



COUNCIL
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SOUTH AFRICAN
CONSTITUTION

Summary and Analysis of the report of the Marikana Commission of Inquiry

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Executive summary

Introduction

On the afternoon of 16th August 2012 members of the South African Police Service (SAPS) killed 34 men at a Lonmin Plc owned platinum mine in the Marikana area in North West province. The killings on the 16th August ('the Marikana massacre') were preceded by a number of other incidents of violence and confrontation over the period from Friday 10th August onwards, relating to an unfolding conflict at the Marikana mine. This conflict was linked to an unprotected strike that a group of miners had embarked on and that had started on Thursday 9th August. In addition to the 34 people killed on 16th August, 10 other people were killed in incidents related to the conflict during the three day period from Sunday 12th – Tuesday 14th August.

Annexure A lists the names of people who were killed between 12 and 16 August at Marikana.

On the day after the massacre, the 17th of August, President Zuma announced that he would appoint a Commission of Inquiry relating to the events at Marikana. The Commission was appointed and its terms of reference announced by Presidential Proclamation on the 23rd of August 2012, one week after the massacre.¹

The Commission submitted its report to President Zuma on 31st March 2015. On the evening of 25th June 2015 the full report of the Commission was also made available to the public.

This document

The primary focus of this document is on examining what the report tells us and on evaluating whether it presents a reasonable assessment of the facts relating to several key issues which may be identified as 'points of contention'. These 'points of contention' include:

- 1) The overall demeanour and dispositions of the strikers (violent or non-violent) throughout the 9th-16th August period
- 2) The justifiability of the use of force and firearms by members of the National Union of Mineworkers (NUM) against the strikers on the morning of Saturday 11 August
- 3) Questions of blame in relation to the confrontation between police and miners on the afternoon of Monday 13th August
- 4) Responsibility of Lonmin, Cyril Ramaphosa, the National Union of Mineworkers (NUM) and Association of Mineworkers and Construction Union (AMCU)
- 5) Planning and decision making relating to the police operation on 16th August including questions about the role of the executive

¹ <http://www.politicsweb.co.za/documents/ian-farlam-to-head-marikana-inquiry--jacob-zuma>

- 6) Whether the strikers attacked police at koppie 1 and whether the police shooting at koppie 1 was justified
- 7) Whether the 17 killings by police at scene 2 were justified

Before discussing the reports handling of each of these points this document provides:

- a) A note on terminology.
- b) A brief background to the events at Marikana.
- c) A chronology of events in Marikana focusing on the period leading up to the massacre on the 16th.

Highlights of this document

Some of the highlights of this document include that:

1. The document argues that the term massacre is an appropriate term for describing the killings by the police of 34 strikers on the 16th of August (paragraph 10).
2. The document argues that the Marikana Commission report is a fair and balanced report that is in many ways even handed and fair in discussing the responsibility of the different parties and allocating blame (paragraph 54).
3. However the 'key framing argument' (paragraph 28) of the report creates a one-sided element within the report. The argument presents the strikers 'intentions' and disposition to violence as consistent throughout the conflict and fails to acknowledge the likelihood that this was strongly shaped by the events of that week (paragraphs 39-42 and 54).
4. These weaknesses are carried forward into the reports engagement with questions about 'game changers' (paragraphs 48-52).
5. This document argues that the adoption in the report of the argument (from the heads of argument of the evidence leaders) that the strikers who marched on the NUM offices had 'violent intent' is not well motivated and inconsistent with other arguments put forward in the report relating to the intention of the group of strikers on the 16th. Nevertheless this document accepts that the NUM members may have reasonably believed that they were in danger as the strikers approached them. (See generally paragraphs 56-71 and specifically 59-62)
6. Related to this the document argues that the report does not properly acknowledge the likelihood that this confrontation, including the belief by the strikers that two of them had been killed by the NUM members, had on the perceptions of the strikers about the nature of the conflict that they were involved in. One implication of this is that it helps to make sense of the strikers determination to retain their weapons when the police asked them to surrender their weapons on the afternoon of the 13th prior to the confrontation that took place that afternoon in which five people, including two police, were killed (paragraphs 48-52).
7. This document argues that it is necessary to give far more prominence to questions about 'emotions in understanding the events of that week. In particular a key argument is that, as a result of the confrontation of the 13th August, many police at

Marikana had feelings of fear, as well as strong feelings of antipathy, towards the strikers. The document later argues that these emotions played an important role in contributing to police conduct on the afternoon of 16th August, most notably at scene 2 (paragraphs 88 and 180) .

8. The document argues that the report's interpretation of the evidence relating to the decision to launch the operation is not consistent with the evidence or with what is likely to have happened particularly in relation to the assertion that it is 'common cause' that the decision was taken by Lieutenant General Mbombo (paragraphs 101-113).
9. The name of Mr Mdze's is omitted from the list of those killed at scene 1 on page 208 of the report. The circumstances of the death of Mr Mdze are however a key motivation for one of the principal recommendations of the report regarding the provision of medical care to people who have been injured in shootings by the police (paragraphs 128-129).
10. This document provides an outline of issues to do with a legal evaluation of the actions of the police at Scene 1 at which 17 people were killed (paragraphs 137-154). However the document argues that it is a mistake to regard the principles issues raised in relation to the killings by the police at scene 1 as issues of individual culpability and that the scale of human carnage at scene 1 need to be understood primarily as a result of the tactics that were used by the police at scene 1 (notably the use of a 'basic line') and the fact that the majority of members of this line were armed with assault rifles (paragraphs 155-160).
11. The final section in this document is about scene 2 at which 17 people were also killed. Notably here the document notes that the report provides no overall explanation or account of the events at scene 2 (paragraph 178). The document refers to the concept of a 'forward panic' as articulated by the American sociologist Randall Collins and argues that 'forward panic' is likely to be useful as a concept for understanding the events at scene 2 (paragraphs 179-185).

This document is therefore fundamentally a review of how the Marikana Commission report deals with key questions about the events of the 8 day period from 9-16 August in Marikana. It does not deal with or try to assess or comment on issues arising from the report and the commission process including questions of compensation for the families and other people who were adversely affected by the events of that week, issues of justice, or the chronic dishonesty that characterised police, and much other, engagement with the commission.

Introduction

- 1) On the afternoon of 16th August 2012 members of the South African Police Service (SAPS) killed 34 men at a Lonmin owned platinum mine in the Marikana area in North West province. A large number of others men were also injured by SAPS gunfire on that afternoon.² The killings on the 16th August ('the Marikana massacre') were preceded by a number of other incidents of violence and confrontation over the period from Friday 10th August onwards, relating to an unfolding conflict at the Marikana mine. This conflict was linked to an unprotected strike that a group of miners had embarked on and that had started on Thursday 9th August. In addition to the 34 people killed on 16th August 10 other people were killed in incidents related to the conflict during the three day period from Sunday 12th – Tuesday 14th August.
- 2) Annexure A gives the names of those whose deaths, during the 9-16 August period, were the key focus of the Commission.
- 3) On the day after the massacre, the 17th of August, President Zuma announced that he would appoint a Commission of inquiry relating to the events at Marikana. The Commission was appointed and its terms of reference announced by Presidential Proclamation on the 23rd of August 2012, one week after the massacre.³ The Commission was constituted by:⁴
 - a) Judge Ian Farlam – chairperson of the Commission. Judge Farlam is a retired judge of the Supreme Court of Appeal.
 - b) Adv Bantubonke Tokota SC, who has acted as a Judge in the Eastern Cape Labour Court and Transvaal Provincial Division.
 - c) Adv Pingla Hemraj SC. She has acted as a Judge in the High Courts of Durban, Pietermaritzburg, Port Elizabeth and Grahamstown.
- 4) The Commission's terms of reference provided that it should investigate matters of "public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana in the North West Province from Saturday 11th August to Thursday 16th August 2012."⁵
 - a) The report of the Commission indicates that 'Although the period set out in the Proclamation begins on Saturday 11 August 2012, the Commission is of the view that in order to put matters in proper perspective it is necessary to have regard to what happened on the two preceding days, i.e. Thursday 9 August 2012 and Friday 10 August 2012.'⁶
- 5) The Commission held its first hearing on 1 October 2012. The final sitting of the Commission was more than two years later on 14th November 2014. The Commission

² One figure that is widely used is 78 (page 395, 9) though there can never be a definite final number as many people who suffered comparatively minor injuries would probably not have been counted in the number of injured.

³ <http://www.politicsweb.co.za/documents/ian-farlam-to-head-marikana-inquiry--jacob-zuma>

⁴ Ibid

⁵ 1, 1.1.

⁶ 1, 1.2

submitted its report to President Zuma on 31st March 2015. On the evening of 25th June 2015, shortly after a controversy erupted over remarks that he had made about the strikers at Marikana⁷, President Zuma gave an address on national television in which he presented a summary of the report⁸ (the summary had at least one major inaccuracy relating to the report's conclusions on the role of the executive).⁹ The full report of the Commission was also made available to the public on that evening.

- 6) A table of contents for the report is provided as Annexure B.

This document

- 7) Though the report has been well received by some¹⁰ it has also attracted strong criticism. Amongst the issues that have been prominent in this criticism have been:
- a) The fact that the Commission did not make any recommendations regarding compensation for the families of those killed by the police and other victims. In the words of one commentator 'And after all this, the Commission doesn't unequivocally suggest the bereaved are entitled to some compensation. Instead, the Commission "is not satisfied that its terms of reference are wide enough to cover the question as to whether a compensation scheme ... should be implemented by the state". Why did the Commission not say whether compensation was reasonable or not and then refer the matter of compensation to the presidency, the treasury or the National Prosecuting Authority or whoever, for further investigations, as it did with other matters? The bereaved must now, at their own cost, on their own strength, without even the psychological, let alone legal, backing of the Commission, try to convince a court that they are entitled to compensation.'¹¹

⁷ Kingdom Mabuza. "Zuma's Marikana Comments 'Injudicious.'" *Times LIVE*, June 25, 2015. <http://www.timeslive.co.za/thetimes/2015/06/25/Zumas-Marikana-comments-injudicious>.

⁸ The Presidency. "Speech by President Jacob Zuma on the Release of the Report of the Judicial Commission of Inquiry into the Events at the Marikana Mine in Rustenburg, Union Buildings, Pretoria." The Presidency, June 25, 2015. <http://www.thepresidency.gov.za/pebble.asp?relid=19997>

⁹ Mina Demian, and Amin van wyk. "What Zuma Said and What the Marikana Commission Wrote." *The M&G Online*, June 29, 2015. <http://mg.co.za/article/2015-06-29-side-by-side-what-zuma-said-what-the-marikana-commission-wrote/>.

¹⁰ Blade Nzimande. "How Biased 'Pseudo Left' Filmmaker Rehad Desai Got Marikana Wrong." *Rand Daily Mail*, July 8, 2015. <http://www.rdm.co.za/politics/2015/07/08/how-biased-pseudo-left-filmmaker-rehad-desai-got-marikana-wrong>; African News Agency. "EFF to Lay Criminal Charges against Deputy President Ramaphosa, Ministers." *Polity.org.za*, July 2, 2015. <http://www.polity.org.za/article/eff-to-lay-criminal-charges-against-deputy-president-ramaphosa-ministers-2015-07-02>

¹¹ Tinyiko Maluleke. "Is This All That 44 Men's Lives Are Worth?" *Mail & Guardian*, July 3, 2015. <http://mg.co.za/article/2015-07-02-is-this-all-that-44-mens-lives-are-worth>; See also: Kingdom Mabuza.

"Families to Sue over Marikana Massacre." *Times LIVE*, June 29, 2015. <http://www.timeslive.co.za/thetimes/2015/06/29/Families-to-sue-over-Marikana-massacre>; Paul Hoffman. "State Must Do the Right Thing Now and Accept Marikana Civil Liability." *Business Day*, July 29, 2015. <http://www.rdm.co.za/politics/2015/07/29/state-must-do-the-right-thing-now-and-accept-marikana-civil-liability>.

- b) The absence of detailed findings on the circumstances in which individuals were killed¹² as well as on individual culpability.¹³
 - c) That the report is biased and 'puts the primary blame for the Marikana massacre on the workers'.¹⁴
- 8) Rather than assessing these criticisms the primary focus of this document is on examining what the report tells us and on evaluating whether it presents a reasonable assessment of the facts relating to several key issues which may be identified as 'points of contention'. These 'points of contention' include:
- a) The overall demeanour and dispositions of the strikers (violent or non-violent) throughout the 9th-16th August period
 - b) The justifiability of the use of force and firearms by members of the National Union of Mineworkers (NUM) against the strikers on the morning of Saturday 11 August
 - c) Questions of blame in relation to the confrontation between police and miners on the afternoon of Monday 13th August
 - d) Responsibility of Lonmin, Cyril Ramaphosa, the National Union of Mineworkers (NUM) and Association of Mineworkers and Construction Union (AMCU)
 - e) Planning and decision making relating to the police operation on 16th August including questions about the role of the executive
 - f) Whether the strikers attacked police at koppie 1 and whether the police shooting at koppie 1 was justified
 - g) Whether the 17 killings by police at scene 2 were justified
- 9) Before detailing and discussing the reports handling of each of these points the report provides:
- a) A note on terminology.
 - b) A brief background to the events at Marikana.
 - c) A chronology of events in Marikana focusing on the period leading up to the massacre on the 16th.

Note on terminology

- 10) During the Commission process one of the issues of contention was acceptable terminology for describing the killings on 16th August. Partly because the Commission process itself was intended to establish whether the killings were the result of

¹² Stuart Wilson. "Judge Farlam's Accidental Massacre." *Daily Maverick*, June 26, 2015.

<http://www.dailymaverick.co.za/opinionista/2015-06-26-judge-farlams-accidental-massacre/#>; Franny Rabkin. "Callous Marikana Report Reduces Casualties to Mere Dead Bodies." *Business Day*, July 23, 2015.

<http://www.rdm.co.za/politics/2015/07/23/callous-marikana-report-reduces-casualties-to-mere-dead-bodies>.

¹³ Stuart Wilson. "Judge Farlam's Accidental Massacre."; Tinyiko Maluleke. "Is This All That 44 Men's Lives Are Worth?"; Greg Marinovich. "In the Shadow of Marikana, a Lost Opportunity for Justice." *Daily Maverick*, June 29, 2015. [e](#).

¹⁴ United Front. "United Front Message to Marikana Public Meeting." *Polity.org.za*, June 28, 2015.

<http://www.polity.org.za/article/uf-united-front-message-to-marikana-public-meeting-2015-06-28>.

blameworthy conduct, it was agreed that parties to the Commission would use more neutral terms such as 'tragedy' to refer to these killings.¹⁵ However the report of the Commission confirms on a prima facie basis that many of the killings on 16th August were the result of blameworthy conduct by the police.

- 11) The term 'massacre' refers to a situation where a number of people are killed indiscriminately¹⁶ or where 'The people killed are helpless or unresisting human beings who are killed under circumstances of atrocity or cruelty'.¹⁷
 - a) This document uses the term 'massacre' to refer to the killings on 16th August. The choice to use the term 'massacre' is based on the understanding that the killings by police on the 16th were carried out in a manner consistent with these definitions of the word 'massacre'.
 - b) As will be discussed in more detail in this document, the report says (with reference to the killings at scene 1) that the Commission 'does not believe that it would be appropriate to draw an adverse inference against all those [who] fired their weapons at scene 1. It accepts that some in all probability did not exceed the bounds of self and private defence'.¹⁸ In using the term massacre this document is therefore not intended to imply that all of the police shooters at Scene 1 were acting in an unjustified manner in relation to the circumstances of the situation (this issue is discussed further below).
 - c) However, apart from the evidence that many of the shooters at scene 1 exceeded the bounds of private and self-defence, analysing the killings at scene 1 in relation to the individual actions and judgments that were made is not adequate as a means of making sense of the scale of carnage. Irrespective of whether some of the shooters may be judged as having acted lawfully the response was completely disproportionate. As indicated further below the key factors shaping the response cannot purely be analysed in terms of individual judgments and errors of judgment. Instead what in many ways dictated the form that the response took was the way in which the police 'basic line' was configured, and the fact that a large number of members of the line were armed with high velocity R5 assault rifles.
 - d) Furthermore, as indicated, the report concludes that the SAPS has as yet not been able to provide a coherent account of any of the killings at scene 2. There appears to be no question at this point that the events at scene 2 were indiscriminate and involved the killings of helpless or unresisting human beings. As this document will suggest it may be possible to understand the killings at scene 2 partly in relation to the events that unfolded over the preceding week (the destructive power of R5s is also of course a relevant factor in understanding the scale of carnage at scene 2). However none of this implies that words like 'atrocity' and 'massacre' should not be

¹⁵ See for instance the exchange between the Chairperson, Advocate Semenay and Adv Mpofu, Day 272, page 34751, line 6 – page 34752, line 34753, line 2.

¹⁶ The Free Online Dictionary defines massacre as: The act or an instance of killing a large number of human beings indiscriminately and cruelly. (<http://www.thefreedictionary.com/massacre>)

¹⁷ The Merriam-Webster online dictionary defines massacre as 'the act or an instance of killing a number of usually helpless or unresisting human beings under circumstances of atrocity or cruelty'. (<http://www.merriam-webster.com/dictionary/massacre>)

¹⁸ 518(6). Also see 249(29) where report refers to the evidence leaders heads on this. Also 251.30 refers to SAHRC on this.

regarded as appropriate terms for describing these events. The term massacre is therefore an appropriate term to use in relation to killings by members of the SAPS at Marikana on the 16th August 2012.

- 12) Strikers – as indicated the killings at Marikana over the period of the 9th – 16th August 2012 took place in the context of an unprotected strike. Of the 44 people killed, 37 were killed by police. This document uses the term ‘strikers’ to refer to these 37 people and the group of people who were gathered on the koppie on the 16th August. However it should be noted that not all of the 37 were in fact members of the Lonmin workforce at Marikana who were on strike.¹⁹ Furthermore some of the other people gathered on the koppie at Marikana on the 16th may also not have been ‘strikers’.

Background to the events at Marikana

- 13) In understanding the context in which the Marikana strike took place it is important to note that:

- a) The National Union of Mineworkers had for some time been the established trade union on the platinum mines including not only at the Lonmin mines but also at the Impala Platinum (Implats) mines.²⁰
- b) In December 2011 Implats ‘unilaterally’ granted an 18% wage increase to a single category of workers (first line supervisors of mining work teams).²¹
- c) Shortly after this, in January 2012, the rock drill operators (RDOs) embarked on an unprotected strike in support of a demand for salaries of R9000.²²
- d) In April 2012 Implats eventually agreed to increase the salaries of its entire workforce²³ with the RDOs receiving very substantial increases in their basic salaries.²⁴

- 14) The Implats strike itself was characterised by high levels of violence with sixty people being injured and 4 being killed. It appears that intimidation was a major factor in the violence and that violence was frequently directed against people associated with the NUM with the NUM branch office at Implats being forced to close.²⁵

- a) The report does not make it clear what the reasons for the violence directed against the NUM at Implats appear to have been.
- b) As reflected below the strike at the Lonmin Marikana mine very quickly turned into a conflict between the strikers and the NUM. NUM representatives tried to encourage workers not to join the strike. There is clearly a bigger story that needs to be told

¹⁹ Notably Mr Thembinkosi Gwelani who was killed at Scene 1 was an unemployed man who came to Marikana looking for work. According to his family he went on to the koppie on 16 August to take food to his uncle, who was a striker (261-262, 51. Also Evidence leaders, 404, 752),

²⁰ 45, 3.1

²¹ 45-46, 3.2

²² 46, 3.4

²³ 47, 3.6

²⁴ 47, 3.7.

²⁵ 46, 3.4

about how it happened that a significant number of miners in the platinum fields came to be in intense conflict, frequently characterised by violence, with the NUM during this period.

- c) One factor in this conflict has been competition between the NUM and other smaller unions, most notably the Association of Mineworkers and Construction Union (Amcu). The relationship between AMCU and NUM has at times been profoundly hostile with each side demonising the other. One factor in this mutual hostility has been the belief, most notably on the NUM side, that its rival has been behind the violent attacks on its members. NUM and its allies also appear to have suspected that mine management had a deliberate strategy to undermine it and that favouring AMCU was part of this strategy.²⁶
- d) A notable feature of both the Implats²⁷ and Marikana strikes was however that the strikers acted independently of any union. Despite this a consistent source of confusion in both strikes, was the tendency amongst people affected to 'blame' AMCU for the strikes. Related to this conflict between workers and the NUM was consistently perceived and presented as conflict between AMCU and the NUM.²⁸
 - i) Though the Marikana report is generally sensitive to the fact that the strikers were not in fact linked to AMCU it nevertheless, at least at one point, refers to the confrontation between the strikers and the NUM on Saturday 11 August as 'the confrontation between the unions'.²⁹
- e) During the late 1990s NUM leadership and members at the Anglo American Platinum (Amplats) mines in the Rustenburg area had suffered severely with a number of NUM members being killed, apparently related to the efforts of a rival union, the Workers Mouth Peace Union (WPMU) to displace NUM as the dominant union at Amplats.³⁰ It may be that some NUM members were inclined to view the conflict that it became embroiled in during late 2011 and 2012 as being similar in nature, and may have been inclined to see AMCU as a new WPMU.³¹
- f) Notwithstanding evidence that the strikers were acting independently of AMCU, NUM was therefore inclined to see AMCU as being responsible for the conflict and violence.

15) The economic and social conditions in which the workers at Lonmin and other mines live also need to be understood as important 'background' factors to the conflict and

²⁶ Concerns about this were expressed by Lt General Mbombo in her meeting with Lonmin on the 14th of August (see paragraph 543 of evidence leaders heads of argument quoted page 167 of report). See also: Jeremy Cronin. "Some of the Underlying Systemic Factors behind the Marikana Tragedy." *Umsebenzi Online*, August 30, 2012. <http://www.sacp.org.za/main.php?ID=3733..>

²⁷ Terry Bell. "Confusing Roots of the Upheaval at Implats." *Terry Bell Writes*, February 19, 2012. <http://terrybellwrites.com/2012/02/19/confusing-roots-of-the-upheaval-and-implats/>.

²⁸ See for instance 148, 1.

²⁹ 99, 7.

³⁰ Bruce, D. (2001). *The Operation of the Criminal Justice System in Dealing with the Violence at Amplats*. Research report written for the Centre for the Study of Violence and Reconciliation, April, <http://www.csvr.org.za/docs/policing/operationofthecriminal.pdf>

³¹ It is not clear that memories of the conflict with the WPMU were a factor in the NUM understanding of the events. Kally Forest said that an NUM member that she interviewed who was part of the group who were at the NUM offices on the 11th was a relatively young man who had no knowledge or memory of the conflict with WPMU (Conversation, 29th July 2015).

violence. One aspect of this was Lonmin's neglect to fulfil its obligations in terms of the Social and Labour Plan (SLP)³². (See further the discussion of the Commission's finding in relation to Lonmin – paragraphs 89-92).

Events in the period Thursday 9 - Wednesday 15 August

- 16) The following is a brief outline of events at Marikana over the period from Thursday 9 – Monday 15th August compiled on the basis of information provided in the report.
- 17) On Thursday 9th August (a public holiday) a large group of rock-drill operators (RDOs) gathered at the Wonderkop Stadium at the Lonmin mine at Marikana. Some estimates put the number of people at the stadium at 3000. They agreed that they would not go to work the next day in support of a demand for a monthly nett salary of R12 500.³³
- 18) On the morning of Friday 10th August the strikers marched from the stadium to the offices of Lonmin Platinum Division. The mood of the crowd was peaceful. According to one account some were carrying sticks.³⁴ According to another some also carried knobkerries.³⁵ There was a 'degree of displeasure'³⁶ expressed by some members of the crowd after Lonmin representatives informed them that they would not negotiate with them.
 - a) Later on Friday afternoon and evening until about 22h30 there were groups of strikers involved in intimidation that were observed by Lonmin security. Information about plans of intimidation were also received by them.
 - b) In terms of the general character of the intimidation it appears that it involved aggressive behaviour of various kinds. The intimidation extended to assaults but there is no clear information that this was in more than one or a few isolated cases. The main evidence of this may have been a report at 20h00 that two workers who were on their way to work had been assaulted near the NUM offices at Wonderkop.³⁷ There was also intimidation of workers who were catching Lonmin transport from the hostels to the shafts with strikers off-loading workers from the buses at the hostel in one or more cases.³⁸ It also involved throwing stones in at least one incident (see below).
 - c) Apart from assaults that took place aggression partly involved the carrying of weapons but also involved toyi-toying.
 - d) Just before 7pm one of the Lonmin security guards reported that there were people 'intimidating workers not to go to work, and were using pangas and knobkerries to do so.'³⁹ Later on this Lonmin security guard and one of his colleagues filed reports

³² Discussed chapter 24, 522-542

³³ 53, 1

³⁴ 65, 1

³⁵ 59-60, 7. See also SAHRC, 233, 1.2.5

³⁶ 65, 2

³⁷ Evidence leaders 101, 183.

³⁸ Evidence leaders 101, 183.

³⁹ Evidence leaders 101, 183.

indicating that some of the strikers were armed with pangas and spears in addition to knobkerries.⁴⁰ The two security guards apparently cooperated with each other in providing these reports as their reports are identical in various respects including in their descriptions of the weapons allegedly in the possession of the strikers.⁴¹ Apart from this there were also various inaccurate aspects of each of their reports.⁴² Nevertheless this may be taken as evidence that at least one of the groups of strikers who were involved in intimidation at this point included one or more individuals who were carrying pangas and spears.

- e) Nevertheless this group of strikers was not consistently present and the groups involved in intimidation were not all armed in this way. A third Lonmin security official who arrived later in the evening at about 20h30⁴³ made no reference to any of the strikers being armed.⁴⁴ He said that the strikers were 'dancing and toyi-toying' and that they 'danced and intimidated employees' and that 'when members of Lonmin Security warned them to disperse' they threw stones.⁴⁵ A SAPS captain who was there for some of the time said that the strikers did not have sharp instruments but had knobkerries.⁴⁶
- f) Lonmin security fired rubber bullets allegedly at people who were involved in the intimidation. The two Lonmin security guards were involved in three incidents where they shot about 38 rubber bullets between them.⁴⁷ They claimed that 19 of these were warning shots⁴⁸ and that they aimed at the legs of the strikers.⁴⁹
- g) There were at least two Lonmin employees who suffered significant injuries as a result of the use of force by Lonmin security. Though it is not clear at least one of them appears to have been shot with live ammunition⁵⁰ and another shot in the head with rubber bullets.⁵¹ It is not clear if these employees were involved in the intimidation.⁵² Some of the shootings took place near the NUM offices⁵³ though there is no indication that NUM members were involved.
- h) The report implies that the shooting of rubber bullets is likely to have been justified.⁵⁴ Nevertheless shortly thereafter it indicates that live ammunition may have been used in some of the shootings and that the cases where individuals were injured merit further investigation.⁵⁵ (The heads of argument of the evidence leaders do not endorse this approach arguing that the actions of Lonmin security are not

⁴⁰ 69, 4 and 71-72, 13.

⁴¹ 71, 12-13. See also Evidence Leaders, 103-187 - 104, 190.

⁴² 71, 12; 72, 14. See also 75, 24.

⁴³ 73, 18.

⁴⁴ 74-75, 22

⁴⁵ 73, 18-19. There is also unreliability in the statement of this Lonmin security official (73, 17).

⁴⁶ 74-75, 22.

⁴⁷ Evidence leaders 104, 189-190

⁴⁸ Evidence leaders 104, 189-190

⁴⁹ Evidence leaders 103, 186.

⁵⁰ 77, 30 and 32.

⁵¹ 77, 31.

⁵² 77-78, 29-32.

⁵³ 73, 18.

⁵⁴ 76, 28.

⁵⁵ 77-78, 29-32.

fully motivated and pointed to questionable aspects of the evidence provided by Lonmin security).⁵⁶

- i) Police intelligence reports compiled on the following day are incorrect in attributing the injuries suffered by the two men to 'inter union rivalry' and saying that the strikers were AMCU members.⁵⁷

19) On Saturday 11 August:

- a) Reports of intimidation were discussed at a Lonmin security meeting⁵⁸ early in the morning
- b) Some NUM members expressed an interest in encouraging Lonmin employees to report for work.⁵⁹
- c) Slightly later in the morning a clash took place between strikers and members of the NUM near the NUM offices at Marikana. The clash is discussed in more detail below (paragraphs 56-71).

20) On Sunday 12th August:

- a) There was a stand-off between two members of Lonmin security and a group of about 150 strikers sometime after about 9.30am close to the Wonderkop hostel.⁶⁰ One of the security officers told the Commission he had been told 'that the strikers wanted to go to the NUM offices to take revenge for the incident of the previous day where they had allegedly been shot at by NUM officials'.⁶¹ The front group of about 50 strikers are reported to have 'rhythmically slammed their traditional weapons together, humming and chanting just loudly enough to be audible.' One of the strikes is reported to have 'stood up and threw a rock at Lonmin security' after which the Lonmin security officers both fired at the strikers with rubber bullets. At this point they were attacked with one of them being 'hit with a knobkerrie on his left shoulder and struck on the left thigh by a large rock' and the other being 'cut by a panga on his right side all the way from the armpit to the hip'.⁶²
- b) What appears to have been the same group of strikers were then involved in a confrontation with a larger group of Lonmin security officers at the Wonderkop hostel. One of the security officers said he had first 'approached them unarmed, and gestured with his hand, enquiring what they wanted' but 'the strikers approached clashing their weapons and gesturing with their hands indicating that the security officers should shift out of their way'.⁶³ The security guards started firing rubber bullets at the group of strikers when they 'realized that the marchers were not going to stop advancing towards them'.⁶⁴ When the strikers stormed at the security guards

⁵⁶ Evidence Leaders, 106-109.

⁵⁷ 80-81, h

⁵⁸ 87, 2

⁵⁹ 87, 1-2.

⁶⁰ Based on the time given at 112, 4.

⁶¹ 115, 17

⁶² 113, 9-11.

⁶³ 119, 17

⁶⁴ 118, 11

two of them, Mr Mabelane and Mr Fundi, were killed, their vehicle was set alight, and their shotguns taken.

- c) That night, after about 9pm,⁶⁵ people and vehicles at K4 shaft were attacked. Mr Thapelo Mabebe was killed, three others were assaulted, and vehicles were burned. The information presented in the report appears to indicate that the attacks involved two groups of people acting in cooperation with one another, with one of the groups (possibly the larger) estimated by one witness at about 15 people.⁶⁶ The groups were said by one witness to have been armed with 'knobkierries, pangas, and iron pipes'⁶⁷ and by another to have been armed with 'spears, pangas and knobkieries'.⁶⁸ One of the people who was non-fatally assaulted was stabbed with a screwdriver or knife.⁶⁹ The report describes this incident as 'an unprovoked attack on unarmed persons' and says that '[t]he only reason for the attack appears to be to enforce the strike with intimidation'.⁷⁰

21) On Monday 13th August:

- a) In the early hours of Monday 13 August, a production team leader at Lonmin, Mr Julius Langa was stabbed to death apparently with knives and pangas. The report concludes that the evidence 'is overwhelming that Mr Langa was killed by strikers on his way to work'.⁷¹
- b) Later that day not long after 14h00⁷² there was a confrontation between SAPS members and strikers in which 5 people were killed. The clash and its consequences are discussed in more detail below (paragraphs 72-88).

22) On Tuesday 14th August:

- a) The body of Mr Twala was found late in the afternoon behind the koppie at Wonderkop. He died from multiple stab wounds and appears to have been killed after an informal trial at which he was accused of being a spy. The evidence against him apparently included the fact that he had a cell phone on him in contravention of a rule that people at the koppie were not supposed to carry cellphones.⁷³ There is no dispute that Mr Twala was killed by strikers.⁷⁴

23) The above is therefore a summary of events that took place at Marikana from the 9th – 15 focusing on the incidents of confrontation and killing. There were other events that are regarded as being significant for one reason or another. This report does not summarise all of them but they included, amongst others:

- a) On the morning⁷⁵ of Tuesday 14th August the SAPS North West Provincial Commissioner, Maj Gen Mbombo had a meeting with Mokwena, the Executive Vice-

⁶⁵ 123, 8

⁶⁶ See 123, 7-8

⁶⁷ 124, 7

⁶⁸ 126, 16

⁶⁹ 124, 10 and 125, 15-126, 19.

⁷⁰ 127, 23.

⁷¹ 129, 5

⁷² Evidence Leaders, 196, 377

⁷³ 169-175.

⁷⁴ Evidence leaders, 275, 559.

⁷⁵ SAHRC, 262, 1.2.2.

President of Human Capital and External Affairs at Lonmin. A recording of the meeting that was belatedly brought to the attention of the Commission is regarded as being of significance particularly in understanding questions about the motivation for the decision to launch the operation.

- b) On the night of Wednesday 15th August a meeting of the SAPS National Management Forum took place. Following the meeting an 'extraordinary session' was held. The evidence relating to the meeting demonstrates that the decision to launch the police operation was taken on the 15th though there remains no clear information as to who exactly was responsible for the decision (see further paragraphs 101-123).
- 24) During this time, including on the Tuesday, Wednesday and Thursday morning, various attempts were made to negotiate with the strikers and persuade them to relinquish their weapons. A consistent obstacle in relation to this was the fact that Lonmin refused to negotiate with them and that the strikers refused to compromise unless Lonmin did so. One of the issues that the report does not examine in any detail is why there was this unwillingness to negotiate by Lonmin (see paragraphs 92).
- 25) Key issues highlighted in the report relating to the events of the 16th August, including in relation to the decision making, and killings by police at 'scene 1' and 'scene 2' are discussed in later sections of this document.

Key issues of contention before the Commission

The overall demeanour and dispositions of the strikers (violent or non-violent) throughout the 9th-16th August period

- 26) Questions here include whether the strikers demonstrated a consistent disposition in relation to the use of violence,⁷⁶ whether there were specific incidents which changed their disposition in this regard, and particularly whether they had violent intentions towards the police as the events of the afternoon of 16th August started to unfold.

The rituals

- 27) One of the issues that was a major source of contention in relation to this was the nature and purpose of the rituals that the strikers engaged in whilst on the koppie. The report outlines evidence from one of the witnesses on this issue but does not evaluate the overall evidence or arguments about it.⁷⁷ (The issue is considered in more detail in the heads of argument of the SAHRC⁷⁸ and in a more cursory fashion in those of the evidence leaders.⁷⁹ This was one of the issues addressed extensively by Mr X in his evidence but his evidence was shown to be unreliable in many respects and his evidence on this was therefore not regarded as credible.)

⁷⁶ See for instance SAHRC, 133-135, Section 4.2.

⁷⁷ Discussed variously at: 103-106.

⁷⁸ SAHRC, 150-157.

⁷⁹ Evidence leaders 146, 263.

The key framing argument within the report

- 28) What may be regarded as the key framing argument in the report is that violence by the strikers 'created' the situation at Marikana. It would be a misrepresentation of this argument to say that this argument places the blame for events at Marikana exclusively on the shoulders of the strikers. The argument is essentially to the effect that, whilst many of the role players in the events at Marikana acted in a manner that was blameworthy, the violence by the strikers was the central cause of the events that subsequently took place.
- a) The argument is made on the first page of the substantive discussion of the events at Lonmin where the report says that 'the tragic events that occurred during the period 12 to 16 August 2012 *originated from the decision and conduct of the strikers in embarking on an unprotected strike and in enforcing the strike by violence and intimidation, using dangerous weapons for the purpose.*' (emphasis added).
 - b) The point is reiterated a number of times in one of the major concluding discussions of the report dealing with the issue of 'game changers'. *Inter alia* this states that:
 - i) 'The Commission is of the view that the first "game changer" was [the] decision by the strikers, to enforce the unprotected strike by violence and intimidation.'⁸⁰
 - ii) After referring to the confrontation with the NUM on the 11th this passage asserts *inter alia* 'That they remained in possession of their weapons so that they could continue implementing their decision to enforce the unprotected strike by violence and intimidation'.
 - iii) This section concludes with a paragraph stating that it was the strikers 'determination to hold on to their weapons and to continue congregating on the koppie which set in motion the series of events which culminated in the tragedy of 16 August. The Commission has dealt elsewhere in this report with the actions and omissions of some of the other participants which also contributed to the tragedy but there can be no escape from the conclusion that if the strikers had not decided to resort to violence, no-one would have been injured and no property would have been damaged.
 - iv) (As highlighted below this discussion of 'game changers' deals partly with the confrontation between the strikers and the NUM on Saturday 11 August. The discussion of this confrontation in the 'game changers' part of the report is based on evidence that appears to be unreliable.)
 - c) The final recommendations and remarks of the report also reflect the Commission's concern with the use of violence by the strikers.
 - i) In the final consolidated recommendations for investigations with a view to possible prosecutions the report says that 'The propensity in South Africa presently for the carrying of sharp instruments and firearms and the associated violence even in service delivery protests, require strict enforcement of the laws prohibiting such conduct.'⁸¹

⁸⁰ 512, 4

⁸¹ 547, (b).

- d) The final concluding remarks of the report has a section on 'Violence on the part of the strikers' which starts by saying that 'This report would not be complete without a condemnation in the strongest terms of the violent manner in which the strike was sought to be enforced, and the brutality of the attacks upon those persons who suffered injuries and who died prior to 16 August 2012.'⁸² Amongst the other conclusions in this section are that:
- i) While not detracting at all from the criticisms of the actions of the SAPS, the taking up of arms and the use of violence by the strikers was an important contributory fact to the situation at Marikana developing as it did. It alerted the police to the type of criminal acts they were required to deal with and precipitated a police presence in addition to Public Order Policing. It was also an indication of the lengths to which the strikers were prepared to go, to enforce their demands.⁸³
 - ii) It appears from the evidence that the taking up of arms and the violence perpetrated by the strikers was partly responsible for the reluctance on the part of the employer to engage in any manner whatsoever, whilst they remained armed.⁸⁴
 - iii) Whilst there exist adequate mediation and negotiation channels to enable issues to be resolved in matters of protests, strikes and stand offs, it might be a salutary lesson, for the citizens of this country to take away from Marikana, that the taking up of arms and the resorting to violence is neither constructive nor appropriate in protecting and enforcing one's rights.⁸⁵
- e) Under the heading 'Hopes for the future' the very final concluding paragraph of the report quotes a paragraph from the heads of argument of the SAPS which in part also refers to concerns of this kind.⁸⁶

Differentiating, and failing to differentiate, the strikers

- 29) The underlying point that is made in these passages, that violence by the strikers was central in shaping the course of events at Marikana, should not be disregarded. But one observation that may be made about these passages is that they treat the strikers in an undifferentiated way and blame the group of strikers as a whole for this violence.⁸⁷
- 30) A point emphasised by the evidence leaders as well as the SAHRC is on differentiating individuals, or groups within the overall group of strikers, from the group as a whole. This reflects a concern to avoid transferring blame from specific individuals who may have engaged in behaviour that was culpable, to the entire group, and to see it as reflecting the general disposition of the strikers overall.

⁸² 561, 1

⁸³ 562, 6

⁸⁴ 562, 7

⁸⁵ 562-3, 8

⁸⁶ 564, 10

⁸⁷ See for instance 512, 4 and more generally 512-513, 4-6

- a) An illustration of this is the sentence in the SAHRC heads of argument in relation to the confrontation on the afternoon of 13th August that: 'Individuals within the striker group attacked and killed two police members'.⁸⁸
- 31) The issue of differentiation is central to the analysis that the evidence leaders provide in relation to the shooting at scene 1. The evidence leaders 'emphasize that the question of the intentions of the strikers in the group that was ultimately shot at by the TRT cannot be answered in an undifferentiated fashion. The group ... may have comprised more than 100 people. It is tempting to impute a single common intention to each one of these people, but that cannot be done.'⁸⁹ The point is expanded on in some detail in their heads of argument.⁹⁰
- a) An inconsistency in the heads of argument of the evidence leaders is that they do not apply the same approach in relation to the far larger group of strikers who marched on the NUM offices on Saturday 11 March. Referring to a crowd of 2000 or more people the evidence leaders says that 'it is probable that the protesters who descended on the NUM office did so with a violent intent.'⁹¹
- 32) The Commission aligns itself with the evidence leaders on both of these points. It quotes in full the passage from the evidence leaders heads of argument on the intentions of the strikers at what was to become scene 1⁹², saying that the evidence leaders have discussed this issue 'fully and fairly'.⁹³ As indicated below they also endorse the evidence leaders argument that the strikers who marched on the NUM offices on the 11th 'did so with violent intent' (see paragraph 59).⁹⁴
- a) On page 559 the report appears to use language that differentiates between people in the group of strikers when it says 'Individual strikers and loose groupings of strikers promoted a situation of conflict and confrontation which gave rise, directly or indirectly, to the deaths of Lonmin's security guards and non-striking workers and to the injuries sustained by Lonmin's security guards and non-striking workers and endangered the lives of the non-striking workers who were not injured'.⁹⁵
- b) However the term 'individual strikers and loose groupings of strikers' is used at this point because the term 'individuals and loose groupings' is used in the terms of reference.⁹⁶ The section of the report where this language is used is one where it is replying directly to the terms of reference.
- 33) As indicated above, part of the backdrop to the strike at Lonmin was the strike by the RDOs at Implats that started in January 2012. This started in January with Impala Platinum agreeing to major wage increases for the RDOs in April. In the absence of alternative evidence it may be assumed that the RDOs at Lonmin started thinking seriously of the possibility of mobilising together as RDOs at or after this point. In June

⁸⁸ 246, 1.1.10

⁸⁹ Evidence leaders 383, 725.

⁹⁰ Evidence leaders 383, 725.

⁹¹ Evidence leaders 129, 234.

⁹² 233 -247

⁹³ 233, 22

⁹⁴ 98, 7

⁹⁵ 559, 14

⁹⁶ 4, 1.6

2012 representatives of a group of 300 RDOs are recorded as having first approached Lonmin with demands.⁹⁷

- 34) The group that decided, on Thursday 9th August, to initiate the strike is therefore a group that did not emerge overnight. Nevertheless it still emerged over a relatively short period of time. Beyond the fact that many of the members of the group were RDOs at Lonmin⁹⁸ and identification with the demand for a wage increase it is not clear to what degree there was any other coherence within the group. The evidence indicates that the group included in the region of 300 members in June. But it is not evident that that the overall group of 2000-3000 strikers had any history of collective activity prior to the early days of the strike initiated on 9th August.

The core/militant group

- 35) It seems difficult to make generalisations about the vast majority of the strikers. The report though refers to a 'militant group' that appears to be the same as the 'core group' referred to by the evidence leaders and SAHRC that played a central role in shaping and directing the strike.
- a) The report refers to a statement by Lt Col McIntosh. Regarding his interaction with the strikers on the Tuesday afternoon he says that there was a group of about 300 men who were 'well armed' and who 'were in front of the others and appeared to be the leaders of the group'. The 'man in the green blanket', Mr Noki, consistently serves as the spokesperson for this group.⁹⁹ The report refers to this as the 'militant group' and mentions this group a few times in its description of the unfolding of events at scene 1 (the word 'militant group' and 'militant strikers' are also used a number of times in SAPS documents referred to in the report).
 - b) According to the evidence leaders 'There are several indications that a core group of protesters was in existence during the week leading up to 16 August 2012, that this group was armed with dangerous weapons, and that its members were always prominently situated at the front of the protesters and near Mr Noki.'¹⁰⁰
- 36) The SAHRC heads of arguments state that the evidence 'supports the view that there was a core group of around 300'.¹⁰¹ They also state:
- a) 'The core group undoubtedly contained within it violent, single-minded individuals who were intent on achieving their goal, including by using extreme violence if necessary. There was also a degree of organization and coordination amongst that group. But to extrapolate from that and conclude that, at the time they were shot by the SAPS, there was a 'single intent' within the group or that they all believed they were rendered invincible and invisible by muti has no reliable evidential support.'¹⁰²

⁹⁷ 50, 4.5

⁹⁸ One of those who was not an RDO was Mr Nzuzza, described as the second in command of the strike, who was a winch driver (133, 4).

⁹⁹ 157, 1

¹⁰⁰ 146, 246.

¹⁰¹ SAHRC 132

¹⁰² SAHRC 133

- b) That the core group can be identified as having become ‘fairly organized and coordinated’ by Sunday 12 August, though it may have been smaller than 300 at that stage.¹⁰³

37) The figure ‘300’ comes up in references to the group of strikers who met with Lonmin in June (paragraph 33 above) and in relation to discussions of the core group during the events of August 2012 (see paragraph 35 (a) above). From the report it is not clear that this is more than a coincidence and not apparent what degree of continuity there was between the group who were involved in taking up the wage issue in June and the core group. It is not clear how people came to be part of the core group: was this by conforming to certain kinds of behaviour (such as the carrying of weapons) or was there a procedure for admission to the group or some other requirement? Notwithstanding an apparent consensus of some kind about the existence of this ‘militant core group’ there appears to be limited, if any, information, about the group.

38) In the absence of evidence to the contrary it seems reasonable to assume that the militant and violent element of the strike was shaped by the core group. A related, though unproven, assumption would be that all of the intimidation and violence that was associated with the strike was carried out by members of this group. In particular it may be appropriate to assume that this core group was central in shaping the strike related violence over the period from Sunday 12th – Tuesday 14th August.

Was the violent character of the strike consistent in nature?

39) The key question though is whether the violent aspect of the strike was consistent. In other words: did the core group demonstrate a single stable orientation towards the use of violence or were there shifts in their orientation towards violence? This document will argue that the information presented in the report is consistent with the argument that there was a dramatic shift in the character of the strike that took place following the confrontation with the NUM on the morning of Saturday 11th August. Specifically it is argued that:

- a) There is no reliable evidence that intimidation on the first day of the strike extended much beyond toyi-toying in an intimidatory manner. Intimidation is often primarily achieved through the threat of violence rather than through violence itself and the threat of violence was largely achieved through toyi-toying and the carrying of weapons. (It may be noted that toyi-toying is widely used as a form of intimidation in South Africa by, amongst others, supporters of the African National Congress.¹⁰⁴) The strikers were not consistently armed with more than knobkerries though spears and pangas were reported at one point in the evening. In terms of actual violence this did not extend beyond isolated cases of assault and stone throwing.
- b) It is not clear that the use of force by Lonmin security was appropriate. There is some indication that the response by Lonmin security was heavy handed and indiscriminate and may have extended to the use of live ammunition.

¹⁰³ SAHRC 134

¹⁰⁴ Bruce, D (2014) Just singing and dancing? Intimidation and the manipulation of voters and the electoral process in the build-up to the 2014 elections, Community Agency for Social Enquiry.

- c) Both the evidence leaders and the Commission have oversimplified the evidence relating to the confrontation between the strikers on the morning of Saturday the 11th. This is not only because the intentions of the strikers cannot be described in a uniform way but also because there is no evidence that a significant group of strikers had the intention to attack NUM members.
 - i) The fact that they were armed does not demonstrate that they intended to attack the NUM and may be explained in other ways (see paragraph 61).
 - ii) Nevertheless, from what they had heard, and from the way in which the strikers presented themselves by marching towards the NUM office with weapons, the NUM members may genuinely have believed that they were in danger. The argument that the strikers may not have intended to attack the NUM should therefore not be translated into blaming the NUM members for the sequence of events that followed.
 - d) It was widely believed amongst the strikers that two of their members had been killed by the NUM on the 11th. This belief was a valid belief as two of the strikers were indeed shot by NUM members (though they both survived the shooting). Considering the circumstances of the shooting, it is easy to understand how it came to be believed that the strikers had been killed as most of the people who were with them fled from the scene and were not in a position to witness what happened to the strikers who had been shot. The fact that this belief was subsequently found not to be true does not mean that it was unjustified or detract from the significant role that it played at the time.
 - e) Aside from the fact that some of the strikers believed that two strikers had been killed, the fact is that the NUM members shot at the strikers. Particularly if the strikers did not in fact have violent intentions towards the NUM this, along with the actions of Lonmin security, would be likely to have influenced the way in which the core group of strikers interpreted the situation following the march on the NUM office. They may have believed that both Lonmin security and the NUM had responded in a manner that was excessive and brutal and that they faced an alliance of forces that was willing to be quite ruthless in suppressing the strike. Furthermore, in so far as they believed that their own members had been killed, this might have influenced them in reconciling themselves to the use of lethal violence as a means of achieving their ends.
- 40) The evidence indicates then that there was a major shift in the perceptions of members of the core group about what they were up against *after* the confrontation with the NUM. This is consistent with:
- a) The main evidence of physical violence by the strikers is on the Friday evening is isolated evidence of stone throwing and assaults. On the Saturday morning the main evidence is that one of the strikers threw a stone at the NUM members as they approached the NUM offices. Though intimidation (primarily in the form of toyi-toying and confronting people whilst carrying weapons) was taking place on the first day there is no evidence of fatal or life threatening violence by the strikers prior to Sunday 12th August. The heads of argument of the SAHRC also indicate that the

character of the core group of strikers was dramatically different from the Sunday onwards.¹⁰⁵

- b) That pangas were not being widely carried by the strikers until after the NUM confrontation. Assuming it to be reliable there is limited evidence of the carrying of pangas on the Friday evening (paragraphs 18(d)-(e) above). There is no reliable evidence of the carrying of pangas by the marchers on the Saturday morning (paragraphs 57 and 69-70 below). The report indicates that the buying of pangas took place right after the clash with the NUM suggesting that it was precipitated by it.¹⁰⁶ This suggests that the weapons that were carried prior to that were weapons that were carried more for intimidatory effect (notably on the Friday evening) and possible to ensure that they were taken seriously (on the Saturday morning). After the clash with the NUM there was a substantial shift by the strikers (perhaps mainly the core group?) to carrying weapons that could more readily be used to lethal effect.
 - c) That the strikers brought in the inyanga to assist them after the confrontation with the NUM. The question about how the muti that the inyanga provided was intended to assist them is not answered in the report. Irrespective of the precise answer to this question, it was after this point that the strikers started to seek 'additional help' to enable them to succeed in their cause.
- 41) It seems that one of the features of members of the core group was that they in some respects 'inhabited', or readily adopted, a 'warrior' identity. Considering the limited concrete information about the core group it also seems reasonable to suggest that, though there must have been a leadership group already in existence, the events of the 10th and 11th may have had a catalytic effect in bringing into being the overtly 'warlike' core group that was involved in the two confrontations with Lonmin security (on Sunday) and the SAPS members (on Monday).
- 42) If this argument is valid, then what it implies is that the strikers might not have precipitated violence from the NUM by attacking (or intending to attack) the NUM members but that they nevertheless provoked fear from the NUM through the fact that they marched on the NUM offices whilst carrying weapons and other aspects of their behaviour that were aggressive.

What type of violence, if any, was initiated by the core group of strikers?

- 43) There appears to be little dispute that the incidents in which the three workers were killed (the attack at K4 shaft in which Mr Mabebe was killed and others injured on the Sunday night, the killing of Mr Langa on the Sunday morning, the killing of Mr Twala on the Tuesday afternoon) were initiated and carried out by a group of individuals associated with the strikers and were part of efforts to enforce the strike through intimidation and/or punishing 'impimpis'.
- a) One is inclined to suspect that the attack on K4 shaft in which Mr Mabebe was killed was carried out by people associated with the core group. The details relating to the

¹⁰⁵ SAHRC, 133, 4.2.2.

¹⁰⁶ 99, 8

attack on K4 shaft appear to indicate that this was a coordinated attack. This appears to imply that it was directed by people linked to those who were coordinating and leading the strike.

- b) Of the three incidents there is very little information on the killing of Mr Langa and it is possible that he was killed by other individuals associated with the strike. However it seems likely that the attack on K4 shaft and the killing of Mr Langa were connected to each other in some way and possibly involved people from the same group.
 - c) If it can be assumed that the evidence presented in the report from the docket into Mr Twala's deaths is reliable then this would appear to indicate that the strike leaders were complicit in the killing of Mr Twala.¹⁰⁷ Considering the evidence that the SAPS tortured people who were arrested on the 16th and in several others in order to build their cases against the miners it cannot be assumed that the statements in the docket are reliable.¹⁰⁸ Nevertheless the proximity of the killing to the gathering at the koppie also points towards the likelihood that the strike leaders were complicit in this killing.
- 44) The incidents in which the three non-striking workers were killed is therefore evidence of deliberate lethal violence initiated by small groups apparently associated with the strike. Nevertheless at three of the critical points where groups of strikers were involved in confrontations the evidence provided by the report remains ambiguous as to the intentions of the strikers and/or whether violence by the strikers was precipitated by the actions of others:
- a) As reflected below the report concludes that the strikers had 'violent intentions' towards the NUM when they marched on the NUM offices on the morning of Saturday 11th. But the report does not show that the strikers attacked the NUM office. Instead it remains a matter of speculation as to whether they would have attacked the NUM offices if the NUM members had not first rushed towards them and initiated the clash with them.
 - b) As reflected above on the following morning (Sunday 12 August) each of the two attacks on the Lonmin security officers actually took place after the security officers had opened fire on the group of strikers with rubber bullets. It cannot be assumed that the security officers misjudged the fact that the strikers had aggressive intentions (though their information was that this was towards the NUM rather than necessarily towards themselves) and that nothing would have happened to them if they had not first fired at the strikers. But the evidence at hand is not absolutely definitive as, apart from the stone that was allegedly thrown at them in the first case, in both cases the security guards were the ones who first 'engaged' the strikers with rubber bullets.
 - c) As indicated below the report does not reach any conclusions on whether any of the strikers were in fact attacking the police at Scene 1.

¹⁰⁷ 170, 5 – 174, 17.

¹⁰⁸ Sipho Hlongwane. "Marikana: Freed Miners Speak of Torture in Police Cells | Daily Maverick." *Daily Maverick*, September 4, 2012. <http://www.dailymaverick.co.za/article/2012-09-04-marikana-freed-miners-speak-of-torture-in-police-cells#>; Greg Marinovich. "Marikana: Police Torturing Their Way to Intimidation | Daily Maverick." *Daily Maverick*, November 2, 2012. <http://www.dailymaverick.co.za/article/2012-11-02-marikana-police-torturing-their-way-to-intimidation/#>

- 45) As indicated below, in relation to the confrontation with the SAPS group on Monday 13th, the report states explicitly that the firing of the teargas and stun grenades 'were unreasonable and unjustifiable in the circumstances and was the "spark" which caused the confrontation between the SAPS and the strikers.'¹⁰⁹
- 46) On the basis of the incidents on the 12th (the confrontation with Lonmin security) and 13th (with the SAPS) it is apparent, at the very least, that there was a group of individuals who were part of the strike (and likely linked to the core group) who very readily retaliated with a high level of violence in response to 'provocation' (rubber bullets in the first case, teargas and stun grenades in the second).¹¹⁰
- 47) The pre-mediated violence including the attack on K4 shaft in which Mr Mabebe was killed and the execution of Mr Twala as well as these acts of (apparent) retaliation all took place after the 11th of August.

'Game changers'

- 48) This document is not intended to understate the seriousness of the violence that some of the strikers engaged in after the 11th of August. But there is a clear case that can be made that there was a profound qualitative shift in the 'disposition' of the group in relation to the use of violence after the 11th. This argument should not be seen as an argument that the violence was justified but is nevertheless relevant to questions about characterising the strikers and particularly the core group and is directly relevant to the argument about 'game-changers' that is presented in the report.¹¹¹
- 49) Firstly it is not true that the evidence shows that the strikers had a single and stable approach to the use of violence in enforcing the strike as is implied by the report. During the evening/night of the Friday 10th of August groups of strikers were indeed involved in intimidation. But none of this involved lethal violence (it is also not clear whether or in what way the core group were prominent role players in shaping the intimidation on the Friday night). As will be argued below (paragraphs 56-66) the conclusion that the report reaches that the strikers marched on the NUM offices with violent intent is neither explained nor fully motivated for.
- 50) The fact that they had been shot at by NUM members as well as the belief that two of their number had been killed may be seen to have contributed to a profound shift in understanding on the part of the core group of strikers about what would be required of them if they were to sustain the strike. This was expressed in a resolve and willingness to use violence against groups who were perceived as trying to intimidate them and break the strike using violence. This 'shift' was manifested in:
- a) A decision to attack the NUM office on the Sunday morning;

¹⁰⁹ 557, 9

¹¹⁰ None of major confrontations that took place on the 11th, 12th, 13th and 16 are therefore clearly inconsistent with the statement by one of the strikers, during the exchange between with the police prior to the confrontation on the afternoon of Monday 13th that (as translated into English) 'The only person that we are disputing with is the one who is attacking us'. (Exhibit QQ-2, page 8, <http://www.marikanacomm.org.za/exhibits/Exhibit-QQ-2.pdf>)

¹¹¹ 510-513.

- b) Violent retaliation against Lonmin security guards who opened fire on them with rubber bullets on the Sunday morning;
 - c) Violent retaliation against the SAPS after the teargas and stun grenades were fired at them on the Monday afternoon.
- 51) Some of the major acts of violence by the strikers were therefore apparently 'retaliatory' (or 'defensive') in nature. However this shift in mindset was also reflected in a shift towards the more aggressive enforcement of the strike that was primarily expressed in violence during the dark hours of Sunday night/Monday morning (the attack on K4 shaft including the killing of Mr Mabebe and later killing of Mr Langa). This shift was also manifested in the murder of Mr Twala on the Tuesday afternoon.
- 52) In relation to the confrontation between the police and the strikers the report says that 'the important factor there was their refusal to comply with Major General Mpembe's request that they lay down their weapons, weapons which were clearly required for the enforcement of the unprotected strike. It was their determination to hold on to their weapons and to continue congregating on the koppie which set in motion the series of events which culminated in the tragedy of 16 August.'¹¹²
- a) However the determination of the strikers to hold onto their weapons may not primarily have been an expression of the wish to intimidate others. Though weapons were carried for this purpose it is also possible that the core group of strikers started to identify themselves as being at risk of attack by Lonmin security and the NUM and that this became a major factor shaping this determination.
 - b) During the exchange with police prior to the confrontation on the afternoon of the 13th one of the strikers said 'On Saturday when we came back the mine security shot at us (...) together with the people from NUM (...) and killed two of our people. That is the reason why we are carrying these weapons.'¹¹³

Implications for overall assessment of the report

- 53) The argument that is presented here should not be seen as an attempt to refute the assertion that violence by the strikers was central in shaping the course of events at Marikana. Nevertheless a weakness of the report, manifested most notably in the 'game changers' argument, is that it represents the miners in a one-dimensional way. It fails to acknowledge the possibility that they were also shaped by events as they experienced and interpreted them.
- 54) Overall the report may be regarded as balanced and fair. It distributes blame and criticism very widely. However this strand of argument in the report introduces an element into the report that has the effect of reducing events that were dynamic into events that were one-sided and static. The argument that incidents of violence during the first few days of the strike had a major impact on the course of events also applies to police. As will be argued below one of the gaps in the report is that it does not consider the impact of the confrontation on the Monday afternoon on the attitudes and emotions of police in relation to the strikers. With respect to both the confrontations on

¹¹² 512, 5 – 513, 6.

¹¹³ Exhibit QQ-2, page 8, <http://www.marikanacomm.org.za/exhibits/Exhibit-QQ-2.pdf>

the Saturday (with the NUM) and on the Monday (with the police) what actually happened needs to be distinguished from how the events were interpreted. In relation to the confrontation on the Saturday the issues about interpretation are most relevant in relation to the subsequent actions of the strikers. In relation to the confrontation on the Monday they are most relevant to being able to analyse the subsequent behaviour of the police, including notably at scene 2.

- 55) The evidence that there was a profound shift in the orientation of the core group of strikers after the 11th however does not help to definitively answer the question about the intentions of the 'lead group of 11/12 strikers' when they approached the police on the afternoon of 16th August at what was to become scene 1 (see paragraphs 137-139).

The justifiability of the use of force and firearms by members of the NUM against the strikers

The main discussion of the confrontation in the report

- 56) As indicated the clash between the strikers and members of the NUM took place on the morning of Saturday 11 August (prior to 9 a.m) near the NUM offices at Marikana. The information presented in the report is that a large group of strikers (said to be between 2000 and 3000 in number)¹¹⁴ marched on the NUM offices.
- 57) One issue that seems to be clearly resolved is that the strikers on the Saturday morning were armed. It had been claimed that they were not armed and that they only armed themselves after the confrontation with NUM on the Saturday. But the report appears to clearly refute this assertion. Some participants in the march were variously reported by two Lonmin security officers as being armed with sticks and spears,¹¹⁵ by one NUM members as being armed with knobkerries and spears¹¹⁶, and by another as being armed with knobkerries and sticks and assegais.¹¹⁷
- 58) In terms of the intention of the strikers who marched on the NUM office the evidence is varied. The report of the Commission refers to the evidence of one of the strikers who said in his evidence that the motivation for the march was to enquire from the NUM 'why they do not want the employer to talk to them' though he also indicated in his statement that 'he wanted to go to the NUM office to find out why they had been shooting at the AMCU members the previous day'¹¹⁸ (this seems to have been a rumour. No specific evidence relating to alleged shootings by NUM members on the previous day seems to have been presented or discussed before the Commission). Two Lonmin security officers received a report indicating that the strikers intended to burn down the NUM offices.¹¹⁹

¹¹⁴ 88, 4

¹¹⁵ 98, 7 and 89, 8.

¹¹⁶ 89, 9

¹¹⁷ 91, 13

¹¹⁸ 88, 3-4

¹¹⁹ 88, 6 and 89, 8 (it is not entirely clear whether this is one or two different reports).

- 59) As indicated above the report of the Commission endorses the argument by the evidence leaders that 'it is probable that the protesters who descended on the NUM office did so with violent intent'.¹²⁰ This argument is unsatisfactory:
- a) Firstly it presents the group of 2000 or more strikers in an undifferentiated way.
 - b) The idea that there was a 'violent intent' is undefined. If this is referring to the alleged intention to burn down the NUM offices then it cannot be assumed that this implied a willingness to attack NUM members and potentially to kill them in order to do so.
 - c) In addition the evidence about the motives of the crowd is mixed. There is no clear evidence of a fully formed intention to attack the NUM, even among a core group (in so far as one may have existed at that point) among the strikers. The facts as they are presented do not demonstrate clearly that the strikers' intention was to attack the NUM offices.
 - d) One NUM witness said in his statement that some of the members of the crowd threw stones as they approached the NUM office¹²¹ but this is the only evidence of the strikers directing violence against the NUM. As indicated later the same witness also modified his evidence when he appeared before the commission raising questions about his reliability as a witness.
- 60) The evidence as presented seems to suggest that burning down the NUM offices had been talked about by some people associated with the march. But the evidence does not clearly indicate that the idea of burning down the NUM office was something that the leaders of the march identified with or even one that was widely discussed by the strikers. It also cannot be assumed that, if there was the intention to burn down the offices, this would translate into a willingness to attack people standing in front of the office. What would have happened if the NUM members had not attacked the strikers is entirely a matter of speculation. It remains possible that there was no full intention to attack the NUM on the Saturday morning.
- 61) Perhaps the critical question is how to interpret the fact that some of the strikers were armed during the march. This does not necessarily imply that they intended to attack the NUM as there are various other possibilities:
- a) The carrying of weapons might have been partly a response to reports (apparently untrue) that NUM members had shot at strikers the previous day.¹²² It might therefore demonstrate that they were afraid of violence from the NUM
 - b) They may also be carried for the purpose of presenting a 'serious' front so that the NUM could not disregard them and would take them seriously. For instance they, or some of them, may have wished to confront the NUM and demand answers to questions about their wage demands and the way in which they NUM and management were responding to them.
- 62) It seems that, at the very least, the NUM members believed that they were in danger. It may be argued that the NUM members were justified in believing that they were in

¹²⁰ 97, 7 and Evidence leaders 129, 234

¹²¹ 92, 16

¹²² 87-88, 3.

danger. A large armed crowd was approaching and they had received information that the crowd had hostile intentions towards them. Rather than imputing an undefined 'violent intent' to the strikers, the approach taken by the Commission should arguably have been the same as that taken at scene 1 (see below). This would involve focusing on whether or not the NUM members indeed believed that they faced an imminent attack. This is not the same as saying there was a 'violent intent' on the part of the strikers.

- 63) There are various accounts of the sequence of events. An account from a NUM member is that, as they approached the NUM offices the strikers were shot, presumably by one of the NUM members who were assembled in and outside the office.¹²³ According to a Lonmin security officer about 30 NUM members first ran towards and clashed with members of the advancing group of strikers and the gun shots were fired during the clash.¹²⁴ According to one of the strikers, a Mr Mabuyakhulu who was injured by the gunfire, the shots were fired whilst a group of NUM members were approaching the strikers.¹²⁵ After trying to flee and collapsing as a result of his injuries he was assaulted by NUM members who were pursuing the fleeing strikers.¹²⁶
- 64) Some of the facts then as they are presented in the report are that:
- a) A large group of strikers marched towards the NUM offices.
 - b) Some of them (none of the evidence indicates how widely weapons were distributed) were carrying sticks, knobkierries, or assegais/spears¹²⁷.
 - c) There were reports that they intended to burn down the NUM offices and their demeanour was confrontational. Some may have thrown stones at the NUM members.
- 65) There are different accounts of how the confrontation itself was initiated. The evidence from one of the security guards (a witness who would not have been biased towards the strikers) is that the NUM members rushed towards the strikers. There is also no dispute that NUM members shot at the strikers.
- 66) As indicated above the evidence is consistent with the argument that the confrontation on the 11th was indeed a game changer. It appears that following the confrontation it was believed that the NUM had killed two strikers. The report itself presents evidence from Lonmin security that shows clearly that strikers shifted to a more 'warlike' mode after the shooting.¹²⁸ If they had not had aggressive intentions towards the NUM, but had been the target of (perceived) aggression, the confrontation would have fed into a belief that they were surrounded by hostile forces and needed to adapt their approach in line with this.

¹²³ 92, 16-17

¹²⁴ 93, 22

¹²⁵ 94, 25

¹²⁶ 95, 27 (The commission recommends that the Director of Public Prosecutions establish whether there is sufficient evidence to prosecute the person responsible for this assault: 95, 30)

¹²⁷ It is not clear to me whether there is a clear differentiation between these two terms

¹²⁸ See for instance 465, 27.

Conclusions of the report on the justifiability of the actions by NUM members

- 67) It should be noted that, reflecting the inconclusive nature of the evidence presented before the Commission, the report does not in fact find that the actions by the NUM members who fired at the marchers were justified.¹²⁹ It says that 'It is difficult to determine whether the actions of the shooters were justified on any basis without having any evidence as to the circumstances in which the shooter(s) decided to fire. NUM has not permitted the Commission to be privy to this information. In the Commission's view, these shootings are matters which require to be further investigated.'¹³⁰ As indicated above it also recommends further investigation in relation to the subsequent assault upon one of the strikers.¹³¹
- 68) These conclusions reflect the fact that there is a far greater degree of ambiguity in the evidence about the confrontation on the 11th than the report acknowledges.

The evidence on the confrontation as presented in the discussion on 'game changers'

- 69) Questions to do with how the report interprets the Saturday morning confrontation in relation to the dispute about 'game changers' are discussed above (paragraphs 48-52). It should be noted however that in this discussion the report relies on information that is different from the information previously relied on and that this information appears to be unreliable.
- a) On page 100 the Commission appears to accept that the NUM members initiated the clash 'by running towards the [marching] crowd' of strikers.¹³² More than 400 pages later the report accepts that 'the strikers ... were singing songs and moving fast, running and their mood was aggressive.'¹³³
 - b) In the same passage the report also for the first time says that during the march some of the strikers were carrying pangas ('knobkierries, pangas and spears'.)¹³⁴
- 70) These discrepancies are explained by the following:
- a) The first discussion¹³⁵ is an abbreviated version of the discussion in the heads of argument of the evidence leaders. One of a number of sources of information for this discussion is the written statement of a NUM member (quoted over pages 123-126 of the heads of argument of the evidence leaders).
 - b) The second discussion¹³⁶ is based exclusively on the oral evidence of the same NUM member. In this latter evidence the witness appears to modify his evidence. Firstly this is the first time that we are told that the strikers were running towards the NUM

¹²⁹ Compare the article by Jeremy Cronin in City Press which states incorrectly that 'Accordingly, NUM members in that office who acted to protect themselves were exonerated'. (Jeremy Cronin, We are not an integrity desk of the ANC, City Press, 19 July 2015, <http://www.news24.com/Opinions/Jeremy-Cronin-responds-to-Trevor-Manuels-attack-on-the-SACP-20150719>)

¹³⁰ 101, 7 as well as 102, 2-3.

¹³¹ See also 102, 3.

¹³² 100, 4 and 101, 6.

¹³³ 511-512, 3

¹³⁴ Compare 91, 13 (and Evidence Leaders 124, 17) with

¹³⁵ 86-102

¹³⁶ 511-512, 3.

office.¹³⁷ Secondly, while in the earlier discussion he is one of four witnesses who says nothing about pangas, he now tells the commission that the strikers were carrying pangas.¹³⁸

- c) The written statement and oral evidence of this witness are therefore inconsistent with each other. This clearly raises questions about the reliability of his oral evidence but potentially also about his initial statement.

71) The commission therefore accepts evidence by the witness¹³⁹ that contradicts his earlier evidence as well as the evidence of two Lonmin security guards and another NUM member as a basis for part of its argument about game changers.

The confrontation between police and miners on the afternoon of Monday 13th August

Questions of blame

72) The incident discussed here took place not long after 14h00¹⁴⁰ on Monday 13th August 2012. The information on this incident is that a group of 100-200 strikers had been heading towards K3 shaft ostensible 'to request the mine management to close the mine and allow the workers there to join the strike'.¹⁴¹ After being told by a security officer that no-one was working at K3 shaft they started returning to the koppie.¹⁴² They were armed with assorted weapons such as pangas, assegais, spears and sharpened objects.¹⁴³

73) They were intercepted by a group of SAPS members under the command of Major General Mpembe. Major General Mpembe requested them to hand over their weapons¹⁴⁴ and tried to give them an ultimatum to do so.¹⁴⁵ The strikers refused, though they said they would hand them over at the koppie and requested the police to accompany them to the koppie. They then continued their journey.

¹³⁷ His written statement says inter alia that 'When they were more or less in line with the satellite police station the strikers in front stopped. I got the impression that they had just then seen who we were. 19. There followed a very short period during which the strikers started shouting at us, including threatening words like 'here are these dogs'. It was clear that they were very hostile. There was at no stage any indication from them that they had come there in order to speak to the NUM people. Nothing at all was said to the effect that they wanted NUM to take their demand to Lonmin management. 20. Some of them threw stones at us and they started moving forward again. These events were happening very fast.' (Quoted in Evidence leaders, 125) In his oral testimony he says 'They were so aggressive and they came towards the offices, the office, running. (Day 39, page 4237, lines 12-13)

¹³⁸ In his statement he said 'They were armed with knobkerries and sticks and I could see that several of them had assegais' (Paragraph 17 quoted in Evidence Leaders 124). In his oral evidence he says 'others were carrying sticks and whereas the others were carrying knobkerries, pangas and also others were also carrying spears' (day 39 page 4237).

¹³⁹ 511, 3.

¹⁴⁰ Evidence Leaders, 196, 377

¹⁴¹ 133, 5. See also Evidence Leaders, 195, 375-6

¹⁴² 134-135, 6-10

¹⁴³ 136, 18

¹⁴⁴ 137, 21

¹⁴⁵ 138, 26-27

- 74) After they set off, members of the SAPS fired tear-gas and stun grenades at them, though it is unclear as to who gave the instruction for them to do so and it appears that there was no specific justification for doing so.¹⁴⁶ Some of the strikers responded to this by attacking the SAPS members.
- 75) The report is uneven in presenting information on the actions of the police notwithstanding the fact that it was able to rely in part on video material in reconstructing the events that led to this confrontation:
- a) On page 139 the report says that the police ‘fired a teargas canister’ and that ‘this triggered a fight between the strikers and the police as the strikers attacked the police’.¹⁴⁷
 - b) The report also refers to the statement of Lt Baloyi which it says is ‘in line [with] what can be seen on the video.’¹⁴⁸ Lt Baloyi’s statement apparently says that ‘Within seconds two teargas canisters were fired. The strikers ran towards him. He then threw a stun grenade at them and ran to the Nyala.’¹⁴⁹
 - c) On page 557 the report refers to ‘the initial firing of a teargas canister and a subsequent stun grenade’ as having sparked the confrontation¹⁵⁰
 - d) According to the heads of argument of the SAHRC it was after teargas and *two* stun grenades were fired, with the second stun grenade exploding ‘in very close proximity to the faces of the strikers at the front of the group’¹⁵¹ that some of the strikers stormed the SAPS members.
- 76) The Commission says that ‘No one has been able to give a proper account of the attack’ by the strikers on the SAPS members.¹⁵²
- 77) In the clash that ensued W/O Monene and W/O Lepaaku were killed. Another police officer, Lt Gen Baloyi, suffered very serious injuries.¹⁵³
- 78) Of the three strikers who were killed, the only one whose body was found at the scene of the confrontation, fairly close to the body of W/O Lepaaku, was that of Mr Jkanisi.¹⁵⁴ The report of the Commission does not discuss his death specifically and his is the only one of the 5 deaths on that afternoon that is not referred for further investigation with a view to possible prosecution.¹⁵⁵
- 79) There is confusing evidence both about the circumstances of the death of Mr Sokanyile¹⁵⁶ and Mr Mati,¹⁵⁷ the other two strikers who (with Mr Jkanisi) were killed in circumstances related to this incident.

¹⁴⁶ 139, 33 - 143, 44

¹⁴⁷ 139, 31

¹⁴⁸ 145, 53

¹⁴⁹ 146, 56

¹⁵⁰ 557, 9

¹⁵¹ SAHRC, 246, 1.1.9, emphasis added.

¹⁵² 139, 32

¹⁵³ 146-147, 55-58.

¹⁵⁴ See Evidence Leaders, 220, 431.

¹⁵⁵ 544, 4

¹⁵⁶ 144, 49 – 50

¹⁵⁷ 147, 49-62.

- a) There is some indication that Mr Mati may have been shot during the confrontation and carried some distance away. His body was found outside a house in the informal settlement.¹⁵⁸
 - b) Mr Sokanyile was killed by a single gun-shot wound and it is likely that he died instantly or almost immediately after it.¹⁵⁹ He is likely to have been shot at or very near to the place where his body was found which was more than 500 metres away from the initial confrontation.¹⁶⁰ The evidence appears to suggest that Mr Sokanyile was killed by police pursuing some of the strikers after the initial confrontation but there is confusing evidence about this, potentially linking his death to one of a number of groups of police officers.¹⁶¹ The evidence leaders argue that 'evidence advanced by SAPS does not suggest that Mr Sokanyile was killed in self or private defence. In these circumstances the Commission ought to find that his killing was not justified or lawful.'¹⁶²
- 80) The Commission recommends that Mr Sokanyile's and Mr Mati's death be referred for further investigation along with the deaths of W/O Monene, W/O Lepaaku and the assault on Lt Gen Baloyi.¹⁶³
- 81) The report states explicitly that the firing of the teargas and stun grenades 'were unreasonable and unjustifiable in the circumstances and was the "spark" which caused the confrontation between the SAPS and the strikers.'¹⁶⁴ (However no recommendation regarding disciplinary action on this is made.)
- 82) Nevertheless this should not be taken to imply that the report regards this as a justification for the actions of those strikers who attacked the SAPS members that afternoon. The finding that the police 'sparked' the confrontation is not the same as exonerating the strikers who attacked the police.
- 83) However the underlying questions and the issues that they raise are not clarified by the report. For instance if the SAHRC's analysis of the evidence is correct then the strikers did not respond to the firing of the teargas but only after the second stun grenade which exploded in close proximity to them. It is not clear how the strikers who attacked the police understood what was happening but one possibility is that they believed they were being attacked by the police. Above it is argued (paragraphs 46 and 50-51) that some of the main incidents of violence by the strikers appear to be characterised by a 'willingness to retaliate' reflecting a resolve to continue with the strike.
- 84) Even if they believed they were being attacked, the attack on the police was a highly aggressive response to this (perceived) police aggression taking into account the fact that the police were armed with firearms whilst the strikers were not. This raises a question not only their motivations but also their willingness to engage in this type of combat, even if it was on the basis of perceived provocation.

¹⁵⁸ See Evidence Leaders 217-219.

¹⁵⁹ Evidence leaders, 222, 434.

¹⁶⁰ SAHRC, 246, 1.1.10.

¹⁶¹ 144, 50; Evidence Leaders, 222-223, 436 and more generally 220-223.

¹⁶² 223, 437.

¹⁶³ 544, 4 (b)-(d) as well as 144-145, 50 in relation to Mr Sokanyile specifically.

¹⁶⁴ 557, 9

85) As argued above the reports analysis of 'game changers' suffers from serious limitations.

- a) In relation to the confrontation on the 13th the Commission argues that 'the important factor there was [the strikers] refusal to comply with Major General Mpmembe's request that they lay down their weapons, weapons which were clearly required for the enforcement of the unprotected strike. It was their determination to hold on to their weapons and to continue congregating on the koppie which set in motion the series of events which culminated in the tragedy of 16 August. ... [T]here can be no escape from the conclusion that if the strikers had not decided to resort to violence, no-one would have been injured and no property would have been damaged.'¹⁶⁵
- b) This reflects the analysis of the Commission that there was a consistent orientation to violence on the part of the strikers. As indicated above a more nuanced approach would acknowledge the need to differentiate between the strikers. It is also suggested that the events of the 11th contributed to the determination of the strikers to retain their weapons in order to defend themselves.

86) The incident on the 13th indicated that at that point the strikers were willing to engage the police in combat. However though two police were killed, three of the strikers were also killed in the confrontation. How did the core group of strikers interpret these events? Presumably the implication is that the strikers would have recognised that many of them would be killed if they tried to attack the police on the 16th when the forces mobilised by the police were far greater.

- a) The report quotes a short paragraph from the evidence leaders regarding the possible influence of the confrontation on the 13th on the perceptions and motives of the strikers on the 16th. This suggests the opposite conclusion – that the deaths of strikers on the 13th may have provided the strikers with a revenge motive.¹⁶⁶

Consequences of the confrontation in relation to later events

87) There is evidence that the SAPS started taking a far more serious view of the events at Marikana after this incident. The National Commissioner, Riah Phiyega arrived at Marikana at either about 16h00¹⁶⁷ or 18h00¹⁶⁸ on the Monday afternoon. Amongst other steps that were taken, were that Major-General Annandale, the head of SAPS Specialised Operations, instructed Colonel Duncan Scott, a member of the Special Task Force, to go to Marikana 'to assist with the planning and co-ordination of an operation there'. In terms of subsequent events this was a critical development, inter alia because it meant that the key SAPS member involved in planning the operation was from an elite 'tactical unit' rather than from a public order policing background. Colonel Scott initially developed a plan that would have involved encirclement of the koppie at sunrise the following morning.¹⁶⁹ There was also a massive increase of SAPS numbers at Marikana the following morning. According to the SAHRC heads of argument 'On the morning of

¹⁶⁵ 512-3, 5-6.

¹⁶⁶ 243, quoting evidence leaders para 713.4

¹⁶⁷ 148, 1

¹⁶⁸ Evidence Leaders, 242, 481.

¹⁶⁹ 149, 3.

Tuesday 14 August the number of SAPS members present at Marikana increased substantially. On the morning of 13 August, there were around 120 members deployed at Marikana. By the morning of 14 August that number had increased to more than 500 members, including large numbers from POP, TRT, NIU, STF and K9 units from around the country.¹⁷⁰

- 88) The report does not engage with questions about the ‘emotional’ significance of the events of the 13th most notably for the police. The critical point here is related to the way in which these events were presented by the police and in the media as an attack by the strikers on the police. At the time no mention was made of the role of the police in precipitating this attack. Related to this the confrontation on the afternoon of the 13th is likely to have been profoundly important in its emotional impact on the police. On the one hand it is likely to have meant that many of the SAPS members at Marikana were, to a greater or lesser degree, afraid of the strikers and particularly afraid of engaging them at close quarters. In addition it is likely that, related to this fear, many SAPS members at Marikana started to view the strikers with a heightened level of antagonism. It is likely that these attitudes of antagonism were also shared by officials within the police at the highest level. (Relative to the likelihood that Minister of Police Nathi Mthethwa was involved in shaping the police response to the Marikana situation, it is also not unlikely that this antagonism would have been one that he shared). One of the unfortunate consequences of the closing of ranks by police following the massacre is that there is little or no evidence before the Commission on how SAPS members who were at Marikana interpreted and reacted to information about these events.

Responsibility of Lonmin, Cyril Ramaphosa, and the NUM and AMCU

Lonmin

- 89) Issues to do with Lonmin are addressed in several sections notably in the later part of the report
- a) Chapter 24 deals with Lonmin’s housing obligations under the social and labour plan.
 - b) Chapter 20 deals with Lonmin’s lack of concern for the safety of its personnel during the strike. The report argues that this lack of concern was a contributing factor to the deaths of non-striking workers who were killed.¹⁷¹
 - c) Chapter 21 partly focuses on questions to do with what was communicated by Lonmin security to the SAPS during the early days of the strike. This discussion is loosely linked to a discussion about lack of a coordinated response from the SAPS.
 - d) One of the topics dealt with by Chapter 23 are allegations by counsel for the Injured and Arrested Miners that the SAPS served as an agent of Lonmin during the strike (the issue of toxic collusion).¹⁷²

¹⁷⁰ 262,1.2.1

¹⁷¹ 132, 12

¹⁷² 505-510 especially 509, 12.

- 90) The strongest criticisms of Lonmin in the report are probably those relating to its attitudes towards the safety of its employees. Inter alia the Commission says that:
- a) It agrees with the submission by the evidence leaders that 'Lonmin had a duty to ensure that it had adequate security arrangements in place at Saffy, K4, and other shafts to protect workers. Their failure to insist on and ensure heightened security arrangements in view of the intelligence information available to them at the time is inexcusable.'¹⁷³
 - b) 'In the Commission's view, this duty is not [confined] to the shafts, but extends across the board to all their employees. Lonmin's reckless actions in urging employees to come to work in circumstances where they were aware of the potential dangers to them and in the full knowledge that they could not protect them, falls to be condemned in the strongest terms. Lonmin must, in the Commission's view, bear a measure of responsibility for the injuries and deaths of its employees and those of its sub-contractors.'¹⁷⁴
- 91) In addition the report acknowledges that Lonmin's failure to fulfil its obligations under the social and labour plan were contributing factor to the conditions that gave rise to grievance that the strikers were trying to address.
- 92) A neglected issue in the report are questions to do with Lonmin's refusal to negotiate with the strikers. The report does criticise Lonmin for this saying inter alia that 'Lonmin should in the special situation created by Impala's action in unilaterally raising the wages of its RDOs have negotiated with its RDOs and not initially sheltered behind the two year agreement and thereafter insisted it would only negotiate with NUM in which it knew the RDOs had no confidence.'¹⁷⁵
- a) One of the issues here that was deserving of greater scrutiny was the exact role played by government and the SAPS and Lonmin in relation to this issue.
 - b) The SAPS¹⁷⁶ and others such as Joseph Mathunjwa and Bishop Seoka did make a number of attempts to engage with the strikers. Ultimately their final request and demand was to talk to Lonmin management.¹⁷⁷ To the last this was refused.¹⁷⁸
 - c) As highlighted below the evidence is that part of the agenda that Cyril Ramaphosa and Albert Jamieson were trying to advance on Wednesday 15th was one that focused on discouraging negotiation with the strikers. For instance Ramaphosa sought to discourage Mineral and Energy Affairs Minister Susan Shabangu from characterising the conflict as one that should be addressed by management and the unions.
 - d) On the other hand, related to the fact that the strikers were equated with AMCU, Lt General Mbombo also put pressure on Lonmin not to undermine the NUM with the implication being that negotiating with the strikers would contribute to this.¹⁷⁹

¹⁷³ 478, 65

¹⁷⁴ 479, 66

¹⁷⁵ 556, 3-4

¹⁷⁶ Evidence leaders, 253-254

¹⁷⁷ Evidence leaders 254, 507; 347, 666.

¹⁷⁸ Evidence leaders 347-349, 666-673.

¹⁷⁹ See 163, 5 as well as Evidence leaders paragraphs 543.1&2 quoted at 167.

- e) In other words there is evidence showing that on the Tuesday Lt General Mbombo was putting pressure on Lonmin not to negotiate with the strikers (in order to protect the NUM) whilst on the Wednesday, Lonmin (as represented by Cyril Ramaphosa and Albert Jamieson) were also discouraging government from advocating negotiation. One of the puzzling questions is therefore who was ultimately responsible for the Lonmin's intransigence. While on the frontline SAPS members were trying to set up a negotiated resolution to the stalemate behind the scenes these efforts were being undermined not only by Lonmin but by their own bosses.
- f) As noted above (paragraph 28(d)(ii)) in the concluding discussion of 'violence on the part of the strikers' the report says that this may have contributed to the reluctance of Lonmin to negotiate.¹⁸⁰

Cyril Ramaphosa

- 93) One of the key points of focus of counsel representing the Injured and Arrested Persons was on the alleged responsibility of Cyril Ramaphosa for the massacre.¹⁸¹
 - a) The evidence allegedly supporting the allegations that Mr Ramaphosa was responsible for the massacre included that he had telephoned the Minister of Police, Nathi Mthethwa, on the afternoon of Sunday 12th August, as well as email correspondence between him and Mr Albert Jamieson, Lonmin's Chief Commercial Officer on Wednesday 15th August, the day before the massacre.
 - b) The Commission rejected the allegation that Mr Ramaphosa had played a role in authorising the massacre.¹⁸²
- 94) However the report does not argue that Mr Ramaphosa should be seen as being entirely innocent in relation to the course of events. It is likely that the situation could have been defused and that the strikers would have agreed to surrender their weapons had Lonmin not refused to negotiate with them. Mr Ramaphosa was one of those who used his influence to discourage resolution of the dispute through negotiation.
 - a) On this issue the report states that it is in full agreement with the heads of argument of the evidence leaders.¹⁸³ These state in part that: *'It is certainly true that the underlying labour dispute also needed to be addressed. It can be contended that Mr Ramaphosa, as a non-executive director, was insufficiently attentive to the underlying labour dispute. His response to this contention was that this was a matter for management (including Shanduka's representative on the management*

¹⁸⁰ 562, 7.

¹⁸¹ The issue is also discussed in David Bruce. "Marikana Will Always Stalk Ramaphosa." *Mail & Guardian*, June 19, 2015. <http://mg.co.za/article/2015-06-19-00-marikana-shootings-will-always-stalk-ramaphosa>; Ferial Haffajee. "Where Does Marikana Report Leave Ramaphosa?" *News24*, June 26, 2015. <http://www.news24.com/Columnists/Ferial-Haffajee/Where-does-Marikana-report-leave-Ramaphosa-20150626>; Ranjeni Munusamy. "Baggage or Collateral Damage? Marikana and Ramaphosa's Path to the Presidency | Daily Maverick." *Daily Maverick*, July 7, 2015. <http://www.dailymaverick.co.za/article/2015-07-07-baggage-or-collateral-damage-marikana-and-ramaphosas-path-to-the-presidency/#>; David Bruce. "Mthethwa Set the Scene at Marikana." *Mail & Guardian*, July 10, 2015. <http://mg.co.za/article/2015-07-11-mthethwa-set-the-scene-at-marikana>.

¹⁸² 438, 40

¹⁸³ 429, 36

*committee, Ms Ncube) to deal with. We submit elsewhere in this submissions that Lonmin management did not respond adequately to the violently conflictual situation which had arisen. It may well be that the directors, and perhaps particularly Mr Ramaphosa given his background, should have appreciated the need for urgent action to address the underlying labour dispute, and should have intervened actively to ensure that management took such action.'*¹⁸⁴

- 95) Though it is not highlighted in the report another criticism of Mr Ramaphosa may be that his company Shanduka was negligent in relation to labour conditions at Lonmin. According to Ferial Haffajee, Lonmin's 'handling of labour relations is excoriated by the Commission and it is no wonder that the then head of labour relations, Barnard Mokwena, has been quietly retired. ... The deputy president's company, Shanduka, was not only a shareholder in Lonmin but it also provided consultancy services for a healthy monthly retainer. These services ostensibly included labour relations advice and also empowerment training – on both counts, Lonmin failed miserably. Numerous reports show how it was in deficit of its own social and labour plans – these are legal documents mining companies pledge themselves to in return for mining licences. This failure casts a shadow over Ramaphosa.'
- ¹⁸⁵

NUM

- 96) The report strongly criticises the NUM on grounds similar to those on which it criticises Lonmin in relation to the safety of workers during the strike: 'Very much like Lonmin, NUM encouraged employees to report to work with the full knowledge of the intimidation and violence that prevailed during that period. Members of NUM were present at many of the briefings by Lonmin Security, as appears from the Log Book, and could not have been unaware of the seriousness of the incidents of intimidation being reported. Whilst they did attempt to protect and convey some of the employees to and from work, it must have been abundantly clear to them that they did not have the capacity to protect all the employees. Their actions were, in the circumstances, reckless and ill considered.'
- ¹⁸⁶
- 97) In its general summary of its findings in relation to NUM the report also says that: 'NUM did not exercise its best endeavours to resolve the dispute between itself and the strikers. It wrongly advised the RDOs that no negotiations with Lonmin were possible until the end of the 2 year agreement. It did not take the initiative in endeavouring to persuade and enable Lonmin to speak to the RDOs. It failed to exercise effective control over its membership in ensuring that their conduct was lawful and did not endanger the lives of others.'
- ¹⁸⁷
- 98) Issues to do with the confrontation between the strikers and the NUM on the Saturday morning are discussed above. Inter alia this document acknowledges that the NUM

¹⁸⁴ 430-431 quoting evidence leaders 535, 973.

¹⁸⁵ Ferial Haffajee. "Where Does Marikana Report Leave Ramaphosa?" *News24*, June 26, 2015.

<http://www.news24.com/Columnists/Ferial-Haffajee/Where-does-Marikana-report-leave-Ramaphosa-20150626>.

¹⁸⁶ 493, 23 also 558-9, 13.

¹⁸⁷ 558-9, 13

members may have believed that they were in danger though there may not have been a clearly defined 'violent intent' against them (paragraphs 62).

AMCU

- 99) The report states that 'Officials of AMCU did not exercise effective control over its members and those persons allied to it in ensuring that their conduct was lawful and did not endanger the lives of other persons. They sang provocative songs and made inflammatory remarks which tended to aggravate an already volatile situation. The president of AMCU did his best before the shootings to persuade the strikers to lay down their arms and leave the koppie.'¹⁸⁸
- 100) Issues to do with the relationship between the strikers and AMCU are mentioned briefly in this document above (paragraphs 14).

Planning and decision making relating to the police operation on the 16th of August including questions about the role of the executive.

Who made the decision?

- 101) It is now generally accepted that the decision to carry out the operation on the 16th was taken the day before on 15th August. This understanding is linked to the fact that it is now known that the intention to carry out the operation the following day was discussed at an 'extraordinary session' of the National Management Forum (NMF) meeting in Midrand. This session was called together immediately following the main NMF meeting in Midrand that evening.
- 102) It appears reasonable to argue that the report of the Commission, as well as the heads of argument of the evidence leaders are incorrect in relation to how they represent evidence relating to the decision making process.
- a) On page 183 the report states that 'It is now common cause that the decision that the strikers would be forcibly removed from the koppie by the police on 16 August 2012 if they did not voluntarily lay down their arms was not taken by the tactical commanders on the ground at Marikana on that day but rather by Lieutenant General Mbombo and "endorsed" by the SAPS leadership at an "extraordinary session" of the NMF held after its ordinary meeting was over on the evening of 15 August 2012. Some of the members had left but those present apart from the National Commissioner, were all Provincial Commissioners and the Divisional Commissioner for Operation Response Services and the Head of Crime Intelligence.'¹⁸⁹
 - b) The statement is a repetition of a statement made in the heads of argument of the evidence leaders.

¹⁸⁸ 558, 12

¹⁸⁹ 183, 2

- 103) The SAHRC heads of arguments raises the issue of the decision making process at different points. These are somewhat inconsistent with each other:
- a) On page 291 the SAHRC heads of argument state that: 'The decision to disarm the strikers on 16 August 2012 was not taken by the command leadership on the ground on 16 August. It was taken the evening before, on 15 August 2012, at an extraordinary session of the NMF for the SAPS'.¹⁹⁰
 - b) Over page 304-305 they revisit the issue stating that 'The SAHRC will let others argue over whether the order to disarm came from the executive or from the extraordinary session of the NMF.'¹⁹¹ After listing evidence pointing to the involvement of the executive the heads of argument state 'The SAHRC is unable to submit that the order *did* come from the executive, but there is sufficient *prima facie* evidence of this possibility that the Commission must consider it properly. In any case, what is clear is that the order was imposed on the command leadership of the Marikana operation from above.'¹⁹²
 - c) At the very least the latter quoted passages contradict the assertion that it is 'common cause' that the decision was made by the National Management Forum.
- 104) As stated in the SAHRC heads of argument 'The SAPS case for many months' was that the decision to launch the operation on the 16th 'was taken by the command leadership in response to an escalation of the threat from the strikers on the ground.'¹⁹³ Information provided to the evidence leaders however indicated that this was not correct.¹⁹⁴ The evidence leaders received a tip-off that there had been a meeting the previous evening at which the decision was discussed. This advised them to "Call for a copy of the minutes and have a look at item 7".¹⁹⁵
- 105) Item 7, the minute on the extraordinary session says that '*The National Commissioner opened the meeting and requested the Provincial Commissioner North West, Lieutenant Mbombo to brief the attendees on the issue of the labour unrest in Lonmin mine in Marikana, North West. After deliberations the meeting endorsed the proposal to disarm the protesting masses and further indicated that additional resources must be made available upon need identification by the Prov Comm, North West.*'
- a) The minute gives no indication that Lt General Mbombo made the decision but merely that she was asked to brief the meeting about the situation and that a 'proposal to disarm the protesting masses' was endorsed by the meeting. The minute gives no indication as to where the 'proposal' emerged from.
 - b) Referring to a statement made by the National Commissioner under cross-examination the evidence leaders state that 'The terms of the minute appear to have been settled by the National Commissioner herself'.¹⁹⁶ The statement referred to are the words 'I'm aware because I needed to add just a paragraph on what we had

¹⁹⁰ SAHRC 292, 3.1.4.

¹⁹¹ SAHRC 304, 3.3.3.

¹⁹² SAHRC 305, 3.3.4.

¹⁹³ 291, 3.1.2.

¹⁹⁴ Evidence leaders 288-289, 593.

¹⁹⁵ Day 294, page 38679, lines 13-14.

¹⁹⁶ Evidence leaders 289, 594.

done in the extraordinary session'.¹⁹⁷ In relation to the general evidence of evasiveness and dishonesty by the National Commissioner it cannot be assumed that this minute is an accurate representation of what happened at the meeting.

- 106) One of the arguments presented by the evidence leaders in the closing days of the Commission concerns whether the meeting discussed the plans for the operation that was to be carried out the following day. The evidence leaders argue that 'the assembled generals must have been told what the plan was. They could hardly have endorsed a proposal without knowing what it was'.¹⁹⁸ The evidence leaders refer to certain passages from the evidence of the National Commissioner in support of this argument. For instance under cross examination by the Chairperson on the 10th of September 2014, General Phiyega said that General Mbombo 'shared with us what their plans are in terms of disarming the protesters, it was furnished for us to say how do you manage a public order situation where people are armed the way they are armed.'¹⁹⁹ However the meeting could not have actually discussed the plan for the operation in any detail as the detailed plan were only developed, by Colonel Scott, on the 16th of August.
- 107) At a very late stage in its proceedings (on 26 October 2014) the Commission received responses from the SAPS to interrogatories that had been sent to the SAPS members who had been at the Extraordinary Session. In summing up the responses that the Commission received to the nine questions one of the evidence leaders says that, with the exception of one of the eight responses received 'most of them have refused to answer the questions which the Chairperson asked. ... Most of them have not answered those questions. That's a matter for very grave concern that there's simply no answer from most of them to the questions which are asked by the Commission of Inquiry'.²⁰⁰ According to the report of the Commission, two of the SAPS leaders who attended the meeting failed to respond to the questions altogether.²⁰¹
- 108) The only account of what happened at the meeting that is not directly from the National Commissioner or Provincial Commissioner is therefore the reply received from the Provincial Commissioner of the Northern Cape. This states that: "Lieutenant-General Mbombo informed the meeting that there had been a prolonged strike action at Marikana during which people lost their lives. They had received information from Crime Intelligence which indicated that striking employees congregated at Marikana were armed. In order to prevent further loss of life she indicated that an operation was planned to be executed on 16 August 2012. General Phiyega asked Major-General Ngcobo whether the intelligence gathered had been confirmed. Lieutenant-General Ngcobo confirmed that intelligence was gathered that striking mineworkers were armed."²⁰²
- a) It may be noted that according to this summary of what happened at the meeting Lt General Mbombo indicated to the meeting that 'an operation was planned to be

¹⁹⁷ Day 288, 37474, 12-14.

¹⁹⁸ Day 294, page 38679, lines 18-21. See also Evidence leaders, 288, paras 595.3-4

¹⁹⁹ Day 288, page 37414, lines 2-5,

²⁰⁰ Day 274, page 38680, line 18 – page 38681, line 1

²⁰¹ 184, 3

²⁰² Day 294, page 38681, lines 8-19

executed the following day'. This summary does not indicate either that it was Lt General Mbombo's decision or that the meeting 'endorsed' the decision.

- b) This statement is effectively the only independent evidence about what happened at the meeting.
- 109) A principal set of facts that must become part of analysing questions about the decision to launch the operation concern the efforts that have been made to conceal the details of the decision making process. These facts include:
- a) The initial efforts by the SAPS to pretend that the decision had been made on the 16th.²⁰³
 - b) The efforts to conceal the fact that the operation had been discussed at the National Management Forum. This included concealment by General Phiyega and of the decision when they first gave evidence before the Commission.²⁰⁴ The report states further that 'Because she had not mentioned the meeting or the decision the National Commissioner was recalled for further questioning on the point but what she said was singularly unhelpful. She claimed to be unable to remember most of what was discussed.'²⁰⁵
 - c) Evidence indicating that the memory stick with a recording of the meeting is being concealed from the Commission.
- 110) The evidence relating to the concealment of the memory stick is highlighted over a full-three pages of the report.²⁰⁶ The Commission states that it 'is satisfied that those who attended the extraordinary session of the NMF should have been able to tell the Commission the reason or the reasons why the decision to implement the tactical option on 16 August if the strikers did not lay down their arms was taken and the only reasonable inference to be drawn from their failure to do so is that they are hiding something. This inference is fortified to some extent at least by the evidence relating to the missing memory stick.'²⁰⁷
- 111) It would appear reasonable to believe that the decision was not taken by Lt Gen Mbombo or General Phiyega.²⁰⁸ Rather, once the fact that the issue had been discussed at a meeting of the National Management Forum on the evening of 15th August was exposed the approach adopted by the SAPS was to present this as a decision that was taken by Lt General Mbombo and endorsed by the meeting. However the best reading of this information would be that the decision had been taken prior to the 'extraordinary session' of the NMF on the evening of the 15th.
- 112) It is reasonable to believe that the Minister of Police, Nathi Mthethwa, was central to this decision making process. The Commission itself acknowledges that this is

²⁰³ See Evidence leaders 299-297, 599

²⁰⁴ 185, 6

²⁰⁵ 186, 7

²⁰⁶ 449, 68 – 452, 72. See also Greg Marinovich. "Marikana's Deep Throat: Charge Brigadier Malahlela, Unravel Police Lies and Deceit." *Daily Maverick*, July 20, 2015. <http://www.dailymaverick.co.za/article/2015-07-20-marikanas-deep-throat-charge-brigadier-malahlela-unravel-police-lies-and-deceit/#>

²⁰⁷ 452, 73

²⁰⁸ David Bruce. "Mthethwa Set the Scene at Marikana." *Mail & Guardian*, July 10, 2015. <http://mg.co.za/article/2015-07-11-mthethwa-set-the-scene-at-marikana/>.

possible. It states that it is 'not able to find that what Mr de Rover²⁰⁹ called "the guidance of the executive", was not one at least of the factors on which the decision was based. If guidance of the executive played a role, then it is probable that such guidance was conveyed to the NMF by Minister Mthethwa.'²¹⁰

- 113) One aspect of the evidence that speaks to this issue is also the evidence of Mr. de Rover that he had been informed of the NMF decision by a third party and that both Major General Mpembe and Major General Annandale had confirmed to him that the information was true prior to 8 March 2013. He also confirmed that both Mpembe and Annandale believed the decision to have come from the executive.²¹¹

Legal implications for the decision makers and operational commanders

- 114) It is therefore apparent that someone decided, apparently on the 15th of August, that the strikers had to be removed from the koppie the following day, irrespective of the consequences. It is argued here that it is most likely that this 'decision' took the form of a directive of some kind that was communicated to the National Commissioner by Minister Mthethwa.²¹²

- 115) After it became apparent that the operation had been the subject of a discussion at the NMF, an attempt was made to pass this off as a proposal that had been put forward by Lt General Mbombo and endorsed by the 'extraordinary session'. However it is most likely that the decision was presented to the NMF as a *fait accompli*. In so far as protocol may have required the NMF to endorse the decision (something not mentioned by the Provincial Commissioner of the Northern Cape) this would have been a formality or 'rubber stamp'.

- 116) Even if one takes this to be the most likely scenario, it obviously is not clear what exactly may have been communicated by Minister Mthethwa to the National Commissioner. But it seems reasonable to assume that the message was to the effect that there should be no further delay in taking action against the strikers. It is reasonable to assume that the National Commissioner communicated this to Lt General Mbombo who then became responsible for putting this instruction into effect.

- 117) However while this is the most likely scenario the current SAPS version is that the decision was put forward in the form of a proposal by Lt General Mbombo to the NMF 'extraordinary session' and endorsed by those present. On this version, which is that admitted to by the SAPS, those who are responsible for the decision are arguably those who were present. According to the report those present were the National Commissioner, all Provincial Commissioners and the Divisional Commissioner for Operation Response Services and the Head of Crime Intelligence.²¹³

- a) The heads of argument of the SAHRC and the Evidence Leaders both suggest that those present included the Deputy National Commissioner for Operations and the

²⁰⁹ A Dutch policing expert appointed by the SAPS as an expert witness.

²¹⁰ 452, 74

²¹¹ SAHRC, 292

²¹² See the discussion of Minister Mthethwa's role, 439-453, especially the evidence of Mr de Rover.

²¹³ 184, 2

heads of argument of the SAHRC also suggest that it was not all Provincial Commissioners.²¹⁴

- 118) Whether the decision was endorsed by the NMF or not however, once the NMF was completed the person who had overall responsibility for giving effect to the decision was Lt General Mbombo. The report states that 'It is clear that Lieutenant General Mbombo foresaw there was a high risk of bloodshed if [the]²¹⁵ decision were implemented during the course of 16 August 2012.²¹⁶
- 119) The report refers to the following as direct evidence that the commanders who were involved in giving effect to the decision recognised the likelihood of bloodshed includes:
- a) The transcript of a debriefing meeting that Major General Mpembe had with Senzeni Zokwana, then the NUM President, on the Wednesday evening, (roughly at the same time as the NMF meeting) in which he stated that an operation to disarm the miners on the koppie would lead to bloodshed.²¹⁷
 - b) The fact that either Brigadier Calitz or Colonel Merafe ordered 4000 additional rounds of R5 ammunition for delivery to Marikana.²¹⁸
 - c) The fact that four mortuary vans were ordered.²¹⁹
- 120) Though the report does not state this explicitly the significance of these points is not just that the individuals who took these steps recognised the likelihood of bloodshed but that it was generally apparent to the SAPS commanders that the operation was in effect a choice to engage in a confrontation with the miners that was likely to be bloody. The nature of the policing units that were involved, and the way in which they are armed, itself demonstrates this point as do the details of the plan that was developed by Colonel Scott.
- 121) On the basis that the likelihood of death and injury could have been foreseen it is therefore in theory possible that those who authorised the operation could be prosecuted for culpable homicide or even, on the basis of the principle of *dolus eventualis*, for murder or attempted murder. In relation to these issues for instance the heads of argument of the evidence leaders argue that:
- a) Those who attended the extraordinary session 'must be held partially responsible for the 34 deaths on 16 August' on the basis that the decision was made, or endorsed by them.²²⁰ However they later argue that 'it is unlikely that this decision would be held to be a legal cause of the deaths of 16 August 2012.²²¹
 - b) IPID should be invited to investigate whether Lt Gen Mbombo should be held criminally liable for the deaths at scene 1 and scene 2 related to the fact that the order to implement the operation was issued by her on the afternoon of 16th August

²¹⁴ Evidence leaders 294, 599.4; SAHRC, 293, d.

²¹⁵ The words used in the report are 'her decision'.

²¹⁶ 193, 4

²¹⁷ 181, 2 – 182, 4 and 194, 5; SAHRC 297, 3.2.6 – 300, 3.2.10.

²¹⁸ 194, 5

²¹⁹ 194, 5

²²⁰ Evidence Leaders 635, 1181.

²²¹ EL 683, 1315

and being aware of the deficiencies in the plan, she failed to postpone the operation.²²²

Breach of the McCann principle

122) The report itself does not make any specific recommendation for investigation with a view to potential prosecution of decision makers or Lt General Mbombo as overall commander of the operation. However the report refers to what it calls ‘the McCann principle, which ‘requires the planners of policing operations where force may possibly be used to plan and command the operations in such a way as to minimise the risk that lethal force will be used’.²²³

- a) The report indicates that the principle is part of South Africa law both because it has been recognised as part of South Africa law by the courts²²⁴ but also because it is provided for in section 13(3)(a) of the SAPS Act. This states that police may only use “the minimum force which is reasonable in the circumstances”.²²⁵
- b) The report says that the decision to launch the operation breached the McCann principle:
 - i) On page 448 it says ‘The decision to implement the “tactical option” on the 16th of August at a time when a large number of armed strikers were present at the koppie was unreasonable and unjustifiable.²²⁶
 - ii) On page 521 it says ‘Put simply: a decision to implement a plan to use more force on Thursday than would probably be required on Friday will, in the absence of compelling circumstances requiring action on Thursday, be an illegal decision.²²⁷
- c) The report does not identify what the implications of this illegal decision are. For instance it is not clear what if any charges may be lodged against a person who is alleged to have acted illegally in this manner. However on the basis of the reports assertion that it is ‘common cause’ that Lt General Mbombo made the decision, the implication would appear to be that she would be the first person liable to be investigated for this illegal decision.
- d) Beyond Marikana itself the report is of major importance in relation to question of the use of force by police because it confirms the McCann principle as part of South African law.

123) The recommendation that General Phiyega and Major General Mbombo (now retired) should be subject to an inquiry into their fitness to hold office is related to their alleged complicity with alleged misrepresentations to the Commission made by the SAPS, and them personally. It is therefore not related to arguments that they may be regarded as responsible for the deaths and injuries that occurred on the 16th.

²²² EL 683,684, 1317-1319 and 686, 1327-8.

²²³ 522, 5

²²⁴ 34, 5.7 - 40-41, 5.19

²²⁵ 521,3

²²⁶ 558, 10

²²⁷ 521, 4

Other questions about culpability of commanders

- 124) In addition to questions about the culpability of shooters (discussed below in relation to scene 1 and 2) there are questions about the culpability of operational commanders.
- a) On this point the heads of argument of the evidence leaders argue that Brigadier Calitz who was the operational commander at Scene 1 should also be investigated in relation to whether he could and should have acted to prevent the deaths at scene 1.²²⁸
 - b) They also state that Major General Mpembe and Major General Annandale were overall commander and de facto overall commander respectively at Scene 2. They both denied that they knew about the scene 1 shootings though the evidence leaders argue that this is patently untrue.²²⁹ The implication is that, knowing that the operation had already led to casualties they would have realised that there were likely to be more casualties. Accordingly they should have stopped the operation before the shootings at scene 2. Accordingly the evidence leaders argue that 'IPID should be invited to investigate this issue and to decide whether Maj Gen Mpembe and Maj Gen Annandale should be held criminally liable for the deaths at scene 2.'²³⁰
- 125) The report discussed in some detail the assertions by the various commanders that they did not know about the deaths at scene 1 when they allowed the operation to go ahead. It consistently rejects these though in some cases more emphatically than in others.²³¹ The report does not address issues about the implications of the fact that the commanders knew about the deaths at scene 1 but failed to stop the operation.
- 126) As discussed further below it recommends 'a full investigation, under the direction of the Director of Public Prosecutions, with a view to ascertaining criminal liability on the part of all members of the South African Police Services who were involved in the events at scene 1 and 2.'²³²
- a) Such an investigation would potentially also cover questions to do with the culpability of operational commanders.
- 127) As noted below there are recommendation in the body of the report for Major General Naidoo to be investigated. These do not related to his failure to intervene to stop the operation despite being the senior officer at scene 2 though, in the course of events, he was the senior officer at the scene.²³³ Instead they relate to delays in providing medical attention to injured people and to his use of lethal force at scene 2.

Whether the strikers attacked police at scene 1 and whether the police shooting at scene 1 was justified

²²⁸ EL 684, 1321.

²²⁹ EL 687, 1331

²³⁰ EL 686, 1330. Also 427, 780 – 431.787.4

²³¹ 262-268.

²³² 546, b

²³³ 312, 10-11

Deaths and injuries at Scene 1

128) On page 208 the report provides a list of the deceased at scene 1. The list omits the name of Mr Mdze. Mr Mdze is referred to as one of those who was killed at scene 1 on page 259 of the report²³⁴ but is not included in this list. The omission may be related to the fact that this list was compiled using an exhibit that does not include all of those who died as a result of injuries sustained at scene 1²³⁵ and that Mr Mdze did not actually die at the scene but died later in hospital as a result of his injuries.²³⁶ There were in fact 17 people killed at Scene 1.

129) One of the features of the report is that there is very limited attention paid to questions about people who were injured including any consideration of questions about the number of injured. Those injured included people who suffered permanent disabilities as a result of the shootings at scene 1 and scene 2. A figure that is referred to in a SAPS statement issued on the 17th August is that 'more than 78' were injured in the overall operation.²³⁷ Apart from a passing reference to one report of 28 injured at scene 1²³⁸ the report itself does not provide any greater detail than this on the scale of injuries either at scene 1 or scene 2 or at the two scenes combined.

- a) The Commission does however make a recommendation relating to the provision of first aid to those who are injured in police shootings.²³⁹ It appears that this recommendation is motivated by the evidence that at least some of those who were injured in the shootings would have survived if medical attention had been provided to them more promptly.²⁴⁰
- b) As indicated by the account of the circumstances of Mr Mdze's death in the heads of argument of the evidence leaders it is likely that he would have survived if basic medical attention had been provided to him relatively promptly after the shooting.²⁴¹
- c) On this issue the Commission also recommends that 'the circumstances surrounding the delay caused by Major General Naidoo' in relation to the provision of medical attention 'should be forwarded to the Director of Public Prosecutions for further investigation to ascertain whether there is a basis for prosecution.'²⁴² (This paragraph in the report should refer to the provision of medical attention at scene 1 rather than scene 2)²⁴³.
 - i) This recommendation is omitted from the final list of recommendations regarding investigation with a view to possible prosecution.²⁴⁴

²³⁴ 259, 45.

²³⁵ Exhibit O. The SAPS heads of argument also omit Mr Mdze's name in a paragraph listing those killed at scene 1 (74, 177).

²³⁶ Evidence leaders 446.

²³⁷ 395, 9

²³⁸ 320, 5

²³⁹ 552-553

²⁴⁰ 321, 9

²⁴¹ Evidence leaders 442-446. Also SAHRC, 485, 1.1.3 – 486, 1.1.5.

²⁴² 321, 11

²⁴³ See EL, 685, 1324.

²⁴⁴ 543-547.

- 130) Those killed at scene 1 may be differentiated into roughly three groups related to the place where they were shot:
- a) The group that was running towards the TRT line are sometimes referred to as “Mr Noki’s group” or the “the 11/12 leading strikers”.
 - b) A second group, described as “the kraal edge group”, were piled up together near the entrance to the kraal.
 - c) The third ‘group’ may be understood as composed of the four (Mr Ledingoane, Mr Mtshazi, Mr Nqongophele and Mr Gwelani) who were killed in different places a significant distance away from the scene.²⁴⁵
- 131) At least one of those killed at scene 1 (Mr Gwelani) was not an employee at Lonmin and was not part of the strike and clearly also not armed. It is not apparent if there is clear information anywhere as to what degree the others killed or injured at scene 1 formed part of the ‘core’ or ‘militant’ group. In addition to Mr Noki one of those on whom there is information on this point is Mr Ntsenyeho. He appears to have been part of the core group as he gave some of the speeches on behalf of the group. Though he expressed the willingness to die his speeches were not aggressive and he was not armed when he was killed at scene 1.²⁴⁶
- 132) The issue about whether the strikers were in the process of attacking the SAPS and therefore posed an immediate danger to them is essentially only relevant to the first of these groups. On this point the report quotes the statement from the evidence leaders that ‘There was a significant gap between the lead group of strikers approaching the TRT line and those behind them [i.e. the kraal edge group]. So whatever intention the 11/12 leading strikers may have had, the strikers behind them posed no imminent threat to the SAPS.’²⁴⁷
- 133) The report also refers to the four people (Mr Ledingoane, Mr Mtshazi, Mr Nqongophele and Mr Gwelani) who were amongst the dead at scene 1 but were actually a significant distance away from the scene and who ‘could not possibly have been perceived as presenting an imminent risk to the safety of anyone else’.²⁴⁸ Two of them were 45 metres away from the TRT line when they were killed whilst another was 250 metres away.²⁴⁹

The people killed and injured by SSG pellets²⁵⁰

- 134) Virtually all discussions of the killings at scene 1 focus on the actions of the line of TRT members who shot at the group of strikers running towards them. However the

²⁴⁵ 261, 50; Evidence leaders 403, 749.3 and 404, 751 – 407, 694. The heads of argument of the families omit Mr Ledingoane from their discussion of the third ‘group’ (Families 273, 352 – 280, 372) though this is possibly an oversight as he is included in a discussion of this group in their replying heads of argument that are appended at the end of their heads of argument (Families replying heads of argument 20, 36.).

²⁴⁶ Evidence leaders, 384-387, 727.

²⁴⁷ 247 quoting EL 732, 9.

²⁴⁸ 262, 52.

²⁴⁹ 261-2, 50-51.

²⁵⁰ SSG pellets are a type of ammunition used in shotguns. Shotgun pellets are broadly differentiated as being either ‘birdshot’ or ‘buckshot’. SSG are a type of buckshot. The abbreviation stands for ‘special small game’. Shotguns are also used to shoot rubber bullets.

report shows that there were four strikers in the kraal edge group who were killed (Mr Yawa, Mr Mdze, Mr Yona and Mr Tukuza) and three who were injured²⁵¹ by SSG shotgun pellets that were fired from a position to their left.

- a) The report says: 'The kraal was on their right hand side and the injuries were all on the other side, i.e., their left hand side. This was the side where, apart from strikers and journalists, members of the SAPS were to be found. There is no evidence to suggest that any Lonmin security officers were there.'²⁵²
- b) Later it says that the pellets 'were clearly fired from the left hand side of the victims, near the fenced area containing the shack, where the SAPS vehicles were parked.'²⁵³ The report rejects a suggestion by Maj General Naidoo that the shotgun pellets were fired by strikers²⁵⁴ and says there is no evidence to support a suggestion that they were fired by Lonmin security guards.²⁵⁵
- c) Though the point is not addressed it appears that this shooting must have been simultaneous or virtually simultaneous with the shooting by the TRT line.
- d) Putting aside SAPS denials to this effect, there appears to be no reason to doubt the SSG ammunition was fired by one or more members of the SAPS.²⁵⁶ The SAPS only admitted to the use of R5 and 9mm ammunition at Marikana and denied using SSG ammunition (shotguns are also used for firing rubber bullets). Shot gun pellets are supposed to have been withdrawn from operational use by SAPS members 'although they were still being used for target shooting practice and were thus still available at various SAPS police stations.'²⁵⁷
- e) The fact that police had used SSG ammunition during violent protests in Mothutlung near Marikana in January 2014, a year and a half after Marikana, was admitted to by Minister Mthethwa.²⁵⁸
- f) The SAHRC heads of argument indicate that the evidence shows that SSG pellets were also used at scene 2.²⁵⁹ The SAHRC heads of argument refer to 'The point-blank refusal to accept that SAPS members may have fired SSG ammunition at scenes 1 and 2, and the failure to conduct any investigation into its use, despite clear evidence to the contrary' and describe this as a manifestation of the SAPS 'culture of denial'.²⁶⁰

²⁵¹ Mr Fantoso, Mr Tikimana and Mr Hlungulwana (Evidence leaders 395, 734.1-3

²⁵² 260, 45 and more generally 259, 45-261, 49; Evidence leaders 395, 734 – 399, 743.

²⁵³ 260, 48.

²⁵⁴ 260, 48.

²⁵⁵ 261, 49.

²⁵⁶ I don't know if the ballistic evidence offers any clues as to how many SSG shooters there may have been.

²⁵⁷ 259, 47.

²⁵⁸ SAPA. "Wrong Ammo Used at Mothutlung Protest: Mthethwa." *TimesLIVE*, January 24, 2014.

<http://www.timeslive.co.za/politics/2014/01/24/wrong-ammo-used-at-mothutlung-protest-mthethwa>.

²⁵⁹ SAHRC 459, e.

²⁶⁰ SAHRC, 115, 1.10.9.

The shooting by the TRT line and legality thereof

135) Some of the deaths and injuries in the 'kraal edge group' were therefore the result of the shotgun fire. All the other deaths (13) and injuries were as a result of the shooting by members of the TRT line. Those killed by the TRT line were:

- a) Mr. Michael Mgweyi;
- b) Mr. Patrick Akhona Jijase;
- c) Mr. Andries Motlapula Ntsenyeho;
- d) Mr. Mzukisi Sompeta;
- e) Mr. Jackson Lehupa;
- f) Mr. Mongezeleli Ntenetya;
- g) Mr. Thobisile Zibambeke;
- h) Mr. Mgcineni Noki;
- i) Mr. Khanare Elias Monesa;
- j) Mr. Bongani Nqongophele;
- k) Mr. John Kutlwano Ledingoane;
- l) Mr. Babalo Mtshazi;
- m) Mr. Thembinkosi Gwelani;

136) On the shooting at scene by the TRT some factual information provided is that:

- a) According to the report members of the TRT and one member of the POP (W/O Kuhn) fired all the shots at scene 1.²⁶¹ At one point the report states that 53 police officers fired R5s at scene 1²⁶² whilst at another it says there were 48 (47 TRT members and WO Kuhn) who fired.²⁶³
- b) According to the SAPS 328 rounds of live ammunition were fired at scene 1.²⁶⁴ The shots fired included shots from 9mm and R5 weapons. (During the cross examination of one of the shooters the number of shots fired by TRT members is said to be 57 9-millimetre rounds and 233 R5 rounds, a total of 290).²⁶⁵
- c) There is contention over the exact duration of the shooting but it is understood to have lasted for a minimum of eight and maximum of twelve seconds. (There is also an acoustic analysis suggesting that guns were fired up to a minute after the first bullets were fired though this evidence is not discussed in the report).²⁶⁶
- d) The heads of argument of the SAHRC indicate that there were roughly 60 TRT members in the line.²⁶⁷

²⁶¹ 558, 11

²⁶² 516, 2

²⁶³ 249, 29

²⁶⁴ 255, 6

²⁶⁵ Day 229, Capt Loest, p 28406

²⁶⁶ SAHRC, 380, 7.1.15.

²⁶⁷ SAHRC 373, 7.1.3 and following.

- 137) Over pages 233-247 the Commission quotes in full a discussion from the heads of argument by the evidence leaders which attempts to assess whether there was an intention by some or all of the group of strikers who were approaching the TRT line to attack members of the SAPS. Essentially the evidence leaders argue firstly that it is inappropriate to treat the group of people who were killed in an undifferentiated way.²⁶⁸ In relation to whether some of them may have intended to attack police members the evidence leaders argue that the evidence is contradictory²⁶⁹ with evidence for and against being detailed by them.²⁷⁰
- a) It may be noted that the Heads of Argument of the SAHRC argue on the other hand that 'the overwhelming probability is that the strikers were not attempting to attack the police when they moved towards the TRT line at scene 1.'²⁷¹
- 138) One addition to the evidence presented by the evidence leaders is that the report presents considerable more detail than do the evidence leaders²⁷² regarding an attack by some of the strikers on one of the Nyalas 'on the northern end of small kraal'.²⁷³
- 139) The Commission agrees with the overall position taken by the evidence leaders on the question of the intentions of members of the group. The report states that 'It is in the circumstances not necessary to decide whether they were actually facing an attack, an issue in respect of which there are arguments of great cogency on both sides.'²⁷⁴
- 140) In addition, the Commission endorses the argument by the evidence leaders 'that the TRT members (and Warrant Officer Kuhn) had reasonable grounds for believing they were under attack in circumstances which justified them in defending themselves and their colleagues.'²⁷⁵
- a) It may be noted that the evidence leaders refer to this point at different points in their heads of argument.²⁷⁶ However the most refined statement of their argument on this point would appear to be that: 'the *first members* of the TRT to fire at the approaching strikers would have had reasonable ground for believing that they were under imminent threat of violent attack. They would thus have had a case of putative self-defence if they fired in a manner which was calculated to stop the putative attack without creating an unnecessary risk of killing the strikers.'²⁷⁷ (emphasis added).
- 141) The reference by the evidence leaders to the *first members of the TRT* who fired at the strikers is highly significant. Though it is not stated in the report in exactly these terms the argument would appear to be that shooters at scene 1 who started shooting when the strikers seemed to be attacking, because they believed they were being

²⁶⁸ EL, 383-388

²⁶⁹ EL 388, 730.

²⁷⁰ Evidence leaders, 389-393.

²⁷¹ SAHRC, 363, 6.1.1.

²⁷² Evidence leaders 390-1, 731.9

²⁷³ 214-222.

²⁷⁴ 248, 28

²⁷⁵ 248, 28

²⁷⁶ See also Evidence leaders 388, 729 and 394, 733.

²⁷⁷ EL 399, 744

attacked by the strikers *and* who stopped shooting relatively quickly may be regarded as having acted lawfully related to:

- a) The fact that it was reasonable for them to believe that the strikers were attacking them; and
- b) That they did not 'exceed the bounds of self or private defence'.

142) As the report summarises the evidence on this point:

- a) It is apparent from the video material that three strikers fell in the first three seconds of the volley and thus after that stage no conceivable threat existed.²⁷⁸
- b) 'Also during the first four seconds an appreciable number of shots were fired as warning shots, into the ground, some possibly into the air, others certainly into the ground in front of the advancing strikers.' As a result of this a dust cloud arose four seconds from the beginning of the volley which made it impossible for the TRT members to see what was happening.²⁷⁹
- c) By this time it appears that all of the front group of 10/11 strikers had either fallen down or turned around before the dust cloud obscured them.²⁸⁰
- d) It is common cause that some members went on firing multiple rounds for at least another four seconds after this.²⁸¹

143) As indicated above the Commission has accepted the argument of the evidence leaders that 'the TRT members (and Warrant Officer Kuhn) had reasonable grounds for believing they were under attack in circumstances which justified them in defending themselves and their colleagues'.²⁸²

- a) This is likely to mean, if they were to be charged for murder, SAPS members who fired, particularly if they only fired during the initial four seconds (during the period when it was reasonable to believe that there was a threat), would merely have to state that they did believe that they and/or their colleagues were under threat.
- b) If the evidence relating to each shooter were to be analysed legally the case would then revolve around whether they continued shooting after a point at which they could not reasonably claim they there was a threat

144) It is likely that the shooting at scene 1 was not purely the result of the 47 or 53 shooters believing that they were under threat.

- a) Under cross-examination Mr. de Rover confirmed his view that some members at Scene 1 were firing simply because others did.²⁸³ His statement says that 'Due to police training, conditioning and indoctrination, discharge of a firearm by one police officer against a perceived threat to life or serious injury, may well trigger support fire from officers at the scene, without they themselves at that stage having fully

²⁷⁸ 255-256. 36.

²⁷⁹ 255-256. 36.

²⁸⁰ 255-256. 36.

²⁸¹ 255-256. 36.

²⁸² 252, 31

²⁸³ SAHRC, 380, 7.1.14.

perceived the threat themselves. “My colleague is under attack, my duty is to back him/her up, in order to protect his/her life”.²⁸⁴

- b) According to de Rover this phenomenon is known as ‘associative threat presumption’. However it appears reasonable to believe that when there is a line of 60 police officers, many of them armed with assault rifles, facing a smaller group of men armed with spears and pangas, the reasons for firing may not be limited to the perceptions of threat or ‘associative threat presumption’. For instance if 20 or 30 of one’s colleagues are already firing one may imagine some police also shooting on the basis of a concern that they might be punished or ostracised for not taking action when others were doing so.
 - c) At one point the SAPS itself argued that ‘officers will stop firing only when they hear a call for ceasefire.’ The SAHRC argues that this is ‘what in fact happened at Marikana. Officers continued shooting until they heard a call for ceasefire, irrespective of whether they continued to perceive an imminent threat.’²⁸⁵
 - d) The key points that emerge from this then are both that:
 - i) Some of the shooters are likely to have started shooting because their colleagues were shooting rather than because they actually identified a threat.
 - ii) Some of the shooters only stopped shooting when they were told to stop shooting rather than at the point when they could no longer identify a threat.
- 145) In order to justify their actions in terms of the law all of the SAPS shooters will inevitably try to motivate their shootings in terms of claims that they believed that they or their colleagues were in danger. This means that the truth of what happened at scene 1 may never come out. There is broadly a spectrum represented by two possibilities:
- i) The one possibility is that most, or even all, of the SAPS members in the TRT line genuinely believed they were facing an imminent danger when they started shooting.
 - ii) The other possibility is that one of the members in the line, believing that they were under attack, fired a warning shot and that all of the other shots that were fired after this point were fired by members who shot ‘because others did’ rather than because of any genuine belief by any of the shooters that they were under attack.
 - iii) It is likely that what actually happened lies somewhere between these two possibilities.
 - iv) These scenarios also only address questions about why members started shooting and do not address questions about the duration of shooting, members who had their guns on automatic mode, or who fired a large number of shots.
- 146) The information presented that there were about 60 shooters in the line and either 47 or 53 who discharged their firearms also suggests that there were a very small number of members in the line who did not shoot. (Unless the figure of roughly 60 TRT members is an overestimate).

²⁸⁴ De Rover statement (initial), para 72 (p 17) – see also 77

²⁸⁵ SAHRC, 379-380, 7.1.13.

- 147) A point referred to in the report²⁸⁶ but articulated more clearly by the evidence leaders is that the initial shots fired by some TRT members were warning shots that were fired at the ground. However there was no time for the strikers to respond to the warning as other TRT members started shooting directly at them - the time difference between the warning and subsequent shots is approximately 1 second.²⁸⁷ (However the evidence leaders also appear to say that TRT members who shot directly at the strikers instead of initially firing warning shots were not necessarily unjustified in doing so 'due to the speed within which the TRT members were confronted with the putative attack'²⁸⁸).
- 148) In addition to concerns that some of the TRT members continued firing after a point at which they might reasonably be regarded as having been justified in doing so other concerns raised by the report in relation to the shootings include that:
- a) Though some TRT members seem to have directed their gunfire towards the legs of the approaching group others were aiming at head and chest height.²⁸⁹
 - b) At least three of the TRT members at scene 1 fired their guns in automatic mode.²⁹⁰
- 149) In so far as the last two points (regarding the height at which fire was directed and firing on automatic mode) implicate TRT members who were amongst the people who only shot within the first four seconds, this may also affect evaluation of whether they exceeded the bounds of self or private defence.
- 150) The report states that none of the statements provided by the shooters at Scene 1 'gives the details required to enable one to say that each shot by the shooters was justified.'²⁹¹
- 151) It states that 'It appears prima facie that some of the SAPS members who fired at the strikers at scene 1 exceeded the bounds of self and private defence. The principle that only the minimum amount of force reasonable in the circumstances should be used was not complied with.'²⁹²
- 152) In relation to the TRT members who fired their weapons at Scene 1 the report's main recommendation is that: The Commission does not believe that it would be appropriate to draw an adverse inference against all those fired their weapons at scene 1. It accepts that some in all probability did not exceed the bounds of self and private defence. It is for this reason that it has decided to refer the whole question as to whether any of the shooters at scene 1 exceeded the bounds of self or private defence to the DPP of the North Western Province with the recommendation that he cause investigations to be made by IPID under the direction of a senior member of his staff as to whether there is a prima facie case against any of the shooters and then for him to consider whether to institute any criminal proceedings.²⁹³

²⁸⁶ 257, 38

²⁸⁷ Evidence leaders 399, 745 and following

²⁸⁸ EL, 402, 747.

²⁸⁹ 257, 39-40.

²⁹⁰ 258, 41. Also SAHRC, 376, 716.

²⁹¹ 517, 4.

²⁹² 558, 10

²⁹³ 518, 6

- 153) Though it was not able to clarify these questions itself the report seems to suggest that an investigation by the IPID can create greater clarity around identifying which, if any, of the TRT members at scene 1 may be regarded as having exceeded the bounds of self and private defence. As suggested by the above outline of points relating to the killing at Scene 1 this would appear to be a task of daunting complexity.
- 154) An additional point is that, if any SAPS members were to be prosecuted it would in theory only be possible to convict them of attempted murder for killings at Scene 1. As the report says 'The evidence indicates that R5 bullets tend to disintegrate when entering the body of a victim. This is what happened at Marikana. As a result it is not possible on the ballistic evidence to connect any member who shot at Marikana with any person who died. In the case of certain shooters there is prima facie evidence that the members concerned may well have been guilty of attempted murder but it cannot be said that any shooter is guilty of murder because it cannot be shown which of the shooters actually killed anyone. In the case of those shooters who exceeded the bounds of self- or private defence, the most they can be convicted of is attempted murder.'²⁹⁴

Systemic issues raised by the shooting at Scene 1

- 155) Arguably however it is a mistake to regard the principles issues raised in relation to the killings by the police at scene 1 as issues of individual culpability. As scene 1 demonstrates the deployment of 60 police officers, most of them armed with assault rifles, is essentially a recipe for grossly excessive force to be used against any threat, real or perceived.
- 156) The TRT line at scene 1 was in effect a badly maintained killing machine that was activated by the (arguably reasonable) perception of one or more of its members that they were under attack. The shooting may be understood as a product of:
- a) The standards that were applied in the recruitment and training of those in the line.
 - b) The approach adopted in training TRT members around the use of firearms.
 - c) The arming of TRT members across the board with R5 rifles – some of the evidence provided to the Commission regarding the consequences of the use of R5 rifles is summarised in the heads of argument of the families.²⁹⁵
 - d) The policy of deploying the TRT in 'crowd management' operations.
 - e) The 'tactic' that was used by the SAPS at Marikana of deploying the lethally armed TRT members in what is referred to as the basic line. As the Northern Irish policing expert says Gary White says: *[The operation was planned] so that a large crowd of people would very likely be confronted by not one, but two consecutive lines of police officers, with the front line made up of c.60 members armed with lethal weapons, each of whom had discretion to fire live ammunition whenever an imminent threat was perceived. The decision to configure the tactical units in a 'baseline' walking towards the protestors in my view represents a reckless attitude with regards to the potential for the use of lethal force and indeed the duty of care in respect of the safety of the officers. This configuration that the SAPS implemented may explain why*

²⁹⁴ 258, 42.

²⁹⁵ Families, 248, 335 – 250, 335.3

more than 300 live rounds were fired and why the “funnel” of fire indicated on slide 209 of Exhibit L is so wide.”²⁹⁶

- 157) It was ultimately the combined effect of these policies that created the 8 to 12 second ‘funnel of fire’²⁹⁷ at scene 1 at Marikana. The barrage of gunfire by the TRT members extended well beyond the front group of strikers (‘Mr Noki’s group’) who were believed (by some of the TRT members) to be attacking them. This funnel of fire also killed and injured others who posed no threat to the TRT line including some members of the ‘the kraal edge group’ (some people in this group on the other hand were victims of SSG pellets) and others in the area.
- 158) A discussion by the evidence leaders of ‘expert policing issues’ is referred to by the commission with approval,²⁹⁸ and quoted in full.²⁹⁹ This discussion endorses:
- a) The recommendation by Northern Irish policing expert Gary White that it is far preferable to designate ‘particular members of the unit or the line as having responsibility for identifying particular members of a crowd who are a threat to life, and giving them the responsibility of dealing with that.’³⁰⁰
 - b) The removal of R5 from crowd control³⁰¹
- 159) The final recommendations of the commission on these issues is that they be referred to a ‘panel of experts’.³⁰²
- 160) Arguably the implications of the Marikana massacre go beyond this and suggest the need for a more comprehensive review of TRT, and other ‘tactical’ units (notably the NIU and K9 unit) implicated in the massacre.
- a) There is no evidence that any one was killed or injured by the Special Task Force (STF), the other ‘tactical unit’ that was deployed at Marikana.

Whether the 17 killings by police at scene 2 were justified

- 161) After the killings at scene 1 some of the miners who had been assembled at koppie 1 fled towards – or in the police version retreated and regrouped at – a smaller koppie about 500 metres away from scene 1. This came to be referred to as ‘scene 2’ at the Commission but is also referred to as ‘koppie 3’. The killings at koppie 3 happened in a period that started at about 16h08,³⁰³ about 15 minutes after the shooting at scene 1 (which started at 15h53.50). The shootings at scene 2 took place over a longer period of time (possibly up to about 10 or 15 minutes).
- a) Photographs and maps showing the location of scene 2 in relation to scene 1 as well as the location of the bodies at scene 2 can be found in an online feature about

²⁹⁶ SAHRC, 374. See also paragraph 1064 of the evidence leaders heads of argument at page 366 in the report.

²⁹⁷ 262, 51

²⁹⁸ 348, 21

²⁹⁹ 348, 21 – 387.

³⁰⁰ 366, 1064 and more generally 364-366.

³⁰¹ 355-356

³⁰² 549, 8

³⁰³ Familes 379-380, 562.4.2; SAHRC 469, 2.4.5.

Marikana by Niren Tolsi and Paul Botes that was originally published in the Mail and Guardian.³⁰⁴

- b) Mr Mohai, Mr Sagalala, and Mr Ntsoele died on their way to hospital³⁰⁵ explaining why they are not listed in the photograph that maps the location of bodies at scene 2 in this feature.
- 162) The evidence shows that there were three groups of police involved in the shootings at scene 2:³⁰⁶
- a) A group of TRT members under Captain Kidd who moved towards koppie 3 from Forward Holding Area 2 (FHA 2) on the west side of the koppie.
 - b) A group of K9 unit members with Major General Naidoo who arrived at koppie 3 'in an arc from the south to the east'.
 - c) A group of NIU members who arrived at koppie 3 from the east side. The discharge report indicates that the NIU members 'ended up shooting 115 rounds of live ammunition at scene 2, of which 103 were R5 rounds.'³⁰⁷
 - d) The report quotes the evidence leaders to the effect that at least 295 shots were fired by the SAPS at scene 2.³⁰⁸
- 163) Findings in the report are that:
- a) There was no proper command and control at scene 2. Numerous shots were fired which were not justified by the principles of self and private defence.³⁰⁹
 - b) The shots fired at scene 2 were fired by members of the POP, K9 Unit, the NIU and the TRT.³¹⁰
- 164) Ten of the strikers who were killed at scene 2 were shot in an area that is referred to by the evidence leaders as 'the killing zone'. In briefly addressing the circumstances of these killings the report refers to the argument by the evidence leaders 'that firing from the K9 members under the command of Major General Naidoo and the NIU members from the east, is most likely to have caused the death of those strikers killed in the area among the crevices and rocks'.³¹¹
- 165) Brigadier Calitz has been criticised by the evidence leaders for failing to issue any warning to the strikers at the stage when they were surrounded in the koppie. They argue that those strikers who wished to surrender peacefully were not given an opportunity to do so before steps were taken to disperse them which might include the use of force. Sections 9(2) (a) and (b) of the Regulation of Gatherings Act 205 of 1993 apply. The Commission agrees with this submission.³¹²

³⁰⁴ See also Niren Tolsi and Paul Botes, 'Marikana Scene 2 – No Refuge'. The article is part of Marikana: The blame game, <https://laura-7.atavist.com/mgmarikanablamegame>

³⁰⁵ Evidence leaders, 447, 807. SAHRC, 463, 2.1.5.

³⁰⁶ Evidence leaders, 476, 848.

³⁰⁷ Evidence leaders 470, 836.

³⁰⁸ 375-376. See for instance evidence leaders 488, 869.

³⁰⁹ 558, 11

³¹⁰ 558, 11

³¹¹ 314-315, 6-7.

³¹² 310, 3

- 166) The Commission also agrees with the further criticism that Brigadier Calitz failed to order the use of tear gas to force the strikers out of their hiding places at koppie 3, which process had far less risk involved to both members of the South African Police Services and the strikers.³¹³

Evidence relating to assertions that the strikers shot at or otherwise attacked the police

- 167) Though the report does not state so explicitly it indicates that there is no positive evidence that any of the strikers at scene 2 shot at the police.³¹⁴ On this issue it states that:
- a) Apart from the three firearms (one with a full magazine) that were taken from arrested strikers 'There does exist a possibility that there might have been further firearms in the possession of the strikers on the koppie that were either hidden on the koppie and not recovered or concealed on the persons of the strikers when they left the area.'³¹⁵
 - b) Though a number ('just under a third') of the cartridges 'for the two hundred and ninety five shots fired by the members of the South African Police Services at Scene 2 were recovered, no cartridge cases for any shots fired by strikers or anybody else was found. This is an indication that only a few shots could have been fired by the strikers.'³¹⁶
- 168) According to the heads of argument of the evidence leaders the evidence is that:
- a) Three Norinco pistols were confiscated from arrested miners at scene two. One of these had a full magazine, another had one bullet missing from its magazine, whilst the third had six out of eight bullets missing.³¹⁷ On its own this evidence points to the possibility that up to 7 bullets were fired at police by strikers from the latter two pistols.
 - b) Firearm residue should have been carried out, on the hands and clothing of those strikers arrested in possession of firearms, to establish whether or not they had recently discharged them. But the SAPS either did not carry out these tests, or if they did so, the tests produced negative results as they provided no evidence to the Commission that indicated otherwise.³¹⁸ Furthermore none of the 121 cartridges found at scene 2 were linked to the three confiscated pistols and all appear to be linked to firearms that were used by the police.³¹⁹
 - c) 'The Commission can therefore safely conclude that if there was any gunfire at all from strikers at scene 2, this would have been confined to a very small number of shots.'³²⁰

³¹³ 310, 4

³¹⁴ 313 (1) and (2). See also the SAHRC 454-456, 1.3

³¹⁵ 313, 1.

³¹⁶ 313, 2

³¹⁷ Evidence leaders 486, 866.

³¹⁸ Evidence leaders 486, 866.

³¹⁹ Evidence leaders 487, 868

³²⁰ Evidence leaders 488, 869.

- 169) There is therefore no ballistic evidence that any of the miners were involved in shooting at the police.
- 170) There are allegations by the police that some of the strikers attacked them with spears or other sharp weapons.
- a) One of these is alleged to have been Mr Mpumza. However the heads of argument of the families detail at length inconsistencies in the evidence of many of the police officers and refer to the evidence of one of the police officers that indicate that 'Mr Mpumza responded when police members chased him. In effect, Captain Greyling says that Mr Mpumza was trapped and lifted his spear in self-defence.'³²¹
 - b) Another of these is alleged to have been Mr Mkhonjwa whom it is alleged was charging at SAPS members. According to the heads of argument of the families Mr Mkhonjwa was part of a group of strikers who ran out of the Koppie and towards the dry dam because they were being driven in that direction by the water cannons' and his 'injuries and the direction from which he was shot are wholly inconsistent with SAPS' version that he was shot whilst charging at SAPS members.'³²²
 - c) As noted below (paragraph 174) the report describes the heads of argument of the families as 'of merit' in relation to details of the events at scene 2 while it says the SAPS accounts do not stand up to closer scrutiny.
 - d) Even if there was some substance to the police allegations that some strikers attacked them with spears (which appears to be doubtful), they are at best of minor significance in relation to the fact that at least 295 rounds were discharged by the police at scene 2, leading to the deaths of another 17 strikers.

Overall assessment by the commission of the scene 2 evidence

- 171) The report indicates that SAPS has not provided an account of most of the deaths at Scene 2 and that the accounts that it has provided are unsatisfactory. The report says that the SAPS 'provided no details of what happened with regard to the deaths of most of the deceased at Scene 2' and that 'where it does provide evidence pertaining to the deaths of some of the deceased, their versions do not, bear scrutiny when weighed up against the objective evidence.'³²³
- 172) The Commission recommends a full investigation, under the direction of the Director of Public Prosecutions, with a view to ascertaining criminal liability on the part of all members of SAPS who were involved in the events at scene 2.³²⁴
- 173) Most explicitly the report appears to regard as credible the evidence that Major General Naidoo, accompanied by a group of police officers from the K9 unit continued firing at the strikers at scene 2, despite being told to ceasefire, and when there was no evidence of shooting by strikers.³²⁵ Major General Naidoo contradicted his own written

³²¹ Families 400, 588.

³²² Families 382, 453.

³²³ 316

³²⁴ 328, 4 and more generally 326, J.1 onwards

³²⁵ 318

statement in his oral evidence before the Commission after ballistic evidence showed that a cartridge case linked to his firearm was found on top of the rocks at scene 2.³²⁶

- a) There is an explicit finding that the shooting by Major General Naidoo should be referred for further investigation with a view to possible prosecution.³²⁷ There are therefore two findings in the report explicitly relating to investigation with a view to possible prosecution of Major General Naidoo.³²⁸ Neither of these are referred to in the consolidated list of recommendations at the end of the report.³²⁹

174) Whereas the Commission's report is characterised by a lack of detail, more detailed analysis of the accounts provided by the SAPS of many of the killings at Scene 2 are provided in the final heads of argument of the families of the deceased and the SAHRC. Inter alia the report makes note of the submission by the families that all of the killings were unlawful.³³⁰ While the report finds that the SAPS accounts do not 'bear scrutiny' the report indicates that the arguments provided by the SAHRC and families are of merit.

- a) Annexure 3 provides a with page references for the sections of these heads of argument, as well as those of the evidence leaders, relating to these deaths.

Explaining the events at scene 2

175) According to the heads of argument of the SAHRC 'Forty strikers who were injured and/ or arrested on 16 August allege that strikers were shot by police while surrendering or injured at Scene 2. They go on to argue that 'When 40 of those injured and/or arrested make the same or similar allegations in statements taken at or shortly after the time, and in circumstances where many were seriously ill as a result of gunshot wounds, is it really credible that all 40 colluded to produce a false account? The SAHRC submits not.'³³¹ The heads of argument state that the evidence shows that many of the killings at scene 2 were 'intentional unlawful killing of strikers by SAPS members.'³³² Two SAPS members also provided evidence that there was an unlawful killing of an injured striker.³³³

176) Whereas the events at scene 1 can partly be understood (and some of the shootings legally justified) in relation to the likelihood that at least some of the shooters believed they were under attack, and that their shooting 'triggered' the shooting by the other TRT members, the events at scene 2 appear to be of an entirely different nature. A satisfactory account of what happened at scene 2 has not been provided yet.

³²⁶ 318-319

³²⁷ 319, 4.

³²⁸ The other is at 321, 11.

³²⁹ 543-547.

³³⁰ 316(10)

³³¹ SAHRC 474, 3.1.1.

³³² SAHRC, 473, 2.6.3 and 474-475.

³³³ SAHRC 474, 3.1.3.

- 177) In an article published in *Business Day* on 23rd July 2015 Franny Rabkin said of scene 2 that 'What happened there is the most harrowing part of the Marikana tragedy and the events still, to a large extent, remain shrouded in mystery.'³³⁴
- 178) The report itself provides no overall explanation or account for the events at scene 2. Reflecting the bewildering nature of the killings at scene 2 the evidence leaders say 'The evidence creates the overwhelming impression of a chaotic 'free for all' at scene 2, with SAPS members firing indiscriminately into the koppie from three sides and no-one in a position of command exercising any control over this process. When Col Gaffley and W/O Mamabolo attempted to stop apparently unjustified shooting by other units they were not successful. In the free for all 15 people³³⁵ were killed in circumstances which SAPS cannot even describe, still less justify.'³³⁶
- 179) The events at scene 2 appear to be consistent with the idea that some of the SAPS members in the TRT, NIU and K9 unit became caught up in what the American Sociologist Randall Collins describes as a 'forward panic'.³³⁷ 'Forward panics' Collins argues, are characteristic of many incidents of massacre as well as other incidents of police brutality and interpersonal violence. The build-up to and dynamics of the massacre at Marikana would have provided the perfect conditions for a 'forward panic'.
- 180) According to Collins 'forward panics' typically start 'with tension and fear in a conflict situation' that is 'prolonged and built up'.³³⁸ At Marikana there was a prolonged stalemate. The vast majority of police at Marikana appear to have been brought there on or before the Tuesday morning. There was a prolonged period of waiting around no doubt characterised in part by boredom. There is likely to have been fear on both sides. The SAPS put on a massive show of force. But there were also many strikers who were armed and, as argued above (paragraph 88), there would have been a lot of fear about having to engage the miners at close quarters that would have been strongly shaped by the killings of Warrant Officers Monene and Lepaakyu on the 13th. As a result of the fact that some of the strikers had killed police any fear would also have been likely to have been accompanied by a sense of antagonism towards the strikers. (After the shooting at scene 1 if any of the members of the police units that were involved in the events at scene 2 had witnessed the events at scene 1 or heard from other police that the miners had attacked the police at scene 1 this might also have added a further edge of vindictiveness in their attitudes towards the strikers.)

³³⁴ Franny Rabkin. "Callous Marikana Report Reduces Casualties to Mere Dead Bodies." *Business Day*, July 23, 2015. <http://www.rdm.co.za/politics/2015/07/23/callous-marikana-report-reduces-casualties-to-mere-dead-bodies>.

³³⁵ Unlike the families and the SAHRC the evidence leaders interpret the evidence on Mr Mpumza's death as pointing to 'justifiable private defence' by the police (Evidence leaders 480, 856). Of the death of Mr Mkhonjwa they say that 'The SAPS may have been justified in shooting Mr Mkhonjwa. The evidence is insufficient to make a finding either way.' (Evidence leaders 479, 854).

³³⁶ 492, 875.

³³⁷ Randall Collins, *Violence – A micro-sociological theory*, Princeton: Princeton University Press, 2008, 83-132.

³³⁸ Collins, 2008, 85.

- 181) In the ensuing confrontation the one (perpetrator) group typically quickly gets the upper hand over the other group. As this happens the built-up tension and fear comes out in an 'emotional rush' and they get 'carried away' by this.³³⁹
- a) The period as the 'lead group' of strikers started moving towards the police (possibly with the intention of going back to the informal settlement) would have been a period of heightened tension. The police did not know what the intentions of the people in this group were. This would have dramatically escalated the dynamics of fear and tension at the final moment. One consequence of this is a build-up of adrenaline (the 'fight or flight' response).
 - b) At the critical point of the (perceived) attack the police very quickly got the upper hand through the devastating power of their weapons. From that point onwards it was apparent that there was no real danger presented to the police by the miners. As a result, following the build-up of adrenaline, the element of fear (largely if not totally) dissipated as it became apparent to the police that the weapons that the strikers had were no match for their own.
 - c) The idea that the police got 'carried away' is of course consistent with the large number of people killed at scene 2 in the absence of any injuries on the police side.
 - d) Collins says that a forward panic 'is violence that for the time being is unstoppable'. Both Warrant-Officer Mamabolo of the Public Order Police³⁴⁰ and Colonel Gaffley of the Special Task Force³⁴¹ indicate that SAPS members continued to fire at the strikers at scene 2 when there was no sign that the strikers were shooting at them and after they shouted at police to cease fire.
- 182) The reason why Collins uses the term 'forward panic' is to do with the emotions involved. In an ordinary panic the build of adrenaline (physiological) is associated with emotion in the form of overwhelming fear. A typical response is to run away, with one's actions driven both by the adrenaline and the emotion of fear. In a forward panic there is the same physiological pattern. The difference is that at the critical moment one's opponent is overwhelmed. While the same physiological pattern is playing itself out the element of fear suddenly evaporates so that it vanishes or is largely absent.
- 183) A massacre resulting from a 'forward panic' is, in other words, carried out in adrenaline induced state that, as a result of the element of fear having disappeared, may manifest in various emotions including 'rage or fury' but also a 'mood of elation'³⁴² manifested in high-spiritedness.
- a) The audio recording from Captain Ryland's cellphone footage, the only piece of 'real time' evidence of the mood of police at scene 2, provides evidence to support the idea that some of the killings at scene 2 were carried out in a celebratory manner.³⁴³
- 184) After they were released from police custody one of the arrested miners told journalist Poloko Tau that "People were shot for fun while down on their knees with

³³⁹ Collins, 2008, 85. The term 'carried away' is hyphenated because it is a colloquialism not because it is used by Collins.

³⁴⁰ Evidence leaders 458, 824.

³⁴¹ Exhibit FFF-10. Evidence leaders 491-2, 873.

³⁴² Collins, 2008, 92.

³⁴³ Families, 577-579.

their hands up in the air and begging for their lives.”³⁴⁴ The expression ‘for fun’ may be used fairly literally, but more loosely might simply mean that the man who was interviewed thought they had been shot for no reason. The information that is available about the mood of the police shooters is therefore relatively limited and not definitive in enabling the development of a full picture of what happened at scene 2.

- 185) The events at scene 2 therefore remain in many ways unexplained. It may only become possible to provide a full account of these events when it becomes possible for those police who are willing to give an honest account of their experiences to speak openly.

³⁴⁴ Poloko Tau, “Begging Miners ‘shot for Fun’, The Star, 5 September 2012, Accessed July 28, 2015. <http://www.iol.co.za/the-star/begging-miners-shot-for-fun-1.1376008#>

Annexure A: Names of the deceased at Marikana³⁴⁵

Killed on Sunday 12 August 2012

- (1) Mr. Hassan Fundi;
- (2) Mr. Frans Mabelane;
- (3) Mr. Thapelo Eric Mabebe; and

Killed on Monday 13 August 2012

- (4) Mr. Julius Langa³⁴⁶
- (5) W/O Hendrick Tsietsi Monene;
- (6) W/O Sello Ronnie Lepaaku;
- (7) Mr. Tembelakhe Mati;
- (8) Mr. Semi Jekanisi; and
- (9) Mr. Phumzile Sokanyile.

Killed on Tuesday 14 August 2012

- (10) Mr. Isaiah Twala

Killed on Thursday 16 August 2012

At Scene 1

- (11) Mr. Michael Mgweyi;
- (12) Mr. Patrick Akhona Jijase;
- (13) Mr. Bonginkosi Yona;
- (14) Mr. Andries Motlapula Ntsenyeho;
- (15) Mr. Mzukisi Sompeta;
- (16) Mr. Jackson Lehupa;
- (17) Mr. Mongezeleli Ntenetya;

³⁴⁵ The list is compiled from the information presented on pages 10-13 of the WRITTEN SUBMISSIONS OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION REGARDING “PHASE ONE”. The list here modifies the order and numbering of that presented in the SAHRC submission in order to differentiate deaths at ‘scene 1’ and ‘scene 2’. There are variations in the spelling of these names in different documents and the list has modified the spelling of some names notably on the basis of some of the spelling provided in the heads of argument of the families.

³⁴⁶ The exact time of Mr Langa’s death is not known. The report and heads of argument of the evidence leaders place it in the ‘early hours’ of the 13th though the SAHRC heads of argument list it as having occurred on the 12th (page 10) though they do latter make reference to a lack of clarity regarding the time of his death (page 237, 1.3.9).

- (18) Mr. Mphangeli Tukuza;³⁴⁷
- (19) Mr. Thobisile Zibambele;³⁴⁸
- (20) Mr. Cebisile Yawa;
- (21) Mr. Mgcineni Noki;
- (22) Mr. Khanare Elias Monesa;
- (23) Mr. Bongani Nqongophele;³⁴⁹
- (24) Mr. John Kutlwano Ledingoane;
- (25) Mr. Babalo Mtshazi;
- (26) Mr. Thembinkosi Gwelani;
- (27) Mr. Bongani Mdze;

At Scene 2

- (28) Mr. Thobile Mpumza;
- (29) Mr. Thabiso Johannes Thelejane;
- (30) Mr. Anele Mdizeni;
- (31) Mr. Makhosandile Mkhonjwa;³⁵⁰
- (32) Mr. Julius Tokoti Mancotywa;
- (33) Mr. Janeveke Raphael Liau;
- (34) Mr. Thabiso Mosebetsane;
- (35) Mr. Mafolisi Mabiya;
- (36) Mr. Ntandazo Nokamba
- (37) Mr. Fezile David Saphendu;
- (38) Mr. Mpumzeni Ngxande;
- (39) Mr. Stelega Meric Gadlela;
- (40) Mr. Henry Mvuyisi Pato;
- (41) Mr. Nkosiyabo Xalabile;
- (42) Mr. Telang Vitalis Mohai;
- (43) Mr. Modisaotsile Van Wyk Sagalala; and
- (44) Mr. Molefi Osiel Ntsoele.

³⁴⁷ Also spelt Thukuza.

³⁴⁸ Also spelt Zimbambele.

³⁴⁹ Also spelt Ngonogophele and Ndongophele and Nqongophele..

³⁵⁰ Also spelt Mkhongwa.

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Compiled by David Bruce

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³⁵¹ Sequence of events up to the shooting: 222-232; Discussion of intention in fact starts on 232, 20 with excerpt from evidence leaders on evidence regarding intention: 233-247.

³⁵² Evidence leaders section on expert policing issues: 348 – 387.

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Annexure C: Table of references for discussion of deaths at Scene 2 from heads of arguments of the Families, the South African Human Rights Commission and the Evidence Leaders

	Families	SAHRC	Evidence leaders
Mr Mdizeni (Victim A) and Mr Thelejane (Victim B)	320-329	463-465	447 (para 807)
Mr Xalabile (Victim O) and Mr Pato (Victim M)	329-338	465-467 (Mr Xalabile)	Evidence indicates that weapons were planted on the bodies of Mr Xalabile and others, 601-603
Mr Mangcotywa (Victim D), Mr Liau (Victim E), Mr Mosebetsane (Victim G), Mr Mabiya (Victim H), Mr Nokamba (Victim I), Mr Saphendu (Victim J), Mr Ngxande (Victim K) and Mr Gadlela (Victim L) and Mr Mohai	339-374	These deaths as well as that of Mr Pato: 460-463	These deaths as well as that of Mr Pato: 447 (para 809) – 449 (para 810) and 488-491 (para 872.9)
Mr Mkhonjwa (Victim N)	374-389	467-472	476-480
Mr Mpumza (Victim C)	389-408	472	480-484
Mr Sagalala and Mr Ntsoele	409-411	Referred to on page 463.	That they died in hospital: 447 (para 807)