



19 August 2015

AN OVERVIEW OF THE FARLAM COMMISSION'S RECOMMENDATIONS

1. Introduction

Undoubtedly, 16 August 2012 will go down in the annals of South African policing history as one of the incomprehensible calamities of our times. As Dixon observes, the events at Marikana when a number of people were injured and 44 of them died at the hands of the South African Police Service (SAPS) in a single day – marked a turning point in South African policing.¹ To many South Africans, the incident raised concerns not only about human-rights and labour-relations travesties², but also about serious systematic shortcomings in public order policing practices and associated use of force by the SAPS.³ According to a number of policing experts, events at Marikana were symptomatic of deep-rooted systematic challenges within SAPS including leadership and operational deficiencies. In fact, in many South African's minds, Marikana conjured up images of public order policing gone wrong⁴- with frightening images of what appeared to be a police failure to deal with public protests in a democratically acceptable manner-one in line with the country's constitutional imperatives.⁵

Following the events at Marikana, a number of questions arose as to:

- Whether people's lives in Marikana were compromised at the altar of economic expediency?
- Whether the SAPS leadership's tactical and operational decisions before and on the day of the mass killings were reasonable and justified?
- Whether, the alleged "toxic collusion"⁶ was a reality or it was just a figment of some people's imagination?
- Whether there was a real or perceived serious and imminent threat (to the lives of the SAPS members and other people around) that necessitated the police to act with maximum lethal force in self-defense?

¹ Dixon, B. (2013). *Waiting for Farlam: Marikana, social inequality and the relative autonomy of the police*. Pretoria, ISS SA Crime Quarterly No.46, December 2013

² Bond, P. (2012) *South African political economy after Marikana*. Durban, University of KwaZulu Natal Centre for Civil Society. Available at <http://www.ejolt.org/wordpress/wp-content/uploads/2012/11/Bond-Marikana-21-October-1.pdf> (accessed on 07 August 2015)

³ Bruce, D. 2014. *In the Marikana Commission of Inquiry*: Submission to the Farlam Commission. Pretoria, Marikana Commission of Inquiry

⁴ Hornberger, J. (2014). *We need a complicit Police: Political policing then and now*. Pretoria, ISS SA Crime Quarterly No.48, June 2014.

⁵ Hornberger (2014)

⁶ According to Dixon (2013), Advocate Dali Mpofu, the Counsel for the injured and arrested miners and their families, described the situation in Marikana as the 'toxic collusion' between the police, the state and capital in the shape of the Marikana mine's owners, Lonmin.



- Whether or not the police reaction to striking miners in the platinum belt was consistent with the ethos of democratic policing, embedded in the country's constitutional and statutory regime, which requires that policing be conducted in an impartial and unbiased manner⁷?

Following the Marikana tragedy, the public wanted some light to be shed on the way in which the police respond to strikes and service delivery protests so as to understand what police officers actually do, and why they do it, in the course of their everyday interactions with individual citizens and under whose command and/or authority do they act? The public wanted the glaring “policing fault-lines” to be clearly delineated so as to bring clarity on a number of issues such as crowd control and management, use of force, police brutality and accountability. But more importantly, in as much as South Africans wanted to find answers on what really happened in Marikana, they wanted to know whether, following that unfortunate event, the policing compass was to continue pointing in the wrong or right direction. As a nation, does our “geography of reasoning” need to change on how we view and think about policing matters in general and public order policing in particular.

Mindful of the above and in response to a growing national and international public outcry, a few days later on 23 August 2012, President Jacob Zuma instituted a Judicial Commission of Inquiry chaired by retired Judge Ian Farlam. The Farlam Commission of Inquiry was established by Proclamation No. 50 of 2012 to investigate matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana. In particular, the Commission was established to address the causes of the events of 9 to 16 August 2012 at Marikana, which culminated in the killing of 34 civilians by members of the SAPS on 16 August 2012, and to make recommendations in this regard.⁸

The scope of the Commission was very broad but this brief is limited to only policing issues. In particular, this brief will focus on the Commission's recommendations that relate to policing issues. It should be noted that the Farlam Commission's final Report on the Marikana tragedy, released on 25 June 2015, made a wide range of recommendations on reforming public-order policing, which determines how the police should react to situations such as service delivery protests, union marches and political demonstrations.⁹ This brief briefly discusses some of the key recommendations contained in the report including: further investigations; weapons; professionalism and depoliticisation of the police; demilitarization; control over operational decisions; standing orders and other prescripts; police equipment; first aid and accountability.

⁷ Tokota, B.R and Hemraj, P.D. (2014). Heads of Argument of Evidence Leaders. Northwest, Marikana Commission of Inquiry

⁸ Tokota and Hemraj. Heads of Argument of Evidence Leaders. Northwest, Marikana Commission of Inquiry

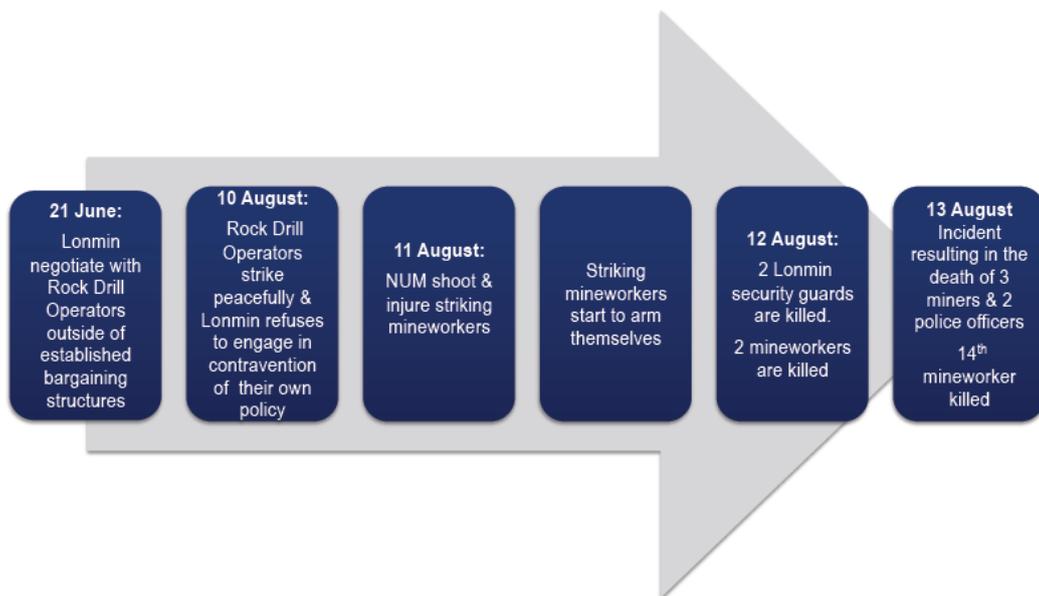
⁹ De Wet, P. (2015). Marikana: History proves that restraint can work. Johannesburg, Mail and Guardian



2. Chronology of events at Marikana

On 16 August 2014, South Africans had to come to terms with bad news that on that day, at 15h53 in the afternoon, SAPS members shot at 112 striking mineworkers at the Lonmin Platinum mine at Marikana, Rustenburg.¹⁰ According to media reports, a total of 34 were killed and 78 injured.¹¹ But, there is a context to the events of 16 August 2012, which did not just happen in vacuum. As shown by Figure 1 below¹², what gave rise to subsequent police shootings started a couple of days earlier on 21 June 2012¹³ when Lonmin negotiated with Rock Drill Operators outside of the established bargaining structures.

Figure 1: Chronological Order of Events as described by Newham, 2014



What transpired from the evidence before the Commission was that, after 21 June 2012 the situation on the ground started to change and take a different form. For instance, according to David Bruce who made an expert submission to the Commission, “there were several incidents of violence from at least Saturday 11 August onwards, prior to the 16th of August including an incident on the 11th where a group of miners were fired at, with at least two of them being injured, by people at or near the NUM office in Marikana and another one on the 12th of August when two security guards and

¹⁰ Newham, G. (2014). *Questions the Marikana Commission of inquiry raises about the senior leadership of the South African Police Service*. Presentation at the 5th Institute for Security Studies (ISS) Annual Conference on National & International Perspectives on Crime Reduction and Criminal Justice- Johannesburg, 04 September 2014

¹¹ Newham (2014)

¹² This figure was extracted from Gareth Newham’s presentation

¹³ The starting date for negotiations might be several days earlier but this brief will limit itself to this date



two mine employees at one of the shafts were killed”.¹⁴ It was alleged the killings were believed to have been carried out by people associated with the group of miners who were on strike.¹⁵ It was reported that on the 13th of August, there was a confrontation between members of the SAPS and a group of miners and two SAPS members and three miners were killed at or near the scene of this confrontation.¹⁶

Two Versions of Events

As can be seen in Figure 1 above, on 14th August a body was discovered near ‘koppie 1’, which had become established as a gathering point for the miners who were on strike.¹⁷ Mr. Gareth Newham, provided a detailed account of both the police and the Commission’s versions of how the events unfolded in Marikana since 21 June 2012. According to Newham, the following is the SAPS’s version of events as presented before the Farlam Commission¹⁸:

- The police leadership maintained that, shortly after 21 June 2012, a semblance of violence and animosity on the part of striking miners resulted in police build-up at Marikana, which culminated to the deployment and maximum use of force on 16 August;
- According to this police narrative, information was received that the strikers on the koppie would not disarm;
- As such, at 13h30 the Joint Operations Centre (JOC) took a decision based on operational considerations to disperse the protesters, disarm them and where necessary effect arrests;
- The operation was scheduled for 15h30 but at 15h40 police deployed barbed wire parallel to the koppie;
- Shortly after the deployment of the barbed wire, miners started leaving the koppie and repeatedly attempted to breach barbed wire;
- Armed to the teeth, the miners succeeded on the 3rd attempt and attack the Tactical Response Team (TRT) police back-up line;
- Police defended themselves using lethal force, resulting in the death of 17 miners– with no police officers injured;
- Miners turned and ran a few hundred metres to a hill and the police surrounded the hill to disarm and arrest miners;
- Police were attacked and forced to use lethal force to defend themselves

On the other hand, the evidence before the Commission in relation to policing issues indicated the following course of events:¹⁹

¹⁴ Bruce, 2014

¹⁵ Bruce, 2014

¹⁶ Bruce, 2014

¹⁷ Bruce, 2014

¹⁸ See Newham’s Presentation at the 5th Institute for Security Studies (ISS) Annual Conference on National & International Perspectives on Crime Reduction and Criminal Justice- Johannesburg, 04 September 2014

¹⁹ Also see Newham’s Presentation at the 5th Institute for Security Studies (ISS) Annual Conference on National & International Perspectives on Crime Reduction and Criminal Justice- Johannesburg, 04 September 2014



- On 14 August, Commissioner Mbombo was quoted saying, “When tomorrow we have to move in, if today we do not find cooperation in these people, we need to move in such that we kill it.”
- On the evening of 15 August, an extraordinary session of a SAPS senior National Management Forum (NMF) meeting was held. The decision that miners will be dispersed the following day was captured in the meeting’s minutes. Later on, Provincial Commissioner Ms Mbombo phoned 3 Major-Generals (Gen. Annendale, Gen. Naidoo & Gen. Mpembe);
- Still on 15 August, the Deputy Provincial Commissioner William Mpembe warned that if the police engaged the striking miners on the koppie there would be “bloodshed.”
- In the morning of 16 August, it was decided that that day is going to be a “D-Day” and later on in a 9 am press conference, Commissioner Mbombo stated that “This thing will end today”. Early that morning four mortuary vans and 4000 rounds of automatic rifle ammunition are ordered.
- On 16 August at 15h53, 17 people were shot by the police. Police trained in medical aid and legally obliged to provide assistance provided no help. As a result, 15 people died at the scene and 2 died en route to hospital;
- On 16 August at 16h03, Brigadier Pretorius, Head of Communications in the JOC sent an SMS to the Acting Provincial Head of IPID Molatedi Molatedi, in the North West Province. The SMS read as follows: “Having operation at Wonderkop. Bad. Bodies. Please prepare your members as going to be bad.”
- On 16 August at 16h20, all SAPS senior commanders in charge of the operation in the JOC testify that they are made aware for the first time that people had been shot and killed.
- The Field Operational Commander Brig Calitz testifies under oath that he first become aware of shootings at Scene One at 16h47 (an hour later);
- It transpired that the SAPS plan initially presented as Disperse, disarm & arrest (DDA) a large group of people (2 - 3000 people) using a horse shoe formation within Public Order Police backed up by the Tactical Response Teams (TRT).
- SAPS Colonel Duncan Scott came under substantial pressure from the evidence leaders of the Marikana Commission to eventually produce his computer hard drive.
- Documents withheld from the Commission for 18 months suggest that the DDA plan was created by the police in a meeting in Potchefstroom subsequent to the events at Marikana
- From documents on Colonel Scotts’ hard drive it appears that the original police plan was to encircle the Koppie during darkness of late night or early morning (called the encirclement plan to tackle 50 people;
- Arguably, the police were forced to abandon and adapt their encirclement plan due to undue pressure to act immediately.

Tactical Option

A number of policing experts raised concerns about what appeared to be deliberate misrepresentation of facts by the police on the operations in Marikana in general and the ‘tactical option’ in particular- which left 34 striking miners dead. According to Farlam Commission Report,



there appears to be a number of pressing questions on the” true version of how it came about that the ‘tactical option’ was implemented on the afternoon of August 16 and on the attempts by SAPS leadership to conceal the fact that the plan to be implemented was hastily put together without public order policing inputs or evaluation”.²⁰ According to Tolsi, “these and other misrepresentations, were contained in “Exhibit L”, the police’s version of events, which was allegedly concocted during a retreat to the Roots hotel in Potchefstroom 11 days after the massacre.²¹ Thus, it came as no surprise that the document was largely discredited during the Commission’s hearings.²²

Though the ‘tactical operations’ were presented as reflective of a shared responsibility and collective decision-making, it emerged during the Commission’s hearings that the “POP commanders were side-lined in relation to the planning and management of the operation (this extended to the fact that no POP commanders were even present at the JOCCOM meeting at which the operational plan was presented)”.²³ An attendant consequence of that was that, “those planning the operation had limited knowledge of the principles that are supposed to apply in relation to the policing of demonstrations”.²⁴ Arguably, an argument can then be advanced that this is why when the operation was launched the “POP units were unable to fulfil their allotted role effectively and the operation quickly became one that was reliant on the ‘tactical units’ whose range of force options was essentially restricted to uses of force at the highest level of the use of force continuum”.²⁵ In fact, it suffices to say that, “the course of action that was taken was therefore guided by a reckless attitude with respect to its potential consequences rather than a careful consideration of different options and the selection of options that were least likely to result in death and injury”.²⁶

Reflecting on the “tactical plan option”, Bruce opined that “the plan for the operation had to be developed at very short notice and was hastily put together and only very briefly discussed by those responsible for implementing the operation”. In his very critical take on the issue, Bruce argues that, “there was very little or no detailed planning and preparation for the operation”.²⁷ It emerged during the Commission’s hearings that the decision to encircle, disperse and disarm the miners on August 16 was actually taken the previous night during an extraordinary sitting of the police’s National Management Forum (NMF), which included provincial police commissioners and then crime intelligence divisional boss Richard Mdluli.²⁸

To this end, questions arise as to; whether the decision to go ahead with the ‘tactical option’ was the main cause of the bloodshed that the nation witnessed on that fateful day? Whether the “tactical

²⁰ Tolsi, N. (2015). SAPS rot runs deep in Marikana cover-up. Mail and Guardian, 02 July 2015

²¹ Tolsi (2015)

²² Tolsi (2015)

²³ Tolsi (2015)

²⁴ Tolsi (2015)

²⁵ Bruce, 2014

²⁶ Bruce, 2014

²⁷ Bruce (2014)

²⁸ Tolsi (2015)



option' route not only gave rise to the deaths of 34 people and the injury to 78 others but, in turn, it gave rise to a multi-dimensional conspiracy of silence and concealment.²⁹

Misrepresentation

It remains unclear why, as a number of analysts pointed out, “both at a rank and file level and at a leadership level, members of the SAPS were involved in attempts to cover-up evidence or at the very least, were less than forthcoming in providing evidence to the commission”?³⁰ Why did police decide to adopt a truth-telling approach that is emblematic of what the counsel for the South African Human Rights Commission, advocate Michelle Le Roux, had described as a “blue wall of silence”?³¹

No matter what the answers and justifications might be to these questions, the fact that the SAPS decided to supposedly closed ranks, was hesitant or unwilling to admit error – or even, in some instances, to admit that a police operation in which 34 civilians had been killed was a catastrophic failure- remains a source of discomfort.³² In fact, as Newham rightfully observes, the nature of the SAPS response to the shootings and to the Commission is a cause for considerable concern and comes short of being a complete failure of any serious self-criticism from SAPS.³³

“Best of Responsible policing”

In a more analytical vein, many analysts are of the view that, contrary to what the National Police Commissioner of Police wants the nation to believe, the Marikana incident was not “best of responsible policing”.³⁴ In fact, to some analysts, at best, the Marikana incident was “worst of responsible policing” and exposed more than just operational unaccountability and a web of lies designed to keep the police service’s top brass out of the problems. To be sure, any discerning observer of the country’s evolving policing architecture would easily realize that the Marikana incident exposed not only ‘poor planning, poor briefing and most importantly poor decision making’, but also flawed analysis and interpretation of the situation and comprehension of the principles of crowd management- ‘a failure on the part of the SAPS leadership to understand, to appreciate and apply principles of crowd management to the events.’³⁵ In fact, it would not be far-fetched to argue that the police operations in Marikana exposed poor theoretical and practical grounding on and application of a number of legislative frameworks (such as the Regulation of Gatherings Act 205 of 1993; the Criminal Procedure Act 51 of 1977 and the Dangerous Weapons Act 71 of 1968) and policy prescripts (such as Standing Order 262; Standing Order 251 on the Use of firearms and POP Policy Document on Crowd Management) that guide the work of the police on public order policing. As evinced by the Marikana incident, it might seem that, the SAPS Public Order Policing units are not in a good state given the failure to maintain them in a sufficient state of readiness. According to

²⁹ Tolsi (2015)

³⁰ Bruce (2014)

³¹ Tolsi (2015)

³² Tokota and Hemraj (2014)

³³ Newham (2014)

³⁴ Newham (2014)

³⁵ Tolsi (2015)



a policing expert, David Bruce, “this is reflected in the fact that there were insufficient POP members present to effect the dispersal and, in line with this, they were unable to control the group of miners who had started moving down from koppie”.³⁶

3. Establishment and Scope of the Commission

In response to a growing national and international public outcry, on 23 August 2012 few days after the events in Marikana, President Jacob Zuma instituted a Judicial Commission of Inquiry chaired by retired Judge Ian Farlam. The Farlam Commission of Inquiry was established by Proclamation No. 50 of 2012 to³⁷:

“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, which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction of property”.

As per Proclamation No. 50 of 2012, the following were the Commission’s Terms of Reference:³⁸

- 1) *The Commission shall inquire into, make findings, report on and make recommendations concerning the following, taking into consideration the Constitution and other relevant legislation, policies and guidelines:*
 - 1.1 The conduct of Lonmin Plc;
 - 1.2 The conduct of the South African Police Service;
 - 1.3 The conduct of the Association of Mineworkers and Construction Union (AMCU), their members and officials;
 - 1.4 The conduct of the National Union of Mineworkers (NUM), its members and officials;
 - 1.5 The role played by the Department of Mineral Resources or any other government department or agency in relation to the incidents and whether this was appropriate in the circumstances, and consistent with their duties and obligations according to law and;
 - 1.6 The conduct of individuals and loose groupings in fermenting and/or otherwise promoting a situation of conflict and confrontation which may have given rise to the tragic incident, whether directly or indirectly.

In particular, with regard to the conduct of the SAPS, the Commission was asked to inquire, make findings, report on and make recommendations concerning:³⁹

- I. 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;

³⁶ Bruce (2014)

³⁷ Report of the Marikana Commission of Inquiry. 2015

³⁸ Newham (2014)

³⁹ Newham (2014)



- II. 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;
- III. The role played by SAPS through its respective units, individually and collectively in dealing with this incident and;
- IV. Whether by act or omission it directly or indirectly caused loss of life or harm to persons or property.

The report drafted by Judge Ian Farlam was released on 25 June 2015 by President Jacob Zuma. Much of the report relies in the Marikana Commission Evidence Leaders who were hired to provide an objective and dispassionate assessment of all the evidence presented before the commission.

The Marikana Commission Evidence Leaders were:⁴⁰

- Geoff Budlender SC
- Matthew Chaskalson SC
- Kameshni Pillay SC
- Charles Wesley
- Tantaswa Lupuwana
- Matthews Mojapelo

4. Summary of Concluding Remarks and Police-Specific Recommendations of the Commission

4.1 Concluding Remarks

Strikers

In the concluding remarks of its Report, the Commission noted that, in as far as the **violence on the part of the strikers** is concerned; the 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 2012.⁴¹ According to the Commission, “whilst the strikers aver that they first took up arms to protect themselves against the attack by NUM, a version which the Commission has found to be untrue, as set out above, they have not placed any evidence before the commission to explain why they found it necessary to resort to violence to achieve any of their aims”.⁴²

The Commission concluded that, “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 further “alerted the police to the type of criminal acts they were required to deal with and precipitated a police presence in

⁴⁰ Report of the Marikana Commission of Inquiry (2015)

⁴¹ Report of the Marikana Commission of Inquiry (2015)

⁴² Report of the Marikana Commission of Inquiry (2015)



addition to Public Order Policing and was also an indication of the lengths the strikers to which were prepared to go, to enforce their demands”.⁴³

SAPS

In terms of **public perception of the SAPS**, the Commission’s Report shared the same view expressed in Stonechild Report, which impresses upon the **police to treat its members with respect and dignity and observe the procedural and substantive protections of the law**. The Commission was of the view that if police practices are antithetical to its responsibility to the public and assumes a partisan role, that would “contribute to a public perception that police cannot police themselves and that complaints against the police are futile.”⁴⁴

The Commission also expressed hopes for the future that the SAPS will provide a policing service within the constraints of the Constitution and the law.⁴⁵ It further endorsed the view expressed in the Heads of Argument submitted on behalf of SAPS, which states that:

“South Africa should not have another Marikana. The loss of lives of the strikers, the members of the police, security personnel of Lonmin and employees of Lonmin is to be deeply regretted. The injuries sustained by some of the strikers are also regrettable. Damage to property should not follow expression of any civil disaffection. Bearing arms against a lawful authority should provoke widespread outrage. A career in the police service should not be a death warrant. Those who are found to have been culpable in relation to the criminal acts in the period 9 to 16 August 2012 in Marikana must bear the consequences of their conduct.”⁴⁶

4.2 Police-Specific Recommendations

Having conducted hearings and evaluated evidence provided by different parties, the Farlam Commission made eleven broad policing related recommendations. These recommendations were around: a) *further investigations*; b) *use of certain (R-5 rifles) weapons in crowd control and management*; c) *police management*; d) *National Commissioner’s fitness to hold office*; e) *police management*; e) *recommendations on the IPID*; f) *recommendations for a Public Order Policing Panel of Experts*; g) *recommendations by National Planning Commission on Demilitarisation*; h) *control over operational decisions*; i) *police equipment*; j) *first aid and*; k) *accountability*.

Further investigations:

The Commission recommended that the following matters are referred to the Director of Public Prosecutions, North West for further investigation and to determine whether there is a basis for prosecution:

⁴³ Report of the Marikana Commission of Inquiry (2015)

⁴⁴ Report of the Marikana Commission of Inquiry (2015)

⁴⁵ Report of the Marikana Commission of Inquiry (2015)

⁴⁶ Report of the Marikana Commission of Inquiry (2015)



- a) The attempted murder of Mr Mutengwane and Mr Dlomo (Marikana CAS 69/08/2012) refers
- b) The shooting by NUM officials of Mr Mabuyakhulu and Mr Ngema and the subsequent attack on Mr Mabuyakhulu whilst he lay injured on the ground. (CAS 67/08/2012)
- c) The assaults upon Mr Louw and Mr Vorster and the deaths of Mr Fundi and Mr Mabelane in confrontations with the strikers.
- d) The death of Mr Mabebe at K4 Shaft. (CAS 109/8/2012)
- e) The assaults upon Mr Janse Van Vuuren, Mr Andries and Mr Keyser at K4 shaft. (CAS 111/08/2012)
- f) The killing of Mr Langa by the strikers in the early hours of the morning of 13 August 2012
- g) The killing of Mr Sokhanyile in circumstances where there are conflicting versions of the allegations of the shooters acting in private defence.
- h) The killing of Mr Mati, where there is difference in opinion about whether the fatal wound is a gunshot wound or a stab wound.
- i) The killing of Warrant Officer Lepaaku and Warrant Officer Monene and the assault on Lieutenant Baloyi.
- j) The killing of Mr Twala (CAS 121/8/2012)

The Commission made two central recommendations with regard to:

- Scene 1: with regard to those members of the SAPS, who in firing shots at the strikers may have exceeded the bounds of self and private defence and the delay in conveying medical assistance to scene 1 and;
- Scene 2: with regard to issues of command and control, the failure to stop the operation after scene 1 and the possible liability of senior officers in the South African Police Services, the shooting of strikers by various members of the South African Police Services.⁴⁷ These were:
 - a) The Commission referred the circumstances surrounding the injuries and deaths of all persons at Scene 1 and 2 to the Director of Public Prosecutions of the North West Province, to exercise his powers in terms of section 24(1) (c) of the National Prosecuting Authority Act 32 of 1998, to supervise, direct and co-ordinate a specific investigation into the events at scenes 1 and 2.
 - b) The Commission recommended that for the purposes of the investigation, a team is appointed (headed by a Senior State Advocate, together with independent experts in the reconstruction of crime scenes, expert ballistic and forensic pathologist practitioners and Senior Investigators from IPID, and any such further experts as may be necessary). 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 the South African Police Services who were involved in the events at Scene 1

Comments and Questions

⁴⁷ Ibid



- The Committee should ask where is the body to be headed by senior counsel to investigate the police officers identified as having taken part in the violence.

The Committee should ask the SAPS to indicate whether, to date, it has received any information from the Director of Public Prosecutions of the North West Province regarding possible charges against its members.

-The Committee should find out whether there are any plans in place to deal with legal costs arising from possible civil claims and possible disciplinary actions against the SAPS members.

- If found guilty by the court of law after investigations on their conducts have been finalised, will the members of the SAPS face disciplinary actions or will the official organizational position that what they did was “best of responsible policing” save them from disciplinary charges?

-For IPID, have the Senior Investigators been identified? If yes, how many? And what are the possible implications to the operations of the organization?

R5-Rifles and Crowds

Policing experts in the Farlam Commission were unanimous in their view that automatic rifles like the R5 have no place in Public Order Policing. For instance, on his testimony, Mr De Rover advanced an argument for an immediate withdrawal of the R5 from POP operations. He contended that military assault weapons have no place in law enforcement and that he was fully aware of the particular problems of violence in South Africa. In the same vein, Mr White also recommended an immediate withdrawal of R5 rifles and added that any replacement weapon system should not be capable of “automatic fire” mode^{.48}

Based on the evidence before it, the Commission resolved that, the measures at the disposal of Public Order Policing are inadequate for the purposes of dealing with crowds, armed as they were, with sharp weapons and firearms, at Marikana. In addition, The Commission found that it was untenable to have sharp point ammunition and firearms such as R5 rifles in policing crowds.⁴⁹ Informed by the realization that, at the moment, no unit in SAPS is currently in a position to deal with such a crowd, the Commission recommended that a panel of experts be appointed, comprising senior officers of the Legal Department of the SAPS together with senior officers with extensive experience in Public Order Policing and specifically including independent experts in Public Order Policing, both local and international, who have experience in dealing with crowds armed with sharp weapons and firearms as presently prevalent in the South African context, to:

- a) Revise and amend Standing Order 262 and all other prescripts relevant to Public Order Policing;

⁴⁸ Exhibit ZZZ31.3 para 45

⁴⁹ Exhibit ZZZ31.3 para 45



- b) Investigate where POP methods are inadequate, the world best practices and measures available without resorting to the use of weapons capable of automatic fire;
- c) Having done so, to implement a training programme where all Public Order Policing members are extensively and adequately trained in such measures and methods; and
- d) Consider and advise on the recommendations made by Mr Robert David Bruce and Amnesty International.

Furthermore, the Commission specifically recommended that the above mentioned Panel pay particular attention to the lacunae in the standing orders and prescripts and identify, revise and amend the relevant protocols with clearly defined roles for each tactical unit. It also recommended that the abovementioned panel be constituted as soon as possible to enable urgent attention to be directed to these recommendations.

Comments and Questions

- Notwithstanding the above Commission's recommendations, some civil society groupings, such as the gun advocacy group- Gun Free South Africa, have raised concerns about what they see as the failure of the Farlam Commission of Enquiry's Report to make specific recommendation(s) to prohibit R5 rifles – the assault weapon used by police to kill 34 miners – in Public Order Policing. According to Gun Free South Africa, “withdrawing R-5 assault rifle use in crowd control was one of the first recommendations made by international policing expert Mr. Cees de Rover when he testified before the Farlam Commission”.
- In March 2013, Mr. de Rover equally urged the SAPS' National Commissioner to withdraw R-5 rifles, which he described as being “guaranteed deadly”, from the Public Order Police and to not permit them to be used in crowd control. And eighteen months later, when the National Commissioner gave evidence on 10 September 2014, she reported that R-5 rifles were still being used in public order operations, and that SAPS was “still considering the matter”.
- As a result, Gun Free South Africa submits that, “given the urgency of the matter, which is demonstrated by the high number of public protests and demonstrations in South Africa, this is simply not good enough; by failing to ban automatic rifles in Public Order Policing, the Farlam Commission has missed an opportunity to learn from the atrocity of Marikana and save future lives”.
- The Committee should ask the SAPS leadership to clearly state the organization's current position on the use of R5 Rifles on public order policing operations.
- Will SAPS continue to make use of R5 Rifles or it will act upon the recommendations of the policing experts and ban the usage of such weapons and replace them with less deadly ones?
- How far is SAPS in implementing the above recommendations of the Farlam Commission?
- Has the panel of experts been appointed? And if yes, what is its composition?
- What will be the role of the Civilian Secretariat for Police in establishing the Panel and in identifying the experts?
- Are there any time frames in looking at the recommendations on the possible ban of R5 rifles?

Endorsement to address Recommendations of the National Planning Commission



Mindful of the fact that the National Development Plan (NDP) of the National Planning Commission (NPC) has been accepted as Government policy, the Commission endorsed its recommendations. The NDP made a number of important recommendations regarding the need to demilitarise the SAPS and to professionalise the police. The Farlam Commission Report recommended that the SAPS implements those recommendations as a matter of priority.

This means that, amongst others:

- Senior police appointments should be depoliticized;
- Only persons with expert knowledge should be appointed to senior policing positions;
- The government should commit publicly to the professionalisation of the police through appointing highly trained and skilled personnel, establishing a body to set and regulate standards, and enforcing the code of conduct and a police code of ethics;
- The code of conduct/ethical code should explicitly prohibit the application of political or sectional or sectarian considerations in decision-making with regard to policing;
- The code of conduct/ethical code should emphasise the fundamental duty of the SAPS to be accountable for the use of force, and to account honestly to the public;
- The SAPS should demonstrate by word and deed that failure to comply with this duty has materially negative career consequences;
- A National Policing Board with multi-sectoral and multi-disciplinary expertise to set objective standards for recruitment, selection, appointment and promotion;
- In the next 5 years a two-stream system should be developed to create high caliber officers and recruits (non-commissioned officer and officer streams) to be trained as professionals;
- No officer may be appointed to a higher rank until they have passed the appropriate training for that rank.

Comments and Questions

-The Committee should ask the SAPS how far it is in terms of implementing the NDP recommendations (including demilitarization of the police).

-In light of the Farlam Commission Recommendations, which programmes and/or initiatives have been rolled out pursuant to the implementation of the NDP recommendations?

-The Secretariat needs to provide feedback on the progress in implementing the Commission's recommendations.

Control over operational decisions

While it is recognised and accepted that in large and special operations there is a role for consultation with the Executive, in particular the Minister of Police, the Commission recommended that the Executive should only give policy guidance and not make any operational decisions and that such guidance should be appropriately and securely recorded. The Commission recommended further



that in Public Order Policing situations operational decisions must be made by an officer in overall command with recent and relevant training, skills and experience in Public Order Policing.

Questions and Comments

- Based on hearings and evidence before the Commission, it is clear that in Marikana the opposite of the Commission's recommendations occurred. In other words, "the decision that the strikers would be removed from the Koppie on 16 August was taken not by the operational commanders on the ground in Marikana, but rather by the Provincial Commissioner and 'endorsed' by the SAPS leadership that met in Midrand on the evening of 15 August 2012." According to the Recommendation, this should not happen in the future.

-Based on the recommendations, the Committee should ask how many officers have recent and relevant training, skills and experience in Public Order Policing

-The Committee should ask the SAPS to provide it with an information on a number of officers per province, who are able to fulfil the operational command functions in the public order policing environment

National Commissioner's fitness to hold office

The Commission recommended that the President establish a board of inquiry under s 8(1) of the SAPS Act to consider the fitness of the SAPS National Commissioner Riah Phiyega to hold her office.⁵⁰ This recommendation was informed by a number of factors including the fact that:

- The National Commissioner's evidence before the Commission was generally characterized by a lack of candour" and her "immediate response to the shootings was incompatible with the office of the
- Head of a police service in a constitutional state."
- Under the leadership of the National Police Commissioner, concerted attempts were made by the SAPS to mislead the Commission;
- The SAPS closed ranks at a very early stage, under the leadership of the National Commissioner. There was an unwillingness to admit error – or even, in some instances, to admit that a police operation in which 34 civilians had been killed was a catastrophic failure.
- Oral evidence of a significant number of witnesses was not helpful and truthful, including that by the National Commissioner, Gen Riah Phiyega; the Provincial Commissioner, Lt Gen Mbombo; Maj Gen Annandale; Maj Gen Naidoo; Maj Gen Mpembe and Brig Calitz.
- Certain evidence was constructed, and other evidence was concealed, in order to support the official SAPS position.

Comments and questions

⁵⁰ Newham (2014)



- The Committee should ask the Board of Commissioners to clarify its position and provide reasons for its statement in support of the National Commissioner.

- The Committee should underscore the need by all stakeholders to respect the processes that are underway in relation to the workings of the Board of Inquiry into the fitness of the National Police Commissioner to hold her office

Police Equipment

On police equipment, the Commission recommended that:

- All radio communications should be recorded and the recordings should be preserved.
- Plans for Public Order Policing operations should identify the means of communication which SAPS members will use to communicate with each other.
- A protocol should be developed and implemented for communication in large operations including alternative mechanisms where the available radio system is such that it will not provide adequate means of communication.
- The SAPS should review the adequacy of the training of the members who use specialised equipment (eg water cannons and video equipment), and ensure that all members who may use such equipment are adequately trained to do so.
- All SAPS helicopters should be equipped with functional video cameras.
- The SAPS should review the procurement, servicing and training processes which have had the result that expensive equipment purchased by the SAPS cannot be used, either adequately or at all.

Comments and Questions

-The Committee should ask SAPS to explain the plans it has put in place to implement the Commission's recommendations on police equipment

- The SAPS should also explain the projected cost implications associated with implementation of the recommendations.

-The SAPS should explain how many helicopters are there and how many have functional video cameras fitted on them? What other alternative modes of communication are being explored (e.g. recording devices)?

First Aid

On the issue of the First Aid, the Commission recommended that:

- In operations where there is a high likelihood of the use of force, the plan should include the provision of adequate and speedy first aid to those who are injured.



- There should be a clear protocol which states that SAPS members with first aid training who are on the scene of an incident where first aid is required, should administer first aid.
- All police officers should be trained in basic first aid.
- Specialist firearm officers should receive additional training in the basic first aid skills needed to deal with gunshot wounds.

Comments and questions

-The Committee should whether the Department has policies around first aid training and deployment in operations. If so, what do the policies entail? If not, what is the status of development of the policy or the Standard Operation Procedures (SOPS)- when will it be finalised?

-The Department should explain how many of its members have been trained on first aid and how far it is in implementing the Commission's recommendations to ensure that all members are trained?

- How many specialist first aid first aid officers are there and how many have the required specialised first aid training?

Accountability

According to the Commission's recommendations; where a police operation and its consequences have been controversial requiring further investigation, the Minister and the National Commissioner should take care when making public statements or addressing members of the SAPS not to say anything which might have the effect of "closing the ranks" or discouraging members who are aware of inappropriate actions from disclosing what they know.

More so, the Commission recommended that;

- Standing Orders should more clearly require a full audit trail and adequate recording of police operations.
- The SAPS and its members should accept that they have a duty of public accountability and truth-telling, because they exercise force on behalf of all South Africans.
- The staffing and resourcing of IPID should be reviewed to ensure that it is able to carry out its functions effectively.
- The forms used by IPID for recording statements from members of the SAPS should be amended so as to draw the attention of the members concerned to the provisions of section 24 (5) of the IPID Act and thereby encourage them to give full information about the events forming the subject of an IPID investigation without fear that they might incriminate themselves.

Comments and questions

-In light of the above recommendations, the Committee should ask the National Commissioner whether she does have any statements she would like to correct or retract regarding the police actions in Marikana?

-The Committee should ask about the status of amendment of SOPs to ensure disclosure



- As per the recommendation, the Committee should ask the IPID how many more staff is required and what additional resources needed.

Independent Police Investigative Directorate (IPID)

The Commission found that the IPID was not in charge of the scenes, were not permitted to access the scenes immediately and did not properly warn people in taking their statements. There are outstanding investigations required by the IPID.

According to Heads of Argument of Evidence Leaders, there are two serious cases which, warrant investigation with a view to prosecution under section 5 of the Commissions Act:⁵¹ the first relates to the attempts, by unknown SAPS members, to falsify evidence in an attempt to hide videos from the Commission and; the second is concerted attempt by SAPS, at Roots and thereafter, to mislead the Commission as to the true facts.⁵² According to evidence leaders, “SAPS members who gave false evidence before this Commission should be the subject of disciplinary proceedings and we would invite the Commission to make a recommendation to that effect in relation to all SAPS witnesses whom it finds to have given false evidence”.⁵³ Evidence leaders further recommended 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. IPID should be invited to investigate whether they should be held criminally liable for the deaths at scene 2, other than the death of Mr Mkhonjwa (victim N) which appears to have occurred before he would have been in a position to prevent it by exercising proper control.
- IPID should be invited to investigate whether Lt Gen Mbombo should be held criminally liable in relation to the deaths at scene 2 for her order at the 1:30 JOCCOM that phase 3 of the plan should be implemented.
- There should be a probe by prosecuting authorities in North West Province to ascertain whether any of the police officers who were involved in the operation could be held criminally liable. Nearly three years after the fact, it calls for this to be accompanied by renewed forensic investigations.⁵⁴

5. Future Considerations and the Role of the Portfolio Committee

There are a number of future considerations that need to be added to the equation of finding sustainable solutions to the country’s policing challenges in general and public order policing in particular. These include, but are not limited to:

⁵¹ Tokota and Hemraj (2014)

⁵² Tokota and Hemraj (2014)

⁵³ Tokota and Hemraj (2014)

⁵⁴ Legal Brief. (2015). Police in the dock for Marikana massacre. 07 August, 2015



- The need to maintain highly specialized public order units that engage in training on a regular basis.⁵⁵
- Public order policing must all times be appropriately staffed and equipped and maintained in an appropriate state of readiness. It is a desirability and a necessity that the public order policing capacity of the SAPS needs to be brought up to a strength that is appropriate in terms of the scale of the public order policing problem. For this purpose government needs to be able to assess the demand for specialised public order policing and to adjust resource allocations in this regard relative to reasonable projections of the scale at which this type of capacity needs to be maintained.⁵⁶
- A systematic and detailed independent review of public order policing systems in South Africa should be carried out.⁵⁷ The findings and recommendations of such review should be presented before the Portfolio Committee.
- There is an increasing realization that military assault weapons have no place in law enforcement and in the spirit of adhering to the principles of democratic policing and in order to advance the country's constitutional imperatives, it is important that, through parliamentary processes, the SAPS explore ways of ensuring immediate withdrawal of R-5 rifles. The Portfolio Committee on Police should play a more active role in framing the discussions on this issue and in monitoring the Commission's recommendations pertaining this issue.
- The relationship of the police to the people they serve is clearly a major problem. The recent hearings on the policing situation in Khayelitsha have revealed a situation that can only be described as dismal. The community has no trust in the police.⁵⁸ Public trust and confidence in the police are prerequisites for effective policing.⁵⁹ Without this trust the public will not be willing to report crimes and provide the police with the information needed to work successfully. It is without doubt that public trust on police has been eroded as a result of what happened in Marikana. As such, moving to the future, there is a need for the SAPS to try to regain public trust and improve on community-police relations.
- Furthermore, democratic policing requires that the police simultaneously stand outside of politics and protect democratic political activities and processes (e.g. freedom of speech, public gatherings, and demonstrations).⁶⁰ When intervening in conflicts, the police must be guided by the principle that everyone shall be subject to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.⁶¹
- Moving beyond institutional issues, crowd control practices, police training and procedures and leadership shortcomings, it appears that there is another, deeper issue

⁵⁵ Bruce (2014)

⁵⁶ Bruce (2014)

⁵⁷ Bruce (2014)

⁵⁸ Magwaza (2014)

⁵⁹ Newham (2014)

⁶⁰ Newham (2014)

⁶¹ Newham (2014)



at hand. This relates to the question of the culture of policing (more especially in as far as “closing the ranks” or the code of silence is concerned) and the relationship of the police to the communities that they work in.⁶²

- Indeed, there are no simple solutions to reforming the police.⁶³ But the NDP recommendations provide a good framework on which to work on in attempting to bring about improved policing that is respectful and mindful of the aspirations and hopes of South Africans. It goes without saying that, moving forward, more focus should be on training for professionalism (detectives; spec units; operational planning; community policing; etc) and demilitarizing the police (as ‘a short term objective which should happen in the immediate term’). An activist-parliament is needed to continue having checks and balances (exercising its oversight role) and monitoring progress in implementing these NDP recommendations.
- Parliament has an indispensable role to play in ensuring accountability and that justice is served. The PC on Police therefore should closely monitor the implementation of the Farlam Commission of Inquiry’s recommendations.

6. Conclusion

It is without doubt that events that happened in Marikana have no place in a democratic society. More so, the events in Marikana speak to the ‘structural or systemic policing issues’ that need to be addressed in order to avoid a recurrence of such calamity. As Bruce eloquently puts it, the events in Marikana also speak to the need of examining issues on ‘the level of how the police organises as an organisation, how it trains its personnel, what it teaches them, to what standards it holds them, how it is managed and who does the managing.’⁶⁴

Specifically, the SAPS need to respond to protests in a fashion that does not result in needless bloodshed and therefore revisiting the training regimes and equipping police officers effectively for crowd control is very important.⁶⁵

In the spirit of honouring the lives lost in Marikana, the police leadership and the Portfolio Committee on Police might need to pay a particular focus on the key ‘systemic’ issues relevant to public order policing and to the deployment of the use of force within the SAPS. There could be no better way of honouring the lives lost in Marikana other than ensuring that all the Commission’s recommendations are implemented and that justice is served.

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⁶² Magwaza (2014)

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