance of penetrating gatherings whether culture differences, there is a need to enhance SAPS informer network in mining communities and that standard operating procedures will be reviewed to manage all intelligence received.
374. In relation to crowd dynamics SAPS has observed that an in depth and well-versed understanding of traditional beliefs and practices could assist with a better understanding of the protestor's orientation and behaviour. Occult issues more akin to the realm of magic or supernatural phenomena appeared to have affected the behaviour of the protesters in some way. The intensity and materiality of what was observed as inter-union rivalry was perhaps not significantly focused upon to the extent that such could have influenced the focus and objectives of the organisers. To this end, SAPS will seek to engage the relevant aspects.
375. Regarding communication, given the fiscal implications of improving the technology to enhance better communication, SAPS is looking at various options that may be taken to revamp their communication equipment, ensure integration, and cater for environmental challenges and operational demands in the longer term.

376. SAPS conducted an Organisational Development work study to deal with issues of human and capital resources. It has identified a need to obtain expertise in all areas of policing including areas in technology, research and procurement.
377. SAPS has also requested the Council for Scientific and Industrial Research to help improve the technology to enhance both audio and visual communication. This, it is accepted, will improve the commanders to exercise control and improve coordination in policing operations.
378. SAPS will embark on an awareness campaign to capacitate members in understanding existing National Instructions, Directives and protocols of strategic role players in dealing with crime scene management including practical application of directives. Joint simulation exercises will be conducted for role players to have a common understanding of their respective roles and responsibilities at similar scenes. A Memorandum of Understanding is being developed between SAPS and IPID to bring to effect harmonisation of operations.
379. The SAPS has identified areas of improvement in relation to training, record keeping and accounting and stakeholder engagements.
380. We now deal with the roles of the other parties referred to in the Terms of Reference.

**M: CONDUCT OF LONMIN**

381. The Commission is required to enquire into, make findings, report on and make recommendations concerning the conduct of Lonmin whether it exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between Lonmin and its labour force on the one hand and among its labour force on the other hand.

382. We now deal with the salient evidence and factors which bear relevance to this issue:-

382.1. On 9 August 2012 a group of Rock Drill Operators (“RDOs”) employed by Lonmin at Karee Mine met outside the stadium in Wonderkop and decided to march to Lonmin the following day to demand a basic salary increase to R 12 500.00;<sup>370</sup> The demand for a wage increase by RDOs had a long history.

382.2. In 2009 and 2011 Lonmin and the National Union of Mineworkers (“NUM”) concluded collective agreements each with a two-year duration. In the wage negotiations that culminated in the two collective agreements, NUM was unable to persuade Lonmin to agree a higher wage band for the RDOs, with Lonmin stating that it could not afford a higher amount than it offered. However, Lonmin appreciated that

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<sup>370</sup> Transcript:Day245,p30934,lines19-25;Exhibit EEEE19,entry09-08-2012

RDOs were underpaid and the issue was described as “a ticking time bomb”.<sup>371</sup>

382.3. On 21 June 2012, about 300 Karee Mine RDOs marched to the office of Mr Da Costa, Vice-President of the Karee Mining Operations, to present a request for a basic salary increase to R12 500-00. Mr Da Costa met with two representatives of the RDOs and undertook to present the request to the Executive Committee of Lonmin (“EXCO”).<sup>372</sup>

382.4. About 20 July 2012, Mr Barnard Mokoena, then Executive President Human Capital and External Affairs, telephonically informed Mr Mathunjwa that there was a rumour that employees had a grievance and intended to deliver a memorandum to Lonmin. Mr Mathunjwa advised Mr Mokoena to convene a stakeholders meeting when he receives the demand.<sup>373</sup> Lonmin did not convene the meeting.

382.5. On 23 July 2012 Mr Da Costa met with representatives of the RDOs and reported to them that he was still awaiting the response of the EXCO on the demand for a salary increase.<sup>374</sup>

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<sup>371</sup> Exhibit XX1

<sup>372</sup> Exhibit 0017

<sup>373</sup> Transcript:Day21,p2243,lines22-25,p2245,lines24-25;p2246,lines 1;lines11-14;Exhibit NN

<sup>374</sup> Exhibit 0017

382.6. On 30 July 2012 five representatives of the Karee mine RDOs met with Mr De Costa. Mr Da Costa reported to them that EXCO had decided to grant a monthly allowance as follows: (i) unassisted RDOs - R750-00; (ii) assisted RDOs - R500-00; and (iii) RDO assistants - R250-00.<sup>375</sup> The representatives of the RDOs told Mr Da Costa that they were unhappy with the offer because it did not meet their demand for R12 500.00.<sup>376</sup>

382.7. On 9 August 2012, Lonmin received information that employees decided to march on 10 August 2012.<sup>377</sup>

382.8. On 10 August 2012, about 3 000 employees marched to Lonmin Platinum Division offices (“LPD”). Some of the employees carried knobkerries and branches of trees. Others carried placards on which was written “R12 500-00” which was the wage demand they sought to present to Lonmin.<sup>378</sup>

382.9. Mr Mokoena also contacted the SAPS, the office of the Premier of North West Province and the municipality to enquire whether the march was authorised. He was informed that nothing was known of the march.<sup>379</sup> Mr Mokoena and Mr Albert Jamieson, Chief Commercial Officer, then decided that due to the illegality of the march and that they

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<sup>375</sup>Exhibit 0017

<sup>376</sup>Exhibit 0017

<sup>377</sup>Exhibit FFFF1

<sup>378</sup>Exhibit Z1

<sup>379</sup>Exhibit 0015

did not know who the strikers were, Lonmin will not receive a memorandum from the strikers and they will ask members of the SAPS to receive a memorandum.<sup>380</sup>

382.10. When the strikers arrived at LPD, Mr Sinclair, then Lonmin Group Mining Emergency and Security Manager, informed them that management was not prepared to meet with them, and that there established channels to convey demands to management. He requested the strikers to put their demand in writing to which they responded that they were illiterate and could not write down the demands. They repeated that they wanted to speak with management. Mr Sinclair conveyed the position of the strikers to management and was again informed that management would not speak with the strikers. Mr Sinclair conveyed this message to the strikers.<sup>381</sup>

382.11. On the same day, Mr Mokwena, telephoned Mr Mathunjwa and informed him that employees had embarked on an unprotected strike. Mr Mathunjwa advised Mr Mokwena to convey a meeting with the trade unions after receipt of a memorandum from the strikers.<sup>382</sup> On the same day Lonmin distributed a communique to employees

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<sup>380</sup> Exhibit 0015

<sup>381</sup> Exhibit FFFF1

<sup>382</sup> Exhibit NN; Exhibit 0015; Exhibit 001

warning them of dismissal if they participate in the unprotected strike.<sup>383</sup>

382.12. On 13 August 2012, Lonmin told the SAPS that it did not know who the people on strike were and described them as faceless people.<sup>384</sup>

382.13. On 14 August 2012, Lonmin discussed with the SAPS that the strikers must be dispersed and return to work.<sup>385</sup>

382.14. On 15 August 2012, Lonmin refused to go to the koppie with AMCU and NUM, under police escort, to address the strikers gathered on koppie 1. Lonmin told Mr Mathunjwa that it will address the issue raised by the striking employees after they end the strike and returned to work.<sup>386</sup>

382.15. On 16 August 2012, in the morning and in the afternoon, Lonmin refused to discuss with Mr Mathunjwa about the conditions for the return of the striking employee to work.<sup>387</sup>

382.16. In the period 21 July to 16 August 2012, Lonmin maintained its position that it will not speak or engage with the strikers. Neither did

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<sup>383</sup> Transcript:Day231,p38081,line8-14,Exhibit0015;;Exhibit CCC4

<sup>384</sup> Transcript:Day103,p11080,lines2-14;Day178,p21310,lines22-25;p21311,lines1-3

<sup>385</sup> Exhibit 0016

<sup>386</sup> Exhibit NN

<sup>387</sup> Transcript:Day22,p2334,lines20-25;p2335,lines1-4;p2365,lines20-21

Lonmin convene a meeting with the trade unions as proposed by AMCU.

383. Lonmin has offered several reasons why it was unwilling to talk to the strikers. We deal with each of the reasons in turn.

383.1. Firstly, Lonmin's attitude was that there was a binding two-year collective agreement dealing, *inter alia*, with salaries which was to expire in October 2013. In evidence however, it was conceded that the collective agreement did not preclude Lonmin and NUM renegotiating and amending the collective agreement where good cause is shown for such a renegotiation and amendment.<sup>388</sup> There was also evidence that there was a precedent for this when circumstances during the currency of the wage agreement had altered to warrant such an amendment.<sup>389</sup>

383.2. Secondly, Lonmin's attitude was that they would only discuss the wage demand through the collective bargaining structures which were in place.<sup>390</sup> In substance, Lonmin's position was that it would discuss this matter with NUM. The position of Lonmin in this regard was disingenuous because Lonmin knew that NUM was not willing to open negotiations on the collective agreement regarding the grievance of the RDOs to the exclusion of the other category of employees who are the subject matter of that collective agreement and that NUM did not support the strike.

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<sup>388</sup> Transcript:Day36,p3951,lines17-23

<sup>389</sup> Transcript:Day36,p3952,lines5-18

<sup>390</sup> Transcript:Day37,p4059,lines15-25;p4060,lines1-22

383.3. Thirdly, Lonmin's position was that engaging with people who were involved in unprotected industrial action would create a bad precedent for industrial relations in Lonmin.<sup>391</sup> This position appears to fly in the face of the contested Emergency Security Procedures Policy of Lonmin which deals with unprotected industrial action. The policy dictates that a dialogue be entered with representatives of employees involved in unprotected industrial action to establish the nature of the grievance with a view to address, and if possible, resolve the grievance.<sup>392</sup>

383.4. Fourthly, that the two unions, namely, AMCU and NUM advised Lonmin not to engage with the strikers directly. This too cannot be a valid excuse. The advice not to engage with the strikers was accompanied by the advice that Lonmin convene a meeting with the trade unions. Lonmin is disingenuous in its selective reliance on the advice from the two trade unions. It would have been plain to Lonmin that the strikers would remain without a voice if it did not convene the meeting proposed by AMCU, rendering the impasse intractable.

384. Instead of addressing the striking employees about their grievance, Lonmin elected instead to remain steadfast in its contractual rights concluded with NUM with regards to the wage agreement. There is nothing to explain why it was not open to Lonmin to have one of its officials properly escorted to go to the koppie and explain further why the demand the employees were making

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<sup>391</sup> Transcript:Day292,p38204,lines7-15

<sup>392</sup> Exhibit XXX8,clause 8

was incapable of being met. Be it because it was not affordable or that with the wage allowance, the RDOs at Lonmin were earning wages comparable to similarly skilled people in the industry who were employed elsewhere. Calling for the intervention of the police should always be the very last resort.

385. We submit that the inflexible attitude of Lonmin not to engage with the strikers for reasons that they advanced is clearly untenable. This was an error. As Mr De Rover said, the rule in conflict resolution is never to close the door even where negotiations may appear to be futile.<sup>393</sup> The situation is rendered more troubling given the financial impact of the strike on Lonmin and the possible violence normally attendant upon an unprotected strike. The evidence indicates that the decision not to discuss with the striking employees was that of Messrs Mokwena and Jamieson without the matter having been discussed by the EXCO during the period of the strike nor was this position discussed or endorsed by the board of directors.

386. The question whether Lonmin responded appropriately to the threat and outbreak of violence which occurred at its premises can be properly addressed against the following and factors relevant to this question.

387. In December 2011, Impala Platinum Mine (Implats) unilaterally granted a wage increase to Miners notwithstanding the existence of a collective agreement concluded in October 2011 in which Implats had offered a lesser amount to Miners on the basis that it could not afford more.<sup>394</sup> This conduct of

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<sup>393</sup> Transcript:Day286,p37091,lines16-2;p37092,lines1-7

<sup>394</sup> Exhibit XX1

Implats resulted in anger by other categories of employees who did not receive the increase.

388. As a result of the unilateral salary increase to Miners, RDOs engaged in an unprotected strike and in February 2012 Implats dismissed 17000 employees. The strike was characterised by violence, threats on NUM and the death of 4 employees.<sup>395</sup> Some of the employees who were dismissed were reinstated.

389. In April 2012 Implats unilaterally awarded salary increases to other categories of employees who were subject to the October 2011 collective agreement. RDOs also received substantial increases. (NUM was not involved in the determination of the increases).<sup>396</sup>

390. In the light of the salary increases at Implats, Lonmin expected that its own employees would also make demands for salary increases, and which, if not addressed, would possibly result in similar unrest and violence at Lonmin.<sup>397</sup>

391. The evidence indicates that as at 21 June 2012, Lonmin knew that the RDOs were going to make demand for a wage increase from R5,400-00 to R12,500-00 and that there was a threat of a strike action.

392. From 10 August 2012, Lonmin was aware that NUM was openly mobilising employees to go to work and provided employees escort to employees

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<sup>395</sup> Exhibit XX1

<sup>396</sup> Transcript:Day35,p3787,lines18-25;p3788,lines1-3

<sup>397</sup> Transcript:Day290/291,p37922,lines2-7

reporting for work.<sup>398</sup> Lonmin made a vehicle available to the NUM to transport non-striking employees to work.<sup>399</sup>

393. On 10 August 2012 an armed group of strikers at Rowland Crossing intimidated employees who were reporting for work. Lonmin security, Messrs Botha and Kellerman, confronted the group of strikers and fired rubber bullets to disperse the group.<sup>400</sup>

394. On 11 August 2012, a group of approximately 2000 to 3000 armed strikers marched to the office of the NUM to confront the NUM<sup>401</sup>. Armed NUM members and officials intercepted the strikers before they reached the office of the NUM and in the ensuing confrontation, some of the NUM officials and members fired at and injured two of the strikers.<sup>402</sup> There is evidence that Lonmin security also fired rubber rounds to disperse the crowd opposite the NUM offices.<sup>403</sup> After the attack, Lonmin received information that the strikers planned to attack the office of the NUM on 12 August 2012 in revenge for the attack on the strikers.<sup>404</sup>

395. On 11 August 2012, incidents of intimidation of employees reporting for work were reported.<sup>405</sup> In addition, Lonmin received reports that strikers on the koppie were undergoing rituals with an inyanga.<sup>406</sup>

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<sup>398</sup> Transcript:Day281,p36180,lines6-25;p36181,lines1

<sup>399</sup> Transcript:Day38,p4090,lines19-25;p4091,lines1-22

<sup>400</sup> Exhibit EEEE29

<sup>401</sup> Transcript:Day38;p4092,lines5-15;Exhibit ZZ3; ZZ4, AAAA1

<sup>402</sup> Exhibit BBB8

<sup>403</sup> Exhibit EEEE19,entry09.03

<sup>404</sup> Exhibit RRRR1.4,para 7

<sup>405</sup> Exhibit EEEE19,entry23:30

<sup>406</sup> Exhibit ZZZZ15.30

396. On the same day, Lonmin's RDO Occurrence Book also records a concern that there may be a tension or fight between the NUM and AMCU members.<sup>407</sup>
397. On 12 August 2012, about 3000 strikers, many armed with dangerous weapons, marched to the offices of the NUM to avenge the attack on the strikers on 11 August 2012. Lonmin security confronted the strikers along the way to prevent them reaching the NUM offices. The strikers attacked the Lonmin security and two security employees, Messrs Hassan Fundi and Frans Mabelane, were hacked to death by the strikers and their vehicle set alight with one of the security officers inside. Other Lonmin securities were injured by the strikers and vehicles damaged. Firearms were stolen from the security officers.
398. In the evening of 12 August 2012, a group of armed strikers gained access to K4 shaft by cutting through the fence. Inside the premises, the armed strikers attacked Messrs Mabebe and Van Vuuren. Mr Van Vuuren escaped with injuries.<sup>408</sup> Mr Mabebe was stabbed and injured by the armed strikers and died from the injuries the same day. The armed strikers also set alight and damaged a number of vehicles.

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<sup>407</sup> Exhibit 19,entry14:00

<sup>408</sup> Transcript:Day270,p34316,line23-25;p34317,line1-5,p34320,line15-21;Exhibit L,slides37-39;GGG19;GGGG3

399. In the early morning of 13 August 2012, a group of armed strikers encountered Mr Julius Langa on his way to work. The group attacked Mr Langa and fatally injured him. Mr Langa was stabbed several times.<sup>409</sup>
400. On the same day around midday, Lonmin officials met with and stated to the Provincial Commissioner and other senior members of SAPS that they did not know who the people on strike were and referred to them as “faceless people”. They also informed the police that the strike and unrest was a result of rivalry between the NUM and AMCU.
401. Immediately after the meeting, the SAPS members and Lonmin security saw a group of strikers on Lonmin CCTV monitors walking along the railway line.<sup>410</sup> The strikers were armed with dangerous weapons, including spears and pangas. Major General Mpembe and members of SAPS intercepted the armed strikers to disarm and disperse them.<sup>411</sup> The attendance of the police to the armed strikers by the railway line ended with the deaths of 2 police officers and serious injury to another and the deaths of three strikers and injury to an unknown number of strikers.<sup>412</sup>
402. On the same day, Lonmin's RDO Occurrence Book also recorded various incidents of intimidation on the same day and that a group of strikers was dispersed and fired at by Lonmin security at Karee 3.<sup>413</sup>

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<sup>409</sup>Transcript:Day248,p31167,lines7-14;Exhibit L, Slide 39

<sup>410</sup>Transcript:Day177,p21296,lines23-25;p21297,line1-5;Exhibit FFF25, entry36-37,Exhibit GGG5,para11

<sup>411</sup>Exhibit Z1

<sup>412</sup>Exhibit L, Slides51-56; Exhibit AAAA1

<sup>413</sup> Exhibit XXX4

403. On 14 August 2012 Mr Twala, an NUM shop steward, was shot and killed behind koppie 1 by some among the strikers gathered on the koppie. Incidents of intimidation of employees reporting for work were also reported.

404. In the light of all the acts of violence, the enquiry is whether Lonmin responded appropriately. The answer to this question is clearly no:-

404.1. In the face of clear intimidation of workers, the potential and actual harm to life and limb of those who chose to go to work, and certainly after the killing and serious assault of employees on 12 August 2012, Lonmin could and should have shut down its operations, especially the non-essential parts, until it had addressed the unrest.

404.2. Having decided not to close the operations and it threatening action against employees who did not report for work, Lonmin failed to provide adequate security to protect employees who reported for work from reasonably foreseeable harm to employees reporting for work.

405. The Commission is also to enquire into, make findings, report on and make recommendations on whether Lonmin by conduct or omission created an environment which was conducive to the creation of tension, labour unrest, and disunity amongst its employees or other harmful conduct. To this, the evidence revealed what we describe below.

405.1. Lonmin's failure to convene a meeting of trade unions as proposed by Mr Mathunjwa to address the issue raised by the RDOs is difficult to

comprehend and must be censured, especially in the light of its stance that the striking employees should raise the issue of salary increases through the bargaining structures.

405.2. Lonmin's engagement with the RDO's around the latter's wage grievance in June 2012, culminating in the decision by Lonmin's EXCO to pay the RDO's an allowance, and yet maintain that they will not discuss the same subject with the RDO's because of the existing bargaining channels, would predictably send mixed signals. The distinction between an allowance and wage increase is one without a difference. This is so, particularly because that distinction would have been lost given the education levels of RDOs.

405.3. Lonmin's failure to meet its obligations under the Social and Labour Plans, which it was legally obliged to do, to ameliorate the social conditions of employees is one such factor which added to an environment which made it conducive to the creation of tension, labour unrest and disunity amongst its employees.

405.4. Lonmin's failure to conduct and complete the trade union membership audit to enable the determination who between AMCU and NUM enjoyed the majority necessary for collective bargaining rights also created an environment which was likely to produce an environment of tension, labour unrest, disunity amongst its employees.

405.5. Despite the acceptance that migrant labour was undesirable, a fact known to Lonmin over many years, Lonmin has not taken any meaningful measures to reduce a reliance on labour migrancy or to mitigate its impact on its employees.

405.6. Notwithstanding its awareness of the unrest and subsequent RDO salary increases at Implats and anticipation of similar demand from its own RDOs, and that this was a “ticking time-bomb”, Lonmin failed to address the matter at all. This would have avoided conflict among its employees.

405.7. The introduction of the housing allowance as a scheme to address housing shortage exacerbated the problem as instead of ameliorating the already desperate living conditions of the mine workers. The fact that the employees would use the housing allowance as an additional income was predictable, given the low income that they were receiving. Even when Lonmin became aware of this consequence, it did not take any steps to address what it considered an unintended consequence.<sup>414</sup>

405.8. The model that Lonmin devised to meet its social and labour plans of accommodating the employees was a breach of its legal obligations. The SLP was to be a cost to Lonmin. The model that Lonmin adopted

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<sup>414</sup> Transcript:Day293,p38425,lines20-25,38426 & 38427,lines 1-13;Day272,p34651,lines6-25

was to transfer this cost from its books to that of the employee through some third party funding.

405.9. In the annual report submitted by Lonmin in 2006, and specifically with reference to its housing plan, it shows that it committed to build five thousand five hundred houses (5500) in the period 2006 to 2011. The plan also included the conversion of hostels into housing units with the target to convert a hundred and fourteen (114) hostels into housing units in that same period.<sup>415</sup>

405.10. In 2008 Lonmin had only converted 29 hostels into housing units and had not built any houses in the period 2006 to 2011.<sup>416</sup> In 2008, Lonmin built three (3) show-houses.<sup>417</sup>

405.11. As at August 2012, Lonmin had not built any other houses and had converted fifty seven (57) blocks off hostels into housing units.<sup>418</sup>

406. Did Lonmin employ sufficient safeguards and measures to ensure the safety of its employees, property, and the prevention of the outbreak of violence between the parties? In the light of the evidence and facts set out above, we submit that Lonmin did not do so.

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<sup>415</sup> Exhibit SSSS2,vol1,p78-79

<sup>416</sup> Exhibit SSSS2,vol2,p549

<sup>417</sup> Exhibit SSSS2,vol2,p549

<sup>418</sup> Exhibit SSSS2,vol5,p1745-1749

- 406.1. Lonmin security responsible to monitor the situation on 11 and 12 August 2012 were insufficient and inadequately equipped to carry out the function.
- 406.2. Lonmin also failed to utilise and act on intelligence received that the strikers planned a revenge attack on the offices of the NUM on 12 August 2012.
- 406.3. Although Lonmin had contracted the services of Protea Coin Security to provide security on its premises, it did not invoke the services of Protea Coin Security to assist with monitoring of the situation on 11 and 12 August 2012.
- 406.4. Lonmin down-scaled its security. This consequence was that Lonmin would rely heavily on the SAPS to deal with security challenges that were to present on their premises.
- 406.5. Lonmin installed close circuit television cameras on its premises to assist with the monitoring of its premises. The attack of the armed strikers by the officials and members of NUM on 11 August 2012 and the attack on Lonmin security and other employees on 12 August 2012 were not captured. The reason offered is that cameras or that the footage was of poor quality. Any footage available could not be

used for identifying persons or assist with the investigation of incidents.

406.6. Lonmin had the option to down-scale or suspend its operations which were not essential in the light of the violent conduct of the strikers, particularly after the murders of its employees on 12 August 2012. Lonmin was obliged to do so in circumstances where it could not guarantee the safety of its employees who were under threat of dismissal if they failed to report for work without permission during this period<sup>419</sup> or provide escort for employees reporting for work.

406.7. On 11 August 2012, Lonmin suspended its regular bus-service for transporting employees to work and yet required employees to report for work without providing any security or escort to secure their safety when they reported for work at risk of dismissal if they did not report for work. Employees were intimidated assaulted and Mr Langa killed on his way to work.

406.8. Lonmin was aware that the conduct of NUM to actively encourage employees to report for work was a potential source of conflict between NUM and the strikers.<sup>420</sup> It failed to discourage NUM from actively mobilising employees to report for work and to defy the call for the unprotected strike.

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<sup>419</sup> Transcript:Day292,p38186,lines16-22;Exhibit 0015

<sup>420</sup> Transcript:Day37,p4054,lines22-25;p4055-5058; p4059,lines1-5;Day41,p4456,lines 22-25;p4457,lines1-19;Day48,p5246,lines1-8

407. The Commission is also required to examine Lonmin's policies, procedures, practices and conduct relating to its employees and organised labour. The evidence in this regard is –

407.1. Lonmin's policy "Emergency Security Procedures" deals, *inter alia*, with unprotected industrial action. It provides that in such an instance, Lonmin shall constitute a committee which includes representatives of the employees involved in the unprotected industrial action and that the committee shall endeavour to address and resolve the grievance. It is clear that the purpose of the provision is to enable effective resolution of grievances and disputes through dialogue, notwithstanding that a strike is unprotected.<sup>421</sup>

407.2. We submit that the policy is sound, more so in an environment where inevitably the parties would not always follow the agreed rules of conduct. This was the situation in Marikana and Lonmin failed, without reasonable explanation, to comply with its own policy. Even if the Mr Mokoena that the document is not policy is accepted, Lonmin security were aware of the existence of the document, considered it to be policy and yet failed to take the measures set out in the document. Lonmin has not given a satisfactory explanation for this failure.<sup>422</sup>

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<sup>421</sup> Exhibit XXX8,para8 In so far as there is doubt within Lonmin about the status of Exhibit XXX8, Lonmin should remove such doubt by completing the necessary processes for the formalization of the policy – in any event, Lonmin security already consider the document binding policy

<sup>422</sup> Transcript:Day268,p30425,lines8-17

408. The Commission must also enquire into, make findings, report on and make recommendations regarding whether by act or omission Lonmin directly or indirectly caused loss of life or damage to persons or property. Lonmin contributed to the loss of life, injuries and damage to property in the period 10 to 16 August 2012.

408.1. We submit that Lonmin failed to take any steps to address the “ticking time-bomb” of RDO salaries even though it was aware of the dissatisfaction. Further, Lonmin’s engagement with the RDOs which resulted in the award of the allowance without the involvement of the unions sent the message to the strikers that they would succeed in their demand if they continued to put pressure on Lonmin.

408.2. Lonmin’s failure to engage with the unions as proposed by Mr Mathunjwa on 21 July 2012 and 10 August 2012 that Lonmin convene meetings with the trade unions, closed an important channel to resolve the stand-off with the strikers before there was any deaths, injuries and destruction of property.

408.3. Lonmin’s refusal to address the strikers on 10 August 2012 at the LPD before there was any deaths, injuries and destruction of property. The refusal purely on the basis that the strike was unprotected and that the march was unauthorised cannot offer an excuse when it was foreseeable that such a refusal would lead to probable unrest.

408.4. Lonmin's wrong stance that it was precluded by the collective agreement of June 2011 from considering the demand of the strikers. This reason too has no compelling weight. In the past, Lonmin varied the terms of a collective wage agreement when circumstances warranted such change.

**N: THE CONDUCT OF AMCU**

409. The Commission is required to enquire into, make findings, report on and make recommendations concerning the conduct of the Association of Mineworkers and Construction Union (AMCU), its members and officials, in particular, (i) whether it had exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between itself and Lonmin and/or NUM or any other parties; (ii) the extent to which it has exercised effective control over its membership and those persons allied to it in ensuring that their conduct was lawful and did not endanger the lives and property of other persons; and (iii) whether by act or omission it directly or indirectly caused loss of life or damage to persons or property.

**AMCU'S STRATAGEM**

410. There is an unsettling coincidence between the strategy that AMCU employed before and after it got Karee mine to agree to negotiate and sign a working-in agreement regulating voluntary overtime; the issue of "skoonteer" overtime

and the strategy AMCU sought to employ in diffusing the impasse during August 2012.

411. Karee mine has two voluntary overtime systems that are of mutual benefit to Karee mine and employees. The “skoonteer” overtime is time worked by employees by cleaning underground in their own time. They earn extra income in this was the underground works are cleaned. Working-in overtime is time worked by employees voluntarily which enable them to take longer easter and Christmas breaks and Karee mine does not lose production in that longer break period.
412. After AMCU obtained limited organisational rights at Karee mine in November 2011, it advised its members not to work voluntary over-time, both “skoonteer” and working-in overtime. It opposed both overtime on the basis that Karee mine did not consult with it before it introduced the overtime system, this, notwithstanding that AMCU was not a recognised union. As a result, Lonmin expressed a serious reduction in the uptake of both forms of overtime in the period January to April 2012. This was contrary to the norm where there is no shortage of takers of both types of overtime. Karee mine signed a working-in agreement with Karee mine in May 2012 and AMCU lifted the ban on working-in overtime. Employees also began volunteering for “skoonteer” overtime.
413. AMCU failed to exercise any control over its members or persons allied to it to ensure that their conduct was lawful and did not endanger the lives and property of other persons.

414. Fast forward June 2012, the RDOs made their demand for a salary wage increase to R12 500.00. NUM did not support the demand. AMCU did not discourage its members at Karee to go on an unprotected strike in asserting their demand. NUM on the other hand, was actively assisting those employees who wanted to go to work to do so.
415. Mr Mathunjwa approached Lonmin wanting a meeting to discuss the demands of the employees engaged in the unprotected strike. Yet again, Lonmin refused to give Mr Mathunjwa audience. AMCU could not go to the CCMA to refer a dispute over which it did not have bargaining rights. In whatever language, Mr Mathunjwa got the SAPS, at the very least, to entertain a possibility of the armed strikers surrendering their weapons voluntarily on 16 August 2012 at 09:00. On that morning Mr Mathunjwa got an informal hearing from Mr Seedat, then a board member of Lonmin. In their discussion, Mr Mathunjwa said if AMCU got a seat on the bargaining table, he would get the workers off the koppie. Had Lonmin acceded to this request, voila! The workers would have disarmed by 09:00 and later return to work. Its membership would balloon. And *“everybody would be happy”*.
416. This stratagem was inimical to any best endeavour AMCU could have employed to persuade the armed strikers to leave the koppie and to pursue their demands in a different and non-violent way.

417. We set out the facts relevant to the consideration of the issues raised in the Terms of Reference.

417.1. In June 2012, RDOs at Karee mine put up posters calling on Karee RDOs to attend a meeting at Karee Hostel on 21 June 2012.<sup>423</sup> On 21 June 2012 RDOs held a meeting at Karee Hostel and decided to go and speak to Mr Da Costa, Vice President Karee Mining Operations. After the RDO meeting, a group of 300 RDOs marched to Da Costa office where Messrs Magqabine and Mofokeng, both members of AMCU, met with Mr Da Costa.<sup>424</sup> The two employees told Mr Da Costa that Karee RDOs request a salary increase to R12 500 and that they did not want to involve trade unions in the matter because the issue concerned only Karee Mine RDOs.

417.2. On 2 July 2012, Mr Da Costa and Mr Tumelo Nkisi, Karee Human Resource Manager, met with Magqabine, Mofokeng and three other employees. Two (2) of the three (3) other employees were also members of AMCU.<sup>425</sup> In the meeting, Da Costa told the workers that EXCO was still discussing the issue of the salary increase but that it was unlikely that it would agree to the increase. He also told them that the issue had to be raised through the proper structures. Further that there was in place a two year wage agreement which would expire in

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<sup>423</sup> Transcript:Day239,30022,lines1-20

<sup>424</sup> Exhibit XXX2

<sup>425</sup> Exhibit 0017

October 2013. The meeting concluded on the basis that Da Costa would revert to the employees when he got an answer from EXCO.<sup>426</sup>

417.3. About 21 July 2012, Mr Mokoena telephonically informed Mr Mathunjwa that there was a rumour that employees had a grievance and intended to deliver a memorandum to Lonmin. Mr Mathunjwa advised Mr Mokoena to convene a stakeholders meeting when he receives the demand.<sup>427</sup>

417.4. On 21 July 2012, Mr Da Costa met with the delegation of five who were representing the employees. These were the same people that he met previously met with. In this meeting, Mr Da Costa insisted that the issue of salaries must be raised in proper structures and that it was unlikely that EXCO would accede to the salary demands. He promised the delegation that he would revert to them as soon as he heard the response of EXCO. Later that day, the RDOs again marched to Mr Da Costa offices with employees demanding to see him. They could not see him because he was out of the office.

417.5. During the period 21 June to 23 July 2012, Mr Tumelo Nkisi, a Human Resource Manager at Karee mine, contacted both branch secretaries of NUM and AMCU presumably to discuss the wage demand of the

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<sup>426</sup>Exhibit 0017

<sup>427</sup>Exhibit NN

RDOs. This effort was rebuffed with both NUM and AMCU saying that the problem is Lonmin's and that it must be solved by the company.<sup>428</sup>

417.6. On 29 July 2012, Lonmin met with AMCU representatives and informed them that EXCO decided to give the RDOs an allowance. AMCU representatives told Mr Da Costa that AMCU had nothing to do with the matter.<sup>429</sup>

417.7. On 30 July 2012, Mr Da Costa informed Messrs Magqabane and Mofokeng about the amount of the allowance and the amount.<sup>430</sup>

417.8. On 31 July 2012, Lonmin, through its line managers, informed the RDO's about their allowance as its response to the demand for wage increase of R12 500.00 which the RDO's had made.

417.9. On 9 August 2012, RDOs decided in a meeting that on 10 August 2012 they would not work and would march to the offices of Lonmin at LPD to present their demand for a salary increase to R12 500.

417.10. On 10 August 2012, about two thousand (2000) to three (3000) employees marched to Lonmin's LPD offices. After the employees were informed that Lonmin was not prepared to speak with them, they

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<sup>428</sup>Transcript:Day239,p30039,lines11-14;Exhibit 0017

<sup>429</sup> Exhibit XX2; Exhibit 0017

<sup>430</sup>Transcript:Day239,p30056,lines17-25,p30057,lines1-12

decided to embark on a strike with immediate effect. The strike was unprotected.<sup>431</sup>

417.11. On the same day, Mr Mokoena telephoned Mr Mathunjwa and informed him about the unprotected strike. Mr Mathunjwa proposed to Mr Mokoena that he convenes a meeting of the unions to address the matter.<sup>432</sup> Lonmin obtained a court order that day interdicting the strike.<sup>433</sup>

417.12. On 11 August 2012, armed strikers marched to the offices of the NUM, on one version to enquire from NUM why the union was refusing that Lonmin speaks to them.<sup>434</sup> The other version, particularly from Lonmin security personnel, was that the march was intended to damage the NUM offices or attack the officials.<sup>435</sup>

417.13. On their way to NUM offices, the armed strikers were confronted by NUM officials who, in the altercation, fired at the strikers injuring two of the strikers.<sup>436</sup>

417.14. On 12 August 2012, armed strikers marched to the NUM offices again. This time, to avenge the attack on their members that occurred

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<sup>431</sup>Labour Relations Act 66 of 1995

<sup>432</sup>Exhibit NN

<sup>433</sup> Exhibit RR1

<sup>434</sup>Exhibit BBB8

<sup>435</sup>Transcript:Day245,p30964,line3-4;Exhibit ZZ4; ZZ3

<sup>436</sup>Exhibit ZZ4; ZZ3

the day before. According to Lonmin security personnel, the strikers intended to attack and set alight the NUM offices. Lonmin security intercepted the armed strikers before they reached the NUM offices. The armed strikers attacked Lonmin security. Two of Lonmin security personnel were killed and others injured in the confrontation. The two security vehicles were set alight. Those who were reporting to work were attacked. One employee was killed and another injured at K4 shaft.

417.15. On 13 August 2012 Mr Kwadi of Lonmin communicated with Mr Mathunjwa about the violence at the mine and requested his intervention. Following the communication with Lonmin, the Major General Secretary of AMCU, Mr Jeff Mphahlele and National Organiser of AMCU, Mr Dumisani Nkalitshani met with the strikers and with Lonmin managers.<sup>437</sup>

417.16. On 14 August 2012, the armed strikers killed Mr Twala on the koppie. On the same day, AMCU publicly blamed the violence in at Lonmin on “sinister forces”.<sup>438</sup> In the same media statement AMCU accused NUM of killing one (1) striker and injuring others.

417.17. On 15 August 2012, Mr Mathunjwa and other AMCU representatives met with the SAPS, Lonmin and NUM. The meeting was requested by

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<sup>437</sup>Exhibit NN

<sup>438</sup>Transcript:Day21,p2268,line25–p2269,line2; Exhibit 002

the SAPS. SAPS sought to persuade the Unions presidents and Lonmin to assist the police in their efforts to get the strikers to disarm and to end their unlawful gathering on the koppie.

417.18. Later in the afternoon, Mr Mathunjwa and a delegation of AMCU representatives went to the koppie and addressed the strikers. In the address, he told the strikers that AMCU had come to hear about their grievances and said that it would convey the demand of the strikers to Lonmin. He also undertook to return to the koppie on 16 August 2012 at 09:00 with a response from Lonmin.

417.19. Mr Mathunjwa's address was immediately after the unsuccessful attempt of Mr Zokwana to address the strikers. Both unions went to the koppie under the escort of the SAPS. At the koppie, Mr Mathunjwa addressed the strikers on behalf of AMCU. Mr Mathunjwa received a warm reception from the strikers who gave him an opportunity to speak to them. He claims that he requested the strikers to go back to work and lay their weapons down. This is not confirmed by video material where his address was recorded.<sup>439</sup>

417.20. There is a dispute between the SAPS and Mr Mathunjwa about what he said to the SAPS when he reported back after the address to the strikers. The SAPS is that Mr Mathunjwa promised the police that the

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<sup>439</sup>Exhibit BB1-BB6

strikers will disarm on 16 August 2012 and that “tomorrow we will be happy”.<sup>440</sup> Mr Mathunjwa denies that he made a promise to the police.<sup>441</sup> His evidence is that he said to the police that he was hopeful that the strikers would disarm.<sup>442</sup>

417.21. In the meeting Mr Mathunjwa wanted to discuss with Lonmin the conditions on which the strikers would return to work. Mr Kgotle, of Lonmin, was agreeable to the proposal and suggested that this matter be dealt with the following day.<sup>443</sup>

417.22. On 16 August 2012 Mr Mathunjwa went to Lonmin in the morning. Mr Seedat, a Lonmin board member, testified that when he saw Mr Mathunjwa at Lonmin that morning, Mr Mathunjwa said to him that he will resolve the strike if Lonmin gave him a place at the negotiation table. Mr Mathunjwa denies this. Mr Mathunjwa’s evidence is that Lonmin management was not willing to meet with him that morning.<sup>444</sup>

417.23. Around midday, Mr Mathunjwa and other AMCU officials went to the koppie around midday and told the strikers that Lonmin refused to meet with him that morning. During his address the strikers also sang a song about how they will kill NUM and NUM President Mr Zokwana. Mr Mathunjwa told the strikers that he would return to Lonmin to try

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<sup>440</sup>Transcript:Day77,p8251,line8-9;Day106,p11374,line9-20

<sup>441</sup>Transcript:Day22,p2449l,line4-5

<sup>442</sup> Transcript:Day22,p2448,line22-23

<sup>443</sup>Transcript:Day22,p2327,lines18-25;p2328,line1-10

<sup>444</sup> Transcript:Day22,2335,line1-4

Speak to Lonmin again. Mr Mathunjwa returned to Lonmin and was informed by Mr Kgotle of Lonmin that management did not wish to meet with him as there was a binding collective agreement between Lonmin and the recognised unions.<sup>445</sup>

417.24. Again around 14:00, Mr Mathunjwa returned to the koppie and informed the strikers that Lonmin refused to meet with him. At this address, his evidence is that he asked the strikers to leave the koppie because a decision had been made that the police would kill the strikers if they did not leave the koppie. The strikers told Mr Mathunjwa that they would not leave the koppie and the police can kill them on the koppie.

418. Did AMCU use its best endeavours to resolve any dispute/s which may have arisen between itself and Lonmin and /or NUM? The answer to this is clearly no. We say so for the following reasons:-

418.1. AMCU, alive to the demand by the RDO's for the salary wage increase, and being the majority union at Karee mine, failed to present the demands of its RDO's members to Lonmin. When Lonmin invited AMCU and NUM to discuss the wage demand of the RDO's, the attitude that AMCU and NUM took was to disengage and took a stance that the problem is Lonmin's and it's for Lonmin to solve it. With

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<sup>445</sup> Transcript:Day22,p2365,line20-21

this attitude AMCU could and should have taken the opportunity to articulate the demands of the RDO's and possibly avert the strike that ensued.

418.2. AMCU enjoyed a majority status at Karee mine and consequently influence over the RDO's in particular. The reception which Mr Mathunjwa received at the koppie both on the 15 and 16 August 2012 is telling. Firstly he was not in favour of receiving any police escort to the koppie. He must have been comfortable in the knowledge that it would not bring in any harm's way. Secondly when he got to the koppie, the first time on the 15 August 2012 he informs the strikers that he would have preferred speaking to them from outside the Nyala but the police had set up that protocol. Again, this demonstrates the level of comfort that Mr Mathunjwa had in the company of the armed strikers.

418.3. In all his address to the strikers he was warmly received. On 16 August 2012 and on both occasions when he went to the koppie to address the strikers, Mr Mathunjwa did that without any police protection. This indicates further how comfortable he was with the strikers.

418.4. Mr Mathunjwa is the president of a union that enjoyed a majority at the Karee mine. He could have certainly used the gravity of his influence to dissuade the strikers from carrying the weapons in public;

could have spoken very strongly against the deaths and injuries that preceded 16<sup>th</sup> August 2012; he would have known that some of the armed strikers were his members and possibly responsible for the carnage that happened including the arson and the killings of the security personnel, co-workers and members of the SAPS; could in his address to the armed strikers to the koppie have spoken against the violence that was associated with the wage demand; must have appreciated that the open hostility between himself and Mr Zokwana could inflame the tempers of the armed strikers who were on the opposite sides of the conflict. NUM being on one side and AMCU on the other.

418.5. The much publicized broadcast interview which Mr Mathunjwa, Mr Zokwana and Mr Mokoena of Lonmin had concerning the violence that was occurring in Marikana at that time, the two union leaders could have used that platform to show greater tolerance and deference. They simply did not. There were instead accusations and counter accusations which could not and did not assist to resolve the standoff.

418.6. On 13 August 2012, the Major General Secretary of AMCU, Mr Jeff Mphahlele and national organiser of AMCU, Mr Dumisani Nkalitshani met with the striking workers at the koppie. AMCU clearly had access to the RDO's. In addition, AMCU national office bearers met with the strikers on 13 August 2012 at the koppie.

418.7. In December 2011, Lonmin and AMCU concluded an agreement providing limited organisational rights to AMCU. The agreement provided AMCU with the following rights: access to workplace; stop order facilities. In May 2012, the parties agreed an addendum to the agreement providing, *inter alia*, AMCU with offices; the right to convene mass meetings; the right to participate in statutory forums. The agreement also provided for the establishment of the Karee mine Consultative Forum and the application of Lonmin's Grievance Procedure to their relationship.<sup>446</sup>

418.8. None of the AMCU officials who attended the meeting with strikers on the koppie on 13 August 2012 have provided evidence that they implored or attempted to tell the strikers to desist from carrying weapons in public; to desist from attacks on non-striking members; to desist from destruction of Lonmin property. There is no evidence that they condemned the criminal conduct of the strikers over the period 10-13 August 2012. Neither is there evidence that they condemned the unprotected strike and unlawful gathering on the koppie.

418.9. AMCU officials, including Mr Mathunjwa, did not publicly dissuade or condemn the singing of inflammatory songs by the strikers in their presence on 15 August 2012 about killing the NUM and Mr Zokwana.

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<sup>446</sup> Exhibit RR1, Annex F (p171-176)

418.10. AMCU officials, including Mr Mathunjwa, did not condemn the strikers who made threats to kill the police on 16 August 2012.

419. AMCU officials, including Mr Mathunjwa, did not call on its members to surrender the dangerous weapons that they were carrying openly. They did not request the strikers not to carry weapons in public. Neither did they attempt to persuade them to abandon the insistence in carrying weapons. Did not inform them that the strike is unprotected their gathering unlawful.

**O: THE CONDUCT OF THE NATIONAL UNION OF MINeworkERS**

420. With respect to the conduct of the NUM, the Commission is required to enquire into, make findings, report on and make recommendations concerning the conduct of the NUM, its members and officials, in particular, (i) whether it has exercised its best endeavours to resolve any dispute/s which may have arisen (industrial or otherwise) between itself and Lonmin and/or AMCU or any other parties; (ii) the extent to which it exercised effective control over its membership and those persons allied to it in ensuring that their conduct was lawful and did not endanger the lives and property of other persons; and (3) whether by act or omission it directly or indirectly caused loss of life or damage to persons or property.

421. We set out the evidence and facts relevant to this issue:

421.1. As at 16 August 2012, Lonmin, NUM and UASA negotiated wages and conditions of employment every two years, valid for a period of two years at a time. During the negotiations for the 2010 - 2012 period, NUM was unable to persuade Lonmin for a higher wage band for RDO's. In their result, the RDOs remained underpaid and unhappy with their wages. It described the issue as "a ticking time-bomb".

421.2. In the period 21 June 2012 to 23 July 2012, Mr Nkisi informed Mr Jerry Ndamase, the branch secretary of the NUM, about the demand of the RDOs for a wage increase to R12 500.<sup>447</sup> Mr Ndamase told Mr Nkisi that the RDOs were Lonmin's problem and that Lonmin should address the issues raised by the RDOs.<sup>448</sup>

421.3. On 28 July 2012 Mr Da Costa met with Mr Elliot Moloji of NUM's regional office and informed him of the decision of management to grant an allowance to RDOs and RDAs. Mr Moloji pointed out to Mr Da Costa that Lonmin was going outside of the NUM wage negotiation protocol.<sup>449</sup>

421.4. On 8 August 2012, NUM addressed a meeting of RDOs in which it reported management's decision to grant an allowance to RDOs.

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<sup>447</sup> Exhibit 0017

<sup>448</sup> Exhibit 0017

<sup>449</sup> Exhibit 0017

NUM became aware that the RDOs rejected the allowance.<sup>450</sup> NUM told the RDOs that the issue of RDO wage increases was dealt with in the collective agreement due to expire in September 2013 and that as a result, it could not reopen the issue with Lonmin for negotiation.

421.5. The RDOs informed NUM that they would deal with the matter of the salary increase without the assistance of the NUM.<sup>451</sup> The NUM also told the RDOs that if they went on a strike on the issue, the strike would be unprotected. It encouraged employees to go to work.<sup>452</sup>

421.6. From 10 August 2012, the NUM arranged for the transporting and escorting of employees to report for work. NUM publicly called for employees to go to work while it was aware that the striking employees were attacking and intimidating employees who were going to work.<sup>453</sup>

421.7. On 11 August 2012, NUM was informed by Lonmin security that the strikers were marching to NUM offices to set the office alight. Lonmin security advised NUM to vacate their offices before the strikers arrived. NUM officials refused to vacate the office and instead confronted the strikers before they arrived at the NUM offices. A

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<sup>450</sup> Transcript:Day38,p4178,lines18-25,p4179,lines1-25,4180,4181-4182,lines1-25

<sup>451</sup> Transcript:Day37,p4077,line7-25;p4078

<sup>452</sup> Transcript:Day38,p4088,lines1-25;p4089,lines1-18

<sup>453</sup> Exhibit EEEE19

confrontation with the strikers ensued and at least two of the strikers were shot and injured by members of the NUM.<sup>454</sup>

421.8. During the entire period that the strikers gathered on the koppie, NUM was aware that some among the gathered strikers were members of the NUM. There is no evidence that it took steps to control such members.<sup>455</sup>

422. We submit that NUM failed to exercise its best endeavours:

422.1. When informed by Lonmin about the demand of the RDOs, NUM inexplicably refused to become involved. This is particularly concerning considering that the NUM was itself of the view that the RDOs were not adequately paid and considering that the NUM was aware that RDOs were not satisfied with the allowance.<sup>456</sup>

422.2. The position of the NUM that it could not open negotiations because of the two-year wage agreement concluded in October 2011 is difficult to understand in the light of NUM evidence that it had previously opened negotiations on issues that were subject of a still binding collective agreement.<sup>457</sup> In any event, nothing in the agreement

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<sup>454</sup> Transcript:Day39,p4226,lines12-25;4227,lines1-13

<sup>455</sup> Transcript:Day38,p4102,lines12-18

<sup>456</sup> Transcript:Day38,p4178,lines18-25,p4179,lines1-25,p4180;p4181;p4182,lines1-25

<sup>457</sup> Transcript:Day41,p4491,lines8-25,p4492-4493,lines1-23

precluded the reopening of negotiations on issues regulated by the agreement.

422.3. The NUM elected a confrontation with the strikers on 11 August 2012 when it had the option and opportunity to vacate its office and avoid such confrontation. As it happened, officials and members of NUM proceeded to attack the strikers even before they established their intention through discussion with the representatives of the strikers. As it is, there are conflicting versions about why the strikers went to the office of the NUM.

422.4. We repeat the criticisms we made against AMCU and its leadership in the standoff that could have been avoided had the two union leaders conveyed a reconciliatory message to the strikers.

422.5. From 10 August 2012, NUM officials and members encouraged employees to report for work. It provided armed escort to such employees. This conduct of the NUM endangered the lives of its members and the employees that it was encouraging to report for work.

422.6. On 11 August 2012, NUM officials mobilised NUM members to gather at the NUM offices in preparation for a fight with strikers. They, the NUM officials, provided weapons to members and encouraged them

to bring weapons to the office in preparation for a confrontation with the strikers.<sup>458</sup>

422.7. NUM officials refused to leave the office when informed that strikers were coming to the offices.<sup>459</sup> They elected to gather armed members to confront the strikers.

422.8. NUM members confronted the strikers even before they arrived at NUM offices and in the attack on strikers, they injured at least two strikers.<sup>460</sup>

422.9. The conduct of NUM was at the very least reckless in its dealing with its members in the relevant period and that it failed to exercise control and proper leadership over its members.

422.10. Officials and members of the NUM fuelled conflict between the striking and the non-striking employees by encouraging employees to report for work and providing escort and security for employees that were reporting for work.<sup>461</sup>

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<sup>458</sup> Transcript:Day39,p4227,lines21-25

<sup>459</sup> Transcript:Day39, p4231,lines 20-25, 4232, 4233, 4234, 4235, 4236, 4237, 4238, 4239, 4240, 4241, 4242, 4243, 4244 and 4245,lines 1-22

<sup>460</sup> Transcript:Day39,p4292,lines14-17

<sup>461</sup>Transcript:Day38,p4090,lines1-25;p4091,lines1-12;p4091,lines13-22;p4091,lines23-25;p4092,lines1-3; Day 38,p4091,lines 17 - 22

422.11. NUM officials failed to call on their members gathered on the koppie to surrender their weapons or not to carry them in public.

423. NUM contributed to the loss of life, damage to persons and property:

423.1. The shooting by NUM officials on 11 August 2012, was the first violent incident producing casualties since the beginning of the strike. That action was ill considered given the fact that some of the strikers were in fact their members. It is even more aggravating that the shooting at the strikers was done by NUM officials which would have conveyed the strikers that NUM was hostile to the interests.

423.2. It is not surprising that even the songs sung by the armed strikers at the koppie were hostile to the NUM.

423.3. On 11 August 2012, NUM officials and members injured two (2) of the strikers who marched to the offices of the NUM.

423.4. On 12 August 2012, Lonmin security were attacked and killed, and other employees injured by armed strikers. Lonmin security officials were attacked when they attempted to prevent the armed strikers reaching the offices of the NUM to avenge the attack of 11 August 2012 by the NUM.

423.5. There is evidence that the strikers allege that they were armed with dangerous weapons in order to defend themselves against the NUM after the attack by the NUM on 11 August 2012.

423.6. The deaths of the Lonmin security personnel were a direct consequence of NUM's officials having shot the strikers the day before.

**P: THE CONDUCT OF ARMED STRIKERS**

424. However legitimate the demand of the strikers for salary wage increase was, the decision to pursue the protest armed was illegal. This tended to taint the validity of their grievance. From the evidence it is clear that the following must point to culpability on one or more of armed strikers:

424.1. The claim that the strikers decided to arm themselves as a defence against attacks by NUM cannot stand. It was open for the armed strikers to register their grievance about NUM not permitting Lonmin to talk to them (if this was ever the true reason) than to do so bearing arms and moving in the manner they did.

424.2. The armed strikers on 11 August 2012, were armed. At that point there was no innocent explanation for them to bear arms if all was sought to do was to make inane inquiries.

424.3. The deaths of Messrs Fundi, Mabelane, Mabebe, Langa, Twala, Lepaaku and Monene are directly attributable to the unlawful conduct on the part of the armed strikers. No justification was ever offered for the attack and deaths of the seven deceased persons.

424.4. The damage to Lonmin property including the setting alight of the vehicles (nine vehicles were burnt on the 12<sup>th</sup> August 2012) was done by some of the armed strikers.

424.5. The public display of dangerous weapons was unlawful.

424.6. The robbery of the firearms belonging to both the members of SAPS and Lonmin personnel, and that of Twala was by some of the armed strikers.

424.7. The robbery of the police radio was by some of the armed strikers.

424.8. Injuries sustained by some of the workers, like Messrs Vorster, Louw, Lt Baloyi, Kent and Van Vuuren were inflicted by some of the armed strikers.

**Q: FACTUAL FINDINGS AND RECOMMENDATIONS**

425. In the light of the evidence and the explanations, or lack thereof, the SAPS asks that the Commission make the following Factual Findings and Recommendations:

**LONMIN**

426. SAPS asks that the Commission make the following findings:

426.1. The failure of Lonmin to convene a meeting with the trade unions as proposed by Mr Mathunjwa is contrary to and not supportive of sound relations with its trade unions.

426.2. The failure of Mr Barnard Mokoena to convene a meeting of trade unions as proposed by Mr Mathunjwa constitutes a failure of leadership and a dereliction of duty in the circumstances.

426.3. The Collective Agreement of June 2011 between NUM and Lonmin did not preclude Lonmin from engaging in discussion and negotiation with the strikers about the demand for a salary increase to R12 500. Lonmin should have been aware of this.

426.4. Lonmin was wrong to refuse to engage with the strikers about their demand for a salary increase.

- 426.5. Lonmin's reliance on the SAPS to resolve a dispute the genesis of which the dispute of an unprotected strike was not conducive to sound industrial relations and was a dereliction of its duty as an employer to address employee grievances.
- 426.6. Lonmin's policy "Emergency Security Procedures" requires that Lonmin enter into dialogue with employees engaged in unprotected industrial action and to seek a resolution of the employee's grievance. Lonmin failed to comply with its policy
- 426.7. By threatening to dismiss employees who failed to report for work during the unprotected strike, Lonmin recklessly exposed its employees not participating in the strike to harm.
- 426.8. Lonmin failed to take measures to secure the safety of those employees wishing to report for work.
- 426.9. Lonmin has failed to comply with its obligations in the SLP and is in breach of the Minerals Petroleum and Resources Development Act.
- 426.10. Lonmin was aware of the resultant adverse effect of granting a housing allowance on the financial circumstances of employees who receive the housing allowance. Lonmin failed to take any measures to address this issue.

- 426.11. The response of Lonmin to the demand for a salary increasing, granting an allowance and refusing to consider the demand for a salary increase outside of established bargaining structures was inconsistent conduct in Lonmin's dealings with its employees.
- 426.12. Lonmin failed to ensure that its security personnel were adequately equipped to deal with the armed strikers on 11 and 12 August 2012.
- 426.13. Lonmin failed to ensure that its security cameras were functioning to record events on its premises during the strike, in particular, the attacks of 11 and 12 August 2012.
- 426.14. Lonmin failed to act on the information that strikers decided to attack the offices of NUM on 12 August 2012.
- 426.15. Lonmin failed to provide timely information to the SAPS about the movements and conduct of the strikers.
- 426.16. Lonmin's award of the allowance to RDOs was contrary to Lonmin's position during negotiations of the June 2011 collective agreement that what it had offered was all it could afford.
- 426.17. Lonmin failed to conduct and complete the trade union membership audit that was essential to determine which union had majority status. This would have created dissatisfaction and conflict with and between Lonmin and the trade unions and the employees.

426.18. Save for the Emergency Security Policy dealing with how unprotected industrial action is to be addressed by Lonmin, no evidence was led regarding Lonmin's policies, practices and procedures.

510. The Commission must make the following recommendations

510.1 Lonmin must investigate the failure of its managers to meet with the trade unions to seek a resolution of the grievance of the strikers and must consider instituting disciplinary action against any manager responsible for such failure.

510.2 Lonmin must investigate the failure of members of its EXCO, to engage in discussion with the strikers about their demand and must consider instituting disciplinary proceedings against any manager responsible for such failure.

510.3 Lonmin must investigate the failure to comply with its policy "Emergency Security Procedures" dealing with unprotected industrial action and must consider instituting disciplinary proceedings against all managers responsible for this failure to act in accordance with its policy.

510.4 Lonmin must investigate and take disciplinary steps against members of its EXCO and managers for failing to take action to secure the safety of employees reporting for work.

510.5 Lonmin must develop policies and procedures which oblige management to consider measures to secure the safety of employees during unprotected industrial action.

510.6 The Department of Mineral Affairs must investigate the failure of Lonmin to comply with its SLP and take necessary corrective measures.

510.7 Lonmin must report to the Department of Minerals and Energy Affairs the steps it intends to take to comply with its SLP.

510.8 Lonmin must report to the Department of Minerals and Energy Affairs the steps it intends to take to address the issues arising as a result of the payment of housing allowance.

510.9 Lonmin must investigate the failure of its camera monitors to record the attacks on 11 and 12 August 2012 and must consider instituting disciplinary action against managers responsible for such failure.

510.10 Lonmin must investigate the failure of its managers to take steps in response to the information that the strikers planned to attack

the office of NUM on 12 August 2012 and must consider instituting disciplinary proceedings those who failed to take steps.

## **NUM**

511 We ask that the Commission make the following factual findings:

511.1 On 11 August 2012 officials and members of the NUM, attacked and injured two strikers near the offices of the NUM.

511.2 Officials of the NUM were wrong in their position that the collective agreement of 2011 to 2013 was a bar to negotiating the demand of the strikers for a salary increase to R12 500.00.

511.3 The conduct of the NUM to openly oppose the unprotected strike and to actively mobilise non-striking employees to report for work contributed to the conflict between the striking employees and the NUM on the one hand, and between the striking employees and non-striking employees on the other.

512 The Commission must make the following recommendations

512.1 NUM must investigate the conduct of its members and officials in the incident of 11 August 2012 near its offices and must consider

instituting disciplinary proceedings against any persons implicated in that incident.

512.2 The NPA must investigate the circumstances of the injury of the two strikers on 11 August 2012, and must consider instituting criminal proceedings against any persons identified as involved in the attack on the two strikers.

513 **AMCU**

514 The Commission must make the following findings:

514.1 AMCU failed to exercise leadership over those of its members who were involved in the strike.

514.2 On 15 August 2012, Mr Mathunjwa represented to the police that the strikers would voluntarily disarm on 16 August 2012.

514.3 On 15 and 16 August 2012, Mr Mathunjwa made no attempt to persuade the armed strikers on the koppie to disarm and not to carry dangerous weapons in public.

514.4 On 16 August 2012, Mr Mathunjwa, without any factual basis, wrongly told the strikers on the koppie that a decision was made that the police would kill them that day.

## **Individuals and Loose Groupings**

515 The Commission must make the following findings:

515.1 Messrs Noki and Nzuzwa were the leader and second in charge respectively in the leadership of the strike.

515.2 Some among the striking employees engaged in rituals performed by an inyanga to protect them and make them brave.

515.3 Armed strikers are responsible for the deaths of Messrs Fundi; Mabelane; Mabebe; Langa; Twala and Warrant Officers Lepaaku and Monene.

515.4 Armed strikers are responsible for the injury of Lt Baloyi; Messrs Janse Van Vuuren and Louw.

515.5 Armed strikers are responsible for the theft of firearms of Lonmin security on 11 August 2012; firearms and ammunition of the SAPS on 13 August 2012; firearm of Mr Twala on 14 August 2012.

515.6 Armed strikers were responsible for the damage to vehicles on Lonmin property on 12 August 2012 and 16 August 2012.

516 The Commission must make the following Recommendations:

516.1 AMCU must investigate the involvement of its members in the incidents which resulted in the intimidation of employees; deaths of any persons and harm to persons and property on 10; 11; 12; 13; 14 August 2012 and must institute disciplinary proceedings against its members who were present during the above incidents.

516.2 Lonmin must investigate the involvement of any of its employees in the incidents which resulted in the intimidation of employees; death of any persons, harm to any persons or property on 10; 11; 12; 13; 14 August 2012 and must consider instituting disciplinary proceedings against any person implicated in any of the incidents.

516.3 The NPA must finalise the criminal proceedings against persons implicated in the deaths of any persons, harm to any persons or property on 10; 11; 12; 13; 14 and 16 August 2012.

516.4 The IPID must investigate and conclude within a reasonable time all investigations in which police are implicated of wrong doing during the operation in Marikana.

**R: CONCLUSION**

517 South Africa should not have another Marikana. The loss of lives of the strikers, the members of the police, security personnel of Lonmin and employees of Lonmin is to be deeply regretted. The injuries sustained by some of the strikers are also regrettable. Damage to property should not follow expression of any civil disaffection. Bearing arms against a lawful authority should provoke widespread outrage. A career in the police service should not be a death warrant. Those who are found to have been culpable in relation to the criminal acts in the period 9 to 16 August 2012 in Marikana must bear the consequences of their conduct.

518 The recommendations of the Commission will hopefully also help the South African Police Service to provide a policing service within the constraints of the constitution and the law.

**ADV IAM SEMENYA SC**

**ADV TF MATHIBEDI SC**

**ADV MS BALOYI**

**ATTORNEYS: VAN VELDEN DUFFEY INC**

**REF: MR FCH PRETORIUS/MR JM MOKOTEDI**

## **PROVISIONAL LIST OF AUTHORITIES TO BE RELIED ON**

1. S v Joshua 2003(1) SACR 1 SCA
2. Snyders v Louw 2009 (2) SACR 463 at para (26), a Full Bench decision.
3. S v Mkosana and another 2003 (2) SACR BCH
4. R v Atwood 1946 AD 331 dictum at 340.
5. Union Government (Minister of Railways and Harbours) v Buur 1914 AD
6. S v Makwanyane and Another 1995(3) SA 391 CC
7. R v Patel 1959 (3) SA 121 A, at 123D-E
8. S v Hlapezula & others 1965 (4) SA 439 A
9. Bell v Van Rensburg N.O. 1971 (3) SA 693 C
10. State v Mulder 1980 (1) SA 113 T
11. S v Sparks & Others 1980 (3) SA 952 T

# IN THE MARIKANA COMMISSION OF INQUIRY

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## SAPS SHORT REPLY

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**A: INTRODUCTION**

1. The various parties have filed written submissions as follows: The Evidence Leaders - 693 pages with 1694 footnotes; SAHRC - 610 pages with 1220 footnotes, including recommendations by SAHRC Commissioners; The Deceased's' families - 426 pages with 904 footnotes; AMCU - 204 pages with 526 footnotes; The arrested and injured persons - 304 pages with 584 footnotes; Lonmin - 115 pages with 203 footnotes; LRC – 236 pages with 495 footnotes; NUM - 116 pages with 375 footnotes; the family of Warrant Officer Monene - 55 pages with 162 footnotes; the family of Warrant Officer Lepaaku and Lt Baloyi - 63 pages with 161 footnotes; the Minister of Police - 30 pages with 47 footnotes; The Deputy President Mr C Ramaphosa 31 pages with **51** footnotes; the families of Messrs Mabelane, Mabebe and Langa– 53 pages with 7 footnotes; Bapo Ba Mogale – 19 pages with 34 footnotes.
2. In a communication dated 30 October 2014, the Chairperson, with the Co-Commissioners concurring, made a ruling that any party wishing to reply must

do so in a short. Any reply to be submitted by 3 November 2014. For that reason and the volume of the written submissions; the repetition of argument made by several parties in respect of the same point, it is not practical, in the available time, to respond to each and every argument made by the various parties which would warrant a reply. For that reason, in these written submissions we address only the recommendations which some of the parties submit must be made by the Commission.

3. We deal with the key recommendations made by each party where a reply is warranted.

**B: PROPOSED RECOMMENDATIONS BY THE EVIDENCE LEADERS**

**Ad para 1266**

4. We have already made submissions in relation to the recommendations proposed by the three external experts on policing and do not propose to make further submission in that regard. However, in so far as the experts recommend the immediate withdrawal of the R5 rifle in crowd management operations, we point out that any such recommendation must not leave members vulnerable during high risk crowd management operations. We also highlight the provisions of Section 9(2) of the Regulation of Gatherings Act of 1993 which authorise the use of firearms and other weapons where dispersal is required in circumstances where there is a threat to life or damage to property. We also emphasize that the constitutionality of that section is not

challenged and remains good law. It is outside the remit of the Commission to question its constitutionality.

**Ad para 1268 – 1272**

5. It is proposed that the Commission recommends that the appointment of senior police members should be depoliticized. We do not understand the Evidence Leaders to suggest that the appointment of senior personnel should not be done as the law regulates. For instance, the appointment of the National Commissioner is regulated by the Constitution and the relevant legislation. The constitutional power of the President to appoint is not qualified. The constitutional injunction which addresses this concern is set out in section 199 (7) of the Constitution.
  
6. In a constitutional democracy and in line with the principle of separation of powers, the Constitution confers powers on the Executive which comprises of politicians. Where the Executive has the constitutional power to make an appointment, there is no doubt that there would be political considerations for that appointment. In a democracy a party that makes poor political decisions is corrected by the electorate. The Executive is constitutionally empowered to make an appointment that it deems appropriate, taking into account the requirements of that office. This is true for the police service. It is not in the remit of a commission to make a recommendation that has the effect of fettering this power of the Executive. However, we understand the recommendation to propose that political considerations should not trump merit in the appointments of senior police personnel. The police are required to discharge their functions without fear or favour and it is indeed

impermissible for police to take into account party political considerations in policing. This is reflected in section 199 of the Constitution.<sup>1</sup>

7. The other proposed recommendation is that only persons with expert knowledge should be appointed to senior policing positions in which they would have any role at all in any operational decisions.<sup>2</sup> Whereas this proposed recommendations may have a particular appeal to common sense, it still remains within the power of those who the law authorises to make appointments to do so. For instance Section 203 of the Constitution vests the power to declare a state of national defence on the President. It cannot follow therefore that a President must have military credentials to enable him to declare a state of national defence.
8. The recommendation to establish an oversight body.<sup>3</sup> To the extent that the proposed recommendations do not offend against the provisions of Section 208 of the Constitution, read with the provisions of Section 3 and 6 of the Civilian Secretariat for Police Service Act,<sup>4</sup> the proposed recommendation is sound.
9. The SAPS Code of Conduct states that all employees shall act with integrity in rendering an effective service of a high standard which is accessible to

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<sup>1</sup>Sec 199 (7) provides that “neither the security services, nor any of their members, may in the performance of their functions, prejudice a political party interest, that is legitimate in terms of the Constitution; or in a partisan manner, any interest of a political party ...”

<sup>2</sup> Para 1269

<sup>3</sup> Para 1270

<sup>4</sup> Act No.2 of 2011. Sec 3(b) provides for civilian oversight of the police service; sec 6 sets out the functions of the Secretariat which includes monitoring the performance of the police service and assessing the extent to which the police service has adequate policies and effective systems and to recommend corrective measures.

everybody, and continuously strive towards improving this service; act in a manner that is impartial, courteous, honest, respectful, transparent and accountable. Accordingly, the recommendation that the Code of Conduct should explicitly prohibit the application of political, sectional or sectarian considerations in decision-making with regard to policing is not necessary.

10. Parliament, as an oversight constitutional institution, would naturally hold the Executive and consequently SAPS accountable for the use of force and that there should be an honest account to the public. Naturally there must be materially negative career consequences for failure to comply with a duty imposed by law. SAPS code of conduct also provides that police officials act in a manner that is impartial, courteous, honest, respectful, transparent and accountable; this principle of public accountability is entrenched. This recommendation must take into account the provisions of the disciplinary policies and procedures of the SAPS, which in fact regulate such matters, including failure to act in accordance therewith.<sup>5</sup> It must also take into account that the disciplinary policy and procedures is a document negotiated and agreed with the unions and any changes would be subject to negotiation with the trade unions.

### **Ad para 1273 – 1276**

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<sup>5</sup> Para 1272

11. The demilitarisation of the SAPS is a matter which is dealt with in the National Development Plan and is now government policy. To that extent, SAPS has addressed the matter in the Lessons Learnt document submitted to the Commission which sets out the present position.
12. The recommendation, in the proposed terms may not be appropriate. We respectfully submit that it cannot fall within the province of the Commission to direct that public declarations are to be done by the Executive. There are already established reporting structures and time frames in the relationship between the Executive, Administration and the Legislature for all programmes and plans of action by Government.
13. It cannot be a proper place for the Commission to determine the method for political accountability (public reporting, intervals of reporting, measures that have been taken to public the account, where there isn't such political accountability, when compliance will occur). In a constitutional democracy there is a place for oversight constitutional structures as well as opposition political parties whose primary function is to deal with oversight matters.
14. It must fall within the statutory remit of the Civilian Secretariat for the Police Service to look into the culture and subculture of the SAPS and to critically review and assess any effects of militarisation, demilitarisation, and remilitarisation, if any occur, within the police service.
15. We accordingly do not support the recommendation.

**Ad para 1277**

16. Without conceding that there is evidence that the Minister of Police gave any operational directions or decisions in the operation in Marikana, a recommendation that in large and special operations, after consultation, the Minister should, subject to security and other operational requirements, give policy guidelines which will be appropriately and securely recorded, appears to be sound.

**Ad para 1278**

17. Section 207(4) of the Constitution imposes on Provincial Commissioners the responsibility for policing in their respective provinces. A recommendation that seeks to exclude responsibility for public order policing from the powers of Provincial Commissioners would be incorrect and inconsistent with the Constitution. We therefore do not support the proposed recommendations.

**Ad para 1279**

18. We support, in principle, a recommendation that policing prescripts should state explicitly that contingency plans must identify and address a range of scenarios, from those thought to be highly probable through to those considered possible, but unlikely. However, care must be taken not to impose a burden to have a contingency or prescript for every possible scenario in policing and ignore the training, experience and discretion of police officers. Every scenario will differ and the police response will be dependent on many factors including but not limited to, the given capacity and equipment at their

disposal at the time. If such caution as we urge is not taken, police action will be judged (in hindsight) strictly to the letter of such proposed prescript and with little or no allowance for situational appropriateness and circumstances at play at the time of the incident.

**Ad para 1280**

19. The revision of the Standing Order 262 to deal with armed and actual or potential violent gatherings in a manner proposed by the Evidence Leaders is correct provided that the provisions of Section 9 (2) of the Regulation of Gatherings Act are considered. This recommendation recognises that pure public order policing techniques alone could not contain the gathering such as we saw in Marikana in August 2012. The revision must not be read to mean that the SAPS must train, equip and maintain POP members to the level that they will have the ability to deal with all types of high risk scenarios. The SAPS does not have such capacity. High risk operations must still be the responsibility of units which are trained for that purpose. Amendments to SO 262 must provide for the integrated functioning of various police units in a single operation to be utilized according to their skills as an appropriate response to a particular situation.

**Ad para 1282**

20. To the extent that the proposed recommendation does not take away a police member's common law right of self or private defence, a recommendation that where shooting may be necessary in violent crowd situations, prescripts should require the designation of particular members of a unit or line as

having responsibility for identifying particular members of a crowd who are a threat to life, and dealing with it a manner consistent with the Criminal Procedure Act and the Regulations of Gathering Act, *prima facie* appears sound. However, the Commission must be alive to practical challenges such as if a crowd consists of a significant large number of people or is spread over a vast area, the proposed recommendation will require that a member who is positioned further away than where the specific threat occurs should respond in protection of another member's life.

**Ad para 1284-1291**

21. The SAPS supports the proposed recommendations to the extent that they do not offend the provisions of Section 9(2) of the Regulations of Gatherings Act, 1993.

**Ad paragraph 1292 - 1295**

22. We support the recommendation in respect of first aid provided that it is limited to a requirement that each section of the police involved in a crowd management operation where there is a high risk of casualties must include a person trained in basic level first aid. It is important that the recommendation takes into account the size of active police members and the budgetary constraints.

**Ad para 1296**

23. The questions when and how to pronounce on matters or events of public interest or controversy requires a difficult but fine balance. It can equally provoke public outrage with an event such as Marikana for officials to tell the public and the world that they offer no comment until such time as all the investigations have been concluded. The lifespan of the Commission is a case in point. We do not believe that the proposed recommendation is appropriate.

**Ad para 1297 - 1298**

24. Adequate recording of police operations and the requirement for an audit trail of those operations must indeed be done. "Adequate" is not a clear standard. Provisions must be clear as to exactly what is expected, has to be practical and implementable given the different operational scenarios and available resources. It is correct that SAPS and its members are to accept that they have a duty of public accountability and truth telling because they exercise force on behalf of all South Africans.

**Ad para 1299**

25. Without accepting that there is evidence that any employee of the SAPS was subjected to adverse conduct as a result of criticising police operations, we support the recommendation that the SAPS must put in place measures that will protect employees to speak freely about SAPS operations.

**Ad para 1300**

26. There was no evidence before the Commission regarding the adequacy or otherwise of IPID resources. Accordingly, a recommendation such as is proposed has no basis on the facts.
  
27. A recommendation to remove any contradictions between the role of the Independent Police Investigative Directorate (IPID) and the duty of the police to render safe and secure an environment where weapons are used and to account for such, enjoys our support.

**Ad para 1302**

28. We submit that the provisions of Section 8(1) of the South African Police Service Act require as a jurisdictional fact, that Cabinet must have lost confidence in the National Commissioner for the President to establish an enquiry. There is no evidence that Cabinet has lost confidence in the National Commissioner and a recommendation to that effect will be improper and without sound legal basis.

**Ad para 1311 - 1312**

29. Lt Colonel Vermaak, Constable Mguye and Constable Segweleya give different accounts of the circumstances of the death of Mr Sokhanyile. IPID is presently seized with the investigation into the death of Mr Sokhanyile and we do not believe that the Commission make a recommendation to IPID to investigate the death.

30. The matters which may be investigated by IPID are set out in section 28 of the IPID Act. This does not include investigation of the conduct of a member in providing evidence before the Commission. Accordingly, we do not support the recommendation that IPID investigate the conduct of Constables Mguye and Segweleya relating to the provision of statements before the Commission.

**Ad para 1317-1319**

31. There is nothing manifestly unlawful with the order given by Lt General Mbombo that people who were reasonably suspected of being responsible for the deaths of 7 people, injuries to many and damage to property should be dispersed, disarmed and arrested. There can therefore be no legal basis for any criminal prosecution of Lt General Mbombo for making that order. We have always understood that the criticism for the police operation of 13 and 16 August 2012 related to how those orders were executed. We accordingly do not support the recommendation.

**Ad para 1321**

32. It is easy, after the fact, to second-guess any decision taken in a given set of circumstances. We have made the submission that where there are multiple valid choices to unlock a violent public unrest situation, taking one choice which proves less effective cannot attract criminal liability. The recommendation for investigating the conduct of Brig Calitz for possible culpability in relating to the deaths at scene 1 would be unfounded for that reason and we do not support the recommendation.

33. To the extent that a recommendation for the possible prosecution of Brig Calitz is inspired by the so called McCann principle, we should hasten to point out that decision is not law in South Africa and can also not even have any persuasive effect in a commission. The reference to the McCann judgment by the Constitutional Court (Ex Parte Minister of Safety and Security and Others in re S v Walters and Another, 2002 (4) SA 613(CC)) was in support of a different proposition, namely, explaining the factors to consider when it is justifiable to use force in effecting an arrest.

**Ad para 1324**

34. With the evidence that some medical personnel refused to attend to the injured at scene 1 until it was rendered safe; that other medics were pelted with stones and were therefore unwilling to attend to the scene; that Mr Mdze arrived at the Saffy Hospital alive; that he was taken through for x-rays, that could have been done by the medical personnel who took him from the scene as well as the medical personnel upon his admission. If Major General Naidoo delayed medical attention for Mr Mdze, that by itself will not be causally connected to the death of Mr Mdze. In any event, the circumstances of the death of Mr Mdze and all persons who died as a result of police action in Marikana are matters with which the IPID is seized and it is not necessary for the Commission to make a recommendation as proposed. Accordingly, we do not support the recommendation.

**Ad para 1327 - 1328**

35. Regarding the deaths at scene 2, we repeat our submissions why a possible prosecution of Lt General Mbombo would be misplaced, particularly where it is conceded that her order was not manifestly illegal.

**Ad para 1329 - 1332**

36. We accept that the Evidence Leaders reject the account of Major Generals Mpembe and Annandale. The evidence is that Major Generals Mpembe and Annandale were not informed by Lt General Mbombo on 15 August 2012 that the strikers must be disarmed on 16 August 2012. Major General Annandale was not informed by Lt General Mbombo during the telephone call of the 15<sup>th</sup> that a meeting of the NMF made a decision that the dispersal action must be implemented on the 16<sup>th</sup>. Neither was Major General Mpembe. Major General Annandale was informed by Lt General Mbombo about her discussion of the events at Marikana. He gave her feedback of the engagement with the trade union leaders and Lonmin and the belief that the protesters will voluntarily lay down their arms at 09:00 on the 16<sup>th</sup>. It was agreed that the situation will be evaluated on the 16<sup>th</sup> given this belief of the voluntary disarming. Lt General Mbombo did not state that the police must disperse and disarm the strikers on 16 August 2012.<sup>6</sup>

37. With respect to whether Major Generals Mpembe and Annandale heard the shooting at scene 1, we point out that Mr Botes' account of having heard the

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<sup>6</sup> Day 82, p8582, line 3-11

shooting at scene 1 must be approached with caution.<sup>7</sup> On his own account, the JOC was not aware that there were two incidents of shooting. If that evidence is accepted, naturally the JOC would not have halted the operation. Only Brigadier Calitz and Lt Colonel Vermaak talked on the radio during the operation near the kraal. If Lt Colonel Vermaak was in the air in the helicopter and the gun shots would not have been audible over his radio transmissions. With Brigadier Calitz and the persons in his Nyala not hearing the shots, it stands to reason that when he spoke over the radio that no shots could be heard in the JOC either. No other police official was talking at the time when this event was happening. They would have been busy dealing with the situation they were facing. That the shots from scene 1 were audible in the JOC is not plausible. On his own admission, aspects of Mr Botes' evidence are incorrect – his recollection of events as contained in his statement was corrected when he gave oral evidence. He also does not mention in his statement that he heard shooting from the JOC. There is also no record or entry in the OB; no recollection by the two police record clerks; no mention in the notes of Captain Van Heerden recording the shooting at scene 1. No other person in the JOC has stated hearing the shooting. There would have to be a conspiracy involving a large number of people who were in the JOC, including employees of Lonmin, for this to be concealed. There is therefore no basis to recommend the investigation of Major Generals Mpembe and Annandale for possible prosecution regarding the failure to halt and to reassess the operation after scene 1.

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<sup>7</sup> Day 266, page 33744, line 1-11

**Ad para 1336**

38. We support the proposed recommendation that those who can be identified to be in possession of armed and dangerous weapons must be prosecuted.

**Ad para 1335**

39. On the version of Brigadier Fritz, the teargas was used to disperse armed persons. Such conduct could not attract a possible criminal prosecution. On the version of Sergeant Venter, it was used to protect the police. On this version, the discharge of the teargas would have been lawful. We do not support the recommendation that Brigadier Fritz or Sergeant Venter should be charged with assault. The contradictions in their version may prove one or the other to have been untruthful - not guilty of an assault.

**Ad para 1337-1338**

40. The recommendation that disciplinary proceedings must be taken against those SAPS members who are found to have given false evidence before the Commission suffers from, at least, one flaw. The flaw is that the disciplinary committee would be bound by the opinion of the Commission that the evidence that was given was false. As we understand the position, it is the employer, as employer, who must hold a view that false evidence was given before the Commission, before it can consider any disciplinary action. At best, the Commission may recommend that the SAPS investigate the conduct of such members.

**Ad para 1339 - 1340**

41. We repeat our submission that the powers of IPID to investigate police conduct do not include investigation of matters set out in the aforementioned paragraphs. Accordingly, we do not support the recommendation.

**Ad para 1333**

42. Major General Naidoo admitted to have taken command and control of the K9 members who were with him together with the NIU at koppie 3. He did not admit that he was in command and control of the operation at koppie 3. For that reason, a proposed recommendation that he could possibly be culpable in relation to some of the deaths at scene 2 is misplaced. In testimony, it was pointed out that due to the extent and nature of the terrain, it was impossible for Major General Naidoo to exercise effective control over the various incidents or know precisely about all activities taking place in the koppie. This problem was compounded by the known failure of radio communication.

**Ad para 1341 to 1347**

43. We are unable to offer comment in this regard at this stage as we await instructions. We will communicate the SAPS position in due course.

**C: THE INJURED AND THE ARRESTED**

44. With respect to paragraphs 829.1 and 829.2, we repeat our submission about the applicability of Section 8(1) of the Police Act, with the necessary changes pertaining to Lt General Mbombo.

**Ad para 830 - 837**

45. It is difficult to appreciate how, if the Executive, were disinclined to prosecute any of its members, a recommendation by the Commission will get the President sending those same members of the Executive to be prosecuted by the ICC. We make this submission without accepting that there are jurisdictional grounds for submitting anyone for criminal prosecution by the ICC.

**D: LT BALOYI AND WARRANT OFFICER LEPAAKU**

**Ad Para 106**

46. The Commission is invited to make a recommendation that disciplinary steps be taken against members of the police who were part of the operation resulting in the death of Warrant Officer Lepaaku.<sup>8</sup> If there is any allegation of police culpability, we submit that this is a matter falling within the mandate of IPID. No recommendation is therefore required.

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<sup>8</sup> Para 106.1

47. The proposed recommendation that there must be an investigation on whether there was a contravention of any provision of Standing Order 262, is unwarranted.<sup>9</sup> That is already a matter before the Commission and a matter on which the Commissions will be making a finding.

**E: FAMILIES**

48. The proposed recommendation that investigation and possible prosecution of those responsible for the deaths of the victims represented by the legal representatives of the Families, is unnecessary. This is a matter which falls within the jurisdiction of the IPID and with which IPID is seized.<sup>10</sup>

**F: LEGAL RESOURCES CENTRE**

49. The LRC makes a proposal that the Commission must make a recommendation that all the members who were present in the extra-ordinary meeting of the NMF of 15 August 2012 must be referred for investigation.<sup>11</sup> The proposal is without merit. As we point out, the decision that the armed protestors be disarmed after the death of seven (7) people, where it could reasonably have been as a result of some of those armed strikers, is not a decision which is manifestly illegal. It would be a different matter if those members of the NMF had given tactical instructions on how the decision was

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<sup>9</sup> Para 106.2

<sup>10</sup> Para 415

<sup>11</sup> Para 327.5

to be executed, which tactical instructions were not informed by relevant information. Even in such case, it would be doubtful whether such persons could be prosecuted as proposed.

50. The Evidence Leaders also correctly concede that the order by Lt General Mbombo was not manifestly illegal and therefore there was a duty on the police officers to obey the order. It must therefore mean that no culpability can attach to the members who were in the JOC or who were, in terms of the law, obliged to carry out a lawful instruction.
51. The proposal for the prosecution of other commanders of the police service who were deployed on the police operation in Marikana is not sound.<sup>12</sup> It is important to appreciate that they were all executing a lawful order and such a recommendation as proposed can therefore not to be made. The Evidence Leaders correctly conclude that the shooters at scene 1 should not be prosecuted because they reasonably believed themselves to be under imminent threat. A recommendation for their prosecution is therefore unwarranted.
52. A proposal that the Provincial Commissioner North West must consider adopting a contingency plan for large scale industrial unrest in terms of paragraphs 5 of the Crime Scene Management Policy is a sound one.<sup>13</sup>

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<sup>12</sup> Para 9 - Recommendations (p228)

<sup>13</sup> Para 356

## **G: THE SAHRC**

### **Ad Annexure A**

53. The proposal that the Commission should make a finding that the State violated and undermined its various specified international obligations can simply not be made.<sup>14</sup> By way of illustration, the Commission made the Ruling that SAPS does not have to call each and every person who discharged their firearm and no adverse inference will be drawn for failure to call all those members. To then call for a finding of fact that there were violations of human rights obligations would be improper.

## **H: THE WRITTEN SUBMISSION OF MR DAVID BRUCE**

54. After the conclusion of oral evidence and during the submission of the Heads of Argument, Mr Bruce submitted written submissions to the Commission. There is no explanation why the evidence and opinions of Mr Bruce are presented in this manner. There is also no explanation why Mr Bruce did not testify. As a result, his evidence and opinions were not subjected to cross-examination. His opinions were also not presented to the three policing experts for comment. In so far as the opinions of Mr Bruce may coincide with the opinion of any of the expert witnesses, it adds no more value and should be disregarded. Where he expresses differing views, such should be

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<sup>14</sup> Para 3

disregarded as such views were not tested in cross-examination or interrogation by the policing expert witnesses who testified.

**ADV IAM SEMENYA SC**

**ADV TF MATHIBEDI SC**

**ADV MS BALOYI**

**ATTORNEYS: VAN VELDEN DUFFEY INC**

**REF: MR FCH PRETORIUS/MR JM MOKOTEDI**