

CLAASSEN

BOARD OF INQUIRY



REPUBLIC OF SOUTH AFRICA

**REPORT OF THE BOARD OF INQUIRY INTO ALLEGATIONS
OF MISCONDUCT AGAINST THE NATIONAL
COMMISSIONER: MANGWASHI VICTORIA PHIYEGA**

**BOARD ESTABLISHED IN TERMS OF SECTION 9(1) OF THE
SOUTH AFRICAN POLICE SERVICES ACT NO. 68 OF 1995**

Prepared by Judge Neels Claassen, Adv Bethuel Sibusiso (Vusi) Khuzwayo and
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EXECUTIVE SUMMARY

1. On 21 September 2015 the President of the Republic of South Africa, His Excellency, The Honourable Mr Jacob Gedleyihlekisa Zuma (“the Employer”) established a Board of Inquiry (“the Board”) in terms of section 9 of the South African Police Service Act No 68 of 1995 (“the SAPS Act”) to convene an investigation into allegations of misconduct against Ms Mangwashi Victoria Phiyega, the National Commissioner (the “NC”).
2. The Employer appointed as the Chairperson of the Board of Inquiry, retired Judge Neels Claassen, who presided with two other co-commissioners, Adv Vusi Khuzwayo and Adv Anusha Rawjee (the “Board”)
3. The Board’s mandate was to investigate and report on all the matters specified in its Terms Of Reference (the “TOR”). In brief, the Board’s TOR were to investigate certain “allegations of **misconduct** by the NC and/or into her **fitness** to hold such office and/or into her **capacity** for executing her official duties efficiently and according to law” and make findings and recommendations in regard to the following:
 - 3.1 Whether the NC, acting together with other leadership of the South African Police Services (the “SAPS”) or alone, misled the Farlam Commission of Inquiry (the “FCI”) by concealing that it had taken a decision to implement a “tactical option”, made at the NMF meeting on or about 15 August 2012.

- 3.2 Whether the NC, in taking the decision to implement the ‘tactical option,’ ought reasonably to have foreseen the tragic and catastrophic consequences which ensued.
 - 3.3 Whether the remarks by the NC at the SAPS Parade on 17 August 2012 would have been understood to be an unqualified endorsement of the police action, frustrating or otherwise impeding the work of the FCI.
 - 3.4 Whether the report prepared by the NC for the President on 16 August 2012 and the media statement subsequently issued on 17 August 2012, were deliberately amended to conceal the fact that there were two shooting incidents (scene 1 and scene 2), resulting in misleading the public that all deaths had occurred at scene 1 which arose out of members of SAPS having to defend themselves from an advancing mass.
 - 3.5 Whether the overall testimony of the NC at the FCI was in keeping with the office which she holds and the discharge of her duties commensurate therewith.
 - 3.6 To make recommendations on steps towards reconciliation and/or possible disciplinary action or criminal prosecution arising out of the findings in the investigation.
4. The Board rejected an argument raised *in limine* that the NC had no legal or constitutional authority to participate and take decisions regarding the Marikana crisis while she was within the North West Province, the jurisdictional area of General Mbombo.

5. **As to the first question to be answered:** The Board found in favour of the NC that she did not mislead the FCI by not disclosing during her initial evidence as to the existence of an extraordinary National Management Forum (the extraordinary “NMF”) meeting held after the official NMF meeting in Midrand on 15 August 2012. The Board found that she did disclose such fact during her initial evidence and that the FCI incorrectly accused her of non-disclosure. Consequently the Board recommends that the NC be acquitted of this charge.
6. **As to the second question to be answered:** The Board found that the NC failed to exercise her discretion judiciously when endorsing the proposed decision to disarm, disperse and arrest the protesters. The Board found that the NC through her press statement and the report to the President made no attempt to address the risks and consequences of the police conduct. At worst, the NC justified the conduct and actions of the police members involved in the operation in Marikana.
7. The Board recommends that she should be dismissed as unfit for the position of National Commissioner of the SAPS as, with all the information at her disposal, she should have been capable of foreseeing the tragic and catastrophic consequences of taking the decision to implement the tactical option.
8. **As to the third question to be answered:** The Board found that the NC’s statement on 20 August 2012 did not impede or frustrate the work of the FCI as alleged. Consequently, we recommend that she be acquitted on Charge 3.

9. **As to the fourth question to be answered:** The Board finds that the NC's conduct in amending the media statement to conceal the fact that the police shot and killed strikers at two different scenes constitutes serious misconduct and a breach of her duty to manage and control the police in a honest and transparent manner rendering comprehensive and correct information to the public and the media. It is recommended that the NC be removed from office.

10. **As to the fifth question to be answered:** The Board finds that her evidence during the FCI was unsatisfactory in many respects unbecoming of a senior public servant in her position. Her failed attempts to avoid esponsibility for the conduct of the police had a negative impact on her credibility and, therefore, makes her unfit for the post of National Commissioner of Police. It is recommended that she be removed from her office.

PART 1:

INTRODUCTION

1. On 21 September 2015 the President of the Republic of South Africa, His Excellency, The Honourable Mr Jacob Gedleyihlekisa Zuma (“the Employer”) established a Board of Inquiry (“the Board”) in terms of section 9 of the South African Police Service Act No 68 of 1995 (“the SAPS Act”) to convene an investigation into allegations of misconduct against Ms Mangwashi Victoria Phiyega, the National Commissioner (the “NC”).
2. The establishment of the Board, the appointment of the members of the Board and the terms of reference of the Board were published under Government Notice No 981 of 2015 in Government Gazette No 39279 of 9 October 2015. The Notice reads as follows;

“ESTABLISHMENT OF THE BOARD OF INQUIRY INTO THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE: GENERAL MV PHIYEGA.

I hereby, in terms of section 9(1) of the South African Police Services Act, 1995 (Act No. 68 of 1995), establish a Board of Inquiry into the allegations of misconduct by the National Commissioner of the South African Police Services and/or her fitness and or her capacity to execute official duties efficiently....”¹

3. This Notice was amended by Proclamation No 4 of 2016 published in Government Gazette No 39638 on 29 January 2016.²
4. The Employer appointed as the Chairperson of the Board of Inquiry, retired Judge Neels Claassen, who presided with two other co-

¹ Government Notice No 981 of 2015 includes the establishment of the Board of Inquiry, the appointment of the Board members and the Terms of Reference is attached hereto as Annexure “A”.

² The Employer amended a typographical error as well as the wording of TOR 2.2 in this Proclamation which is attached hereto as Annexure “B”

commissioners, Adv Bethuel Sibusiso Khuzwayo (Vusi) and Adv Anusha Rawjee (the Board).³

5. The scope of the investigation is set out in the Board's Terms of Reference ("TOR").
6. The Board had authority to determine and issue its own Rules of Procedure. Therefore, in preparation for the hearings the Board issued certain Rules.⁴ Apart from the Rules, the Board also set out a time table for the Employer and the NC representatives wherein they were directed to issue their statement of case and statement of defence, respectively.⁵ These agreements were recorded in minutes of a preparatory meeting held amongst all stakeholders on 18 January 2016.⁶
7. The Board's mandate was to investigate and report on all the matters specified in its TOR. In brief, the Board's TOR were to investigate certain "allegations of **misconduct** by the NC and/or into her **fitness** to hold such office and/or into her **capacity** for executing her official duties efficiently and according to law" and make findings and recommendations in regard to the following:
 - 7.1 Whether the NC, acting together with other leadership of the South African Police Services (the "SAPS") or alone, misled the Farlam Commission of Inquiry (the "FCI") by concealing that it had taken a decision to implement a "tactical option", made at the National Management Forum (NMF) meeting on or about 15 August 2012.

³ CBI: Annexures "B1", "B2" and "B3" at the end of the report.

⁴ The Board's Rules are attached and marked CBI: Annexure "C" to this Report.

⁵ The Statement of Case and Statement of Defense are attached hereto and marked CBI: Annexure "D" and "E", respectively.

⁶ CBI: Annexure "F".

- 7.2 Whether the NC, in taking the decision to implement the ‘tactical option,’ ought reasonably to have foreseen the tragic and catastrophic consequences which ensued.
- 7.3 Whether the remarks by the NC at the SAPS Parade on 17 August 2012 would have been understood to be an unqualified endorsement of the police action, frustrating or otherwise impeding the work of the FCI.
- 7.4 Whether the report prepared by the NC for the President on 16 August 2012 and the media statement subsequently issued on 17 August 2012, were deliberately amended to conceal the fact that there were two shooting incidents (scene 1 and scene 2), resulting in misleading the public that all deaths had occurred at scene 1 which arose out of members of SAPS having to defend themselves from an advancing mass.
- 7.5 Whether the overall testimony of the NC at the FCI was in keeping with the office which she holds and the discharge of her duties commensurate therewith.
- 7.6 To make recommendations on steps towards reconciliation and/or possible disciplinary action or criminal prosecution arising out of the findings in the investigation.

SUPPORT STAFF.

8. In view of the nature and purpose of its establishment, the Board had to secure and employ, amongst others the following resources:

8.1 The Board's Secretariat to facilitate all its organisation, management and support related functions. The Secretariat became the pillar of the Board's logistics and operations, to which it is indebted to Adv Liza Tsatsi and her support team, comprising of Ms Vuyo Mbekwa, Ms Bonnie Badiwe, Ms Nhlanhla Chikane and Mr Sifiso Mthethwa. The Board expresses its appreciation for the sterling manner in which the Secretariat and the support staff rendered their functions and responsibilities.

8.2 In view of the wide spread public interest in the events at Marikana during August 2012, the Board's proceedings were open to the public. This required constant and appropriate communication with the public at large. The Board secured services of relevant personnel to facilitate its Media Office who attended to the release of press statements and maintained the flow of information with regards to its role, participation by third parties and members of the media. Therefore, the Board kept up constant media publication of its sessions whereby it informed all the citizens of the Republic of South Africa of its role, terms of reference, sessions of its hearings and time frames.⁷ The Board was ably assisted by Mr William Baloyi, who was employed as its Communications and Media Manager and through his excellent skills and expertise he professionally

⁷ CBI: Annexure "G" copy of the press statement.

managed the Board's communication and interrelation with outsiders. The Board is indebted to Mr Baloyi for a sterling job well executed.

TIME LAPSES AND DELAYS.

9. The Board's TOR are in part derived from the FCI into the tragic incidents at the Lonmin Mine in Marikana, Rustenburg ("Lonmin Mine"). Contributory factors delaying the commencement with the hearing of evidence before this Board were, amongst other things:
 - 9.1 The background to the Board's TOR is based on the evidence derived from the FCI which was established to investigate the circumstances that led to the death of 34 people in Marikana during August 2012.
 - 9.2 The record of the Farlam Commission was bulky, running into some 38 000 pages of evidence and thousands of pages of exhibits. Therefore, access to and appreciation of its content required more time than was anticipated when the Board set its original time frames.
 - 9.3 Making of adequate copies for delivery to all the parties proved problematic, thus the Board had to reschedule its time frame in order to enable the evidence leaders and the NC's legal teams adequate time to prepare their cases.
10. Another delay in the completion of this report was caused by the illness and hospitalisation which befell the chairperson during July, August and September 2016. Resumption of work in preparing this report was only possible from Monday 19 September 2016.

THE PARTIES BEFORE THE BOARD.

11. The Employer appointed a team that was to facilitate the presentation of evidence on his behalf, as well as to act as the Employer's representatives throughout the hearings before the Board. The team consisted of:

11.1 Ms Zanele Nhlayisi of the Office of the Pretoria State Attorney who acted on behalf of the Employer and briefed the following team of advocates:

11.1.1 Adv Ismail Jamie SC who led the Evidence Leaders;

11.1.2 Adv Thabani Masuku, who was the team's first Junior Counsel; and

11.1.3 Adv Deidre Kusevitsky, the second Junior Counsel.

11.2 The NC, as she is entitled to in terms of the provisions of section 8(4)(a) of the SAPS Act, appointed Werksmans Attorneys as her attorneys:

11.2.1 Mr Sandile July of Werkmans Attorneys acted on behalf of the NC and appointed the following team of advocates.

11.2.2 Adv William R Mokhari SC, who led the Defence Team; and

11.2.3 Adv Mahlape Sello, who was his Junior Counsel.

11.3 At a very late stage during the proceedings, the Board received requests from two interested parties, the Socio-Economic Rights Institute ("SERI") and the Association of Mineworkers and Construction Workers Union ("AMCU") who sought to participate in the Board's proceedings, in representing the

interests of the families of deceased Lonmin miners and affected Lonmin miners respectively.

11.4 SERI sought permission to address the Board and make submissions with regards to the Board's TOR. The Board considered the application and granted SERI limited rights of access whereby SERI was permitted to make written and oral submissions between 1st June 2016 and 3rd June 2016. SERI's legal team was constituted as follows:

11.4.1 Adv Dumisa Ntsebenza SC, led the team; and

11.4.2 Ms K Thobakgale.

11.5 AMCU sought permission to introduce evidence on affidavit by its President, Mr Joseph Mathunjwa and subsequently, to address the Board and make submissions with regards to the Board's TOR. The Board of Inquiry considered the application and similarly granted AMCU limited rights of access whereby AMCU was permitted to file affidavits and make submissions between 1st June 2016 and 3rd June 2016. AMCU's legal team was constituted as follows:

11.5.1 Adv Dali Mpofu SC, led the team; and

11.5.2 Adv Tembeka Ngcukaitobi.

12. The NC had registered written objections against the Board's decision to give AMCU and Mr Mathunjwa rights of audience. The Board overruled the objection as the Rules of the Board provided for the admission of third parties to be joined to the proceedings, and

this was the second third party that was being permitted, though with limited rights. In view of the objection, the Board advised affected parties that prior to dealing with the closing arguments the Board would call upon AMCU's legal representatives to make a formal application for the right to participate.

13. The NC did not object to the Board's decision to grant SERI limited right of audience. Therefore, on 01 June 2016 the Board placed on record the objection raised in respect of AMCU and then invited AMCU, through its legal representatives, to motivate their application to be admitted to the proceedings and be allowed to place the affidavit of Mr Mathunjwa before the Board. Adv Mpofo SC addressed the Board. Upon conclusion of his address, the NC's legal representative placed on record that they were no longer opposing AMCU's limited participation in the proceedings. Consequently, the NC's objection fell away, AMCU was granted leave to participate on similar limited grounds as was granted to SERI and the matter proceeded .

APPLICABLE LEGISLATION AND LEGAL PRINCIPLES

14. The Board's appointment is regulated by legislation, in particular, section 9 of the South African Police Services Act, 68 of 1995 ("the SAPS Act"). The appointment of the NC is likewise regulated by the Constitution, legislation and applicable policies. For purposes of this Report, the Board has opted to focus on its TOR and the relevant legislation that is expressly relevant to the appointment, functioning and control of the SAPS by the NC.

15. The following legislation is referred to:

THE CONSTITUTION 1996

15.1 The Constitution of the Republic of South Africa, 1996 (“the Constitution”) has specific provisions that establishes a single security service. It does so through the Provisions of Chapter 11 (Sections 198 to 210).

15.2 Section 199 (1) and (5) of the Constitution provide that:

(1) The security service of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.

.....

(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law including customary international law and international agreements binding on the Republic.”

15.3 The NC is employed in terms of Section 207 (1) of the Constitution. Section 207 deals with the control of police services and can be summarised as follows:

15.3.1 Section 207 (1) provides that the President as Head of the National Executive must appoint **a woman or a man** as the National Commissioner of police services, **to control and manage the police services.** (Emphasis added)

15.3.2 Section 207 (2) provides that the NC **must exercise control over and manage the police service in accordance with the national policing policy** and the directions of the Cabinet member responsible for policing. (Emphasis added)

15.3.3 Section 207 (4) provides that the Provincial Commissioners are responsible for policing in their respective Provinces –

(a) as prescribed by national legislation; and

(b) **subject to the power of the NC to exercise control over and manage the police services in terms of subsection (2).** (Emphasis added)

16. The NC is also a public servant. The National Commissioner is therefore subject to the dictates and requirements of chapter 10 of the Constitution (Sections 195 to 197). As such, the NC must have attributes to maintain a high standard of professional ethics, be able to promote efficient, economic and effective use of resources, foster transparency in providing timely, accessible and accurate information, based on ability, objectivity, fairness, and the need to redress the imbalances of the past and able to respond to the people's needs.⁸

17. In terms of the Public Service Act, 103 of 1994 (“the Public Service Act”) the NC is not excluded from its terms unless they conflict with the SAPS Act⁹. The NC is therefore also subject to the regulations issued in terms of the Public Service Act which include a Code of Conduct for public servants. Paragraph C in the code of conduct *inter alia* require a public servant to cooperate with public institutions; to protect every persons dignity and constitutional rights; be creative in thought and seek innovative ways to solve problems and enhance effectiveness and efficiency. A public servant is expected to execute his or her duties in a professional and

⁸ Section 195(1) of the Constitution.

⁹ Sections 2(1) and (2) of the Public Service Act 1994.

competent manner and promote sound, efficient, effective, transparent and an accountable Administration.

THE SAPS ACT OF 1995

18. The national legislation referred to in the Constitution, is the SAPS Act. We deal herein below with the provisions that we consider relevant to the allegations of misconduct levelled against the NC .

18.1 Section 9 of the SAPS Act deals with misconduct by or incapacity of a National or Provincial Commissioner. We make reference to what applies to the NC in section 9 that provides:

- “(1) Subject to this section, sub-section (1) to section 8 shall apply mutatis mutandis to any inquiry into allegations of **misconduct** by the National or Provincial Commissioner or into his or her **fitness for office** or **capacity** for executing his or her official duties effectively.
- (2) The board of inquiry established by virtue of subsection (1) shall make a finding in respect of the alleged **misconduct** or alleged **unfitness** for office or **incapacity** of executing official duties efficiently, as the case may be, and make recommendations contemplated in section 8 (6) (b).”(Emphasis added)

18.2 The provisions of section 9 (3) deal with an instance where the NC had lost the confidence of the Cabinet. Of course, it cannot be gainsaid that a loss of confidence in the NC entertained by the President as Head of the Executive will normally constitute a loss of confidence in the NC by the entire or at least a majority of the Cabinet. Should it be otherwise, it would in effect mean that the President is in the minority of his own cabinet and will not be able to effectively rule executively by majority vote. There was in any event no evidence which indicated any support for the

NC from within the Cabinet, something she should have testified about had it existed.

18.3 The other relevant provisions are found in section 8 (4) and (5), which provide that if a board of inquiry is established under subsection 1 or (2) (c), the Commissioner concerned shall be notified thereof in writing, and thereupon he or she may –

“(4)

- (a) be assisted or represented by another person or legal representative;
 - (b) make written representations to the board;
 - (c) be present at the enquiry;
 - (d) give evidence thereat;
 - (e) cross-examine witnesses not called by him or her;
 - (f) be heard;
 - (g) call witnesses; and
 - (h) have access to documents relevant to the enquiry.
- (5) The board of inquiry shall determine its own procedure.”

SOME IMPORTANT FACTORS IN THIS INQUIRY

19. This Board has to take a number of aspects into account when conducting its investigations and making its findings and recommendations:

19.1 This Board was called upon to determine whether or not the NC committed acts of misconduct;

19.2 The proceedings of this Board were not regulated by the Commissions Act No 8 of 1947. The present inquiry resulted from the SAPS Act and is more akin to a disciplinary inquiry between an employer (the President who appointed the NC) and an employee (the NC). It concerns the conduct of the NC in certain respects arising before, during and after the FCI;

19.3 In SARFU (III) the Constitutional Court said that:

“In the case of the appointment of the commissions of inquiry, it is well established that the functions of a commission of inquiry are to determine facts and to advise the President through the making of recommendations. The President is bound neither to accept the commission’s factual findings nor is he or she bound to follow its recommendations”;¹⁰

19.4 The misconduct inquiry’s possible outcomes are contained in section 8 (6) of the SAPS Act. They are:-

“(a) At the conclusion of the inquiry, the board shall submit its report to –

- (i) (aa) The President, in the event of an inquiry under subsection (1);
- (ii) the Commissioner concerned;

(b) The report referred to in paragraph (a) may recommend that –

- (i) no action be taken on the matter;
- (ii) the Commissioner concerned be transferred to another post or be employed additional to the fixed establishment;
- (iii) his or her salary or rank or both his or her salary and rank be reduced;
- (iv) action be taken against him or her in accordance with subparagraphs (ii) and (iii);
- (v) he or she be removed from office;
- (vi) any other appropriate steps (including the postponement of any decision by the President ... for a period not exceeding 12 calendar months) be taken.”

19.5 Therefore, at the conclusion of the misconduct inquiry the board is required by subsection 6 (a) to submit its report to the President in the event of an inquiry in terms of subsection (1).

19.6 For the sake of completeness when reading this Report, we include a reference to the provisions of Section 8 (7) of the SAPS Act which provide that:

“The President or the National Commissioner, as the case may be, may, upon receipt of a recommendation contemplated in

¹⁰ President of the Republic of SA and others v SARFU 2000 (1) SA 1 (CC) at page 70 C – D, paragraph 146.

subsection (6), remove the Commissioner concerned from office, or take any other appropriate action: Provided that, if the President or the National Commissioner, as the case may be, postpones his or her decision for a period, he or she shall, at the end of such period, request the same board of inquiry, or a similar board established for that purpose, to compile a new report and to make a new recommendation after having considered the conduct of the Commissioner concerned during such period.”

THE INTERRELATIONSHIP OF DUTIES BETWEEN THE NC AND PROVINCIAL COMMISSIONER

20. The duties and responsibilities of the NC as the Head of the South African Police Services are set out in several documents beginning with section 11 of the SAPS Act. Section 11(1) provides that:

“The National Commissioner shall exercise **control over and manage the police service in accordance with section 207 (2)** of the Constitution of the Republic of South Africa, 1996.” (Emphasis added)

21. The NC is also expected to conclude a standard employment contract with the employer which sets out her control and management duties and responsibilities in some detail, inter alia:

“1.1 In terms of section 207 of the Constitution, the Employer hereby appoints the Employee as National Commissioner of the South African Police Service and the Employee hereby accepts the appointment.

1.3 During the period of this contract, the Employee shall –

1.3.1 serve the Employer as National Commissioner of the South African Police Service and head of the Department of Safety and Security at such place as may from time to time be directed by the Employer:

1.3.2 **be responsible for the efficient management and administration of the South African Police Service (hereinafter referred to as the Service) as contemplated in section 207(2) of the Constitution, the Act, section 7(3)(b) read with section 7(4) of the Public Service Act, 1994 (Proclamation No. 103 of 1994) and as set out in the performance agreement referred to in clause 6.1;** (Emphasis added)

5.1 The Employee undertakes ---

5.1.4 to comply with the prescribed Code of Conduct.”
(Emphasis added)

22. The incident that gave rise to the death of miners and/or protesters took place in Marikana, North West Province. In terms of the SAPS Organisational Structure, the area fell directly under the then North West Provincial Commissioner, Lt General Mirriam Nosaziso Zukiswa Mbombo (“General Mbombo”). Therefore, we consider it appropriate to set out the provisions that deal with the powers and/or responsibilities of a Provincial Commissioner.

22.1 Section 207 (4) of the Constitution has been referred to hereinabove and deals with the responsibility for policing in the respective Provincial Commissioner’s provinces. It makes provision that such responsibility for policing should be done as prescribed by national legislation and also provides that the Provincial Commissioner acts **under the control and direction of the National Commissioner**. (Emphasis added)

22.2 Section 12(1) of the SAPS Act provides that:

“Subject to this Act, a Provincial Commissioner shall have command of and control over the Service under his or her jurisdiction in the province and may exercise the powers and shall perform the duties and functions necessary to give effect to section 219 of the Constitution.”

22.3 Section 12 (2) (a) and (b) of the SAPS Act provides that a Provincial Commissioner may –

“(a) subject to a determination under section 11 (2) (b), delimit any area in the province and determine the boundaries thereof until the province has been divided into as many areas as may be necessary for the purposes of the organisation of the Service under his or her jurisdiction; and

(b) establish and maintain police stations and units in the province and determine the boundaries of station or unit areas.”

22.4 Section 12 (3) provides that:

“A Provincial Commissioner shall determine the distribution of the strength of the Service under his or her jurisdiction in the province among the different areas, station areas, offices and units”.

22.5 Section 17(1) of the SAPS Act provides for the NC to **“establish and maintain a national public order policing unit”** (“POP”).(Emphasis added)

22.6 Section 17(2)(3) and (4) provide that:

- “(2) The National Commissioner **may** deploy the national public order policing unit, or any part thereof, **at the request and in support of a Provincial Commissioner**, taking into account ---
- (a) the reason for the request;
 - (b) the personnel and equipment available to the unit; and
 - (c) any other circumstances anywhere in the national territory which may have an influence on the maintenance of public order and which may require the deployment of the unit or any part thereof elsewhere.
- (3) Where the national public order policing unit or any part thereof is deployed under subsection (2), the unit shall perform its functions **subject to the directions of the Provincial Commissioner concerned**: provided that the mere fact of such deployment does not preclude the President from exercising his or her powers under subsection (5) in relation to the area where the unit is so deployed.
- (4) the National Commissioner **may withdraw** the national public order policing unit or any part thereof deployed under subsection (2), taking into account ---
- (a) the prevailing circumstances where the unit or part thereof is so deployed;
 - (b) the personnel and equipment available to the unit; and
 - (c) any other circumstances anywhere in the national territory which may have an influence on the maintenance of public order and which may require the deployment of the unit or any part thereof elsewhere: Provided that the National Commissioner shall, at the request of the Provincial Commissioner, withdraw the unit or any part thereof so deployed.” (Emphasis added)

**DO THE THE DUTIES OF CONTROL AND MANAGEMENT OF
THE NC REMAIN IN TACT WHEN SHE IS WITHIN THE AREA
OF JURISDICTION OF ANOTHER PROVINCIAL
COMMISSIONER?**

23. Having referred to the constitutional and other statutory duties of the NC, it becomes necessary to deal up front with an argument raised by the NC's counsel which sought to limit her responsibility for the tragic events that unfolded at Marikana, especially on 16 August 2012. It was argued on behalf of the NC that she lacked both the constitutional and statutory powers to control the police operation at Marikana, and that her role was subsidiary to that of the Provincial Commissioner. Reliance for this contention was placed on section 207(4) of the Constitution together with sections 12 and 17 of the SAPS Act.
24. The argument on behalf of the NC is however fundamentally flawed. It commences with a misunderstanding of the import of section 207(4) of the Constitution. Insufficient emphasis is placed upon the qualification contained in 207(4)(b) which expressly subordinates the responsibilities of Provincial Commissioners to the powers of the NC.
25. The subsection expressly states the Provincial Commissioners are responsible for policing **“subject to the power of the National Commissioner to exercise control over and manage the police service in terms of subsection (2)”** of the Constitution.
26. Subsection (2) expressly imposes a duty on the NC to exercise control over and manage the police service in accordance with the

national policing policy and the directions of the Cabinet member responsible for policing. This duty and responsibility placed upon the NC is an overriding constitutional duty that cannot be undermined or abrogated by lesser stipulations in the SAPS act.

27. The argument for the NC, however, also seeks to divest the NC of her overriding managerial and controlling responsibilities by relying on sections 12 and 17 of SAPS act. The obvious intent of sections 12 and 17 is merely to establish the empowering provisions for Provincial Commissioners to act in their respective provinces. The sections in no way undermine the overriding authority of the NC over the various Provincial Commissioners serving under her.

28. It is apposite to record that in all the NC's statements before the FCI beginning with her Statement "as a base document"¹¹ the NC has maintained that she is cognizant of her capacity and her role as NC and assumed responsibility for the safety and security of South African citizens.¹² The NC, further in her evidence in chief at the FCI stated:

"I stand before you as the National Commissioner of the South African Police Service to tell you that the performance, professionalism, and integrity of the service as a whole **are ultimately my responsibility.**"¹³(Emphasis added)

29. Despite this acknowledgement over her responsibility, she was not willing at one stage to even admit that she "endorsed" the decision proposed by the North West Provincial Commissioner. But ultimately, whether she endorsed, approved, sanctioned or proposed

¹¹ FCI: Exhibit FFF33.1.

¹² Also FCI: Exhibits FFF33.2, FFF33.3, Exhibit 33.4, Exhibit 33.5, Exhibits FFF2A, FFF 3.

¹³ FCI:Transcript-Day 64 at page 6794, lines 18-22.

the option, she was the leading officer in the room where the plan was discussed, explained and accepted. Even if she had simply sat and listened without saying a word, her presence as National Commissioner of Police would have constituted formal approval, tacit or express, of the plan that was being hatched for execution the next day on 16 August 2012.

30. The Marikana operation was not a North West Province issue, as the NC argued before this Board. This much is evident from the composition of the JOC command structure that managed the operation. The NC, assisted by her deputy commissioners had released police commanders and committed them to Marikana before 15 August 2012. Amongst those released to Marikana, included police commanders from the police head quarters, Pretoria. There were further commanders who represented Gauteng, Limpopo and Mpumalanga provinces. It follows that if this was an exclusive North West Provincial matter, there should not have been police commanders, strategic and negotiating teams from outside North West Province.

31. We know that on 13 August 2012, midday, Major General Naidoo, who, at the time was the Acting Provincial Commissioner, North West Province telephoned Major General Annandale and informed him about the death of two police members and a third officer that was seriously injured. Major General Naidoo indicated that the province required deployment of additional personnel. Consequently, when Major General Annandale arrived in Marikana,

Major General Mpembe established a permanent JOC structure.¹⁴ Major General Annandale was tasked as the Chairperson of JOCCOM and also given a role to manage the JOC. He was to be assisted by the designated role-players representing each field. Major General Annandale summoned resources from other provinces. Operational Commander: Brigadier Calitz, North West Provincial Head Operational Response Services was responsible for the coordination of the operations on the ground.

32. The JOCCOM also had role-players from other provinces outside North West Province. The JOCCOM was established to enable the effective management of the different units within their roles and responsibilities during the Marikana operation. Tactical forces from the National Intervention Unit (NIU), Special Task Force (STF) and the Emergency Medical Treatment Representatives were all represented in the JOCCOM. The STF was represented by Brigadier Fritz as the Section Head: Special Task Force. The NIU was represented by Brigadier Tsiloane, the Section Head of the NIU. Brigadier Calitz represented Public Order Policing (POP), and was also the operational commander. The detectives were represented by Brigadier Van Zyl; Crime Intelligence represented by Brigadier Engelbrecht; and Visible Policing (VISPOL) represented by Brigadier Seboloke. Captain Kidd represented the Gauteng Tactical Response Team (TRT). Colonel Makhubele represented members of the Public Order Police (POP) from Pretoria, Mpumalanga and Limpopo provinces. Finally, Lieutenant-Colonel Scott was responsible for planning.

¹⁴ See Paragraph 7, in the statement of Major General Mpembe. Also FCI: Exhibit FFF5 pages 1, 2 and 3 of Major General Annandale's statement. Major General Mpembe employed as the Deputy Commissioner (North West Province) responsible for operations.

33. General Annandale telephoned the National Coordinator for Hostage Negotiators, Lieutenant Colonel (Dr) Strydom to deploy a team of negotiators. They arrived under the command of Lieutenant Colonel MacIntosh, and took over the negotiations. For all intents and purposes, the command structure was led, amongst others by commanders who normally report directly to the SAPS head quarters structure, which is led by the NC.
34. Therefore, the argument that the NC was not authorized to intervene or interfere with the tactical decision decided upon by General Mbombo, the North West Provincial Commissioner to be executed on 16 August 2012, is rejected.

**AGREEMENT BETWEEN THE PARTIES REGARDING
THE EVIDENCE BEFORE THIS BOARD OF INQUIRY.**

35. We take note that the NC has accepted that this Board is entitled to accept as a point of departure that the adverse findings at the FCI constitute *prima facie* evidence against her.¹⁵ More important and very relevant is that she accepted that an inquiry of this ilk provided her with an opportunity to, if needs be, adduce evidence to this inquiry in person or through other persons including documentary evidence and otherwise about her innocence.
36. The entire FCI record was regarded as Exhibit “D” before this Board.

¹⁵ CBI: Defence Statement of Response at page 7, para 8.8 & page 6 paras 8.3, 8.5-8.5.2.

37. In addition to the FCI record, the following documents were tendered as evidence before the Board:

37.1 A bundle of documents submitted by the evidence leaders and a bundle of documents submitted by the defence team.¹⁶

37.2 A letter from the NC's attorneys of record dated 3 May 2016.¹⁷

37.3 One further witness statement.¹⁸

38. The letter dated 3 May 2016 (Exhibit C), records an agreement reached between the parties as to the status of the evidence before the Board. The agreement can be summarised as follows:

38.1 The evidence of witnesses who testified at the FCI is accepted as evidence before the Board, save to the extent that it is contradicted by other evidence;

38.2 The following witness statements, included in Exhibit B by the evidence leaders, were admitted as evidence before the Board:

38.2.1 Captain Moolman (including her hand written notes);

38.2.2 Colonel Madoda;

38.2.3 Colonel Claasens;

38.2.4 Mr Simon Laka;

38.2.5 Mr Philani Tladanyane;

38.2.6 Ms Josephine Keetseng Ngake;

38.2.7 General Mawela; and

38.2.8 General Basson.

¹⁶ CBI: Exhibit A is the Defence Bundle and Exhibit B is the Evidence Leaders' Bundle.

¹⁷ CBI: Exhibit C.

¹⁸ A witness of the evidence leaders: Mr Lindela Leopold Mashigo marked CBI: Exhibit E.

38.3 In a letter from the NC's legal representatives dated 4 May 2016¹⁹ the statements of the following two witnesses were included as evidence before the Board as per the agreement recorded in Exhibit C:

38.3.1 Captain Adriaio; and

38.3.2 Brigadier Mashigo.

39. Save for the record of the FCI, the NC tendered no further evidence to rebut the version and evidence placed before the Board by the evidence leaders and such evidence stands uncontested.

¹⁹ The letter dated 4 May 2016 from the NC's legal representatives recording this agreement between the parties is attached hereto.

TERM OF REFERENCE 2.1 (CHARGE 1)

40. The first charge against the NC as detailed in TOR 2.1, calls upon the Board to determine whether she, acting together with other leadership of the South African Police Services or alone, misled the FCI by concealing that it had made a decision to implement a “tactical option”, at the NMF meeting on or about 15th August 2012.

41. This charge is the result of a finding by the FCI to the following effect:

The leadership of the police, on the highest level, appears to have taken the decision not to give the true version of how it came about that the „tactical option“ was implemented on the afternoon of 16 August and to conceal the fact that the plan to be implemented was hastily put together without POP inputs or evaluation. **In order to give effect to this, the decision at the NMF was not disclosed to the Commission.** An inaccurate set of minutes for the 06h30 meeting was prepared and a number of SAPS witnesses testified before the Commission in support of the incorrect version. There is at least a prima facie case that the National Commissioner and the Provincial Commissioner for the North West Province, who knew the true facts, approved Exhibit L, SAPS presentation which contained the incorrect facts.²⁰ (Emphasis added)

42. The evidence disclosed that several meetings were held on Wednesday 15 August 2012. While Major General Mpenbe was debriefing the NUM and AMCU teams at Marikana, the NC and General Mbombo were attending a meeting of the NMF of the SAPS, which was being held at Midrand. The Provincial Commissioners of the other provinces as well as the Divisional Commissioner for Operational Response Services, the Deputy National Commissioner Operational Response Services and the Acting Divisional Commissioner Crime Intelligence, also attended this meeting. There were in actual fact two separate meetings in

²⁰ FCI Report Paragraph 4) at page 515.

Midrand that evening. The official NMF meeting, where the Marikana situation was **not** discussed, concluded at about 18:00 where after an extraordinary NMF meeting was held attended by *inter alia* Lieutenant General Mbombo, the NC and other senior Police Commissioners. It is at this extraordinary NMF meeting where General Mbombo briefed the senior police officials on the situation at Marikana and of her intention to disarm and disperse the strikers the next day.

43. The FCI recalled the NC to testify about the decision taken at the extraordinary meeting held after the NMF concluded at about 18:00 on Wednesday 15 August. The basis for this recall was the contention by the chairperson of the FCI that the NC did not testify about this extraordinary meeting and the decision taken thereat during her initial evidence in chief or under cross examination. The NC protested that she had already testified about the extraordinary meeting that was held after the NMF meeting, to which the chairperson replied:

“I’m sorry, General, you didn’t – National Commissioner, you didn’t. In your evidence, that’s why I asked you to come back, when you testified before you didn’t tell us about - ... You didn’t mention that everyone was then called, everyone who was still there was called together and what the minutes described as an extraordinary session took place which lasted up to an hour, at which various people spoke. That you didn’t mention, so don’t tell me what you told us before because you didn’t deal with that before, that’s why I’ve got you back to ask you these questions now.”²¹

²¹ See FCI record page 37393 lines 14 to 25.

44. It is, however, correct that:

44.1 In her representations to the President she said there was no plan before the extraordinary meeting of a so-called tactical option.²²

44.2 The SAPS leadership sought to create the impression that the decision to w as taken at 13:3²³ due to a threat of escalation of violence and the commanders well briefed at 14:30²⁴ on 16 August 2012 at the JOCCOM meeting. It was for this reason that:

44.2.1 Exhibit L, the representation of SAPS case do the FCI prepared at the Roots Conference Centre over an estimated period of two weeks, makes no mention of the NMF meeting all the extraordinary NMF meeting. The NC called this an “omission”.

44.2.2 The NC’s written statements to the FCI made no mention of the extraordinary NMF meeting held after the NMF meeting. Her explanation to the FCI was that this was also an “oversight”.

44.2.3 Generals Mpembe,²⁵ Annandale²⁶ and Naidoo²⁷ denied having spoken to General Mbombo telephonically on the evening of 15 August 2012 when she informed them of the decision to implement the tactical option if the strikers did not disarm the next day.

²² Annexure D at Annexure EL2 at page 9 paragraph 27, page 13 paragraph 38, page 14 paragraph 40, page 24 paragraph 65 and page 25 paragraph 70.

²³ FCI record Exhibit HHH20 paragraphs 12 – 13.1, Exhibit GGG1 paragraph 22, Exhibit GGG5 paragraph 19.4, FCI: Exhibit GGG paragraph 40 –41.

²⁴ FCI record -day 193 pages 23643 and 23651, Exhibit DD and Exhibit EE

²⁵ FCI record -day 149 page 17044.

²⁶ FCI record -day 82 page 8662.

²⁷ FCI record -day 193 page 23621.

45. However, the FCI misdirected itself in contending that the NC failed to mention the extraordinary session in her evidence prior to being recalled. She traversed the circumstances surrounding the extraordinary session twice, once while being questioned by Mr Bruinders SC²⁸ and once while being cross examined by Mr Mpofo SC²⁹. In summary, she testified that – (i) the official NMF had nothing to do with the Marikana situation; and (ii) after dismissing certain of the NMF attendees, she asked the Provincial Commissioners and other senior officers to stay behind and discuss in an extraordinary meeting commencing after 18:00; (iii) the question of additional resources for General Mbombo; (iv) the decision to disarm and disperse the strikers the next day as explained by Mbombo; and (v) the possibility of the strikers laying down their arms the next morning as promised by Mr. Mathunjwa. The FCI record at the pages referred to also indicate that the Chairperson is recorded as having stated that the Commission heard her testify about this "second" meeting after the official NMF meeting, both in chief (which she did not) and later under cross examination.
46. We note that in her evidence at the FCI, she did not refer to the decision endorsed at the extraordinary meeting as a “tactical option” but merely as a decision to “disarm and disperse the strikers the next day”. In our view, it was generally understood throughout the FCI that the so-called tactical option amounted to just that – a plan to disarm and disperse the strikers the next day.

²⁸ FCI record pages 7941 to 7943.

²⁹ FCI record pages 10553 to 10556.

47. In light of the evidence of the NC referred to above, it must be concluded that she did not conceal from the FCI **in her testimony** the fact that a decision was taken during the evening of Wednesday 15 August 2012 to effect the disarming and dispersal of the strikers the next day on Thursday 16 August 2012. Her disclosure of what transpired at the extraordinary meeting in her initial evidence is inconsistent with any attempt on her part to continue with any charade that no such decision was taken. The fact of the matter is that she was wrongly accused by the FCI of having attempted to conceal these events in her initial testimony.

FINDINGS AND RECOMMENDATIONS

48. We make the finding that the NC did not conceal from the FCI the fact that a decision was taken on 15 August 2012 to implement a tactical option to disperse and disarm the strikers the next day and we recommend that she be acquitted on Charge 1.

TERM OF REFERENCE 2.2 (CHARGE 2)

49. The second charge against the NC is based on terms of reference 2.2, which called upon the Board to inquire whether the NC, in taking the decision to implement the “tactical option”, ought reasonably to have foreseen the tragic and catastrophic consequences which ensued.³⁰
50. The NC is the commander in chief of the South African Police Services. As a consequence of this responsibility, on 13 August 2012 after she was informed by General Mbombo about the killing of two (2) police members, the NC travelled to Marikana. She was accompanied by Lt-General Mzwandile Petros, who was then the Provincial Commissioner of Gauteng.
51. It is common knowledge that immediately after the killing of two (2) police members on 13 August 2012, some of the senior police members from Pretoria (head office) were also deployed to Marikana and they took over some of the specific roles in the operation. According to the evidence of Major General Annandale and Major General Mpembe a JOCCOM structure was established on 13 August 2012 as stated earlier in this report.

³⁰ The term “tactical option” has been derived from FCI Exhibit HHH20 –(page 46 to 47). This is the consolidated statement of Colonel Scott contained in paragraphs 7.21.6.1 to 7.21.6.4. Colonel Scott describes stage 3 as following “*This was to be a predetermined deliberate **tactical option** by the police to resolve the situation and to be employed where negotiations were deemed unsuccessful and a show of force had failed to deter further lawlessness.*” Colonel Scott continued in paragraph 7.21.6.3 and said “*The Phase 3 concept spoke of encircling with razor wire and offering them an exit point through which they would need to hand over their weapons, if still in possession and not left on the koppie. I had to include Phase 3 as **a tactical option**, but had envisioned that the ideal time to employ the strategy (would be) in the early morning at first light.*”

52. Major General Annandale, the head of one of the components of Operational Response Services (ORS) was designated Chairperson of JOCCOM with the responsibility to manage the JOC. He came from head office and reported directly to General Mawela, the Divisional Commander for ORS. General Mawela was based in Pretoria and reported directly to the NC.
53. All communication liaison responsibilities were taken over by Captain Adriao from the head quarters's communication division. He reported to Brigadier Mashigo who in turn reported to the NC.
54. Colonel Duncan Scott travelled to Marikana in the afternoon of Monday, 13 August 2012 and was immediately entrusted with the responsibility to develop a plan that the police could use to resolve or address the impasse that had developed between Lonmin Mine and the striking protesters. It is common knowledge that Colonel Scott was stationed at the Special Task Force National Office, Alben Building, Rietondale, Pretoria. He explained that he was summoned to Marikana, amongst other things to **assist with planning and coordinating an operation where suspects had to be apprehended.**³¹

EVIDENCE

55. The escalation of violence was constantly reported to the NC as from 13 August 2012 leading to 16 August 2012 wherein more protesters were killed. The importance of the police's failure to have a plan ready for the Marikana operation cannot be brushed aside by

³¹ Paragraph 6.1 of FCI:Exhibit HHH20 -(page 17 of 149).

the NC because she constantly received reports of escalating violence in Marikana.³² What is of importance on this charge is the fact that the NC and the police generals endorsed General Mbombo's proposal without seeking to know **how** General Mbombo planned to disarm and disperse the armed protesters.

56. Before we deal with various explanations that were tendered by the police generals, we revisit the extent of violence immediately prior to the NC inviting the police generals to the extraordinary meeting. It is a brief reflection on the scope of evidence, which described the situation on the ground and whether it called for the police to have a detailed or informed proposed plan of action.
57. On Thursday, 9 August 2012, which was a public holiday, a significant group of approximately 3000 workers met outside the Wonderkop Stadium at Lonmin between 08H00 and 13H00. They had, earlier on, rejected the allowances offered by Lonmin and decided not to go to work the following day. They further decided to march to the offices of the Lonmin Platinum Division in support of their demand of a monthly net salary of R12 500.00.
58. On Friday, 10 August 2012 two people were wounded during a clash of rival unions. On Saturday, 11 August 2012 the police found five (5) wounded people. Whilst a march was in progress, three (3) more people were injured.

³² The NC states in paragraph 21 on page 6 of her statement (dated 07 March 2013), attached as Annexure 1 to her representations to the President: "*I continued receiving regular reports about the events that were unfolding in Marikana...*" This is the NC's confirmation under oath that she was kept up to date with the developments in Marikana. Therefore, when General Mbombo presented the proposal on 15 of August 2012 the NC ought to have appreciated what was the proposal seeking to address the situation at Marikana.

59. On the following day, Sunday 12 August 2012, two Lonmin Mine security guards and two Lonmin Mine employees, were killed. Nine (9) motor vehicles were torched at K4 Shaft. On Monday, 13 August 2012 two (2) SAPS members were killed; one member was wounded. Two (2) protesters were killed and one (1) died due to injury. Five protesters were wounded.
60. On Tuesday, 14 August 2012 the police implemented phase 1 of the operational plan, through negotiations with the protesters. The police found a body of one of Lonmin Mine's employees near Koppie 1. The following day, 15 August 2012, the police continued with phase 1 and engaged in negotiations with the protesters. According to Mr. Mathundjwa, the protesters committed to putting their weapons down at 09H00 the following morning on Thursday, 16 August 2012.
61. Events on Thursday, 16 August 2012 are introduced through the briefing minutes of the Marikana JOCCOM meeting of 16 August 2012 at 06H00.³³ The following points are of importance.
- 61.1 Lt Col Isaacs, from Crime Intelligence reported that:³⁴
- (a) There were about 3000 mine workers at the Koppie, many of whom were armed with dangerous weapons (spears, assegais and pangas).
 - (b) The group was determined not to surrender the dangerous weapons to the police. They were not going to leave the Koppie and were prepared to fight and resist the Police.

³³ FCI:Exhibit TT4

³⁴ FCI:Exhibit TT4, paragraph 2.1.

61.2 Major General Annendale reported that during the negotiating process on 15 August 2012 (the previous day), promises about laying down of arms were made.

61.3 Colonel Scott gave a power point presentation and provided the coordination instructions **on the deployment of forces**.³⁵ This briefing session took place at 06H00 on 16 August 2012 before the special JOCCOM meeting of 13H30. At this late stage the operational plan had no details on how the police were going to implement stage 3. This demonstrated a lack of appreciation or preparedness on part of the police to deal with protesters on 16 August 2012. Colonel Scott dealt with this shortcoming in his statement.³⁶

61.4 Under **Inputs from JOCCOM Role Players** it reflects that **ORS** reported that:

”Brigadier Calitz confirmed the deployments from POP from all provinces as well as TRT’s. 13 armoured vehicles confirmed. No challenges”.³⁷

62. The shortcomings reflected above, should be read with the importance of a plan that could have been in place had the NC appreciated the consequences of her decision to endorse Mbombo’s plan that protesters should be disarmed, dispersed or arrested. These shortcomings came in for sharp criticism during the FCI,

³⁵ FCI:Exhibit TT4, paragraph 2.3. This is recorded under the section “**INPUT ON DAILY DEPLOYMENT**”.

³⁶ Colonel Scott dealt with this point in paragraphs 9.1 to 9.4 of FCI: Exhibit HHH20 (page 73 to 74). In paragraph 9.2 he said “...*I can briefly recall Phase 2 concept being outlined and it being mentioned that Phase 3 had been revised to be dispersal before disarming and arresting could be effected. To the best of my recollection the reason for the change to justify the revised Phase 3 were given, but not discussed in detail. This was to check for any further comments or inputs from the commanders before I briefed. I don’t recall any inputs which raised concerns.*”

³⁷ Paragraph 3.3.6 of FCI:Exhibit TT4.

consequently, during the FCI proceedings the evidence leaders invited the police generals, who attended the extra ordinary NMF meeting of the 15th of August 2012, to respond to an interrogatory circulated through the offices of the SAPS by their attorney, Mr Frikkie Pretorius of Van Velden-Duffey Attorneys.³⁸ The police generals confirmed, through their responses that they did not consider a plan when they endorsed the proposal to disperse, arrest and disarm the striking minors in Marikana.³⁹

63. General CGN Ngcobo, in his response to the interrogatory dated 02 October 2014, recorded that the NC called the extraordinary meeting on 15 August 2012.⁴⁰ CGN Ngcobo does not mention any discussion about a decision to disarm the protesting minors, nor does he mention any plan that was presented and/or considered during the extraordinary NMF meeting of 15 August 2012.

64. A further document marked Annexure 4, is a copy of correspondence dated 22 October 2014 that was issued by **Lt Gen T.S. Mpmbe**, the Deputy Provincial Commissioner: Free State Province in response to the interrogatory.⁴¹ He confirmed the meeting, but reported his absence throughout the meeting. In his words, he stated as following:

“When the specific business item on the agenda was being debated I did not make or signify any intention to discuss the subject”.⁴²

³⁸ Paragraph 92 of CBI:Annexure EL4 (attached to the Statement of Case) page 62. .

³⁹ Paragraph 93 of CBI:Annexure EL4 (attached to the Statement of Case) page 62 to 63.

⁴⁰ Annexure 4 to NC’s Representations to the President on the Recommendations of the Farlam Commission (**the Representations**). This annexure is addressed by the NC in paragraph 42.13 of the representations -(page 17 to 18).

⁴¹ Further document marked Annexure 4 to NC’s comments on the Recommendations of the FCI. This annexure is similarly discussed by the NC in paragraph 42.13 (page 17 to 18) of the Representations.

⁴² Point 2 of Lt Gen Mpmbe’s correspondence referenced in paragraph 64 above.

65. The Employer's statement of case submitted to this Board had a copy of a statement dated 20 October 2014 from **Lt-General Elias Mawela**, the Divisional Commissioner for Operational Response Services (**ORS**) based in Pretoria. He confirmed that General Mbombo had no plan. He did, however, encourage her to continue with her intervention and maintain public order. He further advised her to inform the public about all the interventions and initiatives she was employing to stop the violence in order to dispel the growing perception that the police were helpless while people were being killed. He concluded by saying:

“That is all I can recall and was my last personal engagement with the matter until after the event”.⁴³

66. **Lt Gen CC Binta**, the Provincial Commissioner: Eastern Cape made an Information Note on 08 October 2014 and addressed it to **Major General Rnatho**: Legal Services.⁴⁴ It is a response to the interrogatory relating to the meeting she described as “*informal and had no formal invitation*”. She further explained that “*I made an informal comment about the seriousness of the matter pertaining to the gathering of people with dangerous weapons*”.⁴⁵ She directly explained that **they did not discuss a plan**. The matter was left for General Mbombo's attention.⁴⁶

67. **Lt-General Sehlahle Fannie Masemola**, a Deputy National Commissioner, based at 231 Pretorius Street, Pretoria supplied an

⁴³ Annexure 4 to NC's comments on the Recommendations of the FCI –(page 307 – 308).

⁴⁴ Annexure 4 to NC's comments on the Recommendations of the FCI –(page 303).

⁴⁵ Paragraph 2 of Lt General Mawela's response.

⁴⁶ Lt General Mawela continued in paragraph 3 and made the following explanation “(a) *I do not remember anything said about the plan. (b) Not as far as I can recall*”.

explanation as well. He sent the following response to the interrogatory by email:

“General Masimola handed a document in on Friday, 25 October 2014, not yet emailed. The document (information note) indicates the following:

There was no instruction given to anybody by anybody. Lieutenant General Mbombo briefed the executive about the situation at Marikana and that she appreciates the support that they were getting from other provinces.

Provincial Commissioners pledged their support in terms of personnel and other resources to assist North West Province.

It is common knowledge that when dealing with crowd management you cannot direct how activities or actions should be done on the ground without being there.

The decision to disperse is a tactical option which the operational commander normally takes including the how and the when.”⁴⁷

68. The above explanations sought to respond to a question whether a plan was considered before the endorsement of the proposed decision by General Mbombo. Amongst five (5) generals named above, some sought to describe the meeting as “*informal*”. General Mpembe said that he was not present when *the specific business item on the agenda was discussed*. Another general (CGN Ngcobo) said that *whilst General Mbombo was updating the meeting about escalating unrest situation in Marikana, he was in and out of the meeting*.

69. Some of the police generals’ explanations demonstrated a lack of appreciation of the issue they were specifically invited to explain. Their failure to apply their minds when they considered the decision that contributed to the number of deaths in Marikana is disturbing.

⁴⁷ Page 2 of 4 of the email sent from Mr. Frikkie Pretorius. Email is dated 29 February 2016 and was forwarded to Lt-General E Mawela, who subsequently forwarded it to Adv Ismail Jamie SC (CBI evidence leader). On 26 October 2014, during the proceedings of the FCI Mr. Pretorius sent the email under consideration to Adv Geoff Budlender SC and Adv Matthew Chaskalson SC -(FCI evidence leaders).

The generals' noncommittal responses to the interrogatory is incomprehensible and we can only infer that this was an attempt to conceal from the FCI the fact that the decision to implement the "tactical option" was taken on the evening of 15 August 2012.

70. The NC on the other hand maintained that she convened the extraordinary meeting after the NMF meeting for General Mbombo to brief the generals about Marikana. The NC went even further by incorporating some of the outcome of this extraordinary meeting as part of the minutes of the official NMF meeting. We reject the suggestion by some of the police generals that this was an informal meeting. Marikana was experiencing difficult times. The NC had been receiving constant updates on the seriousness of the violence and disorder, hence she saw fit to convene the extraordinary meeting.
71. It was her evidence that it was possible that the details of the plan were discussed but that she was "not able to give those pedantic details." Her evidence in respect of whether the risk of bloodshed was discussed is relevant and reads as follows: ⁴⁸

"CHAIRPERSON:..... But what I want to know from you, I'm not interested in details, but **did anybody ask for some kind of assurance that the risk of bloodshed had been adequately considered and that measures were in place to ensure that if there was bloodshed it would be kept to the minimum?**

GENERAL PHIYEGA: Chairperson, that detail, as I say, I'm not able to say yes or no to because I'll be doing some injustice because you'd want me to say who was saying that, I don't know. That discussion must have taken place because we were discussing this disarming and whatever, **I'm not able to give those pedantic details**, Chairperson.

⁴⁸ FCI Record at Day 288, pages 37418-37419

CHAIRPERSON: Well I want to make two points to you. One **it's not a pedantic detail**. The second point is that you wouldn't be doing an injustice to the person who raised the problem, you'd be doing the opposite, but you can't help me on that." (Emphasis added)

ANALYSIS OF THE EVIDENCE

72. During the opening statement by the SAPS legal counsel at the FCI, he made the following statement:

"You'll hear in the fluidity of the situation at Marikana on Thursday, 16 August 2012, the situation got out of control and tragic unintended consequences resulted, despite meticulous scenario planning by experienced generals and other senior officers at the joint operational centre, the JOC".⁴⁹

73. To the contrary, the JOCCOM commanders' evidence, Major General Annandale and Colonel Scott, was that there was inadequate planning for the Marikana operation. On 16 August 2012 the plan had to be rehashed because the police did not anticipated the number of protesters that they had to deal with. Also, at the critical moment of the operation, there was a communication breakdown, thus the JOC structure was not aware of the first shooting incident. This necessitated that some commanders had to be flown by helicopter in order to view and establish communication.

74. Major General Annandale conceded that the police plan did not provide for two groups that were going to be treated differently, which concession was contrary to his evidence in chief. Furthermore, they did not expect 3 000 people to be on the scene on 16 August 2012. This complication was a direct challenge to the

⁴⁹ FCI:Exhibit FFF9 page 25.

police deployment plan. Their deployment plan was only capable of dealing with smaller groups than the actual number that was found. We find that that this corroborated lack of proper planning, despite known levels of violence and intimidation.

75. This charge against the NC called upon the Board to determine whether the NC ought reasonably to have foreseen the tragic consequences of the decision to disarm and disperse the protesters. Had the NC testified before this Board of Inquiry, it would have been informed as to what was in her mind at the relevant time of her decision. It is common knowledge that since the advent of democracy this was the first major crowd management incident for the police to deal with. The NC is on record as having simply stated that she thought general Mbombo's plan to disperse, disarm and arrest the strikers "is a good plan". How she could have come to this conclusion in the absence of any explanation as to how the plan was to be executed, defies belief. On the one hand she states that it was a good plan and on the other she is unable to remember the pedantic details of the plan. It is common cause that there was no "challenge" process whereby the details of the plan's execution was subjected to analysis, in particular to ascertain what the possibilities were of the potential loss of life when implemented. The evidence disclosed that the two most senior officials (the NC and General Mbombo) had no adequate skills and training to lead and resolve a matter of this nature, size and complexity. The NC's explanation that at the time of the Marikana incident she was only 3 weeks into her appointment as the national commissioner of the SAPS, constitutes, in our view, a telling admission that she was unfit and incapable of managing and controlling the SAPS faced with a situation which was unique and

foreign even to the likes of Lt Colonel Scott. In such circumstances one would have expected the NC to explain to the Board what factors she considered when the proposal to disarm and disperse the protesters was discussed and subsequently endorsed and why she thought it was a good plan. Her failure to do so, leaves this Board with only one alternative and that is to draw an adverse inference against her that she foresaw the tragic consequences of implementing the decision and is unwilling to testify about it.

76. In order to avoid the drawing of the above mentioned adverse inference, the NC resorted to arguing before this Board that she never took the decision to disarm and disperse the protesters (phase 3 or the tactical option) maintaining that the decision was that of General Mbombo and that she had no legal authorisation to interfere with Mbombo's decision. We have already rejected this defence and found that the NC did in fact take the decision on 15 August 2012 after the extraordinary NMF meeting. If we were to accept the NC's evidence before FCI and her submissions that she could not remember the "pedantic detail" of the plan on how the police intended to disarm and disperse the protesters, she would have failed to act as a reasonable National Commissioner who was faced with evidence of escalating violence. The police command structure had a big contingency of head office commanders present long before the extraordinary meeting of 15 August 2012. On 13 August 2012 Major General Annandale arrived in Marikana and immediately summoned various head office units and section heads. This demonstrates the level of seriousness and complexity at which the operation was being considered.

77. Colonel Scott placed evidence before FCI that on at least two occasions on the 13th of August 2012 he gave advice to the NC. According to his statement he stated that the first instance was when he presented the orientation on Marikana in the presence of the commanders who also gave inputs.⁵⁰ Thereafter, the NC proceeded to a meeting with Lonmin Mine Mngement.
78. The second instance was when the NC returned from the meeting with Lonmin Mine Management at about 23H00, wherein Colonel Scott advised the NC on what he recommended should be the approach in handling the Marikana unrest.⁵¹ Colonel Scott prepared a plan that was followed from 14th August 2012. However, the plan was not adequate for the so-called escalating violence, consequently, on the 16th of August 2012 another plan had to be hatched in order to disarm and disperse the armed strikers. The question which begs an answer is why Colonel Scott's plan was not carried out in the early hours of the morning of 14 August 2012 when there were few protestors at the koppie? This was a question the NC could have answered if she testified before the Board and more pertinently should have asked at the extraordinary NMF meeting.
79. Colonel Scott conceded that when they implemented stage 3 they lacked certain intelligence information. Thus when attempting to deal with the criticism, Colonel Scott made the following statement:

“It is also suggested that the plan ought to have implemented stage 6 first before implementing stage 3. Whereas this may be a view taken by others, from our vantage point we did not have enough intelligence, at that stage as to, for example, who the drivers of the striking action were; who the leadership was; where in relation to the koppie the

⁵⁰ FCI Exhibit HHH20 –(page 20 of 149), paragraph 6.8

⁵¹ FCI Exhibit HHH20 –(page 21 to 22 of 149), paragraph 6.10 to 6.13

leadership lived; whether any arrests would provoke greater unrest with the demand for release of those arrested. It was therefore thought prudent to place stage 5 and 6 after the initial arrests had been effected; those arrested being interviewed; video material examined to determine the identities of perpetrators; more intelligence gathered in order to undertake a direct informed cordon and search.⁵²

80. When the NC gave evidence before FCI, she initially denied being presented during the extraordinary meeting with or discussing a plan on how the police were going to disarm the protesters. She stood by her denial despite the fact that she presided over the discussion and minuted portions of the meeting. She later stated that she could not remember the “pedantic details” of the plan. She could not remember what steps were to be put in place to minimise bloodshed. We find, therefore, that by so doing she allowed her meeting to endorse and engage blindly on an operation that was preceded by escalating violence. This evidence establishes that the NC participated in a decision making process without enquiring and/or considering any possible adverse consequences of her decision.

81. On 19 November 2012 General Mbombo deposed to an affidavit wherein she stated that:

81.1 On 15 August 2012 she attended a NMF meeting in Midrand. She received a report of an agreement between AMCU and SAPS that protesters would laydown arms and disperse at 09H00 the following day (Thursday). She took the opportunity and apprised the NC of the situation in Marikana and further that if negotiations fail she “*shall*” instruct members to disperse, disarm and possibly arrest the protesters.⁵³

⁵² FCI Exhibit HHH20 –(page 146 to 147), paragraph 52.17

⁵³ CBI:Annexure 6(b), paragraph 18

81.2 During a special JOCCOM meeting at 13H30 on 16 August, she received a briefing that protesters did not laydown their dangerous weapons. She then instructed the police to disperse, disarm and arrest those who might offer resistance.⁵⁴

81.3 At the special JOCCOM meeting of 16 August 2012 at 13H30, General Mbombo concluded by informing the JOCCOM meeting about an earlier communication she had with the NC, wherein she (General Mbombo) spoke about her **decision**. This is confirmed through the FCI:Exhibit EE.

81.4 Later that day, she received a report of the unfortunate shooting incident with some fatalities and then telephoned the NC and reported the matter.⁵⁵

81.5 The NC failed to enquire about a plan or how General Mbombo intended to disarm the protesters. This was despite the fact that she **was constantly apprised with the developments in Marikana** Therefore, she clearly had no regard for these developments when she presided over the deliberations on the matter.

81.6 She further stated that commanders of the units that were involved in the operation in Marikana were called up to Potchefstroom for a meeting, which started from Monday 27 August 2012 (the Roots Conference). The purpose of the

⁵⁴ CBI:Annexure 6(b), paragraph 19.4

⁵⁵ CBI:Annexure 6(b), paragraph 20

meeting was to recollect and document the Marikana events in preparation for the Judicial Commission of Inquiry.⁵⁶

82. In addition to the documents and submissions before this Board, the NC's case is also based on the evidence, oral and/or written submissions made during the FCI through the SAPS legal representatives. As a result, we considered the submissions addressing the criticism against the police' failure to comply with Clause 10 of the Standing Order.⁵⁷ The SAPS's defence was on the following two levels:

82.1 Firstly, the operation was not purely a crowd management operation, but a hybrid operation. Further that Standing Order 262 does not address itself to such an operation.

82.2 Secondly, and more importantly, Mr White and Hendrickx could not point to any Public Order Policing measures that were omitted from the **plan**.⁵⁸

83. The police submissions further sought to address the criticism of the absence of a **written plan**. In its response to the criticism the police submitted that on 16 August 2012 Colonel Scott and Brigadier Pretorius briefed the commanders about the operation at 14h30. This was, therefore, in keeping with the communication of a plan to all commanders. The police had tendered the following evidence:

⁵⁶ CBI: Annexure 6(b), paragraph 23

⁵⁷ SAPS' Heads of Argument, paragraph 261

⁵⁸ SAPS' Heads of Argument, paragraph 263

83.1 Colonel Scott arrived in Marikana and immediately put together information and prepared a plan that was approved by the JOCCOM on 14 August 2012. Therefore, there was a plan before the morning 16 of August 2012.

83.2 However, it became necessary for Colonel Scott to rehash another plan. This is the plan that he presented at the JOCCOM meeting of 16 August 2012 at 13H30.⁵⁹

83.3 Colonel Scott was then instructed by Major General Annandale to proceed to FHA1 and brief the commanders.⁶⁰ The evidence was further that Colonel Scott did proceed and brief the commanders at 14H30. This was confirmed by Captain Manobese Joseph Ntlati who testified to this regard before this Board.⁶¹

84. Despite all the above evidence, when the NC appeared before this Board she initially argued that there was no plan for the operation on 16 August 2012 but thereafter contradicted herself by stating she could not remember the pedantic details of the plan. She maintained that position seeking to distance herself from the consequences of her decision. Her position is informed by a desire to keep herself clear from the decision that led to the death of protesters on 16 August 2012. Such conduct is irresponsible, opportunistic and contrary to the legal and constitutional duties of the NC. The NC is the commander in chief of the South African Police Services, and therefore, the NC cannot seek to distance herself from her action and/or failure to appreciate the consequences of her decision. It is also in conflict with her own

⁵⁹ FCI:Exhibit EE

⁶⁰ FCI:Exhibit EE and Heads of Argument, paragraph 262

⁶¹ Captain Ntlati' statement is Document 1 of CBI: Exhibit B and CBI: Transcript-Day 2, page 17 – 34

evidence that she was ultimately responsible for the actions of the SAPS.

85. The NC failed to appreciate the nature and magnitude of the problem and operation in Marikana. She had an opportunity to present her explanations to the charges against her, wherein, she would have had an opportunity to be candid with this Board and tell her side of the story. She is on record of having offered her full cooperation with the FCI as well as this Board. Instead, she chose not to take the Board into her confidence. We find that her argument that **she had no case to meet**, was ill conceived.

FINDINGS AND RECOMMENDATIONS

86. The NC had a duty to inquire about **how the police was going to disarm armed protesters**. We did not find any evidence, which could excuse her conduct and/or omissions in this regard. Consequently, when the NC appeared before the Board to answer a charge arising from her decision to disarm the protesters, it would have been prudent of her to seize the opportunity and explain her conduct and reasons for convening the extraordinary meeting and why General Mbombo was not asked to explain exactly how the actual disarmament and removal of the protesters from the koppies would take place.
87. We find the NC's inability to remember the detail concerning the risk of bloodshed and discussions on how to minimise it, absolutely shocking. These details should have been foremost in her mind as the head of the SAPS. The safety of all South Africans is after all are

foremost duty and responsibility as National Commissioner of the SAPS. We find that her conduct in this respect constitutes gross negligence in the exercise of her legal and constitutional duties as the National Commissioner of the SAPS. We find that in the circumstances of this case a reasonable national commissioner of police would have foreseen that the decision to disperse, disarm and arrest 3000 armed protesting strikers would have been impossible without resulting loss of life.

88. We find that the NC failed to exercise her discretion judiciously when endorsing the proposed decision to disarm, disperse and arrest the protesters. It follows that such failure disabled her from appreciating the consequences of the stage 3 operation. The evidence from statements and explanations of other police officers made before the FCI confirm that there was no plan placed before the extraordinary NMF meeting. Without any plan of action, it is little wonder that there is no evidence from any police member who addressed the consequences of these risks during their respective discussions of the events in Marikana. We hasten to highlight that even the NC through her press statement and the report to the President made no attempt to address the risks and consequences of the police conduct. At worst, the NC justified the conduct and actions of the police members involved in the operation in Marikana.
89. Our recommendation is that she should be dismissed as unfit for the position of National Commissioner of the SAPS as, with all the information at her disposal, she should have been capable of foreseeing the tragic and catastrophic consequences of taking the decision to implement the tactical option.

TERMS OF REFERENCE 2.3 (CHARGE 3)

90. The third charge against the NC is contained in TOR 2.3 and calls the Board to determine whether or not the remarks by the NC at the SAPS parade on 17 August 2012 would have been understood to be an unqualified endorsement of the police action and thereby having the consequence of undermining, frustrating or otherwise impeding the work of the Farlam Commission of Inquiry.
91. It is common cause that the TOR 2.3 contained an erroneous date, which the Board's evidence leaders correctly pointed out. The NC addressed the parade on 20 August 2012 and not 17 August 2012 as alleged. This was common cause between the parties, as the NC's defence team also acknowledged that this must have been an error. Reference was made to the NC's statement before the FCI.⁶² Consequently, the Board accepted the evidence presented before the FCI and corrected the date as referring to 20 August 2012.
92. It is further common cause that the NC and the Minister spoke at the police parade. For the reasons that follow hereinafter, we shall confine ourselves to what we considered as the relevant part of the NC's speech. The NC is accused of misconduct in relation to this charge, amongst others for making the following the remarks:

"I come before you to actually say, trying as it may be, mourning as we are, lets us take note of the fact that **whatever happened represents the best of responsible policing.** (Emphasis added)

You did what you did, because you were being responsible, you were making sure that you continued to live your oath of ensuring that South

⁶² FCI: Exhibit WW6, Exhibit FFF12, transcript of WW6

Africans are safe, and that you equally are a citizen of this country and safety starts with you.”⁶³

93. During the FCI the consequences of this remark was dealt with.

Thereafter, the FCI made the following observations:

“Whatever happened represents the best possible policing” **was singularly inappropriate** because it set out what was from then on to be the official police line: that no blame at all attached to the police for whatever happened because they had been responsible in doing what they did. This was calculated to effect a closing of the ranks, encouraging those who had participated in the operation to withhold contrary information from the Commission and indeed to deny that mistakes had been made and things had been done that could not be described as ‘the best of possible policing’⁶⁴ (Emphasis provided)

94. The FCI considered the NC’s remarks, in its evaluation and conclusion on this matter and found that:

“The National Commissioner clearly did not, and to be fair, could not know all the relevant facts and she exposed herself to a cross-examination in which she cut a sorry figure when things that had happened and which were recorded on video or in photographs were shown to her and she was asked whether they represented ‘the best of responsible policing’.”⁶⁵

95. This charge is the result of the view expressed by the FCI concerning statements made by the NC and the Minister at the parade on 20 August 2012. This view is contained in the following:

While the Commission cannot find, as the evidence leaders suggest, that it is likely that the Minister and the National Commissioner discussed the approach in advance, it is firmly of the view that **his remarks and her remarks were ill-advised and may well have had the result of hampering the Commission in its work for reasons stated above.**⁶⁶ (Emphasis added)

⁶³ FCI: Exhibit FF2, paragraph 27 and FCI Report paragraph 2), page 388; Transcript from video recording VVVV5

⁶⁴ FCI Report paragraph 3), page 388 - 389

⁶⁵ FCI Report paragraph 4), page 389

⁶⁶ FCI Report paragraph 7), page 391

96. When the FCI concluded on this matter, the FCI's opinion was conjectural without making a definitive finding and/or recommendation about this remark. The FCI speculated that the commendatory remarks by the NC (and those by the Minister of Police) might have caused the police who were involved in the Marikana event to close ranks and discourage them from disclosing to the FCI "that things had not gone as well as they must have hoped they would." Instances where information was withheld from the FCI relate to the contents of the lost memory stick and the failure by NMF attendees from disclosing the reasons why the decision to implement the tactical option was taken. There is, however, no *prima facie* finding against the NC with regard to the loss of the memory stick. To the NC's benefit, the FCI made a direct finding against Brigadier Malahlela, whose negligent conduct led to the loss of the memory stick.⁶⁷
97. However, when preferring charges against the NC, the Employer seems to have relied on some of the above views as the basis for charge 3 and thus this Board has to investigate an allegation of misconduct against the NC as to whether evidence exists that establishes a hampering of the FCI's work.
98. In accordance with the Employer's statement of case, this charge is dealt with as **a submission**. The contents of the statement of case and the contents of the evidence leaders' principal submissions are materially similar. The statement of case sought to inform the NC of the allegations against her, whereas, the latter sought to persuade

⁶⁷ FCI Report paragraph 72) page 451

this Board that there was evidence in support of this charge against the NC.

99. It is common cause that the evidence leaders did not lead any evidence neither in the form of affidavits, statements or oral evidence in regard to this charge. Instead, they relied on the submissions referred to above (statement of case and principal submissions). Whilst we are faced with an allegation of misconduct in the form of submissions, we are called to decide whether or not the NC is guilty of misconduct in terms of this charge.

100. In our view the question that stands for determination is **not what the NC meant, or that her remarks demonstrated and constituted an unqualified endorsement of the police action on 16 August 2012** as maintained by the evidence leaders. In our view this charge called for two independent investigations:

100.1 Firstly, did the NC through her unwavering support and/or endorsement of the police action on 16 August 2012 commit an act of misconduct; and

100.2 Secondly, following from the above, did her remarks undermine, frustrate or otherwise impede the work of the FCI.

101. The first inquiry would have followed from the evidence leaders presenting evidence to prove this charge. Instead the evidence leaders confined this charge to the interpretation of the NC's remarks. We have, hereinabove referred to the FCI's views of the

NC's statement.⁶⁸ In short, the FCI found it to be inappropriate as the NC could not have known all the relevant facts around the police action on 16 August 2012. Therefore, in order for this Board to investigate the allegations of misconduct, evidence beyond the NC's poor judgement should have been presented.

102. In the event that the NC acted inappropriately, the second independent investigation would have dealt with clearly determined or identifiable allegations of consequences of the NC's statements at the parade. In this regard, the evidence leaders would have had to present evidence on the police conduct or behaviour hampering the FCI in its deliberations. For example, allegations of concealing material information or documents and/or records should have reflected such conduct or behaviour. A further example could have been evidence indicating conduct impacting on the police witnesses' refusal, reluctance, and/or lack of cooperation with the investigations conducted by the FCI evidence leaders, etc.

103. In our view, the FCI finding on the alleged loss of the memory stick demonstrate how the evidence leaders dealt with a potentially similar occurrence. When the FCI evidence leaders encountered an impediment during the investigation of the extraordinary NMF meeting, they approached the Chairman of the FCI and sought assistance with locating the records of the extraordinary NMF meeting. The Chairman called upon the legal representatives of the police to assist the evidence leaders. The end result was that the police led evidence with regard to the circumstances under which the memory stick was lost. Consequently, the FCI found as follows:

⁶⁸ Paragraphs 93 – 95 (*supra*)

- 72) When the evidence leaders asked for the memory stick which was returned to Brigadier Malahlela to have it examined to ascertain if it had contained a recording of the discussions of the extraordinary session they were told that the stick had been lost after being returned to her. As the stick contained top-secret information it would appear *prima facie* that Brigadier Malahlela is guilty of contravening section 4(1)(b)(dd) of the Protection of Information Act 1982 for neglecting or failing to take proper care of the memory stick....
- 73) The Commission is satisfied that those who attended the extraordinary session of the NMF should have been able to tell the Commission the reason or the reasons why the decision to implement the tactical option on 16 August if the strikers did not lay down their arms, was taken and the only reasonable inference to be drawn from their failure to do so is that they are hiding something. This inference is fortified to some extent at least by the evidence relating to the missing memory stick.⁶⁹

104. This Board did not receive any evidence to support and/or to prove this charge.

FINDINGS AND RECOMMENDATIONS

105. We make the finding that the NC's statement did not impede or frustrate the work of the FCI as alleged. Consequently, we recommend that she be acquitted on Charge 3.

⁶⁹ FCI Report paragraphs 72) and 73), page 451 - 452

TERM OF REFERENCE 2.4 (CHARGE 4)

106. This charge concerns a report prepared by the operational commanders on 16 August 2012⁷⁰ and a subsequent media statement issued and read by the NC the next day on 17 August 2012.⁷¹ The board of Inquiry is called upon to determine whether the NC deliberately amended the media statement to conceal the fact that there were two different shooting incidents on 16 August at Marikana that came to be known as Scene 1 and Scene 2, resulting in misleading the public to believe that all deaths occurred at Scene 1 where the SAPS had to defend themselves from an advancing mass of strikers.

SCENE 1

107. On 16 August 2012, 16 people died consequent upon the events at Scene 1. The operation commenced at 15h40 just after Mr Mathunjwa left the koppie after his second failure to convince the strikers to disarm. The strikers then began moving down the koppie in great numbers towards the kraal. The police vehicles commenced rolling out their barbed wires. The two water cannons remained in place and no teargas or stun grenades had been used at that stage.

108. The Nyala police vehicles were parked in a crescent shape together with a line of Tactical Response Team (“TRT”) members as a show of force to discourage the strikers from approaching the police further. Brig Calitz left the vicinity of Scene 1 and gave instructions

⁷⁰ FCI: Exhibit FFF4; see also page 140 of CBI: Exhibit B.

⁷¹ FCI: Exhibit FFF5; see also pages 137 to 139 of CBI: Exhibit B.

to the POP members to engage strikers that had escaped from Scene 1.

109. At about 15h53 over 100 strikers began to advance at speed towards the police armed with dangerous weapons. During this onslaught, at least two shots were fired at the police. The police vehicles were attacked and damaged as the crowd approached the police. A stun grenade was fired and a group of less than 40 strikers split off from the main group of about 100 strikers.

110. The **FCI found** that the **TRT** had reasonable grounds for **believing they were under attack** in circumstances that **justified** them in **defending themselves and their colleagues**.⁷² The TRT retaliated in what they believed was self-defence by firing into the storming crowd of strikers. This retaliation lasted for a period of nine seconds killing 12 strikers when the strikers were a distance of approximately 18 metres from the police.

111. After the lapse of nine seconds Captain Loest raised his fist and shouted, “cease-fire!” Approximately 328 rounds of live ammunition were fired at Scene 1 over the course of 8 to 12 seconds.

112. The events at Scene 1 were widely covered on television broadcasts by Reuters showing footage of shots being fired at potentially lethal height.

⁷² See FCI Report page 251.

113. Later that afternoon at approximately 16h02 Lieutenant General Mbombo informed the NC by SMS of the events that occurred at Scene 1.

SCENE 2

114. This scene took place at Koppie 3 where 14 persons died on the scene and 3 later in hospital. Ten of these strikers were killed while hiding in crevices in the rocky areas inside the koppie where they appear to have sought refuge from shooting police.

115. Three separate police units approached Koppie 3 simultaneously from 3 different directions, namely the northeast, the southwest and the south.

116. This operation took place without informing either Brigadier Calitz or the JOC. The SAPS from the outset acknowledged that they would have difficulty justifying all the deaths that took place at Scene 2. As Lieutenant Colonel Macintosh said: “*Events just took over*”. In fact more than 250 rounds of which 115 were live R5 rounds were fired at Koppie 3. Unlawful automatic fire from R5 rifles was also heard.

117. Brigadier Calitz and Major General Naidoo assessed the situation at Koppie 3. The arrested strikers were transported and the K9 dog unit was ordered to sweep the scene. Three firearms were recovered from the strikers although no empty cartridge cases were found amongst the firearms used by the strikers. Various other dangerous weapons and firearms were found. The injured were taken to hospital and the

crime scene was evacuated to allow the crime scene personnel to do their investigative work. The FCI concluded that the evidence indicated that the overall commander Major General Mpembe had absolutely no command and/or control of Scene 2.⁷³

118. Apart from the evidence of a reconstruction of the events at Scene 2 prepared by a Mr De Rover, the FCI found that the SAPS provided no details of how the deaths of most of the deceased at Scene 2 occurred.⁷⁴ The SAPS was also criticised for failing to arrange for adequate medical personnel and facilities to attend to the injured.

119. What is important to note at this stage, is that the events at Scene 1 were widely broadcast on television whereas no pictorial evidence regarding the events at Scene 2 were ever broadcast to the public. The visual broadcast of Scene 1 presented the public with a perception that the police had to fire in self-defence from the storming crowd of strikers. On the other hand the description of the events that took place at Scene 2 was far more prejudicial to the conduct of the SAPS. This may have established an incentive on the part of the SAPS to either withhold or distort or attempt to ameliorate the adverse inferences that may be drawn against the SAPS from their conduct at Scene 2.

120. Late at night on 16 August 2012 Captain Dennis Adriaio (“Captain Adriaio”) received a memory stick containing a report compiled by operational commanders for and on behalf of the NC for onward submission to the President who was at that point in time at a SADC

⁷³ See FCI report page 309.

⁷⁴ See FCI report page 316.

meeting in Mozambique. A copy of this report was handed in at the FCI as exhibit FFF4. Brigadier Mashigo played no role in compiling this document.

121. On 17 August 2012, the NC held a media briefing where she read out a statement, which was handed in as exhibit FFF5. Of significance is that on 17 August 2012, the media and the public were only made aware of facts which made it appear as if the SAPS acted in one continuous act of self-defence.

122. Although the wording of the two statements is for the most part identical, there are significant and material differences. These are discussed below:

122.1 To the President in FFF4, the NC clearly distinguished between 2 scenes where the first is described as an incident where the police acted in self-defence and where 16 protesters were killed with 13 wounded “at that Scene”. To the media and the public in FFF5, no reference is made as to how many protesters were killed and wounded at different places as no mention is made what the result was of employing force to protect the police, as was mentioned in Exhibit FFF4.

122.2 In FFF4 the dispersion of the strikers is described as driving them from the “high bushy ground” resulting in 13 more strikers killed and 15 more wounded “at the second incident”. In FFF5 no mention is made of a “second incident”, creating the impression that the police were

continuously on the defensive. At Scene 2 the Police were definitely on the offensive.

122.3 In FFF4 the police is said to have advanced to arrest the protesters whereas in FFF5 the police is said to have “retreated systematically”⁷⁵ while a militant group of protesters “stormed towards the police firing shots and wielding dangerous weapons.” Again this version creates the impression that the police was continuously on the defensive while retreating.

122.4 In FFF5 only the total deaths of 34 strikers and 78 injured are mentioned without distinguishing where or how this occurred.

123. As stated previously, the second scene was never shown to the public on television whereas Scene 1 was extensively and repeatedly broadcasted. If the public compared the television broadcast with the media statement in FFF5, they would have concluded that all the deaths and injuries took place where they saw the police firing and then retreating after the order was given to “cease-fire”. This created the impression that the police was on the offensive for only a few seconds before retreating.

⁷⁵ Brigadier Mashigo testified that this sentence was included on the express instruction of the NC as dictated by her. This evidence of Brig Mashigo remains uncontroverted.

124. Brigadier Mashigo tendered evidence before this Board of Inquiry. He was responsible for media communications. Captain Adriao was his immediate subordinate. Mashigo testified that he was not involved in drafting FFF4. Apparently it was drafted by the commanders on the ground, and then given to Col Scott who gave it to Captain Adriao for onward transmission to the President. FFF5 was a cut-and-paste job of FFF4 prepared at the instructions of the NC prior to the press conference held on 17 August. In light of the fact that the NC never contradicted this evidence, it has to be accepted as uncontested that the NC affected the changes and amendments that appear in FFF5. The only inference to be drawn from these changes is that she deliberately attempted to deceive the public and the media as to the reckless manner in which the police, especially at Scene 2, killed the strikers.

FINDINGS AND RECOMMENDATIONS

125. We find that the NC's conduct in this regard constitutes serious misconduct and a breach of her duty to manage and control the police in a honest and transparent manner rendering comprehensive and correct information to the public and the media.

126. We recommend that she be removed from the office of National Commissioner of Police.

TERMS OF REFERENCE 2.5 (CHARGE 5)

127. This charge relates to the overall testimony of the NC at the FCI.

The Board must decide on the following two issues:

127.1 Was the NC's overall testimony in keeping with the office of the National Commissioner of police; and

127.2 Did she discharge her duties commensurate with holding such office?

NC'S OVERALL TESTIMONY AT THE FCI

128. We refer to what is set out above in respect of the NC's evidence before the FCI and do not intend to repeat it here.

129. We further refer to the NC's statement under oath submitted at the FCI and dated the 7th of March 2013 which mentions *inter alia*:⁷⁶

129.1 She was appointed on the 12th of June 2012 as National Commissioner of South African Police Services.

129.2 It was common knowledge that when she took such an appointment she had **no previous experience as a police officer**.

129.3 The nine Provincial Commissioners **report directly to her** as the National Commissioner.

⁷⁶ See FCI Exhibit FFF2A

129.4 She confirmed that she leads the SAPS and **discharges her mandate through the commanders** and structures of the SAPS. She further confirmed that the performance, professionalism and integrity of the Service as a whole **are ultimately her responsibility.**

130. Absent from this statement, and her other statements, is any mention of the decision to endorse the “tactical option” at the NMF meeting which she explains as an “omission”.⁷⁷ She also omitted this important endorsement of the decision from Exhibit L, the SAPS presentation of their case to the FCI which took over 2 weeks to prepare. This document also reads as if the SAPS acted in self-defence.

131. Had the NC testified she would have possibly been able to explain under what circumstances she omitted to mention the extraordinary meeting in Exhibit L⁷⁸ or why she made no mention of this decision taken at the extraordinary NMF meeting in her statements or in her evidence in chief.

132. She argued before this Board that she did not make the final decision. As stated above, we reject her argument that she did not make the final decision. The NC’s evidence before the FCI was that she was the person with whom the ultimate responsibility rested. We therefore find that her argument before the Board now that the responsibility rested with General Mbombo is not only ill-conceived but is not in keeping with the duties commensurate with her office.

⁷⁷ See FCI -Day 288 p37481

⁷⁸ See FCI -Day 288 – p37424 – p37426 (Her evidence was that she signed it off as the Head of the SAPS)

133. We have found that the NC did not mislead the FCI with regard to when the decision to implement the tactical option was taken. However, before the FCI, the NC –

133.1 during her evidence in chief made it seem like she had an informal discussion with General Mbombo about the situation at Marikana the morning of 15 August 2012 and only mentioned the extraordinary meeting under cross examination for the first time;

133.2 at first testified that no plan was discussed, even when recalled,⁷⁹ but later conceded that the plan was discussed but she could not remember the pedantic detail; and

133.3 proved to be a difficult witness leading to instances where the Chairman of the FCI had to rely on double negatives as an answer to pertinent questions.

134. When considering the above, regard must be had to the fact that the NC and the SAPS had undertaken to fully co-operate with the FCI.

135. We interpose to consider the evidence of the other SAPS leadership at the FCI. The evidence suggests that the rest of the SAPS leadership did intend to mislead or misled the FCI about the endorsement of the decision at the extraordinary NMF meeting. The detail under TOR 2.2 (Charge 2) above deals with this aspect of her evidence. However, since this inquiry is of the ilk of a disciplinary hearing and the other SAPS leadership are not a party to these proceedings we can make no findings in this regard.

⁷⁹ FCI: Transcript -Day 288 p 37404, p37406

136. We find that the NC should have testified before this Board to put to rest the adverse findings of the FCI against her. In the matter of *Zuma v The Democratic Alliance & two Others* [2014] 4 ALL SA 35 (SCA) the applicant filed no answering affidavit. The Court in dealing with the evidential problem the applicant faced asked whether this case was not an ‘abject lesson in how not to conduct opposing litigation’. Justice Navsa said Zuma had not filed an affidavit, but wanted nonetheless to argue that the tapes were part of his confidential representations to the NDPP. This application was dismissed with costs of two counsel.

137. In this Inquiry, despite the NC accepting that this Board is entitled to accept as a point of departure that the adverse findings at the FCI constitute *prima facie* evidence against her, she decided not to testify and contradict such adverse findings.

138. When considering whether her evidence was in keeping with her office and whether she carried out her duties commensurate with holding the office of National Commissioner of Police we have had regard to the following:

138.1 The NC did not know that the plan could have been implemented relatively risk free in the early hours of the morning while there were few protestors. She did not know that it could not be implemented after 9:00 on Thursday.⁸⁰ She also could not explain why the tactical option could not have waited until the early hours of the next morning on Friday 17 August.

⁸⁰ FCI record Day288 p 37403 - 37404

138.2 She did not accept that it was irresponsible to use R5 rifles at such instances.⁸¹ She testified that she was aware that a bullet from a R5 rifle travels in a horizontal path for up to 600m and if you shoot a person 5m away and miss him, you can end up injuring an innocent person 595m away which is what happened at Marikana.⁸² Even after the killing at Marikana, her evidence was that the SAPS still use R5 rifles.⁸³ She was also aware that the bullets from the R5 disintergrate after hitting a person causing serious damage, which could sometimes even be fatal.⁸⁴ She was also aware that the disintergration of the bullet results in a problem with ballistic evidence as you will not be able to tell who fired the bullet.⁸⁵ The Chairperson of the FCI had asked the NC what was wrong with using R1 rifles **to which she had no answer.**⁸⁶ We find the continued use of R5 rifles by the SAPS whilst under her leadership, grossly negligent. Her evidence was that she was aware of all the risks and yet she allowed her subordinates to continue using R5 rifles. We find this decision not only reckless and grossly negligent but that it is also not in keeping with the duties of her office. We find she failed in her constitutional duty to keep the citizens of this country safe in particular the protesting miners as well as the SAPS members on duty at Marikana.⁸⁷

⁸¹ FCI: Transcript -Day 288 p37438

⁸² FCI: Transcript - Day 288 p37436 - 37437

⁸³ FCI: Transcript - Day 288 p37439

⁸⁴ FCI: Transcript - Day 288 p37440

⁸⁵ FCI: Transcript -Day 288 p 37442

⁸⁶ FCI: Transcript - Day 288 p 37441 & 37443

⁸⁷ FCI: Transcript -Day 68 at p 7289 - 7290

- 138.3 The NC's failure to pay attention to the "pedantic details" about the plan at the extraordinary NMF meeting resulted in the tragic events on 16 August 2012. Any reasonable National Commissioner would have paid attention to the details of the plan. Had she done so the tragic events of 16 August 2012 could have been averted.
- 138.4 Had the NC made basic enquiries about the planning of the tactical option, as a reasonable NC would have done, the events on 16 August 2012 could have been avoided.
- 138.5 Her comments on 20 August 2012, at a police parade, where she described the SAPS actions at Marikana as "the best possible policing" are not in keeping with her duties commensurate with her office. This statement by the NC displays her lack of understanding of what "best possible policing" is. No reasonable National Commissioner would call an incident leaving 34 people dead the "best possible policing". Her lack of experience and understanding of sound SAPS operations are evident from this remark which makes her unfit for the job.
- 138.6 Her deliberate attempt to mislead South Africa by amending the media statement to read as if the tragic incident only occurred at 1 scene where the police acted in self-defence is not in keeping with the duties commensurate of her office. A reasonable National Commissioner, would have known that this amounted to misrepresentation to the people of the

country and would not have acted in this way. We refer in particular to what is set out under TOR 2.4 (Charge 4) above.

138.7 At the FCI the NC maintained that she was cognisant of her duties and role as NC and assumed responsibility for the safety and security of all South African citizens. Under cross examination, the NC accepted that she was responsible for the actions of her subordinates. Her evidence before the FCI therefore puts to bed the argument by her before this Board that General Mbombo was in charge and not her. Furthermore, there is no evidence before this Board supporting this argument she advanced.

139. The NC further attempted to avoid responsibility for the actions of the police by resorting to an argument that section 207(1) of the Constitution only requires the President to appoint “a man or a woman”. Emphasis was placed on the lack of any stipulation regarding the “fitness” of such person to be appointed. By implication it was argued that the President could subjectively decide who he wanted to appoint as the NC as the appointment does not constitute an objective jurisdictional fact.

140. There is no merit in this argument. A similar argument was rejected by the Constitutional Court in the matter of DA v President of the Republic of South Africa⁸⁸ which dealt with the appointment of the National Director of Public Prosecutions (the “NDPP”) in terms of section 179 of the Constitution. That section also does not require the President to appoint a fit and proper person as a NDPP. Despite

⁸⁸ 2013 (1) SA 248 CC paragraphs [14] to [26].

the absence of such a provision, the Constitutional Court held by necessary implication that the NDPP had to be appropriately qualified even though not expressly so stated in section 179.

141. It also rejected the argument that the appointment is subjectively made by the President and held that the appointment is an objective jurisdictional fact. The national legislation dealing with the qualifications of the NDPP and other officials are set out in the National Prosecuting Authority Act 32 of 1998 which require the NDPP and Deputy National Directors to be fit and proper persons. As the NDPP was slotted in between the political head of the Department of Justice and the offices at the head of the provincial prosecutorial divisions, so too was the NC slotted in between the political head of the SAPS and the offices of the 9 provincial commissioners in order to gather the strands of all police services in the hands of one non-political chief executive officer directly appointed by the President.

142. It also found that the NDPP could be suspended by the President on the basis that the person so appointed was not a fit and proper person and could be removed by the President after a commission of enquiry was conducted. In this regard it held as follows:

“If the President is the sole determinant of fitness and propriety, then the spectre is raised of the President appointing someone as National Director on the subjective belief that the person concerned is indeed fit and proper and the President suspending or removing that person from office in the subjective belief, equally genuine, that the incumbent is neither fit nor proper. Neither the Constitution nor the Act could have contemplated that the position of the National Director would be so vulnerable to opinion.”

143. Similar considerations would also apply to the dismissal provisions contained in the SAPS Act discussed above.

144. Another reason why the appointment of a NC should be regarded as an objective jurisdictional fact is the importance of this portfolio in the context of our democracy. The office must be non-political and non-partisan to achieve adequate policing services and administration to all. A minimum requirement would therefore be that the NC should be a fit and proper person.

FINDINGS AND RECOMMENDATIONS

145. The argument by the NC that she need not have been a fit and proper person shows a distinct lack of understanding of the importance of her position resulting in a finding by this Board that she was indeed NOT a fit and proper person to have been appointed as the National Commissioner of the SAPS and her evidence and arguments before this Board similarly results in the same finding.

146. Having considered all the evidence before us we find that the NC was not a satisfactory witness in all respects although she did not mislead the FCI about the existence of the extraordinary NMF meeting. She was, however, ambivalent and contradictory on the topic whether or not the tactical option was discussed. Her attempt to avoid taking responsibility for the conduct of the police at Marikana by denying that she took the decision has tainted her evidence to the extent that her credibility is serious in doubt. Her argument that she was not entitled to participate in such a decision while in the jurisdiction of General Mbombo in North West

Province, was disingenious and somewhat facile. This kind of evidence is not to be expected of such a senior officer in the SAPS.

147. This Board, therefore, recommends that she be removed from office.

THUS SIGNED AND DATED AT JOHANNESBURG ON THIS 21ST
DAY OF OCTOBER 2016.



Judge Neels Claassen



Adv Bethuel Sibusiso (Vusi) Khuzwayo



Adv Anusha Rawjee