

Marikana Commission

Unearthing the truth or burying it?

The Marikana Commission was an opportunity to bring justice to the miners who died and also to those who were injured. Unfortunately, the Commission was ambiguous where it should have been strong and an opportunity was lost when Phase 2 of the Inquiry was stopped mid-stream because the terms of references were shortened, writes **Kally Forrest**.



The Marikana Commission Report came and went rapidly. It emerged from a judicial Commission of Inquiry whose mandate was to investigate events between 9 and 16 August 2012 when 34 striking mineworkers were gunned down by the police, a further 78 were seriously injured, and over 200 arrested at Lonmin Plc's mine in the North West province.

WHAT IS A COMMISSION OF INQUIRY?

A judicial inquiry in South Africa is appointed by the president and its main function is to inform and make recommendations to the president.

In the course of investigating the truth, however, an inquiry may offer benefits to society in general. These include uncovering often concealed government and business practices as well as informing and educating the government and public on important neglected issues. Inquiries, unlike court prosecutions that narrowly focus on individual justice, have a broad reach and so can allow for informed public debate which may contribute to policy change. As such inquiries can play a role in good governance.

A Commission Report often includes recommendations but does not have the power to implement. However, recommendations can be used by government or interested parties to develop new policies to address burning issues which may erupt again.

WHAT DID THE MARIKANA COMMISSION REVEAL?

The Marikana Commission, unlike many inquiries in post-apartheid South Africa, maintained its credibility. It generated public debate and was a transparent, impartial process which exposed myths and revealed a number of truths.

For example, the story promoted by Lonmin that the violence was primarily related to inter-union competition principally perpetrated by the Association of Mining and Construction Union (Amcu) poaching National Union of Mineworkers (NUM) members was found to be untrue. The inquiry discredited police witness Mr X who claimed to be part of the strike committee and who accused Amcu president Joseph Mathunjwa of planning violence against NUM members. In fact Mathunjwa was cited in the report as the one person, who if people had listened to his advice, could have prevented the massacre.

The Commission also revealed how police leadership manufactured a story before the inquiry to which all police witnesses adhered even if it meant committing perjury. The narrative was that *muti* (drug) crazed mineworkers attacked the police who had no option but to shoot. The Commission showed this to be false.

The inquiry was also able to gather substantial information on what happened at Scene 2. The events at Scene 1 where 17 workers were killed by police were broadcast globally; 20 minutes later, hidden from the media, a further 17 workers were killed as they attempted to hide, flee or surrender at Scene 2.

The Commission revealed that at Scene 2 several police tactical units pursued the workers and in a chaotic operation, believing workers were armed, began shooting at each other while workers were caught in the cross-fire. It also exposed that some workers were assassinated by police at point blank range whilst attempting to surrender.

The inquiry also uncovered a number of wider truths. It exposed a chain of command from top politicians to senior police leadership down to armed tactical response teams who did the shooting in a chaotic plan to disarm and disperse strikers in full knowledge that there could be bloodshed.

However, the inquiry was not able to prove that direct orders were given by African National Congress (ANC) National executive committee and Lonmin board member Cyril Ramaphosa to then police minister Nathi Mthethwa to rapidly end the strike, which Ramaphosa characterised as being conducted by 'criminals'. Despite the Commission's claim to operate on a balance of probabilities rather than to prove facts beyond reasonable doubt its overly legalistic approach meant that it was unable to find that Ramaphosa and Mthethwa were seriously responsible for the events that followed.

The inquiry was successfully able to prove repeated police dishonesty. It exposed that evidence was withheld, doctored and planted and that senior police lied in the witness box.

For example, a year into the Commission under cross-examination a senior policeman revealed that a hard-drive submitted to the inquiry had been doctored. The original contained a conversation between the provincial police commissioner and a Lonmin executive on how the strike must be immediately ended on Ramaphosa's instructions because a rival political party, the Economic Freedom Fighters (EFF), was gaining workers' support, which would

impact on the ANC's 2014 election results. Thus a hastily assembled police plan resulted in 34 deaths.

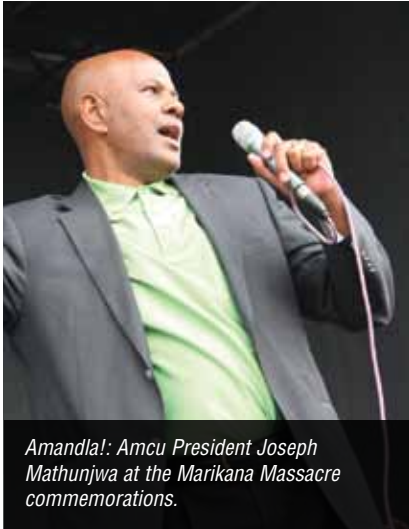
The inquiry also exposed the existence of a police National Management Forum meeting the night before the massacre where the decision to end the strike the next day was taken. Minutes of this meeting, however, mysteriously disappeared.

The Report makes recommendations on the reform of public policing. These include that the national and provincial police commissioners be investigated for perjury and their fitness to hold office; that R5 assault weapons be withdrawn; and that public policing be restructured and members retrained.

Importantly, the inquiry linked workers' poor housing and living conditions and the Marikana violence to Lonmin having 'created an environment conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct.'

The Report is strong on Lonmin's non-compliance with its Social Labour Plan which it must implement in order to obtain a mining licence. Lonmin had promised the delivery of 550 worker houses between 2006 and 2011 but only delivered three. It recommended that Lonmin's failure to comply: 'should be drawn to the attention of the Department of Mineral Resources, which should take steps to enforce performance of these obligations by Lonmin.'

The inquiry rejected Lonmin's lack of affordability argument owing to the 2008 global financial meltdown. It showed that Lonmin continued to engage in profit shifting to the tune of R500-million a year to a Bermuda and fabricated internal marketing company. Delivery on its housing obligations would have cost R665-million. Lonmin also paid US\$607-million in shares to its black economic empowerment partner during this period.



Amandla! Amcu President Joseph Mathunjwa at the Marikana Massacre commemorations.

COMMISSION FAILURES

The inquiry also had its weaknesses. The Report is badly written, recommendations are often buried in a welter of detail, and there is no executive summary. Many keen to read its findings have abandoned the attempt.

The inquiry was not successful in creating an environment conducive to truth-telling. From the start human rights' lawyers were pitted against the police and Lonmin and the terms of reference (ToR) polarised parties as each was itemised for investigation for responsibility in the killings.

Further, the Independent Police Investigative Directory (Ipid) advised the police to engage legal counsel to protect them from later prosecution instead of counselling them to be witnesses to the truth. Thus, the delay in Commission proceedings was largely due to time spent on uncovering police deception. The truth at the inquiry was often overridden by personal and political concerns.

For example, the provincial police commissioner, asked by an evidence leader why she had not prevented Scene 2 killings after knowledge of killings at Scene 1 despite her presence at the Joint Operating Centre (JOC) claimed ignorance at the time of either

sets of killings. She maintained she was in the toilet, or could not hear the radio announcement from a helicopter to the JOC announcing, 'Bodies down'. She lied in testimony to protect her political masters and her privileged position.

The report frequently mentions police mendacity but few are fingered for perjury. Ultimately, it recommends that the police be investigated for their roles in Scenes 1 and 2 by the North West prosecuting authority – an event that is unlikely to happen.

The Commission's operations were plagued by hyper-legalism. A judicial inquiry is run by lawyers and has the advantages of the powers of search, seizure and subpoena but it also has limitations. The Report is written like a judgement and tends to focus on individual responsibility.

An example: Many were dismayed that the inquiry did not recommend compensation for victims' families. This came about because of the inquiry's legal framing. It asked: 'Who fired shots?' This was difficult to prove as R5 munition disintegrates on impact. Thus individual criminal liability could not be established and no verdict of state/police responsibility could be delivered. The premise should rather have been: 'People were shot by police' and from this a recommendation to compensate could easily have followed.

Such legalism impacted on the Commission's ability to make strong findings and recommendations. It swung between investigating the truth on a balance of probability and proving it beyond reasonable doubt. So despite much factual information it had difficulty finding responsibility for police actions at Scene 2, the chain of command, or the toxic relationship between police and Lonmin. The Report's tone is

cautious and large amounts of detail was not brought to a logical conclusion.

The legalism also lent a narrow perspective. Early on the Report states: 'the tragic events ... originated from the decision and conduct of the strikers in embarking on an unprotected strike and in enforcing the strike by violence and intimidation, using dangerous weapons for the purpose.' Yet much of the tragic events emanated from political and police leadership who insisted workers were criminals. Workers' rights were weakly represented. The context of the constitutional right to strike was never established nor that employers have the right to dismiss in an unprotected strike. An unprotected strike is not illegal although it may have consequences for workers.

Commission evidence was much stronger than the Commission Report findings. Most interested observers will not trawl through 26 months of evidence nor will they wade through the poorly structured Marikana Report. This is a Commission failing.

The Report also makes explicit and implicit recommendations. For example, it agrees with an expert police witness' recommendation that assault rifles should be withdrawn from public policing but it never explicitly states this in its recommendations. The authorities can thus discount such implied recommendations. Explicit and implicit findings and recommendations do not hold equivalent weight.

Finally a Commission failing was the removal of large parts of the Phase 2 ToR. The inquiry comprised Phase 1 to establish the facts of the events and Phase 2 to explore 'Underlying Causes' to the violence. Phase 2 was mandated to investigate matters such as workers' living conditions and the failure of traditional, municipal and company authorities to