

# Marikana Commission

unearthing the truth,  
or burying it?

By Kally Forrest

“It’s always difficult to  
get at the truth”

Judge Goldstone



NOVEMBER 2015

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## Summary

This Report investigates the strengths, weaknesses and failings of the Marikana Commission in a context of what a successful Inquiry can be expected to achieve. The bullet points below give an overview of findings that are considered by this report and are not a comprehensive summary of the Marikana Commission's Report findings. The strengths and failings considered cover both the Commission's hearings and the Commission's Report.

### Marikana Commission:

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#### Main Strengths

- The Commission's proceedings were independent from political interference.
  - The Inquiry was a fair legal hearing guided by an impartial chair.
  - A strong and well informed Evidence Leader Team was apparent.
  - There was broad participation by different actors in society some of whom contributed importantly to the Commission's proceedings and set precedents for future inquiries.
  - The Commission had credibility and was not viewed as a whitewash as in the case of many post-apartheid South African Commissions.
  - The Commission exposed pervasive police mendacity such as omitting facts through evasion, lying under oath, failure to produce relevant documents and the doctoring of evidence.
  - The Commission unearthed important facts and events that contributed to understanding who was responsible for the violence.
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#### Main Findings

- The Commission exposed that the police constructed a common narrative at a conference prior to the Commission.
- The police account that they were engaged in finding a peaceful resolution using non-lethal weapons when they were attacked by armed mineworkers forcing them to shoot in self-defence, was found to be untrue.
- The Commission exposed the existence of a meeting between the North West Commissioner of Police and a Lonmin director which revealed agreement on the need to rapidly end the strike due to ANC political considerations.
- The Commission found that the violence was not triggered by inter-union competition.
- The Commission found that the Associated Mining & Construction Union president was not responsible for the violence but instead he was commended for attempting to diffuse the situation on the koppie.
- The Commission found that Lonmin engaged in substantial profit shifting, tax evasion and concealment of resources from the negotiating table.
- Lonmin's ability to pay the R12 500 wage demanded by Rock drill Operators and to afford its Social Labour Plan obligations was uncovered.

## Main Failings

- The Commission was appointed by the President resulting in a delay in the Report's release. The President also altered the Terms of Reference concerning "Phase 2: Underlying Causes" which disallowed the investigation of state institution's responsibility for the violence.
- The Commission's proceedings were highly adversarial which impacted on truth telling - some lawyers were overly concerned with exonerating their client's responsibility in the violence.
- Time was wasted in over lengthy cross examination in the first year although this was partly due to time taken in uncovering police deception.
- The Commission did not invoke its powers under the Commission's Act when confronted by police and other witnesses' lying under oath.
- The Commission's failure to discover National Management Forum (15 August) minutes meant precise details of the decision to 'go tactical' could not be revealed.
- The Commission's failure to cross examine TRT foot soldiers meant it could not substantiate its claims that the first four seconds of shooting was a fear response to approaching mineworkers walking in the direction of the informal settlement.
- The Marikana Report failed to make stronger recommendations on Scene 2 despite detailed facts uncovered at Commission hearings.
- The Report was overly timid in asserting the culpability of top politicians in the violence in a chain of command despite strong indications of their complicity.
- The Commission was overly legalistic in its approach which was intent on establishing individual responsibility to the detriment of understanding the violence in a broad socio/political context. This impacted on its findings for example on responsibility for the violence in a chain of command, on Lonmin/police collusion, on the awarding of compensation, on the TRT motive in shooting.
- The Report in attributing overall responsibility for the violence to strikers in conducting an illegal strike and enforcing it demonstrates a weak worker rights context. That the Constitution enshrines the right to strike and employers' have the right to a strike lock out and dismissal powers was not foregrounded.
- The Report's overly cautious and ambiguous text with no consolidation of recommendations and no executive summary of findings meant it was inaccessible to a concerned public and its ambiguity allowed the President to impose an ANC spin in exonerating police minister Mthethwa from any responsibility in the violence.
- There was a disjuncture between the facts revealed in the hearings and the Report's findings.
- The Report contained both implicit and explicit findings and recommendations thus giving the space to the authorities to discount those implied.
- The failure to examine Phase 2 socio-economic "Underlying Causes" meant the Commission was ultimately about apportioning blame and not about how to prevent similar events from reoccurring in the future.

# One

## Introduction

### What is this report about?

When I first began to write this report I had envisaged a focus on the outcomes of the Marikana Commission, namely the Report, with some reference to procedure. However the Report which was handed over by the three Commissioners to the President on 31 March 2015 was not immediately released and I thus decided to focus on the Commission's process.

The decision to evaluate the process was done with a view to providing guidance for future South African commissions of inquiry which in the main have a poor track record. However following a court action brought by the families of the deceased the Report was made public on 25 June 2015. Thus the structure of this account is based on process issues at the Marikana Commission but also engages with the findings and recommendations of the Report. These two 'products of knowledge' emanating from the Commission sometimes reinforce each other but at other times it is clear that Commission evidence is stronger than findings in the Report. Such discrepancies will come to the fore in this account.

The following account aims to assess the Marikana Commission in the light of generally held understandings of what Commissions of Inquiry aim to do and what their value, possibilities and constraints are. This report

thus reveals both the weaknesses and value of the Marikana Commission's workings and findings but does not aim however to be a comprehensive account of its deliberations nor is it a holistic assessment of its ultimate findings.

### Methodology

I have based my observations on various sources of information. Firstly, I conducted a range of interviews with different parties' represented at the Commission. Being a judicial Commission, these were all lawyers and included among others counsel for the deceased, injured, arrested, trade unions and police. I also conducted interviews with family members of the deceased and with injured and arrested mineworkers as well as Marikana support organisations. Literature on Commissions of Inquiry both locally and internationally was accessed as well as various media commentaries and of course the Commission's extensive transcripts<sup>1</sup> and the Marikana Commission Of Inquiry Report. Finally as a researcher for Phase 2 of the Commission some of the appraisal is based on my own observations, particularly that which pertains to *Phase 2: Underlying Causes*.

The Report is divided into 5 Parts: Part 1: Introduction, Part 2: Commissions of Inquiry in South Africa, Part 3: Value of Judicial Inquiries & the Marikana Commission, Part 4: Weaknesses of Judicial Inquiries & the Marikana Commission, and Part 5: Concluding Remarks.

<sup>1</sup> The transcripts are available at <http://www.marikanacomm.org.za>

## Commission of Inquiry in South Africa

On 16 August 2012, 34 striking mineworkers were gunned down by police next to Lonmin Plc's Marikana mine in the North West province and over 78 were injured.

At Scene 1 where 17 people lost their lives the events were captured by local and international media and broadcast globally. Twenty minutes later, out of the media's sight a further 17 workers were killed as they attempted to hide, flee or surrender in what became known as Scene 2. In the mop up operations at least 200 were arrested and bizarrely charged with killing their co-workers under the common purpose law. In the eight days prior to this massacre, the increasingly tense strike initially led by rock drill operators, had resulted in the killings of ten others: two SAPS (South African Police Service) members, two Lonmin security guards, a Lonmin supervisor and five mineworkers - a combination of scab labour and strikers. The brutality of the event sent shock waves through post-apartheid South Africa and immediately assumed a political face as the ANC government sought to distance itself from the killings, as did ANC national executive and Lonmin non-executive board member, Cyril Ramaphosa. The situation was further complicated by the striking workers shifting their allegiance before, during and after the strike from the established National Union of Mineworkers (NUM) in alliance with the ANC to the non-aligned AMCU (Association of Mineworkers & Construction Union).

In the face of a massive public outcry President Zuma established a judicial Commission of Inquiry to investigate responsibility for these killings on 12 September 2012. Such appointments had long been an automatic response to dealing with gross human rights violations in South Africa and the way the Marikana Commission defined itself as both a fact finding and healing exercise was familiar to South Africans.

But was a judicial Commission of Inquiry the most appropriate vehicle? This was contested at the time. While some believed a judicial inquiry was apposite others proffered the possibility of a civilian commission. Yet others believed the best route to ascertain the truth and deliver justice was to move to immediate prosecutions since the killers at the main massacre site were known. Still others supported a Truth & Reconciliation (TRC) type process where the truth would be traded for immunity from prosecution.

Most however agreed that some form of commission was necessary to establish the truth. This was curious as South Africans often view such inquiries with cynicism. They were used by the apartheid government to both evade responsibility for gross human rights violations and to persuade the white electorate that it should accept a particular policy direction.<sup>2</sup> In the post-apartheid period commissions have come to be viewed with equal scepticism. Dale McKinley wrote of the government's "...familiar pattern of refusing to release another commission's report and selectively spinning its findings over time for their own personal and political purposes..." concluding that commissions are "an expensive

<sup>2</sup> Ashford, A (1990) *The Politics of Official Discourses in Twentieth Century South Africa*. Oxford. Oxford University Press.

and largely cynical exercise in burying the truth and protecting the powerful...”<sup>3</sup>

Indeed a litany of post-apartheid commissions have manipulated the release of reports under both the Mbeki and Zuma presidencies to both protect senior ANC politicians and/or to bolster the position of a particular faction within the ANC. The 2003 Hefer Commission, for example, investigated allegations in an ANC faction fight that the National Prosecuting Authority (NPA) director, Bulelani Ngcuka, had been an apartheid spy but despite an impartial judge it was impossible to establish the truth. Hefer was obstructed by the inability to access information from officials, including incumbent President Zuma, and security officials who ignored commission subpoenas claiming that information was classified. In the Ellis Park inquiry into responsibility for the stampede at a Premier Soccer League match between Kaizer Chiefs and Orlando Pirates in 2001 where 43 people died, Justice Ngoepe framed his findings sufficiently broadly to ensure that the soccer leagues and Ellis Park management were exonerated and families of the deceased were not provided with answers. A decade long legal struggle for the release of the Khampepe Report into the validity of the 2002 Zimbabwean elections was finally brought to fruition when it was released in 2014 to confirm that the opposition had lost in the face of substantial state violence yet South Africa under Mbeki had endorsed them as free and fair. The 2006 Matthews Commission Report on South Africa's intelligence operations and their compliance with the Constitution was secreted away and later leaked confirming that intelligence services were deeply implicated in ANC politics (it remains classified). The 2008 Ginwala Inquiry Report was manipulated by politicians who released information as it suited them. The inquiry

examined whether Vusi Pikoli was fit to be NPA director during which the suitability of his successor Menzi Simelane was highlighted with Ginwala noting that he had lied in his testimony before the commission. Pikoli was removed whilst Simelane was later appointed NPA director. In 2006 the Donen Commission, investigating the UN oil-for-food scandal where Deputy President Kgalema Motlanthe, working with housing minister Tokyo Sexwale, was alleged to have paid bribes to secure oil consignments for South African companies, was deeply compromised. The report was not immediately released and a protracted legal battle to make it public finally succeeded in 2011 but many believed it had been doctored whilst the presidency claimed that both men had been absolved. Meanwhile the Seriti Commission, completed in 2015 which cost the tax payer some R300 million investigating corruption in the 1999 arms deal, has been compromised in an attempt to conceal the culpability of ANC politicians and senior 'struggle heroes'. Such rulings as the inability to present documents without the author being present, accompanied by a number of senior legal counsel and evidence leaders withdrawing from the commission because of constraints on the presentation of evidence, left it with little credibility.

There are some exceptions but these are few. The Khayalitsha Commission, for example, into police inefficiency and the breakdown in relations between it and the community, after a number of false starts exposed significant inadequacies and produced some important recommendations. It is possible that this report was more rapidly released to the public because the commission had been appointed by Democratic Alliance Western Cape Premier Helen Zille and thus avoided entanglement with ANC politics. Mostly however critics

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<sup>3</sup> *Business Day*, 21/4/2015

argue that South African commissions are used by the ANC as a politically expedient means of deflecting both criticism and responsibility for controversial and politically sensitive issues. Yet distinguished legal minds like George Bizos who has played a role in inquiries in the apartheid and post-apartheid periods and who represented families of the deceased at the Marikana Commission, argues that judicial commissions have an important role in good governance in South Africa's democracy.<sup>4</sup>

So can commissions in post-apartheid South Africa reveal the truth and make space for transformation? What are their strengths, if any, and what their shortcomings? I will answer these questions with particular reference to the Marikana Commission.

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<sup>4</sup> Telephone conversation Adv George Bizos 19/3/2015

## Three

# Value of Judicial Inquiries & the Marikana Commission

## Introduction

Following the Marikana massacre the idea that a TRC type process - amnesty for those responsible in exchange for the truth - may be the best way to establish the truth was in the main rejected.

From the beginning there was a strong feeling that prosecutions were a possibility even if an inquiry was also held. The notion that a civilian commission of inquiry was the most appropriate came from such disparate quarters as the Marikana Support Committee, and in retrospect from Adv Sesi Baloyi, part of SAPS' legal team and James Nichol, a member of Amcu's legal team. While Amcu suggested that an international human rights body should chair a commission, Baloyi argued that a commission headed by a non-judicial chair and consisting of experts in areas such as industrial relations, labour law, public policing and crowd control would have been more successful in both understanding and eliciting the truth.<sup>5</sup> However Rehad Desai of the Marikana Support Committee recalls that people were persuaded in part by Advocate Bizos that there are significant advantages to the judicial commission model that other paradigms do not hold. Bizos argued that judicial inquiries can be powerful digging devices unearthing unexpected information and are particularly empowered to do so because of their special investigative and

coercive powers such as powers of subpoena and search and seizure or simply because of the weight of the commissions' authority which is not held by other types of inquiries or in the traditional legal system. As a result, they are often able to fill gaps where other forms of inquiry fail.<sup>6</sup>

## Adversarial Model

One of the strengths of judicial inquiries, it is argued, is that the evidence that emerges cannot be used in later court actions.<sup>7</sup> A commission usually operates on a balance of probabilities rather than holding the obligation to prove the truth beyond reasonable doubt as in criminal proceedings in South Africa. The logic behind this is that it creates a less adversarial environment which is more conducive to truth telling. However the Marikana Commission was often not successful in creating such an atmosphere.

From the first day of the inquiry an adversarial model was established as different parties were represented by their own legal teams. The judge thus made the decision to conduct the inquiry as a quasi-judicial court hearing. Legal counsel confronted each other with broadly human rights' parties pitted against the police and Lonmin and competing trade unions lining up against one another. In addition the way the presidency framed the inquiry's Terms of Reference further polarised the investigation. Each party was itemised for investigation for its responsibility in the violence - AMCU, NUM, Lonmin, SAPS, Department of Mineral Resources (DMR) and other

<sup>5</sup> Interview Adv Sesi Baloyi 18/3/2015

<sup>6</sup> Interview Rehad Desai Marikana Support Committee, 22/3/2015

<sup>7</sup> For example, "The Objectives of a Commission of Inquiry and the Standard Applicable to Inquiries" <http://justice.gov.sk.ca/stonechild/finalreport/part3.pdf> - Accessed 13/2/2014

government departments and agencies and 'loose individuals and groupings'<sup>8</sup> - instead of allowing responsibilities to emerge in a general investigation in a less combative manner. Such naming tended to harden attitudes and distance parties from the horror of the killings especially as each designated group felt the need to clear its name in the light of possible later prosecutions.

## Independence & fair procedures

The judicial commission of inquiry format is mainly employed by Commonwealth countries where it is traditionally favoured over other forms of truth investigation. This preference is informed by the fact that judicial inquiries are seen as being independent from the executive and thus removed from political interference. Judges who often chair commissions are people that in a democratic society are expected to be the most impartial, and in South Africa to most closely represent the values of the Constitution.

Concerning the Marikana Commission parties were generally in agreement that there had been no executive interference in its proceedings and that Judge Farlam had in the main operated without bias<sup>9</sup> thus giving the inquiry legitimacy. This was important as whatever expectations there may be of judges they are certainly not consistently without bias as the bench eloquently demonstrated under apartheid (with a few exceptions). In the Bloody Sunday Inquiry in the United Kingdom, for example, Chief Justice Widgery cleared the British army of killing 14 protestors from Derry in Northern Ireland in 1973 without cross examining any of the injured protestors. Some years later however in 2010 a second inquiry

found that the soldiers had lied and falsely claimed to have been attacked (shades of Marikana). In 2002 army Lieutenant Colonel Derek Wilford stated, "There might have been things wrong in the sense that some innocent people, people who were not carrying a weapon, were wounded or even killed. But that was not done as a deliberate malicious act. It was done as an act of war."<sup>10</sup> The report found that all of those shot were unarmed and according to British prime minister David Cameron, who apologised on behalf of the United Kingdom for the Bloody Sunday events, the killings were both "unjustified and unjustifiable - it was wrong" and most now regard Widgery as discredited.<sup>11</sup> Judges can clearly arrive at inquiries armed with their own prejudices.

However although the Marikana Commission's proceedings cannot be accused of such severe impartiality, an element of bias emerges (as explored below) in the Commission's Report. Early in its deliberations it attributes overall responsibility for triggering the violence to the conduct of the strikers in embarking on an unprotected strike and in enforcing it through violence and intimidation.<sup>12</sup> There is no consideration of workers' right to strike under the Constitution or that employers have dismissal and lock out rights in industrial action making it unnecessary for employers to call in state agents to resolve disputes.

Besides independence of the executive, judicial commissions according to experts are often favoured by the public because they are conducted by people who are trained in fair procedures. Bolstering this perception is that a judicial inquiry holds the full force of the law and there are no other investigative

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<sup>8</sup> Terms of Reference, Marikana Commission of Inquiry

<sup>9</sup> Some queried the impartiality of the other two Commissioners, advocates Hemraj Pingla and Bantubonke Tokota who at times seemed to be overly sympathetic to SAPS. Tokota for example when SAPS was cross examined by the Human Rights Commission asked, "Bearing in mind your mandate in terms of the Constitution, I didn't have an opportunity to go through all the pages here, is there anything right which was done by the police?" (The SAHRC was investigating the behaviour of SAPS in particular having received a complaint about its operations at Marikana). Adv Ntsebeza who represented some families of the deceased, post the Marikana Report release, also claimed in Xhosa at the 2015 Marikana memorial in Rustenburg that Judge Farlam was not impartial but he did not however raise this at any point during the Commission.

<sup>10</sup> Bloody Sunday Inquiry - Col Wilford: "Don't blame my soldiers" BBC News, retrieved 28/09/2014.

<sup>11</sup> "Bloody Sunday: PM David Cameron's full statement". BBC News. Retrieved 28/09/2014.

<sup>12</sup> Marikana Report p42.

mechanisms that carry this weight.<sup>13</sup> Witnesses at a judicial commission give evidence under oath and can be charged, fined or imprisoned for hindering its work or giving false evidence.<sup>14</sup> However the Commissions Act did not appear to weigh on many witnesses who flagrantly evaded and lied to the inquiry and the former's sanctions were not used by the Commissioners. The issue of truth telling loomed large in the Marikana Commission as Evidence Leaders in particular showed repeatedly that police, and to a lesser extent Lonmin officials, were lying and evading under oath, failing to produce relevant documents, and doctoring evidence. In closing arguments senior Evidence Leader Geoff Budlender lamented this state of affairs, 'There is good reason to doubt the truthfulness of a large number of the witnesses who gave evidence to the Commission. It has been, for me, one of the most dispiriting aspects of this Commission. In an attempt to avoid accountability many witnesses have avoided truth telling.'<sup>15</sup>

The Commission's Report was also disappointing on the police's wide-ranging dishonesty. Although it mentions this factor a number of times and aligns itself with police expert witness, Cees de Rover,<sup>16</sup> who contrary to expectations insisted that the police should be "witnesses of truth"<sup>17</sup>, it does not recommend that those who perjured themselves should be prosecuted. De Rover testified that,

*It is understandable that an institution would attempt to shield itself from criticism in a situation such as this, and that it would be reluctant to invite criticism by explicitly*

*or implicitly acknowledging mistakes that were made. That, however, is what is required of the SAPS. It has a duty of public accountability and truth-telling, because it exercises force on behalf of all South Africans, and all South Africans are entitled to know whether what was done in their name was justified.<sup>18</sup>*

De Rover further explains that, "There clearly is a need for alleged police misconduct to be investigated by an agency which is independent of the SAPS, and IPID [Independent Police Investigative Directorate] is intended to perform that function." But IPID he found simply advised the police to get a lawyer in case any prosecutions were in the offing and where possible to say nothing, "You are advised of the fact that you do not have to say anything if you do not wish to do so. Now personally I think well, 'I'd rather say nothing for the time being', and I think many SAPS members elected that path, even when I tried to engage them."<sup>19</sup> And he concluded "... the manner in which the system operates appears to be counter-productive, at least in instances where a substantial public interest is involved such as is the case with regard to Marikana."<sup>20</sup>

Despite endorsing such opinions the Report does not invoke its powers under the Commissions Act to call the police to account, "Offences by Witnesses: A person is guilty of an offence if he or she ... wilfully hinders or obstructs a commission in the performance of its functions ... Any person ... having been sworn or having made affirmation fails to answer fully and satisfactorily any question lawfully put to him, or fails to produce any

<sup>13</sup> "The Objectives of a Commission of Inquiry".

<sup>14</sup> Commissions Act, 1947, s. 5&6.

<sup>15</sup> Evidence Leaders Oral Closing Argument: pp38494/5 lines 19-23, available at <http://www.marikanacomm.org.za/transcripts.html>

<sup>16</sup> De Rover is a former Dutch officer and police expert for over 20 years for such organisations as the International Committee for the Red Cross and the United Nations.

<sup>17</sup> *Marikana Commission Of Inquiry: Report On Matters Of Public, National and International Concern Arising Out Of The Tragic Incidents At The Lonmin Mine In Marikana, In The North West Province*, p385.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid, p386.

<sup>20</sup> Ibid, p387.

book, document or object in his possession or custody or under his control, which he has been summoned to produce, shall be guilty of an offence and liable on conviction to a fine ... or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment... Any person who after having been sworn or having made affirmation, gives false evidence before a commission on any matter... shall be guilty of an offence and liable on conviction to a fine ... or to imprisonment for a period not exceeding twelve months, or to both such fine and imprisonment.” Up to now no SAPS members who perjured themselves have been prosecuted nor have they been disciplined or demoted within the police force. This flies in the face of the idea of restorative justice particularly for families of the injured and deceased which was so keenly embraced during South Africa's Truth & Reconciliation Commission in the face of gross human rights abuses.

## Broad Reach: Phase 1

The Marikana Commission originally envisaged conducting a Phase 1 to establish the facts behind the responsibility for the killings at the Marikana mine between 9 -16 August 2012 and a Phase 2 to investigate the broader underlying causes of the violence. This meant, like many inquiries, the Marikana Commission was tasked with both a narrow and broad mandate often referred to as Investigative and Advisory inquiries respectively.<sup>21</sup>

Concerning both Phases those who favoured immediate prosecutions rather than the appointment of a Commission failed to recognise the importance of the broad reach of an official inquiry both in terms of content and participation.

In Phase 1 broad participation in the inquiry was noticeable. Inquiries unlike a court of law

allow for the engagement of a wide range of parties and this was indeed a strong feature of the Marikana Commission. Courts allow for *amicus curiae* (friend of the court) who assist the court where necessary with expert evidence but this is by definition narrow in scope. At the Marikana Commission by contrast there was formal representation for and from the arrested, injured and deceaseds' families, SAPS, Human Rights Commission, Lonmin, three trade unions, Council for the Advancement of the Constitution, the Bapo ba Mogale (traditional authority), DMR, CCMA (Commission for Conciliation, Mediation & Arbitration), CALS (Centre for Applied Legal Studies), Chamber of Mines, Benchmarks Foundation and a number of expert witnesses. In addition various support groups such as the Khulumani Support Group and Marikana Solidarity Campaign (now Justice for Marikana) were in regular attendance and all hearings were open to the public and media.

Further the strong Evidence Leaders team through its careful cross examination also exposed the public to police and Lonmin machinations and how bargaining processes and trade unions operate on the mines in South Africa. This gave legitimacy to the proceedings. It was a transparent process in an environment where much of the dealings of government, business and other organisations are opaque in South Africa. The Commission gave the public the opportunity for a moment to glimpse behind the external operations of such institutions.

Evidence leaders, human rights lawyers and solidarity groups played an important role in the Commission and engaged with both the factual and a few of the socio/economic issues and exposed a complexity of perspectives with which the society has to engage. Commissions operate at various levels. They investigate to ascertain the truth but in the

<sup>21</sup> Privy Council Offices, Government of Canada - <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=commissions&doc=about-sujet-eng.htm> - Accessed 10/01/2015.

process they also inform and educate the public and government about matters of substantial importance and through their recommendations can at times push governments into formulating new policies.<sup>22</sup> There is no doubt that the Marikana Commission through its probings unearthed a number of myths and untruths that had emerged pre and post the killings thus deepening the public's understanding of what had happened.

So for example the SAHRC/CALS' video footage of events at Scene 1, painstakingly reconstructed from a number of media sources, showed that the lead group of protesters who were said to be intent on attacking the police were actually leaving the koppie at a walking pace. They could have attacked the police, but instead, directed by a police razor wire barricade they slowly passed the police towards the shanty town of Nkaneng until SAPS' armoured vehicles cut them off. Rather than confronting the police, video footage showed that protesters were herded towards the police line where the 60 odd Tactical Response Team (TRT) awaited with R5 rifles. At this point the video shows the release of water jets together with an explosion of stun grenades aimed at the rear of the lead group which forced the workers towards the TRT ten seconds before it opened fire with 328 rounds of live ammunition often at head height. Many died of head wounds including those who raised their hands in peace and despite repeated 'cease fire' calls.

Throughout the Commission, the SAPS had maintained its commitment to a peaceful resolution using non-lethal weapons to disarm and disperse miners. The video footage gave the lie to this argument.

The video also showed that as the stun grenades detonated, a protester fired one

pistol shot at the ground near a police Nyala [armed vehicle] again contradicting the SAPS' claim that it was "confronted with a heavily armed group with guns, plural, being fired from within that group. In V5 [Video 5] ... there's only video footage of one handgun being discharged by a striker."<sup>23</sup>

The Evidence Leaders /Marikana Report however were at variance with the SAHRC video account believing that some TRT members in front and very close to the departing workers may have panicked and thought their lives were at risk. Thus it believes the initial three second blast of gunfire may have been justified whereas the subsequent firing (including some R5s on semi- automatic) which continued over eight seconds could not be defended because it created a dust cloud through which police blindly shot and some people were hit as much as 45 and 250 metres away.<sup>24</sup>

Yet as James Nichol observed, despite these differences in interpretation, the Commission in an extraordinary absence never cross examined the TRT rank and file shooters who would surely have testified to what actually happened and to their state of mind.<sup>25</sup>

De Rover who had originally buttressed the police narrative, in subsequent interrogation confronted by video evidence admitted that the massacre must have been a planned decision in response to an executive instruction. In addition he asserted, "... I think that R5 rifles do not belong in public order management ... automatic rifle fire doesn't have a place in law enforcement..."<sup>25</sup> and that "...there are rules of international law that address the use of assault rifles in law enforcement, generally stating that this should be discouraged... a .556 round fired at close range is virtually and per definition a kill shot. The R5 is guaranteed deadly."

<sup>22</sup> Gomery John H. (2006) "The Pros & Cons of Commissions of Inquiry" *McGill Law Journal* vol 51, p783.

<sup>23</sup> Marikana Commission Transcription Day 286, 5 September 2014, p 37117 lines 17-20 (De Rover cross examination by counsel for SAHRC.)

<sup>24</sup> Marikana Report, pp2-262.

<sup>25</sup> Telephonic interview, James Nichol, counsel for Amcu, 24/3/2015.

<sup>26</sup> Marikana Commission Transcription Day 286, 5 September 2014, p 37135-37134 lines 6-10 (De Rover cross examination by counsel for SAHRC.): Marikana Report p258.

The Commission's broad reach also allowed it to reveal a strong possibility of a chain of command. It pointed to responsibility for the massacre running from top politicians onto SAPS' leadership down to members in the Tactical Response Team (TRT) who did the actual shooting. Such linkages would unlikely to have come to the fore in a more narrowly defined prosecution case. However the Evidence Leaders were unable to definitively attribute an instruction for what to police minister Nathi Mthethwa due to lack of concrete evidence. Said one lawyer, "With the evidence we did what we could. We couldn't establish political responsibility. To get evidence you have to have good luck, or insider information, or some kind of carelessness."<sup>27</sup> This was an unfortunate weak link in the Commission's case but it was certainly a failure in its Report not to draw conclusions from evidence that emerged at the inquiry and to recommend further investigation in this regard.

The Commission Report made an important break with most past South African inquiries by naming particular people for responsibility - National Police Commissioner Riah Phiyega<sup>28</sup> and North West Police Commissioner Zukiswa Mbombo stating that they were driven by 'irrelevant political considerations'<sup>29</sup> and should be investigated for their "fitness to remain in their posts and whether they are guilty of misconduct in attempting to mislead the Commission"<sup>30</sup> Yet the report was not

prepared to go higher in the chain of command and exonerated Ramaphosa for his self-interested personal and political meddling and ambivalently cleared police minister Nathi Mthethwa saying, "The Commission wishes to emphasise that it is not finding that such 'guidance' [from the executive] was given. It is, however, unable in the light of what has been said above to find positively in Minister Mthethwa's favour..."<sup>31</sup> This ambivalence allowed President Zuma in his televised release of the Report to entirely absolve Mthethwa of blame.

Evidence led at the Commission strongly fingered Ramaphosa for responsibility in the killings. He sent 'a long line of e-mails'<sup>32</sup> to minister of mines Susan Shabangu and Mthethwa which counsel for the injured and arrested characterised as "concerted pressure that was being put, among others, on the police - well firstly on the government not to call the strike a strike or not to call it labour related but to call it so-called *criminal action* (my emphasis)..."<sup>33</sup> and argued further that Ramaphosa encouraged "concomitant action to deal with these criminals whose only crime was that they were seeking a wage increase."<sup>34</sup> On 12 August he told Mthethwa that he did not think that what was happening was "...pure industrial action in the true sense of the word: It had criminality on it and violence"<sup>35</sup> and he informed Shabangu on 14 August that her 'silence and inaction' was 'bad for her and government'.<sup>36</sup> Ramaphosa also

<sup>27</sup> Interview 25/8/2015 - the lawyer preferred to remain anonymous.

<sup>28</sup> Phiyega was dismissive of evidence leaders and other counsel's attempts to get at the truth calling for example the crucial question on whether a risk assessment of the police decision to move in on strikers on August 16 was carried out at a National Management Forum meeting of provincial police commissioners on the evening before the killings "pedantic detail" pg 38680 transcription Marikana Commission of Inquiry.

<sup>29</sup> Marikana Report, pp167/168. The Commission made a finding that. "Gen Phiyega was complicit in engaging in discussions where political factors were inappropriately considered and discussed in relation to policing the situation at Marikana. This is inconsistent with our constitutional and statutory regime which requires that policing be conducted in an impartial and unbiased manner." Marikana Report p169; and that "Lt Gen Mbombo took into account irrelevant political considerations in approaching the situation at Marikana: 543.1 She did not want mining companies to be seen to be supporting AMCU; 543.2 She did not want mining companies to undermine NUM; 543.3 She was responding to what she perceived as pressure from Mr Cyril Ramaphosa whom she considered to be politically influential; 543.4 She wanted to end the violence before Mr Julius Malema arrived in Marikana and was given credit for defusing the situation; 543.5 She was concerned to put an end to a situation where an opposition member of Parliament was involving himself in the community." Marikana Report, p16.

<sup>30</sup> Marikana Report, p515.

<sup>31</sup> Ibid, p453.

<sup>32</sup> Ibid, p412.

<sup>33, 34</sup> Ibid.

<sup>35</sup> Ibid, p417.

<sup>36</sup> Ibid, p420.

communicated with Lonmin executive Barnard Mokwena that he had spoken to Mthethwa and "...stressed that they should immediately take steps to ensure that they protect life and property and bring those responsible for the terrible acts of violence and deaths to book. He [the Minister] said that they were working on it."<sup>37</sup> Pressure was then brought to bear on Lieutenant General Mbombo who gave evidence that she had received a telephone call from Mthethwa on 12 August in which he told her that he had received a report from Mr Ramaphosa "... that is pressurising him".<sup>38</sup>

Yet despite this clear line of communication to take action against 'criminal' strikers conveyed to Mbombo and emanating from one of the most powerful people in the ANC who held shares in Lonmin through his BEE company Shanduka (Incwala Resources), the Commission still found that Ramaphosa's "...conduct in endeavouring to get the police to do their job to stabilise the situation and arrest those strikers who had committed serious offences was not improper."<sup>39</sup> It is clear that Ramaphosa's communications put immense pressure on all involved in the senior ranks of government and police. The Marikana Report is reluctant, it seems, to finger the powerful and to take its findings to the logical conclusion that Ramaphosa's political interference persuaded senior police leadership that *all* the strikers were criminals who should rapidly be removed from the koppie in whatever way possible.

At no stage does the Report make the obvious point that the right to strike is protected by the Constitution even when workers engage in an unprotected strike. Nor does it draw the equally obvious conclusion that not all, if any, of the 'criminal' strikers on the koppie had been involved in the killings of two policemen and two[k2] security guards in the days

preceding the massacre. Nor does it concede that Ramaphosa was highly compromised in his views on the strike. Firstly as a non-executive director of Lonmin seeking to get strikers back to work; secondly as an ANC executive member seeking to protect the NUM in alliance with the ANC which many strikers were in the process of rejecting; or thirdly that Ramaphosa had a keen interest in shutting down the burgeoning influence of the EFF (Economic Freedom Fighters) on these striking platinum workers especially as he had headed an ANC disciplinary committee which had expelled EFF leader Julius Malema from the ANC.

The Report seems intent on finding a couple of individuals responsible for the shootings on August 16 instead of allocating responsibility in a multifaceted, but connected manner along a chain of command linking the ANC in government, the ANC national executive, senior ANC police appointees and senior executives in Lonmin where specific people interacted who should jointly be held responsible. The Commission's strength in allowing for a broad investigation along a chain of command which revealed significant relationships and interactions was stymied by its fear of taking such finding to their logical conclusion.

The Commission's broad reach however allowed other wider cause and effect relationships to emerge which again would not have materialised in individual prosecutions. Burke observes that, "A commission of inquiry can go beneath the surface of the controversy and explore the factors and conditions that gave rise to the problem in the first place"<sup>40</sup> which he believes a court room cannot do with its limited frames of reference on what is considered to be relevant evidence. The probe of an earlier (February 2012) strike at Impala Platinum at

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<sup>37</sup> Ibid, p416

<sup>38</sup> Ibid, p418.

<sup>39</sup> Ibid, p509.

<sup>40</sup> Burke, TJ (2003) "The Role of Public Inquiries in the Development of Public Policy". <http://m.gowlings.com/KnowledgeCentre/article.asp?pubID=932&lang=0> - Accessed January 2015.

the Commission, for example, threw light on the Lonmin drillers' strike motivation as they now earned the lowest wages of the big three platinum companies (Amplats, Implats, Lonmin) on the Rustenburg platinum belt<sup>41</sup> (see Table below) showing that instead of being criminals they had a genuine strike grievance.

## Broad reach: Phase 2 Underlying Causes

The Legal Resources Centre (LRC) acting for Benchmarks, together with Evidence Leaders, also inserted broader material into the "Phase 2: Underlying Causes" of the Commission thus shifting the charges of criminality from

the strikers to the company and exposing Lonmin's considerable neglect of its workforce.

They both led evidence concerning housing provision for workers in which Lonmin's 2007 Social Labour Plan (SLP) promising 5 500 houses had in reality culminated in three show houses by 2011. Under cross examination the LRC exposed how Ramaphosa (now SA's Deputy President) as head of Lonmin's Transformation Committee and a multi-million rand shareholder, was ignorant of Lonmin's housing developments and of its commitments under the SLP which by law it had to fulfil to renew its valuable mining licence.<sup>42</sup> Evidence Leader Matthew Chaskalson exposed Lonmin's

### 1. Background

Following recent market movements in respect of RDO remuneration, we completed a detailed market comparison and reviewed several options to enable our retention of RDOs. Both exercises have revealed that our RDO remuneration is lagging behind and left unattended, we run a risk of losing RDOs to both Impala and Amplats.

### 2. RDO Remuneration

Table 1 compares our current remuneration (pre-October 2012 increases) with the adjusted rates for Impala and Amplats. The current gap is R898 (total package) and R1135 (basic wage) in the case of Impala and R938 (total package) and R995 (basic wage) relative to Amplats.

**Table 1: Current remuneration**

	LONMIN	IMPALA	ANGLO
Current Basic	R 5 405	R 6 540	R 6 400
Pension/Provident Fund Contribution	R 802	R 1 056	R 909
Medical Aid Subsidy	R 556	R 320	R 700
Housing Allowance	R 1 850	R 1 500	R 1 737
HLA	R 450	R 545	R 505
RDO Allowance	R 0	R 0	R 750
<b>TOTAL</b>	<b>R 9 063</b>	<b>R 9 961</b>	<b>R 11 001</b>
<b>Difference (total remuneration)</b>	-	<b>R 898</b>	<b>R 1 938</b>
<b>Difference (basic wage)</b>	-	<b>R 1 138</b>	<b>R 996</b>

Print Screen 1: "Drilling Market Allowance", Memorandum 27 July 2012 from Lonmin's Abey Kgotle. Page 1 - motivating the recommendation for RDO allowances of R750, R500 and R250. (Source: Marikana Commission).

<sup>41</sup> Marikana Commission Transcription Day 241, 6 June 2014, p 30352 lines 3-14 (cross examination Lonmin's Da Costa).

<sup>42</sup> For example Marikana Commission Transcription Day 271, 11 August 2014, p34489 lines 14-25; p34490 line 1; 34496 - 34498 lines 24-25, 1-25, 1 respectively; 344500 1-14; 34533 - 35 lines 14-25, 1 respectively (cross examination Cyril Ramaphosa by LRC counsel for Benchmarks and 20 families of the deceased).

lame lack of affordability arguments when it asserted that the 2008 global financial meltdown had altered its financial position making it impossible to realise its housing commitments.<sup>43</sup> Chaskalson reminded Lonmin of its handsome dividends paid to shareholders in 2009.

The Commission's Report was unusually strong on condemning Lonmin for reneging on its legally binding SLP housing commitments. It noted that Lonmin's Mohamed Seedat "conceded in his evidence that the living conditions in Nkaneng and other informal settlements were truly appalling... and ... that there was a critical shortage of decent housing for the employees of Lonmin and that the board and executive of Lonmin understood that the tragic events at Marikana were linked to that shortage."<sup>44</sup> The Commission thus wrought a strong concession from Lonmin.

The Inquiry rejected Seedat's argument that its SLP housing obligation was simply to broker a relationship with their employees and financial institutions who would grant them mortgage bonds. It noted that this was inconsistent with the terms of the SLP, annual SLP reports which Lonmin furnished to the DMR under the Minerals & Petroleum Resources Development Act (MPRDA), the SLP close-out reports that Lonmin submitted to the DMR after the five year term of the SLP, and Lonmin's sustainable development reports.<sup>45</sup> It also rejected Lonmin's argument of an inability to afford its housing obligations at Western and Eastern Platinum between 2007-2011 budgeted at R665m. It observed that Lonmin in this period was able to pay dividends of US\$607 million to Lonmin Plc and Incwala Resources (its BEE company), and paid more than R1.3 billion in 'marketing commissions' to Lonmin Plc through a transfer pricing arrangement involving its SA company

Lonmin Management Services (LMS) and its Bermudan registered subsidiary, Western Metal Sales Ltd. In this period alone, LMS made a profit of R 643,547,159 on 'marketing commissions' paid by WPL and EPL.<sup>46</sup>

The Commission was thus satisfied that Lonmin's failure to comply with its housing obligations "created an environment conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct"<sup>47</sup> and it recommended that the failure of the DMR to adequately monitor Lonmin's implementation of its housing obligations should be investigated and the DMR "should take steps to enforce performance of these obligations by Lonmin."<sup>48</sup> It should be noted that the President had changed the Commission's Terms of Reference in April 2014 and had excised all government departments, agencies and institutions from investigation for their responsibility in the Marikana violence. It was thus important that the Report should recommend an investigation of the DMR's weak SLP monitoring responsibilities because the Inquiry was unable to investigate this itself.

## Broad reach: Challenge to Commission

The participation by human rights organisations in the Commission was triggered by SAPS and Lonmin witnesses being represented by well-furnished legal teams which in the case of the former was state funded. The families of the deceased and the injured however had neither state support nor the resources to employ legal counsel. Organisations such as Seri (Socio-Economic Rights Institute) the LRC and the EFF's Dali Mpfou stepped into the breach to provide free legal counsel which however when the Commission overran its initial four months' term they could no longer sustain.

<sup>43</sup> For example Marikana Commission Transcription Day 292, 16 September 2014, p38297 lines 19-25; p38298 lines 1-4; p38315 lines 1-24; p38319 lines 22-25.

<sup>44</sup> Marikana Report, p527.

<sup>45</sup> Marikana Report, p528.

<sup>46</sup> Ibid, p554.

<sup>47</sup> Ibid, p542.

<sup>48</sup> Ibid.

A dispute therefore erupted when Legal Aid faced with applications for assistance from injured and arrested workers allowed for the funding of further prosecutions and civil actions, but not for legal representation at the Commission. The workers represented by Mpofo and supported by other sympathetic parties at the Commission approached the high court, claiming that it was unjust and discriminatory for Legal Aid to assist SAPS at the Commission but not the miners. The court ruled in their favour stating that Legal Aid should “forthwith take steps to provide legal funding”<sup>49</sup> to the mineworkers. Legal Aid however challenged this decision on the grounds that it only had an annual budget of R1.4-billion which was already inadequate for the demands it had to meet. The likely cost of Marikana representations until end September 2014, based on teams requiring Legal Aid would be R22-million, almost 2% of Legal Aid’s annual budget.<sup>50</sup> It appealed the judgment and the final decision now lies with the Constitutional Court.

The high court decision was significant however as the human rights lawyers had established an important principle for future commissions on the issue of equitable representation. Government had not applied its mind to this question when it appointed the Commission. As the LRC noted the poor and vulnerable “continue to be left to their own devices” while organs of state wield enormous influence in commissions through “overwhelming firepower” provided at taxpayers’ expense.<sup>51</sup> Even Sesi Baloyi, part of SAPS’ legal counsel, agreed that, “In principle in Commissions of Inquiry where communities have an interest they should have access to funding as they must participate. There has to be a mechanism for individuals and communities to participate so when the president sets up a commission

he must ensure that funds are made available.”<sup>52</sup> The LRC cited Canadian practice in judicial inquiries where commissioners can recommend to Cabinet that funding be provided to ensure fair participation in inquiries.

This important precedent on equitable representation was established by the Marikana Inquiry because Commission’s allow for broad participation by any interested party no matter how many.

## Value of Inquiry versus Prosecution

Canadian Justice Gomery explained the difference between Inquiries and civil and criminal court actions,

*...there are no legal consequences attached to the determinations of a commissioner whose conclusions do not bind courts considering the same subject matter. A public inquiry is not a trial but an investigation to determine the facts and to make recommendations... trials ... accomplish one thing and commissions of inquiry a different thing: ...and the two shouldn't be confused ... reports are not judgments...[but] they may be findings of blameworthy conduct...<sup>53</sup>*

Those who urged immediate prosecution following the Marikana massacre argued that many of the mine workers’ killers were known and it would be the cheapest and quickest route to give families of the deceased some form of justice. They contended that President Zuma appointed a commission because he wanted to avoid police prosecutions which would have meant surrendering the ANC’s moral high ground and acknowledging the culpability of the state in the largest post-apartheid massacre.

<sup>49</sup> Marikana: Who funds the poor at inquiries? <http://mg.co.za/article/2014-09-11-marikana-who-funds-the-poor-at-inquiries> - Accessed 12/2/2015.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Interview Sesi Baloyi, counsel for SAPS 18/3/2015.

<sup>53</sup> Gomery, John “The Pros & Cons of Commissions of Inquiry” 796-8.

Although there is some truth to this argument borne out by the ANC's lack of empathy with the deceased and injured workers and their families and its inaction in the face of the Commission's Report, it is however true that only certain families of the deceased would have gained from this approach. Courts can only provide individual solutions and are unable to address the collective pain that survivors and their communities have suffered. As Stanton notes,

*The costs of litigation for individuals, both in financial and emotional terms, can be prohibitive. The trial process is plagued with delays, often resulting from arguments about minutiae that do not touch upon the heart of the case. There may be tactical arguments by defence counsel to delay the process or discourage the plaintiffs from proceeding. The totality of the harms experienced by the plaintiffs may not fall into compensable legal categories, or the time elapsed since the harms occurred may bar recovery due to the expiry of limitation periods.<sup>54</sup>*

Further the National Prosecuting Authority (NPA) has a poor record of prosecuting the police in protest situations as the Tatane case showed<sup>55</sup> whilst the totality of harms experienced by the plaintiffs may result in partial or no compensation and some receiving compensation and others not.<sup>56</sup> The Report has called for only one named individual to be investigated with a view to prosecution, Major General Naidoo. This is a departure from a larger number of named people to be probed in the Evidence Leaders heads of

argument at the Commission including Major Generals Annandale and Mpembe, Brigadier Calitz, Brig Fritz and Sgt Venter, and those who hindered or obstructed the Commission. This, I believe would have been preferable to the broad sweep recommendation in the Report that *all* SAPS at Scene 1 and Scene 2 be investigated to clarify the circumstances surrounding the injuries and deaths of people - a mandate so general that it may lead to no-one being found culpable.<sup>57</sup> The Report calls for such an investigation to occur under the supervision of the Director of Public Prosecutions of the North West Province together with a team appointed by a Senior State Advocate, including independent experts in the reconstruction of crime scenes, expert ballistic and forensic pathologists and Senior Investigators from IPID.<sup>58</sup> It further recommends that the assaults and deaths of mine workers, SAPS and Lonmin security officers prior to the massacre be investigated with a view to prosecution.<sup>59</sup> In effect the report is calling for a second inquiry but with the possibilities of prosecutions emanating from it - probably a recommendation that is unlikely to be heard because of the expense and political sensitivities involved unless civil society is vociferous in demanding it.

Some commentators have argued that the Commission had already investigated key people with a view to prosecution as it was given sufficient resources to do so. However it should be noted that the Commission operated on a balance of probabilities which in criminal cases would not be sufficient to secure a conviction so further investigation is

<sup>54</sup> Stanton, P (2010) *Addressing Historical Injustices in Established Democracies*. Thesis: Doctor of Juridical Science, University of Toronto.  
[https://tspace.library.utoronto.ca/bitstream/1807/24886/1/Stanton\\_Kim\\_P\\_201006\\_SJD\\_thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/24886/1/Stanton_Kim_P_201006_SJD_thesis.pdf)

<sup>55</sup> Andries Tantane, a maths teacher was beaten and shot dead by the police during a peaceful demonstration in Ficksburg, Free State on 13 April 2011. A number of police officers were charged with murder but were found not guilty on the grounds that Tatane's murderers could not be identified as they were wearing helmets. However, a British journalist was easily able to identify his killers from video footage:  
[https://en.wikimedia.org/wiki/Andries\\_Tatane](https://en.wikimedia.org/wiki/Andries_Tatane).

<sup>56</sup> Interview Bizos.

<sup>57</sup> The Report has recommended that the police who did the actual shooting should only be investigated for attempted murder as it is impossible to ascertain which bullets came from which gun and the clouds of dust kicked up by nearly 300 rounds made it impossible to see who directly shot whom.

<sup>58</sup> Marikana Report p327.

<sup>59</sup> Ibid, p543.

necessary if prosecutions are to follow. However indications are that the prosecution authorities lack the will to undertake the substantial investigations concerning the killing and injuries on August 16 and may only investigate some of the murders in the days leading up to the massacre. This seems to be borne out by the fact that 16 mine workers are currently appearing on charges of murder relating to incidents prior to the massacre. Up to now no police who participated in the Marikana killings on 16 August have been dismissed, suspended, disciplined, prosecuted or relieved of their guns.

In the period post the release of the Commission's report, a number of lawyers/organisations announced their intention to take civil action for damages on behalf of the injured, arrested and families of the deceased. This has been contested however for reasons already argued by Stanton including that some complainants may be unsuccessful and it may take considerable time before families get relief. Adv Bizos has argued that rather than squandering money on individual legal cases there should be a collective solution whereby the state and Lonmin are encouraged to negotiate and decide on their contribution to aggrieved parties' long term living costs.<sup>60</sup>

The ANC government has been generally reluctant to engage with the Marikana Report except in the case of the National Police Commissioner who was asked to justify her fitness to remain in office. In September 2015 however President Zuma established a Board of Inquiry to ascertain whether she had misrepresented events at Marikana by failing to inform him of the police killings at Scene 2. More recently the Commissioner was suspended from office and now faces a further board of inquiry into allegations of misconduct and inability to effectively perform her duties. The state would probably prefer to dismiss

her on the latter grounds rather than acknowledging police culpability in the Marikana killings. Current police minister Nathi Nhleko also hinted in September 2015 at the removal of R5 rifles from public order policing as well as indicating a willingness to negotiate compensation for the families of the deceased. He further announced the intention to create an independent panel to investigate the reform of public policing. None of these intentions have as yet been implemented and there is scepticism that they may simply constitute an ANC election gambit.

## Commission Report

The production of an independent Commission Report is generally seen to be of value. The hope is that government and civil society will act upon its recommendations in the form of further investigations, prosecutions, campaigns, advocacy, policy changes and possible implementation. In the post-apartheid period in South Africa the production of reports has been problematic, including that of the Marikana Commission Report which the President took nearly three months to release and used its publication as an opportunity to clear senior ANC members of culpability.

Commissions can be viewed as governments reducing public pressure on them, yet it is equally true that governments often await a Commission's report with trepidation as it is again called to account and the thorny issue is once more placed in the public terrain. As Schwartz & Buck comment, "A report's scolding can deliver a serious blow to a government or an organization."<sup>61</sup> The public too await its release often with considerable anticipation. This was certainly true of the Marikana Report yet ultimately the Report was greeted with some ambivalence although not viewed as a whitewash.

The Report is poorly written, recommendations are often buried in a welter of detail and it is

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<http://www.timeslive.co.za/sundaytimes/stnews/2015/06/28/Marikana-Where-is-the-justice> - Accessed 20/06/2015.

sometimes difficult to discern if they are Commission recommendations at all, and there is no executive summary. Its tone is often timid, legalistic and over-cautious and reads like a judgement making it difficult to interpret how seriously it views certain findings. This may be due to the Commissioners' failure to abandon the necessary impartiality of the Commission's hearings or it may be due to a lack of consensus amongst the Commissioner's themselves resulting in ambivalent and diluted findings.

There are exceptions however. The Report is for example overtly strong on recommendations around the retraining and restructuring of public order policing and on Lonmin's failure to honour its SLP. It is also explicitly judgmental of the strikers when it asserts that "... the tragic events that occurred during the period 12 to 16 August 2012 originated from the decision and conduct of the strikers in embarking on an unprotected strike..."<sup>62</sup> which in essence contends that no matter how the police responded, they were provoked by the workers.

This section has highlighted some Commission strengths whilst the following sections assess its weaknesses and underscores some failures. However it should be remembered that the report is not the only outcome of an inquiry. A useful way of looking at inquiries is that they contribute to policy debate. Commissions focus the public's attention on a particularly neglected policy area and stimulate debate with the quality of discussion being enhanced through the investigative capacity of the inquiry.<sup>63</sup> The Marikana Commission did indeed create this public opportunity and its credibility produced information that could be profitably used. Whatever happens with the Report's recommendations the transcript of Commission proceedings is accessible on

the internet to the public and researchers at large and remains a valuable document including for those investigating possible prosecutions. In fact the details of the killings that emerged from the Commission itself are much more damning than the mild, cautious character of the Report.

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<sup>61</sup> Buck A & Schwartz B (2003) *Inquiries* in A Manson and D Mullan (eds) *Commission of Inquiry: Praise or Reappraise*, Irwin Law Inc p568.

<sup>62</sup> Marikana Report, p42. The phrase is again used in the Concluding Remarks section of the Report p561 and is often bracketed after any mention of the workers organising a strike, eg p242/244.

<sup>63</sup> Burke TJ (2013) "The Role of Public Inquiries".

## Four

# Weaknesses of Judicial Inquiries & Marikana Commission

Part 2 outlined some international comment on the value of Inquiries some of which were reflected in the Marikana Commission process. However both local and international experience also point to the weaknesses of the judicial commission model as a means of accessing the truth.

This section explores some of these inadequacies and how they impacted on the Marikana Commission.

### Police Mendacity

Judge Goldstone commented simply that, "It's always difficult to get at the truth."<sup>64</sup> The commission of inquiry model relies in large measure on witnesses coming forward with honest testimony and relevant undoctored evidence, including visual material, to uncover the truth. When this is in question however, particularly in societies emerging from an illegitimate violent past like South Africa where the rule of law is fragile and the society divided, a Commission is in danger of being sabotaged. The Marikana Commission confronted this challenge and attempted to use the Commission model's strengths to circumvent this obstacle. However in a number of instances these tactics were not successful.

Judicial inquiries can easily become highly combative making the truth more difficult to access. As previously argued the way the Marikana Commission was conceived deepened its confrontational nature. Further although evidence led at the Commission could not be used in later prosecutions parties were acutely aware that negative findings could provide the backdrop for later court actions, dismissals and demotions. This probably accounted in part for why the SAPS lied and evaded on numerous occasions.

The 'big SAPS cover up' was initially planned at a nine day meeting shortly after the massacre in August/September 2012 in Pietermaritzburg (the Roots Conference) where the police, realising the implications of their actions, fabricated a scenario and thereafter all evidence was doctored, or simply not submitted, to ensure it did not contradict this version.<sup>65</sup> This could not have happened unless it was coordinated and funded by top leadership of the SAPS. Prominent in this version was that the police were under attack from 'muti' (drug) crazed armed mine workers and thus had no option but to defend themselves with live munition. In consequence the first year of the Commission's work was focused on 'discovery' or in other words unearthing material that was not voluntarily surrendered.

So, for example, SAPS modified and submitted a hard drive in the early days of the Commission's work where the original only

<sup>64</sup> "The Role of Commissions of Inquiry in a Democratic South Africa" Centre for Applied Legal Studies (CALS) Seminar 27/7/2014.

<sup>65</sup> Marikana Commission of Inquiry <http://www.marikanacomm.org.za/docs.201411-HoA-EvidenceLeaders.pdf> pp510-516.

came to the fore a year later in 2013. Lt-Col Duncan Scott fearing he would become the police scapegoat directed evidence leaders to a master version containing significantly more evidence pointing to a planned aggressive intervention in the strike. SAPS had early in the process subpoenaed from Lonmin a recording of a meeting between North West Commissioner of Police Mbombo and Lonmin's Barnard Mokwena on 14 August where they discussed frankly and cooperatively why the strike should be terminated immediately. Their conversation demonstrated that political considerations were primary in ending the strike, but this section of the hard drive had been deleted. In their discussion it became evident that Ramaphosa had put pressure on the minister of police, Mthethwa, to rapidly terminate the strike partly because the ANC was afraid that opposition party, the EFF, viewed favourably by the strikers would take advantage of the situation and win votes from the ANC in the upcoming 2014 national and provincial elections.<sup>66</sup>

SAPS' dishonesty went to the highest level of police structures. Commissioner Mbombo claimed she knew nothing about the killings at Scenes 1 or 2 whilst they were in progress and yet a police logbook showed that minutes after the shootings at Scene 1, Lt Col Vermaak watching from a helicopter, radioed the Joint Operations Centre (JOC) announcing, "bodies down" and called for medical assistance. The call was heard throughout the JOC. He also immediately sent pictures of the scene to the command centre on his Blackberry. It is inconceivable that Mbombo and Major General Annandale from the Special Tactical Operations team did not immediately know what had happened. Mbombo herself had particularly arrived at the JOC to oversee the dispersal of the workers but later pleaded that technical glitches made it hard for her to hear and that she went to the toilet or was outside

and thus could not intervene in follow up operations at Scene two where a further 17 workers were killed 20 minutes later.<sup>67</sup>

This dismissive attitude to the law by those in authority has been one of the major pitfalls for inquiries in South Africa's democracy. In the Marikana, Hefer, Ginwala, Donen and Seriti inquiries figures of authority have lied, evaded, instituted legal challenges to avoid giving evidence, ignored requests to produce documents and concealed evidence such as videos, minutes and other documents, memory sticks and hard drives. It should be noted that this is not unique to South Africa. In the United Kingdom for example in the 1990 Hillsborough Inquiry into 96 soccer stadium deaths the South Yorkshire police interfered with witness statements, and alleged that drunk and disorderly Liverpool fans and the deceased (blood samples were taken of the deceased!) were responsible - much like the Marikana SAPS' allegation that mine workers high on 'muti' provoked the killings. Only in a renewed inquiry 12 years later in 2012 when access to police documents was permitted, did it become evident that lack of police action and planning had led to the stadium deaths.<sup>68</sup>

Comparisons with other countries however point to such deception as being particularly insistent in South African inquiries. Dishonesty and a refusal to take responsibility is the greatest threat to inquiries and indeed to South Africa's democracy as a whole. People in authority are often more concerned with personal advancement than that of the society which they serve. In the Marikana case an attempt at creating a truth telling environment was often unsuccessful and significant leads to the truth were more frequently obtained through tip-offs to evidence leaders (a 'deep throat' in the police for example alerted them to the missing minutes of a senior SAPS' National Management Meeting the night

<sup>66</sup> Marikana Report p164 – Ramaphosa had presided over Julius Malema, the EFF leaders' appeal hearing when he was expelled from the ANC. See also [www.dailymaverick.co.za/documents/Exhibit-JJJ192-transcript-of-meeting-between-national-commissioner-and-lonmin-on-afternoon-of-14-august-2012.pdf](http://www.dailymaverick.co.za/documents/Exhibit-JJJ192-transcript-of-meeting-between-national-commissioner-and-lonmin-on-afternoon-of-14-august-2012.pdf).

<sup>67</sup> <http://www.marikanacomm.org.za/docs/201411-HoA-EvidenceLeaders.pdf>, pp683-687.

<sup>68</sup> [https://en.wikipedia.org/wiki/Hillsborough\\_disaster](https://en.wikipedia.org/wiki/Hillsborough_disaster).

before the August 16 massacre<sup>69</sup>) or through a witness under threat of being scapegoated like Col Vermaak when Brig Calitz alleged he had handed over command to him at Scene 2.

This web of SAPS' deceit can partly explain away the criticism that the first year of the Commission was squandered on irrelevant matters with little progress being made.

## Judges aren't managers

It is clear that the potential for judicial inquiries to become overly adversarial needs to be carefully managed but there are also other problems which a commission chaired by a judge can bring. As previously noted it is important that commissioners are impartial so that all parties feel they will get a fair hearing and a fair opportunity to cross examine witnesses which in turn engenders an environment where the truth is more likely to emerge.

At Marikana however this commitment to impartiality had an unfortunate spin-off.

Judge Farlam was careful to create a level playing field but he was overly solicitous. In the first year he permitted legal counsel almost unlimited time to cross examine. Bishop has commented, "Commissioners failed to impose the necessary discipline on the participants, particularly with regard to cross-examination. Parties were allowed to ask repetitive and irrelevant questions... [and] took full advantage of the free reign they had been granted and often used cross-examination for grandstanding and political posturing, rather than forensic evidence gathering."<sup>70</sup>

So for example Commissioner of Police Riah Piyega who stubbornly refused to engage with the truth was cross examined exhaustively by all parties for over a month (March- April 2013).

An injured mine worker, Mzoxolo Madigiwana still under medical care, was also submitted to nearly a month of prolonged questioning (February-March 2013). This contrasted with for example, the judicial Khayalitsha Commission chaired by Justice Kate O'Regan, where witnesses were given ten minutes to tell their stories and a great deal was achieved in a very short time (it is possible that O'Regan learnt from the Marikana Commission which was underway simultaneously).<sup>71</sup>

At the Marikana Inquiry the judge's heightened concern to be fair resulted in frustrating time limits in the final days of the hearings as the Commission ran out of time. This meant some were examined too hastily and others simply not at all. Thus important witnesses like Captain Loest and his armed TRT unit who opened fire was in the box too briefly, whilst the police who actually shot the workers were never cross examined, and Lonmin executives answering to wage demand affordability issues and the living conditions of mine workers were not examined in the depth required.

Judicial commissions are usually chaired by a judge in conjunction with other legal experts, or commissioners, as at Marikana. Thus the way the inquiry is managed is dependent crucially on their management skills and judges by definition are not managers and running a commission is a complex business. O'Connor observes that, "A public inquiry commissioner may combine a number of roles: fact-finder...; a proposer for policy reform; a healer for traumatized communities; and a manager with responsibility for budgets and an administrative and legal staff."<sup>72</sup> Marikana lawyers complained about the management of the Commission citing, for example, that procedures were not properly addressed in the early stages. Time they argued should

<sup>69</sup> See Greg Marinovich <http://dailymaverick.co.za/article/2015-07-20-marikanas-deep-throat-charge-brigadier-malahlela-unravel-police-lies-and-deceit/#.Vbl4zrOqqko> - Accessed 21/7/2012.

<sup>70</sup> Bishop M (2014:33) "An accidental good: the role of commissions of inquiry in South African democracy" <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Bishop.pdf>.

<sup>71</sup> The role of commissions of inquiry in a democratic South Africa, Seminar Centre for Applied Legal Studies, live streaming 28/7/2014.

<sup>72</sup> Dennis O'Connor 'Some Observations on Public Inquiries' Presentation to the Canadian Institute for the Administration of Justice (10/10/2007).

have been set aside to examine documents, draw up witness lists and to clarify rules of procedure.<sup>73</sup> Some parties unsuccessfully requested clarity on evidence rules and for a timetable and time limits to be set so that they could adequately prepare. In retrospect however given that some parties were concealing evidence this may not have been entirely possible as important evidence was submitted late in the day requiring flexibility from the Commission. The issue of when an inquiry begins is also moot. Judge Goldstone has argued that inquiries should proceed without delay while the event is fresh in people's minds and they are demanding answers<sup>74</sup> thus inquiries should not be used expediently to delay and conceal burning issues. This means commissioners have to juggle the imperative to allow for sufficient preparation with the need to immediately launch the inquiry. Goldstone recalls that the investigation into the Boipatong massacre in 1992 which he chaired started within seven days of the incident<sup>75</sup> while the Marikana Commission began within six weeks of the event.

Some lawyers felt that a more thorough explanation of the Terms of Reference (TOR) in the early stages would have avoided time wasting later arguments over interpretation. So for example the term 'omission' used in relation to each party to be investigated: "...whether by act or omission it directly or indirectly caused loss of life or harm to persons or property" and the term 'endeavours' in the phrase "whether the parties used their best endeavours to resolve any disputes that may have arisen between itself and..." were continuously contested. Lawyers also complained that they were given insufficient time before the SAPS' cross examination to process the mass of documents submitted by the police in no particular order on several

hard drives. This meant that witnesses were questioned in a haphazard order. Amcu's Joseph Mathunjwa, for instance, was called very early because lawyers were not prepared to question the police who clearly needed to be first to account.<sup>76</sup> Some lawyers thought that the Commission swung between establishing the truth beyond reasonable doubt and establishing it on a balance of probabilities and that this created confusion. Others felt more discussion on witnesses to be called as well as adequate forewarning of who was to be examined would have allowed for better preparation. These complaints probably in part point to a certain flexibility that is required in the management of inquiries which for lawyers used to clear cut court procedures requires adaptation and is also a difficult balancing act for the Chair to maintain.

Some lawyers felt a predetermined process of cross examination could have reduced adversarialism. They argued that the evidence leaders should have been the primary investigators and led witnesses who the various parties should thereafter have had the option to question. Parties could then respond with their own witnesses if they wished. James Nichol, part of counsel for Amcu, recalled the Bloody Sunday cross examination process in the UK in which he participated,

*I represented a Captain Colin Wallace who was an intelligence officer. He contacted the Commission because he had something to say. He was first advised to get a lawyer and I was paid by the Commission to represent him. I was not allowed to question him at the Commission. Firstly the Commission sent all lever arches of information concerning the Inquiry and we went through this information. Then we went to the solicitor's [attorney] office to discuss his statement. We were still nowhere near the Commission hearings. The*

<sup>73</sup> For example interviews with Heidi Barnes, Sheldon Magardie, Sesi Baloyi.

<sup>74</sup> The role of commissions of inquiry in a democratic South Africa.

<sup>75</sup> Ibid.

<sup>76</sup> Interview Adv Heidi Barnes, counsel for Amcu, 2/4/2015.

*information was then served on all parties and his statement was posted on the internet. Thereafter he was examined on his statement by the evidence leaders and the judge. The judge then invited any of the parties to the inquiry to make an application if they wanted to cross examine him on his statement. One party did so. This was a very satisfactory, time efficient process and a good way of interrogating the truth. It was devoid of the adversarialism present at the Marikana Commission.*<sup>77</sup>

Such a procedure could have eliminated some of the combative court-like practices at the Marikana Inquiry where witnesses were encouraged to remain silent in order not to incriminate themselves whilst the case against them was proved.<sup>78</sup> Many witnesses at Marikana simply withheld information. The power of subpoena was also not used sufficiently which allowed some parties to simply evade telling the truth. South African commissions need to carefully look at how to convert the adversarial model which militates against truth telling into a more inquisitorial forum and create guidelines so that the chair is not principally responsible for how a commission is conducted.

## Dealing with Evidence

Such guidelines would have been particularly useful in clarifying how to conduct Phase 2 issues at the Commission. The LRC's Sheldon Magardie contended that, "More thought should have gone into the process of how evidence was going to be dealt with particularly concerning the distinction between Phase 1 and Phase 2 and what would be dealt with in each phase. Processes should have been sorted out before evidence was led."<sup>79</sup> Indeed for those parties who wanted to engage with Phase 2 on the underlying causes of the violence there was little clarity on when or how this would happen. Would Phase 2 run parallel to Phase 1 or follow Phase 1 proceedings? Would it have a separate

budget including for research capacity? Would evidence be led in the same way as Phase 1 or would it take a different form? Such questions were never clarified.

As previously mentioned inquiries fall into two main categories: *investigative* where the truth concerning the sequence and facts involved in an event are probed and *advisory* where a seriously neglected issue is explored in order to recommend policy changes and a way forward. The Marikana Commission embraced both of these roughly equating to Phase 1 and Phase 2 of its work. Yet the workings of Phase 2 was never seriously considered at the outset of the Commission. Whilst Phase 1 commenced quickly in October 2012, a researcher was only engaged in January 2014 to begin investigations into Phase 2 issues. These had been compiled by evidence leaders and covered such themes as the composition of the strikers/protestors, the lived experience of rock drillers, mineworkers' housing and services, migrant labour, the impact of events at Implats, collective bargaining on the platinum belt, violence and industrial relations, Lonmin financial issues and ability to pay, lending and debt collection and Lonmin's obligations. These were all critical issues to interrogate in order to address the disastrous events at Marikana and to ensure that such incidents never occurred again.

In Canada the public invest considerable faith in Commissions and Advisory inquiries are well resourced and organised and the way evidence is led carefully structured. A recent *Paediatric Forensic Pathology Inquiry* in Canada utilized a range of policy development processes which included the presentation of research and policy papers from experts on diverse but relevant topics. The structure of such presentations was carefully guided and included a description of current practices, historical developments, analysis of relevant issues, comparative experiences and potential

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<sup>77</sup> Interview Nichol.

<sup>78</sup> Interview Baloyi.

<sup>79</sup> Skype interview Sheldon Magardie, 7/4/2015.

options. Such policy papers were designed to inform Commissioners and were posted on the Commission's website. In the next stage written and oral submissions were sought from commission parties and the public on matters relevant to the TOR and on the research and policy papers. Following this the Inquiry convened meetings and symposia embracing varying formats including panel presentations to discuss pertinent issues in which parties to the commission and members of the public were invited to participate. In addition the Commissioners invited the submission of evidence at any stage of the Inquiry from panels of expert witnesses.<sup>80</sup> In early 2014 the Marikana Commission turned to how Phase 2 evidence could be led and experts on the Rustenburg platinum belt were approached to research background papers. In addition seminars were planned for attendance by Commission parties and the public of which only three transpired on collective bargaining in platinum, mining and migrant labour and violence in industrial relations. But it was too little too late as the process was abruptly terminated when the President amended the Commissions' TOR in April 2014.

Amendments to the TOR directly impacted on Phase 2 and excised any investigation of state institutions, departments or agencies for responsibility in the Marikana violence. Thus, for example, the National Credit Regulator could not be interrogated on the breach of the National Credit Act by Marikana micro lenders who had left some workers overly indebted; nor could national, provincial and local government account for the lack of housing and services in the Greater Lonmin area; while the resistance to releasing land for development by the traditional authority, the Bapo Ba Mogale, on whose land many mineworkers lived in informal settlements

could not be examined; the DMR did not have to explain why Lonmin was not called to account on non-compliance with its SLP obligations; and the Department of Labour did not have to explain Lonmin's figures showing that it paid the same rate to its contracted workers<sup>80</sup> for five consecutive years nor why it failed to query the large apartheid wage gap between grading bands at Lonmin which it was obliged to investigate under the Employment Equity Act.

This huge lost opportunity may have been avoided if Phase 2 matters had been clarified at the beginning of the Commission's work, including what budget would be allocated to this phase and when it would ensue. An opportunity to move forward from the Marikana calamity and to make serious recommendations on a range of new policy directions was therefore lost.

It is thus clear that the way a commission is planned has a significant impact on its outcomes. Ultimately the Marikana inquiry was chiefly about apportioning blame which although important precluded a forward looking exercise where government could probe its role as not a defendant in quasi-judicial proceedings but as an actor ensuring that issues underpinning the violence would be addressed. As Centa et al assert, "Inquiries are one of the most effective institutional mechanisms for the formulation of public policy."<sup>82</sup> They are not prosecuting authorities but are there to make recommendations to the president on such matters as new policies and laws and on whether to investigate certain participants' actions whilst creating a momentum around matters that urgently need attention.

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<sup>80</sup> <http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/>

<sup>81</sup> Six of the 34 mineworkers killed at Marikana on 16 August were contract workers. Contracted workers were also amongst the injured and were present in numbers on the koppie. Although exact numbers are not known over a thousand brokered workers were present on the koppie during the strike.

<sup>82</sup> Centa, Robert and Macklem, Patrick. "Securing Accountability through Commissions of Inquiry: A Role for the Law Commission of Canada". *Osgoode Hall Law Journal* 39.1 (2001) p159. <http://digitalcommons.osgoode.yorku.ca/ohlji/vol39.iss1/4>

It should be said however that faced with the amendment to the TOR Judge Farlam clarified that Phase 2 research and cross examination around Lonmin's ability to pay wages demanded by workers and its social obligations would continue. This ultimately led to the questioning of Lonmin executives whose inadequate account of why they did not fulfil their obligations under the Mining Charter revealed a basic neglect of their workforce. Evidence was led that each year Lonmin shifted R500 million out of South Africa through transfer pricing arrangements (\$330 million were shifted to the tax haven of Bermuda between 2002 - 2012) which could have been used to meet the workers' R12 500 wage demand as well as its SLP housing obligations.<sup>83</sup>

## Appointed by the President

A significant weakness around South Africa's public inquiries is that they are appointed by the president. The president decides whether an inquiry should be held, for how long, who the commissioners and chair should be, what its TOR should cover and includes a decision on if and how the final report should be released. Presidential commissions emanate from the executive and there are no checks and balances on its discretion which can allow an inquiry to be used as a political weapon.<sup>84</sup> An inquiry's independence is one of its most valuable assets especially as the history of South African commissions clearly demonstrates how they have been manipulated or ignored and have often not served the public's interest. Such manipulations can occur through the formulation of an inadequate TOR, or the appointment of partisan commissioners, or by stipulating an unreasonably short time frame, or by doctoring or not releasing a final report and so on.

In Canada where the inquiry tradition is a vibrant part of its democracy the cabinet

appoints inquiries and this has led to considerable debate. Contributing to this debate Schwartz *et al* have suggested that an independent agency with the authority to establish inquiries or to do a preliminary report before government appoints a commission would be useful in ensuring its autonomy from influence. Such a body could determine if an inquiry should be called, the definition of its mandate, guidelines and procedures that it will use, the appointment of commissioners and staff, approximate budget required and so on.<sup>85</sup>

In South Africa such an arrangement would ensure the impartiality of the commission and commissioners and reinvest South African inquiries with legitimacy. In the Marikana case the president deliberated for three months before he released the Report during which time Mbombo, recommended for investigation, took early retirement. For a variety of reasons the ANC government has been hostile to an honest appraisal of Marikana events. Political factors including vote-catching concerns in Rustenburg following a rejection by Marikana mine workers; the disruption of its alliance with Cosatu (Congress of South African Trade Unions) of which the NUM is its largest union through its replacement by Amcu; its protection of ANC Vice President Cyril Ramaphosa and police minister Nathi Mthethwa who was adversely implicated in the events; and the Report's recommendation that senior police officials be investigated for their misrepresentations to the commission holding the suspicion that they were briefed by the executive on the dispersal of the strikers on August 16 have all interfered with the government's approach to finding the truth and addressing deeper causes. A more independent investigation may have allowed for a more robust engagement with the truth in both Phase 1 and Phase 2 parts of the Commission's work and findings.

<sup>83</sup> See (2015) *The Bermuda Connection: Profit sharing, inequality and unaffordability at Lonmin 1999-2012*. Dick Forslund, on the Alternative Information & Development Centre's website for a full explanation of Lonmin Plc's profit-shifting arrangements and how if Lonmin had abandoned these mechanisms it would have been possible to pay the increased wages and honour its SLP obligations.

<sup>84</sup> Buck A & Schwartz B (2003) "Inquiries" in *Commissions in Inquiry* p568.

<sup>85</sup> Ibid.

## Five

# Concluding Remarks

So can commissions of inquiry in post-apartheid South Africa reveal the truth and make space for transformation? Was there any value in the deliberations and findings of the Marikana Commission?

Was the Marikana Commission just a familiar pattern of manipulating findings for personal and political purposes rendering it an expensive and largely cynical exercise in burying the truth and protecting the powerful?

As previously mentioned commissions operate on different levels. They investigate the truth and in the process inform and educate the public and government and through their recommendations may persuade government to enact new policies. Commissions also function to restore public confidence in government especially in cases where its own institutions are under investigation. So how did the Marikana Commission fare in relation to these different levels of operation?

### Marikana & Accessing the Truth

Concerning the accessing of truth Bishop believes that the Marikana Commission did not succeed since, "The truth is likely to be a contested issue; otherwise a commission would hardly be necessary. And the truth will remain contested after the commission has sat."<sup>86</sup> Though some truths concerning the Marikana Commission remain contested I contend that it unravelled a number of myths and lies and through its probings pointed to what actually

happened. It, for example, clearly demonstrated that the initial narrative promoted by Lonmin of inter-union rivalry where the responsibility for strike violence was attributed to Amcu which was intent on poaching NUM members, was incorrect. The strike was in fact organised by an independent workers' committee which had alarmed Lonmin and the ANC authorities who had an embedded relationship with the NUM. Further it showed that Joseph Mathunjwa, Amcu's general secretary, far from fomenting violence by encouraging attacks on NUM members on the koppie as alleged by police witness Mr X, was actually on the koppie trying to defuse the situation and prevent bloodshed just before the police opened fire.<sup>87</sup> Evidence leaders also exposed Mr X's version of what happened on the koppie as deeply unreliable: "The improbabilities and unexplained contradictions in his evidence abound. He was evasive whenever he was challenged about the differences in his various statements."<sup>88</sup> This included unmasking his claim to be part of the inner strike organising group when evidence leaders demonstrated that photos he submitted of himself consulting with strike leadership were actually of someone else. Further they disproved his evidence that Mathunjwa was responsible for the killings earlier in the week when it was shown that Mathunjwa only arrived in Marikana on 15 August. The Report stated that, "... at the risk of damaging his [Mathunjwa's] credibility with the strikers, he pleaded with them to leave the koppie, telling them they would be killed by the police. If the strikers had clearly indicated at that point that they would accept

<sup>86</sup> Bishop M (2014:39) "An accidental good".

<sup>87</sup> Interview Barnes.

<sup>88</sup> Marikana Report p640.

his advice and left it is probable that the tragedy would not have occurred.”<sup>89</sup> Other important prevailing narratives were also shown to be untrue such as SAPS’ main defence that mine workers at Scene 1 & 2 had attacked the police and they were forced to shoot them in self-defence, or that Lonmin could not have afforded its SLP housing commitments owing to the 2008 global financial crisis.

Clear proof, and at times motive, was established in a number of areas and it is simply too lazy to assert that the truth is always contested so it is not of import in an inquiry. Bishop comments that the real value of a Commission lies in its conduct - “...the act of sitting in hearings, calling witnesses, disclosing documents and allowing the space for public discussion and debate... This value is not replicated by other institutions. Other investigatory bodies are either not independent or are not held in public.”<sup>90</sup> Indeed the transparency of inquiries and the opportunity for public engagement as at the Marikana Commission are significant strengths but the importance of establishing facts and other truths cannot be underestimated.

Some of the Report’s recommendations however are disappointing where significant facts were established at the Commission. The timidity around asserting that there was a strong possibility that the executive instructed the police commissioner to go tactical on 16 August despite the likelihood of bloodshed<sup>91</sup> and that this should be specifically investigated was frustrating. The argument led by evidence leaders and adopted by the report that some shootings at Scene one were justified because shooters feared for their lives appears loose

and unsubstantiated and as police researcher and expert David Bruce has argued, “... it is a mistake to regard the principles [sic] issues raised in relation to the killings by the police at Scene 1 as issues of individual culpability. The TRT line at scene 1 was in effect a badly maintained killing machine that was activated by the (arguably reasonable) perception of one or more of its members that they were under attack.”<sup>92</sup>

Also the Commission unearthed much information on what happened at Scene 2 where a variety of tactical units converged<sup>93</sup> and responded to gun fire interpreted as workers shooting at SAPS whereas it was in fact various tactical units shooting from different vantage points. The workers caught between took the bullets. Strong evidence also emerged that some workers were assassinated at close range and of police complicity in planting guns around at least six of the deceased. The Report’s main conclusion on Scene 2 was that there was a lack of SAPS’ command and control and that the killings should have ceased at Scene 1. Such detailed information could have resulted in a much stronger recommendation than the generalised one that Scene 2 should be investigated. It is common cause that much of the evidence from Scene 2 no longer exists and that the SAPS has had ample time to delete, destroy and lose evidence whilst the Scene 2 location three years later has long been defaced and is no longer fit for forensic investigation.

Finally a general observation should be made on an early statement in the Report that overall responsibility for triggering the violence should be attributed to the conduct of the strikers.<sup>94</sup>

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<sup>89</sup> Ibid, p504.

<sup>90</sup> Bishop M (2014) “An accidental good” p40.

<sup>91</sup> See p181-182 of the Report where Major General Mpembe talks of the strong possibility of bloodshed in any dispersal plan.

<sup>92</sup> Bruce D (2015) “Document prepared for the Council for the Advancement of the South African Constitution: Summary and discussion of the report of the Marikana Commission”.

<sup>93</sup> The NIU under Colonel Modiba approached Koppie 3 from the North East, the TRT under Captain Kidd approached Koppie 3 from the South West and Major General Naidoo with the K9 and other units approached the Koppie from the South. Thus three separate units converged on Koppie 3 without informing either Brigadier Calitz who went North to arrest miners at Koppie 3 or the JOC (Marikana Report p271).

<sup>94</sup> Marikana Report, p42.

Such assumptions surely demonstrate a prejudice rather than an exercise in accessing the truth and as such demonstrate a failure by commissioners to impartially represent the workers in their investigations. Such statements are not situated in a broader context where it is clear the majority of strikers were ordinary workers who had nothing to do with the previous killings and violence. Nor is the strike viewed as a common labour dispute with the right to strike protected under the Constitution which provides an opportunity for workers and employers to dialogue about a grievance. Strikes are not a crime punishable by death! The attempts by workers to access their employer were frustrated by employer and state interests to quickly end the strike no matter how for personal, economic and political reasons. The context that prevails in the Report is that the police response was provoked by the mine workers and that this unfortunately escalated into a disastrous confrontation. Worker rights as a backdrop to the truth are very weakly represented in the Report as are the prevailing personal and political interests.

## Educating the Public

On the issue that inquiries inform and educate the public, the Marikana Commission had some success and some failings.

Commission hearings, media coverage, and campaigns (including the film *Miners Shot Down*) exposed the public to the inadequacies of public order policing; the untransformed nature of the police force which is militarised to the detriment of public interest; the lengths to which multi-national companies like Lonmin will go to evade tax responsibilities and responsibilities to its workforce; and how a co-mingling of personal and political interests informs how politicians and senior administrators arrive at some deeply misguided decisions with disastrous implications for ordinary people. For the public evidence,

findings and recommendations that emerge from an inquiry can allow for important public debate and policy making. However in the case of Marikana only a few experts, campaigners and media members trawled through the Report and spotted some of the embedded recommendations and findings. This was not the case for members of the public eager to find out what had happened at Marikana. The long, opaque and badly written Report without an overall summary meant that few read all its contents and many were none the wiser on what had happened at Marikana and an important opportunity to educate the public was lost.

The assertion that inquiries inform and educate comes with other reservations as well in relation to Marikana. Duncan has commented on how workers' voices were seldom heard in the media in the Marikana discourse. While the voice of business was heard in 27% of media coverage, mine workers' voices only occurred in 3% and some have noted how after the initial outcry concerning the Marikana killings, the media shifted its focus to the Oscar Pistorius trial.<sup>95</sup> Both the sensationalised Pistorius trial and the meandering cross examination in the first year at the Commission eclipsed some important truths to which the public should have been exposed.

In addition the absence of probing into government institutions in a detailed and systematic manner in Phase 2 meant that a significant opportunity to educate and inform the public and government was lost. The chance to make recommendations and expose the impact of mining on the livelihoods of rural communities and on migrant constituencies and to demonstrate how government, business and traditional authorities all played a role, and sometimes colluded, in deepening the impoverishment of people was not achieved by the Commission.

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<sup>95</sup> Jane Duncan "Press transformation: A Marikana Case Study" Seminar University of Johannesburg 6/3/2013; Steven Friedman: <http://www.bdlive.co.za/opinion/columnist/2015/05/20/interests-shape-response-to-marikana-report>.

## Restoring confidence in government

The question also needs to be asked if the Commission restored public confidence in government as inquiries are meant to do.<sup>96</sup> This is probably an optimistic aim in South Africa as the executive is often defensive and dismissive about attempts to prompt it into good governance and delivery. President Zuma decided on the TOR and later ensured that government institutions would not be investigated thus demonstrating that government was not deeply interested in engaging with possible Commission probings and recommendations. He expressed the view that Phase 2 issues were the responsibility of different government departments to investigate and that they, rather than the Commission, should take such matters forward. He would have been aware that some of these departments were reluctant or unable to address these burning issues. Interrogating matters like migrant labour; transgressions of laws and regulations like the National Credit Act and the Mining Charter; the difficulty of releasing land for development in the Greater Lonmin area; and mining companies accountability for their social footprint, would all have revealed government's failures. It was precisely such failures that contributed to the Marikana calamity and was why government needed the impetus of the Commission's recommendations to refocus on important policy areas. A serious Marikana investigation could have acted as stimulus for policy development and implementation from which government departments would have benefitted. Although some departments were galvanised by the Marikana events such as the Department of Human Settlements which had launched a Mining Towns in Distress

programme and had approved a plan for the upgrade of the informal settlement of Nkaneng (outside Lonmin mine), three years on nothing has changed in Marikana.<sup>97</sup> Hopefully any similar future inquiries will acknowledge the need for appropriate forums and funding and move away from the overemphasis on fact based, empirical investigations.

Interestingly this was a criticism that was also levelled in the wake of the Truth & Reconciliation Commission (TRC) where epistemological variances emerged with lawyers seeking one kind of truth and historians and sociologists a different meaning. Posel & Simpson commented that, "The TRC employed a large contingent of lawyers ...generally more attuned to describing individual acts of abuse than reading these within a broader historical context. Indeed there is little room in legal proceedings for structural explanations of wrong doing; from the perspective of law, agency is foremost a question of individual accountability."<sup>98</sup> They note that the TRC was "...headed by respected experts or judges trusted for their capacity of sober, rational deliberation and reflection, who gathered all relevant data, heard all pertinent sides of the story, and then extracted the reliable objective truth ... elevating its activities above the ideological into domain of fact ... producing authoritative judgements in the midst of politically competing versions of how things were and how they ought to be."<sup>99</sup> In the pursuit of facts and forensic truth the Marikana Commission like the TRC could only "render up fractured, incomplete and selective truths"<sup>100</sup> and had little space "to explore moral ambiguities born of the politics of collaboration and complicity ...; nor explore the complexities of social causation, where individuals are caught up in structural processes

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<sup>96</sup> Buck A & Schwartz B (2003) *Inquiries Commissions of Inquiry* p568.

<sup>97</sup> Interview M Narsoo, Governance Advisor at National Upgrading Support Programme, Department of Human Settlements, 23/3/2015.

<sup>98</sup> Posel D and G Simpson eds (2002:6) *Commissioning the Past: Understanding South Africa's Truth & Reconciliation Commission* Wits University Press, Johannesburg.

<sup>99</sup> Ibid, p4.

<sup>100</sup> Ibid, p11.

that both motivate and constrain their actions, in ways that may not be intelligible to the actors themselves.”<sup>101</sup> It is likely that if Phase 2 of the Marikana Commission had unfolded there would have been a much greater exploration and understanding of these complexities. As it was the Marikana Commission like the TRC failed to “... penetrate the veil of subterfuge ... that masks complex relationships ... and how the failure to transform these relationships might affect the goals of nation-building... There was scant concern with the bigger canvas...”<sup>102</sup> This may partly explain why nearly 20 years later in a post-apartheid democratic state Judge Farlam found it difficult in his Report to make a decisive ruling on the entangled, toxic relationships between capital, the ANC, government and the state. This would have meant unpicking inherited, untransformed relations from the apartheid era and reflecting on how the failure to transform these relations had obstructed attempts at democratic and equitable nation building and had allowed events like Marikana to erupt.

With regards to restoring government legitimacy, it remains to be seen if it will pursue the Commission's Report recommendations and if so which ones. Concerning Phase 1 recommendations it is unlikely government will have the political will or resources (the Marikana Commission cost R153 million<sup>103</sup>) to follow through on all recommendations. Some of them are extremely broad and involve substantial resources such as recommending the investigation of all police actions at Scene 1 and 2.<sup>104</sup> As previously argued the political will to engage in an expensive political hot potato like Marikana is unlikely to transpire.

Other recommendations are more attainable such as an investigation of Commissioner Phiyega's fitness to hold office. President Zuma immediately requested her to answer to such charges and it seemed government was likely to sacrifice the commissioner as a scapegoat for the state's debacle at Marikana especially as Mbombo was 'persuaded' to retire before the release of the Report. However the national commissioner has fought back to clear her reputation and is evidently unwilling to take a golden handshake. She is however under sustained attack from the state as a more recent appointment of a Board of Inquiry into allegations of misconduct and inability to effectively perform her duties illustrates.

The Report recommends thorough reform of public policing, including the withdrawal of R5 automatic weapons and following the National Planning Commission's recommendation to demilitarise and professionalise the police. It recommends an investigation into world's best practice on public policing and that a training programme be implemented, “...where all Public Order Policing members are extensively and adequately trained in such measures and methods...”<sup>105</sup> These are appropriate, strong and thorough recommendations but may well be resisted and only result in a tinkering with minor reforms in the force. Police advocate Sesi Baloyi indicated that the police had been hostile to the Marikana Commission throughout its proceedings and there are indications that this attitude persists.<sup>106</sup> Now the Report has been released which exposes police mendacity and refutes the police position that there was no misconduct on its part, the SAPS at the very least as a sign of good faith should

<sup>101</sup> Ibid, p10.

<sup>102</sup> Ibid, p12.

<sup>103</sup> *Sunday Times*, July 5, 2015.

<sup>104</sup> “It is recommended that for the purposes of the investigation, a team is appointed, headed by a Senior State Advocate, together with independent experts in the reconstruction of crime scenes, expert ballistic and forensic pathologist practitioners and Senior investigators from IPID, and any such further experts as may be necessary. The Commission recommends a full investigation, under the direction of the Director of Public Prosecutions, with a view to ascertaining criminal liability on the part of all members of the South Africa Police Services who were involved in the events at Scene 1 and 2.” Marikana Report, p546.

<sup>105</sup> Marikana Report, p549.

<sup>106</sup> Interview Baloyi.

immediately suspend implicated members such as Brigadier Calitz, Maj General Annandale and Lt General Naidoo. However there is no indication of this happening. No police members have been disciplined internally for their role in the Marikana shootings which does not bode well for a thorough overhaul of public policing despite minister Nhleko's promise to do so over the next five years.

Government may however restore some confidence in its ability to govern if it acts on the Commission's surprisingly strong recommendations concerning Lonmin and the DMR. The Commissioners clearly did not accede to Lonmin's weak excuses, coupled with its massive Bermudian transfer pricing arrangements, regarding its inability to deliver on its SLP commitments of 5,500 worker houses between 2007 and 2011. The Report found Lonmin negligent in the implementation of its SLP and recommended that, "In view of the fact that the Commission has found that Lonmin did not comply with housing obligations in the SLP's of its two Marikana subsidiaries ... the apparent failure by the Department of Mineral Resources adequately to monitor Lonmin's implementation of its housing obligations, should be investigated."<sup>107</sup> However, again there is no indication that the DMR will call Lonmin to account on its failure to honour its SLP obligations.

Concerning compensation ultimately civil suits are more likely to proceed than criminal ones. Notwithstanding their different remits, as I have argued above, it is important not to see Commission and court processes as mutually exclusive. Inquiry recommendations to investigate may lead onto court action where appropriate prosecutions allow for individual justice to mesh with society's wider concern that government has a commitment to delivering basic rights in accordance with the

Constitution. In the case of Marikana, families of the deceased and injured are currently suing the state for damages and despite rumours that the state may be willing to negotiate compensation in an out of court settlement, no progress is evident. The Commission's failure to recommend that compensation be awarded to the injured and families of the deceased arguing that it did not fall within the Inquiries remit, removed any opportunity for the restoration of public confidence in government with regards to Marikana. The Commission asked the question 'who did the shooting' rather than stating 'people were shot by the police'. The latter would have made it clear that the police were responsible and as such the state was liable to pay compensation. The overly legalistic approach of the Commission meant that individual police liability became the focus and as this was not possible to establish, the commissioners felt unable to recommend compensation. Thus despite the Commission's motto 'Truth Restoration Justice' it missed the opportunity to engage in some genuine healing and restorative justice.

As a final comment it is probably true that the Marikana Commission was loaded with very high expectations that simply could not be fulfilled, but it is also true to say that the Report's timidity meant that it failed to make important and realisable recommendations. A commission has no power to enforce its recommendations, but its recommendations do carry weight in the public's mind. Recommendations however can be quietly lost or be taken with considerable seriousness by government and civil society. Burke has remarked that, "The process of considering and then implementing policy change based on that debate [in a commission] can be a lengthy one. It may take years before an inquiry's findings manifest themselves in legislative change."<sup>108</sup> A commission places recommendations in the public terrain and in

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<sup>107</sup> Marikana Report, p555.

<sup>108</sup> Burke "The Role of Public Inquiries".

so doing keeps such ideas circulating until, depending on the pressure that prevails in the society, they are acted upon at a future date possibly when further abuses finally persuade the authorities to act. It is only at this point that government may finally regain the public's confidence in its ability to transform the society.

The Marikana Commission was able to reveal important truths in circumstances where some parties were reluctant to offer it. It should be noted however that evidence led at the Commission itself were often stronger and more revealing than findings and recommendations that emerged from the Commission's Report. The chain of command ending in police shootings of workers, the injured and deceased families' right to compensation, the facts uncovered concerning the chaos and failure of police command and control at Scene 2, the individual culpability of particular police leaders were all more robustly argued and demonstrated during the Commission's proceedings. The evidence ultimately was much stronger than the Commission's findings. Sadly most international and local observers will never trawl through the 26 months of dense evidence led at the Commission nor will they rummage through the tepid Marikana Report. This is surely a failing of the Commission. The Report also makes explicit and implicit recommendations which at times weakens their power. The Report for example agrees with Cees de Rover's recommendation that assault rifles should immediately be withdrawn from public policing but it never explicitly states in its recommendations that they should be banned at once. This is a failing of the Commission as the authorities can simply discount implied recommendations. Explicit and implicit findings and recommendations do not hold equivalent weight.

It should be noted that Commissions in general are seldom able to get at the 'whole' truth

especially in a politically charged context where powerful interests are at stake.

Government's current discourse on Marikana articulated by Ramaphosa at the Commission is that, "Marikana should not have happened, we are all to blame and there are many stakeholders that should take blame."<sup>109</sup> It is depicted by all in government including the president and SAPS as a 'tragedy' rather than a 'massacre' where direct agency is at play. This means that there is little that can be done about it except to mourn. Only time will rupture this negation of responsibility.

Commissions only have the power to begin the process of getting at the truth. Inquiries like Marikana open cracks that allow for further investigation. In the two UK examples previously cited, Hillsborough and Bloody Sunday, it was the persistence of families and supporters pursuing the truth after the inquiries' end that enabled further investigations to be reopened. Only after a lapse in time when fear, politics, jobs and promotion were no longer at issue, and when the imperative to tell the truth came to the fore, did new evidence emerge allowing for a different and more complex verdict. Hopefully such a process will follow the Marikana calamity allowing for new information to surface which may take into account the voices of the mine workers', TRT foot soldiers and 'deep throats' in the establishment. Ordinary South African citizens have responded to the Marikana massacre with horror and compassion for the deceased and their families, so perhaps civil society in concert with the relatives and the injured will continue probing for a more complete version of events.

**Kally Forrest**

November 2015

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<sup>109</sup> <http://www.dailymaverick.co.za/article/2012-10-25-cyril-ramaphosa-the-true-betrayal#.Vaegpmqqko>.

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## List of Interviewees

Doctor Ngwana (Arrested at Marikana)

Families of deceased (working at Lonmin) [group interview]

Geoff Budlender: Senior Evidence Leader

George Bizos: Counsel for families of 20 deceased

Heidi Barnes: Counsel for AMCU

James Nichol: Attorney for Amcu

Khulumani Support Group: NomaRussia Bonase & Judy Seidman

Leonard Meya: (Arrested post Marikana)

Lungisile Madwantsi: (Injured at Marikana)

Malosi Nkonyana: (Arrested Marikana)

Marikana Support Campaign/Justice for Marikana: Rehad Desai

Michael Cele: (Injured & Arrested at Marikana)

Monte Narsoo: Governance Advisor National Upgrading Support Programme, Department Human Settlements

Mzoxolo Magidiwana: (Injured at Marikana)

Sesi Baloyi: Counsel for SAPS

Sheldon Magardie: Advocate/Regional Director LRC



# Marikana Commission

unearthing the truth,  
or burying it?



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