

## MARIKANA COMMISSION OF INQUIRY

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### WRITTEN SUBMISSIONS ON BEHALF OF THE FORMER MINISTER OF POLICE, MINISTER E N MTHETHWA

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#### **A: INTRODUCTION**

1. The Marikana Commission of Inquiry (“Commission”) was established to investigate matters of public, national and international concern arising out of the tragic events that took place at Lonmin Mine situated in Marikana within the North West Province.
2. On 9 August 2012, the Lonmin mineworkers embarked upon an unprotected strike that resulted, on 6 August 2012, in the unprecedented and catastrophic deaths of approximately forty-four (44) people and left more than seventy (70) others injured (“the Marikana incident”).
3. On 12 September 2012 the President of the Republic of South Africa (“the President”), acting pursuant to the powers conferred upon him in terms of the provisions of Section 84(2)(f) of the Constitution of the Republic of South Africa,

1996 (“the Constitution”), appointed this Commission in Inquiry to investigate the Marikana incident<sup>1</sup>.

4. The Commission’s terms reference are *inter alia* to inquire into, make findings, report and make recommendations on the following:

“1.2 *The conduct of the South African Police Service (SAPS), in particular:*

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

1.2.2 *the precise facts and circumstances which gave rise to the use of all and any force and whether this was reasonable and justifiable in the particular circumstances;*

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

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

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<sup>1</sup> Proclamation No 50 of 2012, published in the Government Gazette No 35680 of 12 September 2012

5. At the time of the occurrence of the Marikana incident Minister E N Mthethwa, MP (“the Minister”) was the cabinet member responsible for policing and the determination of national policing policy<sup>2</sup> within the Republic of South Africa. Although the Minister is no longer the cabinet member responsible for policing, we make these submissions on his behalf because the Marikana tragedy occurred during his term of office.
  
6. In so far as the SAPS is concerned the terms of reference, properly construed, contemplate an investigation into two broad categories, being:
  - 6.1. Firstly, the constitutional, legislative and policy framework that was in place at the time of the occurrence of the Marikana incident; and
  - 6.2. Secondly, the precise facts surrounding the occurrence of the Marikana incident.
  
7. We deal with the above more fully in turn below. We then conclude with the submission:
  - 7.1. As regards the first issue that the framework comprises of:
    - 7.1.1. The Constitution, the SAPS Act and the Regulations made thereunder<sup>3</sup>;

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<sup>2</sup> Section 206 of the Constitution

<sup>3</sup> Exh CCC1, page 4 - 8

7.1.2. The Policy For Gatherings and Public Protests (the Policy) dated 29 August 2011<sup>4</sup>;

7.1.3. The Draft White Paper on Policing and on Safety and Security, 2014<sup>5</sup> ; and

7.1.4. The National Development Plan, 2010<sup>6</sup>.

7.2. As regards the second issue that all imputations of blameworthiness on the Minister for the Marikana incident have been shown to be lacking in both factual and legal foundation and thus fall properly to be dismissed in that no evidence whatsoever could be or has been adduced to prove that:

7.2.1. Political pressure was exerted on the Minister by Messrs. Zokwana and Ramaphosa alternatively, undue pressure that of the sort that constitutes the proximate cause of the Marikana incident;

7.2.2. Political pressure was exerted on the National Commissioner of Police by the Minister, alternatively, political pressure of the sort that constitutes the proximate cause for the implementation of the tactical phase of the operational plan leading to the Marikana incident; and that

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<sup>4</sup> Exhibits R and CCC1, Page 8 - 14

<sup>5</sup> Exhibit CCC1, page 14 - 15

<sup>6</sup> Exhibit FFF 13

7.2.3. The Minister's publicly made addresses prior to the Marikana incident constitute the proximate cause thereof.

**B: THE LEGISLATIVE, INSTITUTIONAL AND POLICY FRAMEWORK OF SAPS**

8. As stated above, this Commission is enjoined to probe *inter alia* the nature, extent and application of any standing orders, policy considerations, legislation or other instructions in dealing with the situation which gave rise to the Marikana incident.

9. We deal in this section only with the nature and extent of the prescripts referred to above, leaving the question of the application thereof to be dealt with by the relevant operational officials.

10. The Minister dealt at the length with the nature and extent of the policy framework both in his supplementary statement<sup>7</sup> and in his oral testimony before this Commission.

11. In summary, his evidence in this regard is that:

11.1. The mandate of the SAPS and indeed of the Minister derives in the first instance from the Constitution<sup>8</sup>. In terms thereof the responsibilities of:

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<sup>7</sup> Exhibit CCCC1, Part C, Paragraphs 6 - 60  
<sup>8</sup> Section 205(3) of the Constitution

- 11.1.1. The Minister are to be responsible for policing in general and report to Cabinet and Parliament on matters relating to policing and to determine national policing policy; and of
- 11.1.2. the SAPS are to prevent, combat and investigate crime; maintain public order; protect and secure the inhabitants of the Republic and their property; and uphold and enforce the law;
- 11.2. The National Commissioner exercises control over and manages the police service in accordance with the national policing policy and the directions issued by the Minister;
- 11.3. Political power over the police service vests in the Minister who exercises same through providing oversight and accounting to Parliament in that regard;
- 11.4. In exercising oversight the Minister is supported by the Civilian Secretariat for Police and the Independent Police Investigative Directorate;
- 11.5. When the country experienced a growing number of protest action and unrest situations of a violent character, the Ministry of Police determined the Policy as a response thereto on 29 August 2011;
- 11.6. The Policy *inter alia*:

- 11.6.1. provides a framework with guidelines for the SAPS in reviewing and aligning its operational strategies and instructions applicable to policing public order policing and related events;
  - 11.6.2. promotes ideal crowd control and management capacity within the police in order to secure public trust; and
  - 11.6.3. identifies the need to re-establish and re-capacitate the Public Order Policing Units;
- 11.7. The implementation of the Policy requires significant work and financial resources such that it was not immediately implementable. Although its total implementation cost is approximately R1bn some portion of it have been implemented already;
- 11.8. After the coming into effect of the Interim Constitution, the democratic government of the Republic of South Africa was faced with the task of transforming the police “*force*” as it then was into the police “*service*” aligned to the Human Rights values;
- 11.9. Transformation has begun in earnest and policies are being developed on a continuous basis for relevance.
12. None of the above evidence was contradicted. We submit therefore that it should be accepted.

13. There can be no doubt therefore that when the unprotected strike started assuming a violent character SAPS had to attend and remain in attendance in Marikana pursuant to its constitutional obligation of maintaining public order, enforcing the law, preventing and combating crime.
14. Accordingly, we submit that in dealing with the situation as it unfolded in Marikana SAPS, under the control and management of the National Commissioner, had to comply with the prescripts to which we refer above.
15. We point out that none of the crowd management experts that testified before this Commission attributes the Marikana incident to the Policy or the lack thereof. By way of an example Professor Gary White state that *“it is not the policy framework that explains the disastrous operational outcome that was witnessed in the police actions at Marikana, particularly on 16 August 2012.”*<sup>9</sup>
16. A further significant aspect to policing is the recommendation of the National Planning Commission in respect of the police service. Chapter 12 of the National Development Plan, 2030 (“the NDP”) recommends that the police service must be demilitarised. In line with this recommendation, a White Paper on the Police has been developed and includes, amongst others, the following core elements<sup>10</sup>:
  - 16.1. Professionalising the police service as a cornerstone of a strong criminal justice system;

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<sup>9</sup> Exhibit WWW2, paragraph 2.3.5; Exhibit JJJ178, paragraph 2.3.5

<sup>10</sup> Exhibit ZZZZ7

- 16.2. Demilitarising the police;
  - 16.3. An active citizenry which would include the contribution of civil society partnerships and civic participation to sustainable safety and security;  
and
  - 16.4. Modernising the police through technology including technological solutions for prevention and investigating crime at its incipient.
17. In sum, we submit that the Minister has indeed discharged his constitutional responsibility of determining policing policy and giving directions to the SAPS<sup>11</sup>.
18. We submit as regards the nature and extent of the legislative and policy prescripts in existence at the time that same comprised of the following:
- 18.1. The Constitution, the SAPS Act and the Regulations made thereunder<sup>12</sup>;
  - 18.2. The Policy For Gatherings and Public Protests (the Policy) dated 29 August 2011<sup>13</sup>;
  - 18.3. The Draft White Paper on Policing and on Safety and Security, 2014<sup>14</sup> ;  
and

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<sup>11</sup> See Exhibit CCCC1.5; Exhibit ZZZZ7

<sup>12</sup> Exh CCC1, page 4 - 8

<sup>13</sup> Exhibits R and CCC1, Page 8 - 14

<sup>14</sup> Exhibit CCC1, page 14 - 15

18.4. The National Development Plan, 2010.

**C: ALLEGATIONS OF UNDUE INFLUENCE**

19. Certain of the parties before this Commission allege that the Marikana incident occurred as a direct result (in the sense of 'proximate cause') of political interference and pressure having been brought to bear on SAPS' operational team by the Minister<sup>15</sup>. No iota of evidence has been tendered in support of these very unfortunate and reckless allegations.

20. We do not take issue with the fact that the Commission is inquisitorial as opposed to adversarial in its approach. It, however, still behoves of a party making scathing allegations against another to lay a factual foundation for the said allegations. *In casu*, no factual foundation of any sort has been laid for the scathing allegations of political influence levelled against the Minister were laid. The Minister has, in any event, elected to lead oral evidence before this Commission, not because a *prima facie* case calling for his rebuttal had been established, but because he sought to assist this Commission in the proper discharge of its functions.

21. We deal with this topic under the following sub-headings:

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<sup>15</sup> Day 256 of the Commission, Transcripts, page 32261, line 9-19;

- 21.1. Issues raised by the Evidence Leaders<sup>16</sup>;
- 21.2. Allegations of *'toxic collusion'*;
- 21.3. The reason for the alleged *"metamorphosis"* of the National Commissioner's statement; and
- 21.4. Public statements made by the Minister and their alleged tragic effect.

#### **Issues Raised By Evidence Leaders**

22. In this regard we refer the Honourable Commission to Exhibits "**CCCC2**" and "**CCCC4**" respectively being electronic mail correspondence that passed between the Minister 's legal team and the evidence leaders in order to provide context to the Minister's oral evidence on the topic of political influence. We deal with these below in turn.

#### **Exhibit "CCCC2"**

23. On 7 March 2013 SERI addressed a letter Madlanga SC (as he then was) in terms whereof it requested the Ministers of Police and of Mineral Resources

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<sup>16</sup> Copy of E-Mail dated 11 March 2013 at 12h50 from Nomzamo Zondo to Adv M Madlanga SC (as he then was); Copy of E-Mail dated 2 June at 10h30 from Adv Madlanga SC to Adv Nkosi-Thomas SC

should adduce oral evidence before this Commission. That request was conveyed to the legal teams of both Ministers who in turn requested particularity on the issues on which the oral evidence of the Ministers was required. Madlanga SC duly requested the particularity and **Exhibit CCCC2** constitutes a response to that request.

24. The relevant portion of exhibit “**CCCC2**” reads as follows:

*“... We would like the Ministers’ testimony to deal with their engagements about the Lonmin strike (9 – 16 August 2012) and the interventions that they undertook upon requests to intervene. We would like it to deal specifically with:-*

- 1. Whether they were contacted about the Lonmin strike (9-16 August 2012)?*
- 2. Who contacted them and when?*
- 3. What was the content of the communication?*
- 4. What intervention did they order - what actions did they take to deal with the requests?*
- 5. Who did they contact to implement the intervention?*
- 6. What meetings were held to deal with the strike?*
- 7. Who attended these meetings?*
- 8. What were discussions and resolutions of the said meetings?*
- 9. Who requested the presence of the SAPS and what was the justification for the request? ...” [ the emphasis is ours]*

25. It is clear from the above that the correspondence proceeds for the premise that:
  - 25.1. the Minister was contacted by certain people about the Marikana incident;
  - 25.2. upon being so contacted the Minister attended some meeting(s) concerning the Marikana incident; and
  - 25.3. subsequent to the alleged meeting(s) referred to above, the Minister ordered or directed SAPS to take certain intervention(s) or actions in order to deal with the situation as it was unfolding in Marikana.
26. The above correspondence not only misconstrues the role of the Minister, but conflates the role of the Minister and that of operational officers under the leadership of the National Commissioner of Police.
27. It is common cause that the Minister spoke to:
  - 27.1. Mr Senzeni Zokwana, now the Minister of Agriculture, Water and Fisheries on 12 August 2012;
  - 27.2. Mr Cyril Ramaphosa, now the Deputy - President of the Republic of South Africa on 12 August 2013;
  - 27.3. The National Commissioner of Police on two occasions only during the period between 12 August 2012 and 16 August 2012 at 16.00 being the approximate time at which the tragedy occurred; and

- 27.4. The Provincial Commissioner only three times only during the period between 12 August 2012 and 16 August 2012 at 16.00 being the approximate time at which the tragedy occurred.
28. According to the evidence of the Minister:
- 28.1. the general tenor of these conversations was information and validation thereof concerning the situation as it was developing in Marikana, information concerning the SAPS capacity to deal therewith and confirmation that SAPS was in fact actively seized with the matter; and
- 28.2. In none of these interchanges did the Minister seek to prescribe to the operational team how they should go about dealing with the matter.
29. Both the National and Provincial Commissioners corroborated the evidence of the Minister in this regard.
30. No material contradictory evidence was led by the Minister's accusers in this regard except for the email correspondence **Exhibit BBB4** which we submit is completely neutral as against the Minister because:
- 30.1. The Minister was not party to the electronic mail communication;
- 30.2. Although the correspondence refers to Minister Shabangu's undertaking to discuss the matter with the President and to get my office to act "*in a more pointed way...*" there was no full Cabinet

meeting on that day and the Minister was at no stage whatsoever asked to deal with the matter in a pointed way as alleged or at all; and

30.3. The Minister was not in Cape Town on 15 August 2012.

31. We submit:

31.1. that it cannot be said based solely on the evidence that the Minister spoke to the above named people, that he thereby brought undue pressure upon the operational team to act in a manner contrary to their constitutional obligations. That conclusion runs contrary to the totality of the evidence led before this Commission.

31.2. it is not within the Minister's province to issue operational orders as that is the constitutional mandate of the National Commissioner together with the Provincial Commissioners<sup>17</sup>. The National Commissioner and the respective Provincial Commissioners control and manage the SAPS whereas the Minister is responsible for the formulation of policing policy.

31.3. that the suggestion that the Minister would have directed certain intervention(s) or actions implies that the Minister has breached the constitutionally entrenched segregation of roles between the office of the Minister and that of the National Commissioner. Accordingly, we

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<sup>17</sup> Exhibit "FFF29", page 4, paragraph 12; Exhibit "CCCC1" page 4, paragraph 8 to page 6 paragraph 15; Day 255 of the Commission, Transcripts, page 32048, line 19 to page 32049 line 3, page 32063, line 15 to page 32064, line 9, page 32159, line 10-20

submit that any such contention is devoid of any factual basis and falls properly to be rejected.

**Exhibit CCCC4**

32. **Exhibit “CCCC4”** on the other hand suggests that SAPS was prevailed upon to embark on the tactical phase of the operation<sup>18</sup>. In this regard the Honourable Commission is referred to paragraph 3 of exhibit “CCCC4”:

*“Leading up to 16 August 2012 SAPS intelligence was to the effect that protesters would resist any attempt to disarm them. Coupled with this the plan was to the effect that SAPS would proceed to the “tactical phase” only if the situation escalated. .. the situation appeared to be similar to what had been happening in the approximately 48 hour period after the killing of Mr Twala, a NUM office bearer. ...The question that arises then is why SAPS would have proceeded to the tactical phase despite the earlier stated position and the awareness that the protesters would resist police action in this regard, with all the consequences that this might entail. On the face of it (from that perspective), the apparent change of attitude is unexplained. Was SAPS prevailed upon to act and bring the protest to an end regardless of what its own plans were and what is it that informed those plans? If so by whom, and why? Without suggesting that the Minister did anything in this regard, at the very least the commission must be afforded an opportunity to probe these matters with the Minister.”*

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<sup>18</sup> Day 70 of the Commission, Transcripts, page 7442, line 16-22; page 7501, line 3-7; page 7503, line 14-18

*I am quite mindful of the fact that SAPS suggests that the escalation that led to the tactical phase was characterised by an increased belligerence on the part of the protesters which included the utterances referred to: this is the other perspective. But at this stage one has no idea what view the commission will ultimately take on this.*

*The possibility is there that it may not accept that there was any escalation. For as long as we do not know what it will conclude, all issues that bear relevance to the decision to proceed to the tactical phase need to be probed during testimony. In my view Minister's testimony does bear relevance to this issue. This is not based on pure conjecture. A possible link is to be found in the admitted approaches to the Minister by Mr Zokwana and Mr Ramaphosa." (our emphasis)*

33. It is implicit from the excerpt reproduced above that some of the parties, including the Evidence Leaders, are of the belief that SAPS was prevailed upon in order to embark on the tactical phase of the operation. The suggestion in this regard is that after the Minister's conversation with Messrs. Zokwana and Ramaphosa, the Minister proceeded to exert pressure upon SAPS to embark on the tactical phase of the operation hence the formulation of the questions above.
34. Any suggestion that the Minister issued operational orders including that the tactical phase be implemented were dealt with in oral evidence and were strenuously denied by the Minister. Yet again, no iota of evidence seeking to lay a factual foundation for the allegation has been adduced before the Commission. All that there is, is inferences sought to be drawn from the so-called unexplained

implementation of the tactical phase. That the Minister would have issued an operational order to the effect that the tactical phase be implemented is not the only reasonable inference capable of being drawn in the circumstances. Indeed, the evidence is that the increased belligerence of the protesters caused SAPS to implement tactical phase.

35. We submit that any suggestion that the only inference capable of being drawn from the fact that SAPS implemented the tactical phase when not indicated is that the Minister brought undue pressure to bear on the operational team is far-fetched in the extreme and falls properly to be rejected.
36. The Minister's evidence that he does not issue operational order was corroborated by the National Commissioner as is made plain by the following interchange during the cross-examination of the National Commissioner:

**"MR BIZOS SC:** *Did the Minister from time to time give you directions or instructions?*

**CHAIRPERSON:** *About Marikana, or in general?*

**MR BIZOS SC:** *Generally.*

**GENERAL PHIYEGA:** *The Minister would not give directions or instructions, but he would ask questions around whether we have sufficient capacity, what have we done about capacity, as I give feedback, and I*

would share with him what we have done as operatives.

**MR BIZOS SC:** *You've told us about capacity, which may be important because he has the final say, or may have the final say, but the question is did he give you any directions or instructions as to what the police ought or ought not to do in relation to any specific matter?*

**GENERAL PHIYEGA:** *The operational decisions are not the remit of the Minister.*

**MR BIZOS SC:** *Are you able to state categorically that the decision to confront the miners on the 16<sup>th</sup> of August had no connection whatsoever with any communication or directions you received from the Minister or other higher authority?*

**GENERAL PHIYEGA:** *I think I hear many questions out of that; maybe if you could just dismember them.*

**CHAIRPERSON:** *Mr Bizos, I think the witness wants to know from you what you mean by any other higher authority, so perhaps you could ask the question firstly confining it to the Minister, and then once you've*

*got the answer, then you can give her, tell her what you mean by other higher authority and then she can answer it, but I think it's just a bit vague, the way you're phrasing it.*

**MR BIZOS SC:** *We'll deal with the question of higher authority. Let's deal with the Minister first.*

**GENERAL PHIYEGA:** *Our operational instructions, as I've already said, are not coming from the Minister<sup>19</sup>.*

37. Based on the above, we submit that any suggestion that SAPS embarked on the tactical phase of the operation as a result of being pressurised by the Minister following his conversation with Messrs. Zokwana and Ramaphosa is factually unsustainable.
38. In addition, the evidence before the Honourable Commission demonstrates that Messrs. Zokwana and Ramaphosa were merely concerned about the level of violence that was taking place in Marikana.
39. It has not been contended before this Commission that the act of calling the Minister with a view to drawing his attention to unfolding acts of criminality is inappropriate. What remains unclear, with respect, is the differentiator as regards these two phone calls. The fact that the callers happen to be political leaders

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<sup>19</sup> Day 70 of the Commission, Transcripts, page 7500, line 10 to page 7501, line 23

imposes all the more responsibility on them to show leadership and become involve in the resolution of the violent situation.

40. Accordingly, we submit that such communication cannot, without more, constitute political influence or pressure on the Minister to prevail on SAPS to act in a particular manner<sup>20</sup>.
41. Quite apart from the fact that the Minister did communicate with the persons referred to above, there is no evidence to show that in the course of his communication with the National and Provincial Commissioners, the Minister exerted pressure on them to act one way or the other in relation to the operation<sup>21</sup>.
42. The Minister testified that no pressure was ever exerted on him by any person and neither did he exert any pressure on any of the officials working under his leadership<sup>22</sup>. Furthermore, the Minister did not in any way direct either the National Commissioner or Provincial Commissioner on how to discharge their duties and responsibilities in so far as the Marikana incident is concerned<sup>23</sup>.
43. We submit that there is nothing untoward for the Minister to interact with the Provincial Commissioner and the National Commissioner regarding the unrest in Marikana as the events unfolding there were matters perfectly falling within his

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<sup>20</sup> Exhibit FFF 32 paragraph 13.4; Day 41, Transcripts, page 4433, line 17 to page 4434 line 20

<sup>21</sup> Day 255 of the Commission, Transcripts, page 32063, line 15 to page 32064, line 15

<sup>22</sup> Day 256 of the Commission, Transcripts, page 32260, line 16-18

<sup>23</sup> Day 255 of the Commission, Transcripts, page 32095, line 18-24

jurisdiction as the Cabinet member responsible for policing and the person required by the Constitution to account to both Cabinet and Parliament.

44. We submit therefore that in order to give an accurate account of what was taking place in Marikana; it was incumbent upon the Minister to enquire into the factual situation and establish what SAPS was doing about it<sup>24</sup>. The evidence amply show that during the said enquiry, the Minister never prescribed the manner in which SAPS was to manage the unfolding situation<sup>25</sup>.
45. Equally, we further submit that there is nothing inappropriate for members of the society to express their disquiet with the Minister about criminal acts affecting them<sup>26</sup> and it matters not who the complainant is<sup>27</sup>.
46. In the circumstances, we submit that the Minister would have been derelict in the extreme if, despite the tragedy that was unfolding to his knowledge, he had failed to contact the National Commissioner and Provincial Commissioner, North-West in order to obtain an official account of the situation<sup>28</sup>.
47. Accordingly, we submit that on the evidence the Minister never prevailed upon SAPS to embark on the tactical phase of the operation.

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<sup>24</sup> Exhibit CCCC1, paragraph 85.1.4; Day 255 of the Commission, page 32078, line 21 to page 32081, line 20

<sup>25</sup> Day 255 of the Commission, Transcripts, page 32086 line 20 to page 32087, line 2

<sup>26</sup> Day 41 of the Commission, Transcripts, page 4433, line 19 to page 4434, line 15; Day 271 of the Commission, page 34417, line 24 to page 34419, line 6; exhibit "CCCC1" page 29, paragraph 89-92

<sup>27</sup> Day 255 of the Commission, Transcripts page 32083 line 9-18

<sup>28</sup> Day 255 of the Commission, Transcripts page 32090 line 4-21

**Alleged Toxic Collusion**

48. It is contended by certain parties before the Commission that the Marikana incident was a product of “*toxic collusion*” between SAPS and Lonmin Mine management<sup>29</sup>. The “*toxic collusion*” is alleged to have manifested itself as follows:

48.1. The establishment of SAPS’ Joint Operations Centre (“the JOC”) at the Lonmin mine premises and communication between police and Lonmin mine personnel; and

48.2. The electronic mail communication between Lonmin mine officials (“**Exhibit BBB4**”).

49. It is significant for the Commission to take note of the fact that the establishment of a JOC is an operational matter in respect of which the Minister played no part.

50. **Exhibit “SS2”<sup>30</sup>** is SAPS’ standing order aimed at regulating crowd management and demonstrations. It contemplates a partnership between SAPS, the community and other agencies with a view to promoting public safety. In order to achieve this objective, SAPS is enjoined to play a pro-active role in attempting to identify and diffuse any possible conflict before it escalates to violence<sup>31</sup>. Given this injunction, for SAPS to be in a position to avert any possible acts of violence

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<sup>29</sup> Day 4 of the Commission page 218, line 8-25

<sup>30</sup> Standing Order (General) 262

<sup>31</sup> Exhibit SS2 paragraph 3

it had to establish the JOC at Lonmin mine premises and that we submit can hardly amount to collusion.

51. We further submit that stakeholder engagement is a common occurrence in crowd management situations and is, regarded as a best practice. By way of example, in a sporting event, the police would ordinarily interface with the relevant sporting entity and utilise both its infrastructure and personnel for the maintenance of public order<sup>32</sup>. This too, we submit, can never be said to be inappropriate collaboration.
52. We further submit that a generalised accusation of collusion between capital and government is inappropriate in that in a democratic society such as ours relations between capital, labour and civil society is one that requires ongoing interaction in finding solutions about matters of public interest. And so we submit that any such interaction is not a manifestation of toxic collusion.
53. Furthermore, we submit that the contention that the Marikana incident was an act of pre-meditated murder of defenceless people- reliance being placed on the minutes of the Joint Operational Coordinating Committee (“JOCCOM”) of 16 August 2012 at 13h30<sup>33</sup>- and that the Minister was party to such alleged killings is not supported by any evidence and therefore ought to be rejected.
54. To the extent that reliance for the alleged political meddling is placed on **Exhibit “EE”** (paragraph 2 under **CLOSING REMARKS**), we submit that the evidence is

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<sup>32</sup> Exhibit CCCC1 paragraph 63-64

<sup>33</sup> Exhibit EE

that the Provincial Commissioner thought that the National Commissioner was going to inform the Minister about the actions which SAPS intended taking. The evidence before this Commission demonstrates that the Minister was never informed about the decision to execute phase 3 of SAPS operation<sup>34</sup>. In this regard, the Honourable Commission is referred to the Minister's telephone records for 15 August 2012<sup>35</sup> which clearly indicate that the Minister did not speak to the National Commissioner on this date.

55. In the result, we submit that the Minister was never involved in any collusion as alleged or at all that resulted in the Marikana incident.

**Exhibit "BBB4"**

56. In so far as **Exhibit "BBB4"** is concerned, it is common cause that the Minister was not party to that electronic mail communication<sup>36</sup>. According to the Minister on 15 August 2012, there was no Cabinet meeting. In addition, the Minister testified that he was never prevailed upon by any person to act either in a pointed manner or in whatever way in relation to the Marikana tragedy<sup>37</sup>.

57. As borne out by **Exhibit CCCC1.8**, it is clear that until the evening of 15 August 2012 when he arrived in Johannesburg, the Minister was in Kwazulu-Natal.

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<sup>34</sup> Exhibit CCCC1 paragraph 80

<sup>35</sup> Exhibit CCCC1.8

<sup>36</sup> Day 255 of the Commission, Transcripts, page 32076 line 17-19

<sup>37</sup> Day 255 of the Commission, Transcripts, page 32078 line 23 to page 32080 line 25

58. We submit that the institutional and legal framework to which we have referred above make plain that political interference of the sort alleged in this Commission is not countenanced. We submit further that there are various remedies for interference of the sort alleged and none of these have been activated by any member of the operational team in protest to such interference.
59. Having regard to all of the above, we submit that the constitutional scheme establishing SAPS imbues it with sufficient structural and operation autonomy, so as to immunise it from undue political influence through institutional and legal mechanisms.
60. Accordingly, to the extent that it is contended before this Commission that SAPS ought to be insulated from political actors, we submit that such a contention is constitutionally misplaced as it is inconsistent with the fundamental principles of our Constitution.
61. In the matter of ***Hugh Glenister v The President of the Republic of South Africa and 4 others***<sup>38</sup> where the Court stated as follows:

*“It is apparent from the provisions of the Constitution that far from requiring insulation from the political sphere, it is a fundamental principle of our legal system that there is political oversight over police. To this end, Section 206(1) requires that the member of the Cabinet be responsible for policing and determining national policing policy. Section 206(8) requires the establishment of a committee composed of the*

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<sup>38</sup> (2011) ZACC 6 at para 6

*Cabinet member and members of executive councils responsible for policing in the provinces to “ensure effective coordination of the police service and effecting cooperation among the spheres of government”. To the extent that oversight over South African Anti-Corruption Unit located within the police subject to Cabinet level oversight, such oversight is not only consistent with the Constitution but expressly contemplated.”*

62. The above judgment essentially recognises that political oversight over SAPS is a constitutional imperative.
63. Accordingly, we submit that any contention suggesting that the Minister, in communicating with the National Commissioner and Provincial Commissioner, North-West during the period under investigation, unduly brought political influence to bear on the commissioners’ exercise of their functions falls properly to be rejected as lacking any factual or legal basis.

**The Alleged Metamorphosis of the National Commissioner’s Statement**

64. We submit that in so far as this aspect is concerned, the Minister cannot be in position to assist this Commission as he has no personal knowledge of this subject<sup>39</sup>.

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<sup>39</sup> Exhibit CCCC1 paragraph 97.2

**Media Statements**

65. Some parties before this Commission impute blame for the tragic loss of lives at Marikana to certain media statements made by, amongst others, the Minister during his tenure<sup>40</sup>.

66. During cross-examination of the National Commissioner, Mr Bizos SC put the following statement to the National Commissioner<sup>41</sup>:

*“We don’t believe that, when you are faced with criminals armed with sophisticated weaponry, the police’s task would be to take out some human rights charter. Because we are in the field, we are in the killing field, where criminals are killing law-abiding citizens. Now we are saying to the police that we ourselves have an obligation as well to strengthen the arm of these task forces. So that they are able, on the field, to teach those people a lesson- to fight fire with fire. There’s no other way on that<sup>42</sup>.”*

67. In July 2009, the Minister made the following statement:

*“We are saying in such dangerous situations will be flexible so that the police can use maximum force without these surprises happening. When criminals shoot the police, they boast about that while police are here to protect the public and to*

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<sup>40</sup> Day 68 of the Commission, Transcripts, page 7254, line 25 to page 7256

<sup>41</sup> Day 68 of the Commission, Transcripts, page 7261, line 12-15 read with page 7263 line 8-13

<sup>42</sup> Exhibit FFF14, page 15

*protect property of the country. As long as section 49 is there, these criminals will have a field day<sup>43</sup>.”*

68. We submit that the above statements were made in the context of tackling violent crimes in the form of cash-in-transit heists<sup>44</sup> besetting the country at the relevant period and perpetrated by gangs armed with automatic weapons<sup>45</sup>.
69. Furthermore, we submit that the above statements were made with the sole purpose of informing the members of the police service that the judgment of the Constitutional Court does not in any manner whatsoever detract from their common law right of resorting to proportional force in private defence<sup>46</sup>.
70. It is notable that the Minister's testimony that he has consistently stated that if there is no life-threatening situation but people are illegally marching the police may simply disperse the protestors using water cannons is not controverted<sup>47</sup>.
71. Having regard to the above, we submit that there is no evidence placed before the Honourable Commission that the statements referred to above influenced the members of the police to act in an unlawful manner. Accordingly, we further submit that there is no causal link between the statements and the tragic events which took place in Marikana.

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<sup>43</sup> Exhibit CCCC1 page 32 paragraph 104

<sup>44</sup> Day 68 of the Commission, Transcripts, page 7262, line 12-14

<sup>45</sup> Exhibit CCCC1, page 32, paragraph 102, Day 255 of the Commission, Transcripts, page 32117, line 3 to page 32118, line 23

<sup>46</sup> Exhibit CCCC1 paragraph 105 -107, Day 255 of the Commission, Transcripts, page 32120, line 6 to page 32121 line 4

<sup>47</sup> Exhibit CCCC1, paragraph 107

**D: CONCLUSION**

72. Taking into account all of the above, we submit that the Minister, during his tenure, discharged his constitutional mandate of determining public policing policy in terms whereof he gave direction to the police service.
73. To the extent that the Policy may be found to be deficient, we submit that the Marikana incident can nonetheless not be attributed to such deficiency.
74. Having regard to the conspectus of all evidence placed before this Commission, we submit that the Minister cannot in any manner whatsoever be held liable for the tragic loss of lives at Marikana.

**L G NKOSI-THOMAS SC**

**T K MANYAGE**

**CHAMBERS**

**SANDTON**

**26 OCTOBER 2014**