

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

THE HONOURABLE MR JUSTICE FARLAM (RETIRED) - CHAIRPERSON
MR TOKOTA SC
MS HEMRAJ SC

HELD ON

DAY 261

23 JULY 2014

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1 [PROCEEDINGS ON 23 JULY 2014]
2 [09:17] CHAIRPERSON: The Commission resumes, but
3 before I swear Mr Da Costa in again, Mr Mpofu, I gather you
4 wish to make a statement.

5 MR MPOFU: Thank you. Thank you very
6 much, Chairperson, and thank you for giving us a few
7 minutes to start late while I was consulting with my
8 clients.

9 They've asked me to place on the record,
10 Chairperson, tragically that one of the persons whose name
11 has been mentioned in the Commission several times, his
12 name is Mr Bongani Mehlomkomo, but he has been mentioned
13 here more than a hundred times by Mr X as Bhayi, that's the
14 person that Mr X has mentioned since, or for the number of
15 days that he has been here, he was gunned down yesterday as
16 he was coming out of work and to the place of residence.
17 The details are not yet fully clear and obviously the
18 police are still investigating.

19 But what I've been asked to place on record,
20 Chairperson, is that there is growing concern among the
21 people that I represent, which was expressed here earlier a
22 few weeks ago, that at least the speculation among them or
23 in the community is that this assassination may be
24 connected to the mentioning of people's names by Mr X and
25 they are feeling, their fear at least which they wanted me

1 to express is that those of them who have been similarly
2 mentioned and implicated falsely in activities feel that
3 their lives may well also be under threat and they feel
4 that they are not protected, unlike Mr X they are not
5 protected by the authorities and they're vulnerable to
6 being killed, and that is why their view was that before –
7 in order to protect their rights, before a person like Mr X
8 could be allowed to be banding their names about, which has
9 been repeated in the electronic media and in the printed
10 media, that Mr X's competency should have been ascertained.

11 The second issue is that Mr X did mention the
12 name of, not only of the nickname of Bhayi or the clan name
13 of Bhayi, but he mentioned Mr Mehlomkomo's name. You might
14 remember, Chairperson, is he said "Bhayi's name is Bongani
15 but I've forgotten his surname." It will be on the record,
16 and what I've been told is that these people are very
17 concerned because Mr X seems to know their names and their
18 surnames and they are sure that before his arrest these are
19 people he didn't even know, or he was not in familiar terms
20 with them, that he would even know that Bhele is so-and-so,
21 this one is so-and-so, because they all knew each other
22 with these clan names and so that's been the source of
23 their concern that now suddenly he seems to know their full
24 details, and that's just part of the concerns what they
25 have.

1 The last point, Chairperson, which I've been
2 asked to raise, which is also indirectly related, is that
3 the concern is that a witness like Mr X whose at least in
4 the view of my clients a self-confessed serial killer, that
5 somebody like that has been sitting here for weeks and they
6 feel that it's unfair because other essential witnesses are
7 whisked in and whisked out, as they put it, and that the
8 longer a person like that who gives such "dangerous"
9 evidence, the more vulnerability for people's lives being
10 put at risk by someone who may, as I have already argued,
11 have actually nothing to offer to the Commission, and that
12 insofar as his evidence might be a public relations
13 exercise then it's expensive not only in Commission days or
14 money, but it might also have cost a life more. Thank you,
15 Chairperson.

16 CHAIRPERSON: Well, thank you for giving
17 us the benefit of your views. You'll understand that many
18 of the points you've raised are matters we have to consider
19 at the end of the inquiry and you'll also understand that
20 it's our duty to get to the truth of what happened at
21 Marikana and to do that we have to hear evidence from all
22 sides. But I want on behalf of my colleagues and myself to
23 extend our condolences and commiseration to the family and
24 friends of the deceased. Every death is one death too
25 many.

1 There have been quite a number of deaths already
2 in the Marikana saga, starting, as we were reminded
3 yesterday, on the Sunday the 12th of August and then
4 continuing from then on for a long time, and I would ask
5 the police authorities to redouble their efforts to ensure
6 that insofar as they can do so that violence of this kind,
7 whether fatal or otherwise, isn't allowed to continue and
8 if it does that it will be dealt with as effectively as
9 possible.

10 But certainly it's a matter of grave concern to
11 us all, not just those of us here in the Commission but I'm
12 sure to the whole country, that there's been yet another
13 death against the background of Marikana and let us
14 fervently hope that it will be the last.

15 MS BARNES: Chair, if I might be
16 permitted to just say something on behalf of AMCU –

17 CHAIRPERSON: Yes, certainly, Ms Barnes.

18 MS BARNES: Mr Mehlomkomo was a leader of
19 AMCU. He was the AMCU secretary at the Rowland Shaft.
20 AMCU is horrified and deeply saddened by his murder. AMCU
21 wishes to send its condolences to his family and calls for
22 a full and swift investigation into the circumstances of
23 his murder. Thank you, Chair.

24 CHAIRPERSON: Yes, thank you. Is there
25 anybody else who wishes to make any comment? Mr Semenya.

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1 MR SEMENYA SC: Chair, we take heed to
 2 your request that this matter receives full attention of
 3 the police and we will communicate that sentiment to them.
 4 CHAIRPERSON: Thank you very much.
 5 MR MPOFU: Chairperson, I'm sorry –
 6 CHAIRPERSON: Yes, Mr Mpofu.
 7 MR MPOFU: Just one sentence which I
 8 forgot to mention, that the last remarks that I made about
 9 the duration of testimony of witnesses was also related to
 10 the talk that is there now that there might be an exclusion
 11 of police expert evidence which I was discussing with the
 12 clients, so they are concerned that essential witnesses
 13 might even be excluded, not only whisked in and out, while
 14 non-essential witnesses like Mr X are given such a long
 15 period of time. Thanks.
 16 CHAIRPERSON: That's a matter that's
 17 still being considered because they must understand that
 18 what is not proposed is that witnesses be excluded, but
 19 simply that their evidence is put before the Commission in
 20 a particular way, which is not the normal way that's dealt
 21 with ordinary witnesses but which may well be not
 22 inappropriate in the case of witnesses of that kind.
 23 Mr Da Costa, would you please stand? I would
 24 like to swear you in again. You were here with us a long
 25 time ago. Do you swear that the further evidence you'll

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1 give before this Commission will be the truth, the whole
 2 truth, and nothing but the truth? Please raise your right
 3 hand and say, "I swear, so help me God."
 4 MICHAEL GOMES DA COSTA: I swear, so help
 5 me God.
 6 CHAIRPERSON: You may be seated. Who is
 7 going to cross-examine Mr Da Costa this morning?
 8 MS BARNES: Chair, I'm still busy with my
 9 cross-examination.
 10 CHAIRPERSON: Yes, please proceed.
 11 CROSS-EXAMINATION BY MS BARNES (CONTD.):
 12 Yes, thank you, I shouldn't be very long, Chair. Mr Da
 13 Costa, if we could go to your supplementary statement,
 14 which is exhibit XXX2, to paginated page 150, paragraph 18,
 15 if we could have that on the screen, please. Paragraph 18.
 16 Now you refer in that paragraph, Mr Da Costa, to the
 17 assault of Mr Sameo Dulane who subsequently died of his
 18 injuries. Were any Lonmin employees disciplined or
 19 dismissed in connection with that incident?
 20 MR DA COSTA: No, not that I'm aware of.
 21 MS BARNES: Presumably if it had been
 22 possible to establish who was responsible for the assault
 23 on Mr Dulane, those persons would have been disciplined and
 24 dismissed by Lonmin. Correct?
 25 MR DA COSTA: Yes, there certainly would

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1 have been a disciplinary case and if they were found guilty
 2 dismissal was quite likely, yes.
 3 MS BARNES: So Lonmin was not able to
 4 establish who had been responsible for the assault on Mr
 5 Dulane. Is that correct?
 6 MR DA COSTA: That's correct, and to my
 7 knowledge neither were the South African Police Services.
 8 MS BARNES: If we can go now to your
 9 original statement, which is exhibit OO17, to page 69,
 10 paragraph 3.8, you say there, "A short while later at about
 11 5 o'clock on the 21st of June 2012, approximately 300 people
 12 marched to the area outside my office." You see that?
 13 MR DA COSTA: Yes, I do.
 14 MS BARNES: You're talking here about the
 15 first approach that the RDOs made to you on the 21st of June
 16 2012, correct?
 17 MR DA COSTA: That's right.
 18 MS BARNES: And you made this statement,
 19 this is your original statement, sometime in November 2012.
 20 We see that at page 89. It doesn't have a specific date,
 21 or indeed a signature, but we see those – presumably it was
 22 made sometime in November 2012, which is when we received
 23 it. Is that correct?
 24 MR DA COSTA: When I made the statement?
 25 MS BARNES: Yes.

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1 MR DA COSTA: Yes, yes.
 2 MS BARNES: Now if we go to exhibit XXX3,
 3 which is the Lonmin bundle of documents that you referred
 4 to in your evidence-in-chief, I think we're working with
 5 the paginated numbering on top, if we could go to page 448.
 6 CHAIRPERSON: We went past 448. Please
 7 go back to 448. There we are, thank you.
 8 MS BARNES: Right, now this is a
 9 memorandum that you wrote to the Lonmin EXCO on the 27th of
 10 June 2012, just a few days after the RDOs had approached
 11 you for the first time. Is that right?
 12 MR DA COSTA: That's right, yes.
 13 MS BARNES: And here you say the
 14 following in the opening paragraph of the memorandum, "The
 15 rock drill operators at Karee called a meeting on the
 16 afternoon of Thursday the 21st of June 2012. Following the
 17 meeting a delegation of approximately 50 people arrived at
 18 the office of the vice president and requested a meeting
 19 with him." You're talking about yourself there, correct?
 20 MR DA COSTA: Yes, that's correct.
 21 MS BARNES: Mr Da Costa, was it 50 people
 22 or 300 people that came to your office on the 21st of June
 23 2012?
 24 MR DA COSTA: No, I can't remember
 25 exactly, but this was soon after the event, so it may have

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1 been a smaller group of people, ja. It was a group of, a
 2 fair-sized group of people.
 3 MS BARNES: Presumably the figure –
 4 CHAIRPERSON: I'm sorry to interrupt.
 5 This note that we have on the screen, exhibit XXX3, which
 6 is part of exhibit XXX3, was that compiled reasonably soon
 7 after the events of the 21st of June when a number of people
 8 present or approximate number of people present would have
 9 been fresh in your mind?
 10 MR DA COSTA: Yes, the note that's on the
 11 screen now would have been compiled probably a day or two
 12 after the event, yes.
 13 MS BARNES: So presumably the figure that
 14 you recorded soonest after the event would be the more
 15 accurate figure. Is that right?
 16 MR DA COSTA: I think it's fair to assume
 17 that.
 18 MS BARNES: Are you prone to
 19 exaggeration, Mr Da Costa?
 20 MR DA COSTA: No, I'm not.
 21 MS BARNES: Well, let's look at something
 22 else. Let's go to your supplementary statement again,
 23 exhibit XXX2, page 149, paragraph 16, the second line in
 24 that paragraph you say, "Prior to January 2012 Karee had
 25 not experienced problems with securing sufficient

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1 underground employees to volunteer to work a Schoon tier
 2 shift." You see that?
 3 MR DA COSTA: Yes, I do.
 4 MS BARNES: And then over the page on
 5 page 150, paragraph 17, you say, "During January 2012 Karee
 6 experienced a significant drop in the number of underground
 7 employees who were volunteering to work Schoon tier
 8 shifts." You see that?
 9 MR DA COSTA: Yes, I do.
 10 MS BARNES: And then if we go on to page
 11 152, paragraph 24, you say the following, "On the 15th of
 12 December 2011 Lonmin entered into a limited organisational
 13 rights agreement with AMCU. In terms of the agreement AMCU
 14 was afforded certain organisational rights, including
 15 access to the workplace and the deduction of union
 16 subscriptions on behalf of AMCU. A copy of this limited
 17 organisational rights agreement is annexed marked E."
 18 Now immediately after that in paragraph 25 you
 19 then go on to say the following, "AMCU nonetheless retained
 20 its obstructive attitude towards the working of overtime at
 21 Karee." Now Mr Da Costa, that can't be right. On your own
 22 version the problems of overtime only started in January
 23 2012, correct?
 24 MR DA COSTA: Yes, that's correct.
 25 MS BARNES: And we will argue, Mr Da

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1 Costa, that the evidence does not establish that AMCU was
 2 responsible for any overtime ban, but on your own version
 3 the first time that you encountered any problems in this
 4 regard was in January 2012, correct?
 5 MR DA COSTA: Yes, that's when we started
 6 experiencing the overtime ban, yes.
 7 MS BARNES: But if we look at paragraph
 8 24 and 25 of your statement you talk in paragraph 24 about
 9 what happened in December 2011 and then immediately after
 10 that you say, "AMCU nonetheless retained its obstructive
 11 attitude towards the working of overtime at Karee," thereby
 12 creating the impression that the overtime ban had in fact
 13 started in December 2011 or even earlier. Isn't that
 14 correct?
 15 MR DA COSTA: I suppose using the word
 16 "retained" in that sentence –
 17 CHAIRPERSON: "Retained" clearly isn't
 18 right, isn't it?
 19 MR DA COSTA: No, that's not the –
 20 CHAIRPERSON: If one reads it in the
 21 light of the earlier paragraphs to which Ms Barnes referred
 22 you the problem, if one can so describe it, in relation to
 23 overtime, getting people to volunteer for overtime and the
 24 allegation that AMCU were discouraging people from
 25 volunteering, to put it neutrally, only surfaced in

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1 January, so there's no question of a retention of an
 2 obstructive attitude dating from before January. Isn't
 3 that correct? So "retained" has got to be substituted,
 4 there had to be substituted for "retained" another more
 5 appropriate word surely?
 6 MR DA COSTA: No, no, I'd agree with
 7 that.
 8 CHAIRPERSON: "Commenced" perhaps?
 9 MR DA COSTA: Yes, that would probably be
 10 a better word, yes.
 11 MS BARNES: Well, but the difficulty, Mr
 12 Da Costa, is that there was no obstructive attitude on your
 13 own version in December 2011, and that's the period you're
 14 talking about there. So it hadn't even commenced. It only
 15 commenced on your version in January 2012. Isn't that
 16 right?
 17 MR DA COSTA: That may well be right,
 18 yes.
 19 MS BARNES: Isn't it another example, Mr
 20 Da Costa, of you exaggerating your version of the facts?
 21 MR DA COSTA: No, I don't believe I'm
 22 exaggerating.
 23 MS BARNES: If we could have the
 24 transcript up on the screen, day 241, page 30322 –
 25 CHAIRPERSON: I'm sorry, Ms Barnes,

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1 before we carry on, Mr Tokota draws my attention to the
 2 fact that in paragraph 23 there is a reference to
 3 correspondence with Mr Mathunjwa concerning what's
 4 described as AMCU's involvement in the overtime ban on
 5 Schoon tier shifts, and then the next paragraph refers to
 6 something that happened on the 15th of December 2011. So we
 7 don't know when this exchange of correspondence which is
 8 referred to in paragraph 23 took place –
 9 MS BARNES: Well, we see the letter
 10 attached, I believe it's dated the 8th of February 2012.
 11 So –
 12 CHAIRPERSON: Well, I'm not sure if
 13 that's the first letter which is part of that exchange, but
 14 it may well be that the – you see, the problem is paragraph
 15 24 then goes on to talk about the 15th of December, after
 16 talking about this exchange of correspondence. So perhaps
 17 we should have clarity on that.
 18 [09:37] I'm not saying the point you're making is
 19 necessarily a bad one, but it's not clear from what is in
 20 his statement. So perhaps that should be clarified if the
 21 point is going to have any permanent importance.
 22 MS BARNES: Well, Chair, I've put to the
 23 witness where that the statements is that AMCU nevertheless
 24 retained its obstructive attitude towards the working of
 25 overtime which must be referenced back to December 2011. I

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1 put that to the witness. I don't know if the witness would
 2 like to make any further comment.
 3 MR DA COSTA: I think I'm satisfied. As
 4 far as I can recall the overtime issue started in January,
 5 so having used the word retained that was probably not the
 6 best word to use.
 7 MS BARNES: It was in fact the wrong word
 8 to use.
 9 CHAIRPERSON: He conceded that actually.
 10 I suggest that the next bit, I don't know if you like that
 11 word maybe you can suggest a better one.
 12 MS BARNES: Chair, perhaps we can move
 13 onto the next point. The transcript day 241, page 30322.
 14 Now if we can read from the beginning or 30322, Mr Da
 15 Costa, this is where the notice of mass meeting on an AMCU
 16 letterhead which is a document that is attached to your
 17 supplementary statement as being discussed. And you've
 18 cross-examined by Mr Tip here, but in this portion the
 19 Chairperson is asking you questions and he asks you what
 20 the Fanagalo on that document means and you then say
 21 translated it means no Schoon tier overtime until we get
 22 our offices or until we get into the offices.
 23 MR DA COSTA: That's correct.
 24 MS BARNES: Okay, I just need to read the
 25 next portion of this transcript into the record so that you

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1 can follow the questions that follow on. So the Chair then
 2 says "I see. Part of the complaint of AMCU was that they
 3 hadn't been afforded office accommodation. Is that
 4 correct?" And you then say "Yes, ja at that point AMCU was
 5 pushing quite hard for further organisational rights." The
 6 Chair then says "Yes I know" and then it goes on and then
 7 at the end of that page you say "At that stage they did not
 8 even have – there was no agreement that they could have
 9 representatives or offices." And then at the top of the
 10 next page it goes on and you then say about halfway down
 11 30323 "They wanted representatives and offices, yes." And
 12 the Chair says "Yes that's right, but this appears to
 13 relate to the demand for office accommodation." You say
 14 "Yes." And the Chair then says "And they were suggesting
 15 no co-operation in respect of Schoon tier and no agreement
 16 to do overtime unless they get the office accommodation.
 17 That's effectively what it says. Is that right?" And you
 18 say "That's correct." If we can look now at annexure F to
 19 your supplementary statement which is on page 171. That
 20 would be exhibit XXX2. This is the addendum to the initial
 21 limited organisational rights agreement that were concluded
 22 with AMCU and you'll see on page 172, clause 3 the addendum
 23 provides that AMCU will have office facilities and it says
 24 that AMCU will have one office at Karee, at the Karee
 25 hostel and a further three offices at each of the three

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1 shafts at Karee. Do you see that?
 2 MR DA COSTA: Yes I see it.
 3 MS BARNES: And then paragraph 3.5
 4 provides for office equipment such as a computer,
 5 telephone, furniture, fax machine and so on. And then over
 6 the page on page 173, paragraph 4 of the addendum entitles
 7 AMCU to elect shop stewards. Do you see that?
 8 MR DA COSTA: Yes that's correct.
 9 MS BARNES: So in short this addendum
 10 makes provision for AMCU to have offices and
 11 representatives at Karee, correct?
 12 MR DA COSTA: Yes.
 13 MS BARNES: And we see that this addendum
 14 was signed by Lonmin and AMCU on the 5th of May 2012. We
 15 see that on page 176. Now if we look again at the annexure
 16 B, the notice of the mass meeting you'll recall, Mr Da
 17 Costa, that on the last occasion we asked if a clearer copy
 18 of that data could possibly be made because the copy that
 19 was attached to your supplementary affidavit was virtually
 20 illegible. That was done. Chair, I have additional copies
 21 of that clearer copy which –
 22 CHAIRPERSON: I'd be grateful for that
 23 because I thought I had one, but I can't find it, but I
 24 would appreciate it if -
 25 MS BARNES: Chair, I don't believe that

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1 it was made an exhibit on the last occasion perhaps if it
 2 could be made an exhibit at this stage.
 3 CHAIRPERSON: Well we are handicapped
 4 this morning because Ms Pillay is not with us. Can you
 5 perhaps help us, Ms Lupuwana?
 6 MS LUPUWANA: Chair, the last exhibit on
 7 Mr Da Costa's evidence was XXX8, so the next one should be
 8 XXX9.
 9 CHAIRPERSON: I see and what was the
 10 XXX3? It was the statement. You see XXX3 is just main
 11 documents, so we might have inserted it there, but let's
 12 not waste time, let's just add it in and now XXX10 would be
 13 the next one wouldn't it?
 14 MS BARNES: Yes XXX10.
 15 CHAIRPERSON: Let me make it XXX10 and
 16 I'll call it Clear Copy or Legible Copy of Notice, simply
 17 describe it Legible Copy of Annexure B to Witnesses
 18 Statement.
 19 MS BARNES: Yes thank you, Chair. Now,
 20 Mr Da Costa, you'll see on this legible copy that the mass
 21 meeting here was held on the 19th of May 2012. Do you see
 22 the date?
 23 MR DA COSTA: Yes I see that.
 24 MS BARNES: At which time AMCU was
 25 entitled to offices and representatives at Karee, correct?

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1 MR DA COSTA: Yes at that point in time
 2 they were, ja.
 3 MS BARNES: So it doesn't make much sense
 4 does it for AMCU to be telling its members not to work
 5 overtime until they are granted offices and representatives
 6 when they have in fact already been granted offices and
 7 representatives.
 8 MR DA COSTA: It doesn't make sense, but
 9 that is what the note is saying though.
 10 MS BARNES: You don't have any direct
 11 evidence that AMCU instructed its members not to work
 12 overtime before the 5th of May 2012 or in fact anything
 13 other than this document, is that correct?
 14 CHAIRPERSON: Sorry, Ms Barnes, can I
 15 interrupt you? I'm told by Mr Tokota who understands
 16 Fanagalo that the words [African language] offices means
 17 entry offices, so the impression I get when reading the
 18 document in the light of what I've been told is it may well
 19 mean that though they've been given the right to offices
 20 they hadn't physically been allocated rooms and given keys,
 21 etcetera thereof. So perhaps that might be a line that's
 22 worth following. I understand there's no point in doing
 23 that if they already got the offices, but getting the
 24 offices, both the entitlement and actual occupation and the
 25 actual occupation and use thereof may or may not have been

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1 made available at that time. So perhaps the witness can
 2 help us on that.
 3 Perhaps I should ask him. Do you understand what
 4 I put to Ms Barnes? The suggestion is that although the
 5 agreement is dated the 5th of May it appears that there was
 6 still a rumbling discontent on the 19th of May because, so
 7 it is said, the AMCU representatives had not yet been able
 8 to enter the offices that had been allocated to them. Is
 9 there any substance in that?
 10 MR DA COSTA: Chair, it is a long time
 11 ago. There could have been some logistical issues around
 12 allocating offices and getting furniture etcetera, etcetera
 13 to get them properly into the offices. That may have been
 14 an issue at that point in time, but I can't remember
 15 clearly though to be honest.
 16 CHAIRPERSON: It looks as if that was
 17 probably right because as Ms Barnes is saying to you it's
 18 unlikely that they've an overtime ban because they're not
 19 getting entrance to offices if in fact they've already been
 20 allocated offices, had been given the key, been occupation
 21 and were able to use the offices. It doesn't make sense
 22 does it?
 23 MR DA COSTA: Sorry, Chair, just say that
 24 again.
 25 CHAIRPERSON: What I'm saying to you is

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1 it looks prima facie the point Ms Barnes is making may well
 2 have some substance to it because if it's a fact they'd not
 3 only been allocated offices, but given the keys to the
 4 offices and given occupation of the offices and were using
 5 the offices it doesn't make sense that they would then have
 6 an overtime ban [African language] lapa offices. Isn't
 7 that right?
 8 MR DA COSTA: No that's right. I mean
 9 there was clearly some issue otherwise they wouldn't have
 10 put this note up.
 11 MS BARNES: But you can't that they
 12 didn't in fact have occupation of the offices at that
 13 stage.
 14 MR DA COSTA: I don't recall, I really
 15 don't recall.
 16 CHAIRPERSON: It looks as if there was a
 17 sort of rumbling discontent that they didn't have the
 18 offices yet. They'd been allocated them, but they weren't
 19 getting them that's why wanted to have a mass meeting.
 20 That's what it looks like isn't it?
 21 MR DA COSTA: It does appear so. It
 22 certainly does appear so and I mean this whole period AMCU
 23 had a number of mass meetings during this period. I can't
 24 remember how many, but they were requesting permission for
 25 mass meetings on a regular basis during this period. And

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1 during those mass meetings there was comment about not
 2 working overtime. I don't have any hard, concrete evidence
 3 of that because it was only told to me. It wasn't reported
 4 to me in any kind of report or anything.
 5 MS BARNES: And in fact this is all the
 6 evidence that Lonmin had put out in support of this alleged
 7 overtime ban by AMCU, correct, this document?
 8 MR DA COSTA: This is all the evidence,
 9 yes as far as I know. Further – ja I mean the only other
 10 thing is as soon as this agreement was concluded, very
 11 shortly after, the overtime problem went away.
 12 MS BARNES: Except that that's not
 13 correct, Mr Da Costa, because we've just established that
 14 the agreement was concluded on the 5th of May.
 15 MR DA COSTA: I did say shortly after.
 16 CHAIRPERSON: Paragraph 17 talks about
 17 January 2012, dropping underground employees and so on and
 18 you investigated reasons for this, I imagine you did so
 19 with a certain degree of promptitude. And you say you were
 20 told by Tumelo Nkisi, the human resources manager at Karee
 21 there was a rumour that AMCU had instructed members not to
 22 work Schoon tier shifts because AMCU had not been consulted
 23 about these shifts. I was also shown an AMCU pamphlet
 24 which had been found in one of the hostels which stated no
 25 overtime, no Schoon tier and this pamphlet is annexed. I

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1 mean they're not likely to have sent out a pamphlet in
 2 January saying we're going to have a mass meeting in May
 3 are they? So we must assume that this pamphlet went out a
 4 short time before 19th May. Wouldn't that be right?
 5 MR DA COSTA: Thos one yes it would have,
 6 yes. This one would have gone out shortly before the 19th
 7 of May. So right now I don't recall if there were other
 8 pamphlets that were around at the time, I can't remember
 9 anymore.
 10 MS BARNES: Well you haven't attached any
 11 other pamphlets to your –
 12 MR DA COSTA: No, no I haven't.
 13 MS BARNES: If we could look then just
 14 finally at exhibit XXX2 again, page 150, that's your
 15 supplementary statement, paragraph 18. You say here "On or
 16 about the 21st of April 2012 I received a report that a NUM
 17 member, Mr Sunio Delani who was rostered to work a Schoon
 18 tier shift had been assaulted upon arriving at Karee to
 19 work the shift. This employee later died in hospital."
 20 Now you stated earlier that you weren't able to establish
 21 who was responsible for this assault, correct?
 22 MR DA COSTA: Yes, that's correct.
 23 MS BARNES: So the Commission can't
 24 possibly conclude that Mr Delani was assaulted because he
 25 arrived to work a Schoon tier shift. There's definitely no

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1 direct evidence of that, correct?
 2 MR DA COSTA: I think that's for the
 3 Commission to decide.
 4 MS BARNES: Well isn't it correct that Mr
 5 Delani could have been assaulted by another NUM member that
 6 he was having an argument with when they both arrived to
 7 work the Schoon tier shift. You simply don't know. Isn't
 8 that correct? You don't know who assaulted Mr Delani or
 9 what the circumstances of the assault were, is that
 10 correct?
 11 MR DA COSTA: I haven't been able to or
 12 Lonmin hasn't been able to establish who was responsible
 13 for that assault.
 14 MS BARNES: So you can't discount the
 15 fact that Mr Delani might have been assaulted by, say for
 16 example, a NUM member in circumstances that have absolutely
 17 nothing to do with this alleged overtime ban. You can't
 18 discount that can you?
 19 MR BURGER SC: Whether this witness
 20 discounts it or not it's quite irrelevant and it doesn't
 21 advance the inquiry that you are making. So I object to
 22 that proposition.
 23 CHAIRPERSON: I was wondering why no-one
 24 was objecting because I don't understand that the
 25 circumstances in which Mr Delani died in April 2012 are

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1 covered by our terms of reference. I know the evidence was
 2 put before us and AMCU is seeking to respond effectively to
 3 what Lonmin says about it, but even what Lonmin says about
 4 it is it doesn't specifically allege that AMCU were
 5 responsible in any way for the killing. But haven't you
 6 made the point about the dates and those sorts of things?
 7 You see it doesn't help to get the witness to say there's
 8 no evidence. Whether there's evidence or not it's a matter
 9 we've got to decide. If there's evidence there's evidence,
 10 if there isn't evidence there isn't evidence, even if he
 11 says there is evidence and there isn't evidence it doesn't
 12 help. So you're not helping us very much by asking him
 13 whether there's evidence.
 14 MS BARNES: Chair, with respect the
 15 witness himself says in his statement that after this
 16 incident thereafter there was a further drop in the number
 17 of volunteers who were prepared to work Schoon tier shifts.
 18 So the clear implication was that this was part of that and
 19 this had the effect that further people refused to work
 20 Schoon tier shifts. I'm establishing that the witness is
 21 not in fact in a position to have made that link.
 22 MR DA COSTA: Well, Chair, can I respond
 23 to that? And I'm merely stating a fact that the numbers
 24 did drop off. So clearly the perception amongst the
 25 remainder of the workforce was that he was assaulted

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1 because he was coming to work. So that's the inference
 2 that I draw out of this.

3 MS BARNES: But you had no evidence that
 4 that was in fact the case.

5 CHAIRPERSON: No, no he's putting facts
 6 before us for which he's asking us to draw a post hoc, a
 7 proctor hoc conclusion. The facts he's putting before us
 8 which I take it you don't challenge are that Mr Delani was
 9 killed on about the 21st of April. That Mr Delani was
 10 assaulted when he arrived at Karee to work at one of these
 11 overtime shifts and the further fact he puts before us is
 12 that after that there was a drop in volunteers for
 13 overtime. So those are the facts from which he asks us to
 14 draw an inference. If you challenge the facts I can
 15 understand the point of the cross-examination. If you
 16 challenge the inference well that's a matter of argument.

17 MS BARNES: No, Chair, I believe that
 18 I've made the point. I've made the point that the witness
 19 did not know who was responsible for the assault or what
 20 the circumstances were. The witness has conceded that.

21 CHAIRPERSON: He didn't say who was
 22 responsible, he didn't say what the circumstances were, he
 23 put three facts on the table and he then said – then
 24 presumably Mr Burger will be invited at the end of the
 25 argument, at the end of the case to argue if he considers

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1 it necessary that the inference should be drawn. That's as
 2 far as it goes. I think as you said to me a few minutes
 3 ago, possibly justifiably perhaps we can move onto the next
 4 point.

5 MS BARNES: Yes, Chair, those are our
 6 questions. Thank you.

7 CHAIRPERSON: Thank you, Ms Barnes.
 8 Who's next to cross-examine? Mr Mpofu. Mr Wesley, can you
 9 tell us how much time we have allocated to Mr Mpofu?

10 MR WESLEY: Chair, Mr Mpofu has two
 11 hours, 120 minutes.

12 CHAIRPERSON: Right well let's start with
 13 the two hours now, Mr Mpofu.

14 MR MPOFU: I can assure you, Chairperson,
 15 I won't be - So you can relax.

16 CHAIRPERSON: I'll accept the donation
 17 before it's withdrawn.

18 MR MPOFU: Thank you, Mr Chairperson.

19 CROSS-EXAMINATION BY MR MPOFU: Good
 20 morning, Mr Da Costa.

21 MR DA COSTA: Good morning.

22 MR MPOFU: Thank you, Mr Chairperson. Mr
 23 Da Costa, just to situate my question so that we don't
 24 spend a lot of time. You know that Lonmin have been blamed
 25 for the deaths that occurred at a broad level by the people

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1 that I represent as expressed by people like myself. You
 2 are aware of that.

3 MR DA COSTA: Yes I'm aware of it.

4 MR MPOFU: Yes, and that the terms of
 5 reference for this Commission, one of the things that needs
 6 to be investigated is whether or not or to what extent
 7 Lonmin might have been responsible for the tragic events
 8 that gave rise to this Commission.

9 [09:57] You're aware of that?

10 MR DA COSTA: Yes, I'm aware of it.

11 MR MPOFU: Now what I'm going to do is
 12 I'm going to try – you can rest assured that we're blaming
 13 Lonmin for all sorts of things, but I'm going to try and
 14 confine it to the areas that are relevant to your
 15 involvement and other matters we'll deal with, with other
 16 witnesses. Understand?

17 MR DA COSTA: No, that's fine.

18 MR MPOFU: The thrust of what Lonmin is
 19 blamed for in relation to the matters that concern you can
 20 be found at paragraphs 47 to 49 of the SAPS opening
 21 statement, and I just want to show you the line that I'm
 22 going to be taking, and that's FFF9, paragraph 47, if we
 23 can have it up, please. FFF9, yes. Let's start at
 24 paragraph 47. I'll just read it out. It says, "The
 25 evidence will show that on 23rd July 2012 Lonmin struck a

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1 wage deal directly with workers outside the collective
 2 bargaining process and only informed the unions about the
 3 deal after it had been struck. The National Union of
 4 Mineworkers, the recognised trade union at Marikana, was
 5 not pleased."

6 48, "Yet, when it really mattered, tensions
 7 having risen to boiling point by August 2012, Lonmin
 8 steadfastly refused even to address the protesters on their
 9 wage increase demands, contending that the protest was
 10 illegal and that it was not prepared to negotiate outside
 11 the collective bargaining process. This inconsistent
 12 approach must have sent mixed messages to the protesters.
 13 They must have believed that if they could secure wage
 14 allowances from Lonmin just two days after their first
 15 demand for wage increases and without embarking on any
 16 industrial action, much more could be achieved by upping
 17 the ante to a violent unprotected strike."

18 49, "Lonmin created the beast that it later found
 19 impossible to tame, the beast being the violent strikes
 20 that contributed to this tragedy, and not the deceased
 21 protesters."

22 You understand the message that's being
 23 communicated in those three paragraphs?

24 MR DA COSTA: Yes, I mean –

25 MR MPOFU: Obviously not that you agree

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1 with it, but you understand the gist of –
 2 MR DA COSTA: I understand the gist of
 3 it. There's some factual inaccuracies in that statement –
 4 CHAIRPERSON: Before we go into those,
 5 perhaps we should also look at paragraph 47 –
 6 MR MPOFU: Yes, thank you, Chairperson –
 7 CHAIRPERSON: - because I think it's a
 8 good idea to get the context –
 9 MR MPOFU: Yes, to get it into
 10 perspective –
 11 CHAIRPERSON: - of the paragraphs that Mr
 12 Mpofu read. Let me read them out. "Failure of other role
 13 players to play their part can never on its own be
 14 justification for the loss of lives at Marikana, but this
 15 failure cannot be ignored if we are to learn from these
 16 events and seek to ensure that they do not recur. In our
 17 submission" - this is the police talking, I understand –
 18 "In our submission there is real possibility that this
 19 tragedy could have been averted if the parties involved
 20 here had played their proper roles, and then they set out
 21 what Mr Mpofu has read to you. That you understand as
 22 well –
 23 MR MPOFU: That's correct, Chairperson.
 24 MR DA COSTA: I understand that.
 25 MR MPOFU: Yes, so that's exactly it.

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1 That's the answer I needed, not that you agree with it but
 2 you understand what it seeks to portray.
 3 MR DA COSTA: Yes, I understand.
 4 MR MPOFU: Thanks. Now it would be fair
 5 to say that – or at least I think you have given this
 6 evidence that you yourself were shocked, I think is the
 7 word that you used, that a matter that had started so well
 8 and in such a peaceful manner could have escalated to the
 9 tragedy of the 16th of August. That's correct?
 10 MR DA COSTA: Yes, I've given that
 11 evidence.
 12 MR MPOFU: Yes, and it's also true that
 13 for you the first sign that this has now taken other
 14 proportions is what we have called in another context as
 15 the game changer, which was the shooting of protesters on
 16 the 11th of August, correct?
 17 MR DA COSTA: Yes, that's correct.
 18 MR MPOFU: Well, we are in agreement with
 19 you there because we, putting aside the background and
 20 other things, we see that particular event as the first
 21 game changer where the complexion of the entire saga took a
 22 different turn. You would agree with that?
 23 MR DA COSTA: Ja, I think that is the
 24 point where it started escalating to more violence, yes.
 25 MR MPOFU: Yes, in fact before that there

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1 was no violence at all in relation to this 12 500 story.
 2 MR TIP SC: Chair, I –
 3 MR DA COSTA: There was a bit of a –
 4 MR TIP SC: There's an objection to that.
 5 There is evidence of numerous incidents of intimidation and
 6 the like in the course of the evening of at least the 10th
 7 of August and the proposition as put is not accurate.
 8 MR MPOFU: Yes. No, that's correct.
 9 The –
 10 MR DA COSTA: I was going to –
 11 MR MPOFU: Yes. No, no, I'm sorry, Mr
 12 Tip. Mr Tip is correct. There was evidence that some NUM
 13 members going around in a Quantum were forcing people to
 14 work on the 10th, ja.
 15 MR DA COSTA: Ja, I think we –
 16 MR MPOFU: So putting that aside –
 17 MR DA COSTA: I think we did get reports
 18 of intimidation –
 19 CHAIRPERSON: I'm not sure that that's
 20 the evidence –
 21 MR MPOFU: That's the evidence I
 22 remember.
 23 CHAIRPERSON: Possibly it would be more
 24 accurate to say that evidence which tends to go both ways,
 25 but anyway –

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1 MR MPOFU: Yes, there was some violence
 2 both ways, including the Quantum that was going around and
 3 maybe other violence from another side. I accept that, but
 4 apart from that the 11th, in your estimation at least the
 5 11th was something of a turning point and a shocker,
 6 correct?
 7 MR BURGER SC: I object to that question.
 8 It's not only irrelevant at this stage, it has been asked
 9 and answered and on the third basis whether that's this
 10 witness's perception does not assist you, Sir. Your and
 11 your Commissioners' perception is all that is important.
 12 So it's unhelpful to debate my learned friend's future
 13 argument with the witness and try to agreement on the
 14 correctness that amount to submissions.
 15 CHAIRPERSON: Sorry, Mr Mpofu?
 16 MR MPOFU: Ja, I'm going to respond just
 17 now, Chairperson, if you would give me some time. Yes,
 18 okay, I'll go to – it's OO17, which I think your statement,
 19 witness statement of Michael Gomes da Costa, not the
 20 supplementary one. It's marked OO17 but something tells me
 21 that it was – no, the original. I remember Mr Burger I
 22 think remarking it's XXX2, I think.
 23 CHAIRPERSON: Sorry, there's the original
 24 one which is the one on the screen at the moment –
 25 MR MPOFU: And the supplementary –

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1 CHAIRPERSON: Then there's a
 2 supplementary one and that's the one which is, according to
 3 my notes is XXX2 and that is at page 146 of the Lonmin
 4 bundle of documents.
 5 MR MPOFU: No, 8.3 would be on the
 6 original statement, Chairperson.
 7 CHAIRPERSON: No, the original statement
 8 hasn't got numbered – as you can see from the one on the
 9 screen –
 10 MR MPOFU: Well, then can I submit –
 11 CHAIRPERSON: No, sorry. No, sorry, no,
 12 I'm wrong. XXX2 hasn't got –
 13 MR MPOFU: 8.3 –
 14 CHAIRPERSON: - 8 subdivided.
 15 MR MPOFU: Yes.
 16 CHAIRPERSON: So perhaps we must go back
 17 to the original –
 18 MR MPOFU: That's correct.
 19 CHAIRPERSON: - the one that's now on the
 20 screen now, which is OO17.
 21 MR MPOFU: That's correct, Chairperson.
 22 CHAIRPERSON: And there we've got 8.3.
 23 MR MPOFU: That's it, ja. Well,
 24 Chairperson, my response to the objection is that the
 25 sentiments that I'm testing with the witness about the

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1 shootout on the 11th being some kind of a turning point is
 2 expressed in his own statement, which I suspect Mr Burger
 3 might have had something to do with the drafting thereof.
 4 So if it was so irrelevant –
 5 CHAIRPERSON: Yes, you say that and even
 6 if it's true it's not relevant.
 7 MR MPOFU: Ja, well if it was so
 8 irrelevant then I don't know why they wanted to communicate
 9 it to the Commission. So I'm dealing with it because they
 10 themselves have brought it up.
 11 MR BURGER SC: May I have a ruling on
 12 that then, Sir? He doesn't address the question that it
 13 had been asked before and answered, that it is irrelevant
 14 and that it is on its merits irrelevant as to what this
 15 witness considered to be the trigger of the tragic events
 16 of the 16th.
 17 CHAIRPERSON: I really, I thought I had
 18 ruled, upheld your objection in respect of the third point,
 19 that what this witness's opinion on the matter is, is not
 20 relevant, it's for us to decide. His impression is his
 21 impression, but it's not really helpful. But what he does
 22 say in the last sentence of paragraph 8.3, in fairness to
 23 Mr Mpofo, is "It became apparent to me that the situation
 24 was becoming increasingly more serious," "increasingly more
 25 serious."

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1 MR MPOFU: Yes.
 2 CHAIRPERSON: Which presupposes it was
 3 already serious, and then you can have a series of turning
 4 points turning from various degrees of seriousness to
 5 greater degrees of seriousness, but anyway, I don't know
 6 that –
 7 MR MPOFU: Ja, even on their version
 8 there are three game changers –
 9 CHAIRPERSON: We don't have to debate
 10 that now. I suggest you ask the witness questions which he
 11 can give us answers which we can take into account.
 12 MR MPOFU: Thank you. I don't understand
 13 that.
 14 CHAIRPERSON: Well, if you ask him his
 15 impression when his impression has already been ruled to be
 16 irrelevant, then that's not an answer that will help us,
 17 but if you ask him questions which will elicit answers
 18 which will help us then that's fine, carry on.
 19 MR MPOFU: So are you ruling,
 20 Chairperson, that I can't ask him on what he says in his
 21 statement?
 22 CHAIRPERSON: What I said was you can't
 23 ask him about his impression insofar as it's an impression
 24 you want us to uphold –
 25 MR MPOFU: Even if it's a –

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1 CHAIRPERSON: But while I've already
 2 said, would have thought was you can perhaps ask him why it
 3 became apparent to him that the situation was becoming
 4 increasingly more serious. That you can ask because that's
 5 in his statement.
 6 MR MPOFU: Yes, that's what I'm building
 7 up to, Chairperson.
 8 CHAIRPERSON: Alright, well –
 9 MR MPOFU: First I might establish that
 10 it became so and so, and then I will ask why. I can just
 11 start by saying why.
 12 CHAIRPERSON: Well, you were busy with a
 13 slightly different point, but anyway, let's focus on the
 14 sentence and see what we can learn from it.
 15 MR MPOFU: Chairperson, I'm sorry, maybe
 16 I'm not in the right frame of mind. What is your ruling?
 17 That what I'm asking is irrelevant?
 18 CHAIRPERSON: I said –
 19 MR MPOFU: That's what –
 20 CHAIRPERSON: There were a number of
 21 objections –
 22 MR MPOFU: Sorry, Chairperson –
 23 CHAIRPERSON: One, it's been asked and
 24 answered.
 25 MR MPOFU: Yes.

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1 CHAIRPERSON: The second point is
 2 generally impression isn't helpful, but what I did say was
 3 that you could ask him why it was apparent to him that the
 4 situation was becoming increasingly more serious.
 5 MR MPOFU: Yes.
 6 CHAIRPERSON: That's what I suggested you
 7 ask.
 8 MR MPOFU: Thank you, that's what I was
 9 doing.
 10 CHAIRPERSON: Alright.
 11 MR MPOFU: Okay, now Mr Da Costa –
 12 CHAIRPERSON: Well, you weren't, but
 13 let's not fight about that.
 14 MR MPOFU: Ja, thank you. Mr Da Costa,
 15 as you have expressed in 8.3 that the shootings of the 11th
 16 constituted some kind of a turning point, might that have
 17 been –
 18 CHAIRPERSON: He didn't quite say that.
 19 He said things had become increasingly more serious –
 20 MR MPOFU: Okay.
 21 CHAIRPERSON: In other words they were
 22 already serious –
 23 MR MPOFU: Yes.
 24 CHAIRPERSON: - but they were now
 25 increasingly more so. Whether, I'm not sure if that

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1 accurately describes a turning point. That's certainly not
 2 a statement of what he said is your paraphrase which may or
 3 may not be right.
 4 MR MPOFU: Okay, in terms of dynamics and
 5 speed you felt that the events of the 11th introduced a new
 6 momentum to the events that had occurred, in terms of what
 7 you say in 8.3. Is that correct?
 8 MR BURGER SC: No, that's not correct.
 9 That's an incorrect –
 10 MR MPOFU: Well, I'm not asking you, Mr
 11 Burger. I'm asking the witness.
 12 MR BURGER SC: I'm objecting.
 13 MR MPOFU: No, don't answer for the
 14 witness.
 15 CHAIRPERSON: No, no, no, Mr MPOFU, let's
 16 keep the temperature down.
 17 MR MPOFU: Well, it's not me,
 18 Chairperson –
 19 CHAIRPERSON: Mr Burger is entitled to
 20 raise an objection –
 21 MR MPOFU: That's not an objection to
 22 answer the question, Chairperson.
 23 CHAIRPERSON: No, no, he's not
 24 answering –
 25 MR MPOFU: He's not entitled to answer

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1 the question.
 2 CHAIRPERSON: He's entitled to raise an
 3 objection –
 4 MR MPOFU: He's not entitled to answer
 5 the question.
 6 CHAIRPERSON: Are you and I going to
 7 speak over each other –
 8 MR MPOFU: Well –
 9 CHAIRPERSON: - or are you going to let
 10 me speak first –
 11 MR MPOFU: I'm also making an objection,
 12 Chairperson. I'm objecting to his objection, if that is
 13 what it is.
 14 CHAIRPERSON: Well, I object –
 15 MR MPOFU: He cannot answer for the
 16 witness.
 17 CHAIRPERSON: I'm objecting –
 18 MR MPOFU: That I know for a very good
 19 fact –
 20 CHAIRPERSON: I'm objecting to you
 21 talking over me. Let me speak and you can speak after
 22 that. That's the only way we can conduct these proceedings
 23 properly. What I'm saying to you is Mr Burger is objecting
 24 to the form of your question, which he suggests is an
 25 inaccurate summary of what, purported to be a summary of

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1 what the witness said. He complained that it wasn't an
 2 accurate summary. That's the objection. What is your
 3 answer to that?
 4 MR MPOFU: I've no answer because there's
 5 no objection. He just answered the question. He must
 6 frame his objection, then I'll answer to it. I can't
 7 answer to him answering the question.
 8 CHAIRPERSON: Well, my ruling is he did
 9 not answer the question, he raised a valid objection.
 10 You're not prepared to –
 11 MR MPOFU: What was the objection?
 12 CHAIRPERSON: The objection was that the
 13 summary that you, the question was an unfair one because it
 14 purported to give a summary of what the witness said –
 15 MR MPOFU: When did he say that,
 16 Chairperson? When did Mr Burger say that?
 17 CHAIRPERSON: That's what he said.
 18 That's what I heard him say. Did you say that, Mr Burger?
 19 MR MPOFU: No, he didn't. He just said
 20 that, he just answered my question.
 21 CHAIRPERSON: Mr Burger, what did you
 22 say?
 23 MR BURGER SC: Sir, I don't understand
 24 this process. Either the –
 25 CHAIRPERSON: [Inaudible, speaking

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1 simultaneously with Mr Burger SC]
 2 MR BURGER SC: No, may I just say –
 3 CHAIRPERSON: Carry on.
 4 MR BURGER SC: - because I kept being
 5 interrupted and I can't say what I want to say. I don't
 6 understand this process. I can work in a commission where
 7 there's a chairman who speaks and then people listen. I
 8 can work in a commission where a colleague is cross-
 9 examining and he's not interrupted, but if he poses an
 10 incorrect question there's an objection raised, it's
 11 listened to, it's then dealt with and ruled on. But this
 12 is a free-for-all. What my objection was before I was
 13 interrupted by Mr Mpofo was that his paraphrasing of
 14 paragraph 8.3 was incorrect. He ascribed a version to the
 15 witness which the witness didn't say. He is now in a fight
 16 with you, Chair, on what my objection was, to which he
 17 wouldn't listen.
 18 CHAIRPERSON: I've already summarised
 19 your objection correctly, as I thought, and I invited Mr
 20 Mpofo - invitation which he declined - to answer the
 21 objection, but I will give him the opportunity again. Do
 22 you wish to answer the objection?
 23 MR MPOFU: Well, now that there is an
 24 objection I'll answer it, Chairperson, and I'm not going to
 25 be lectured by Mr Burger on how I respond –

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1 CHAIRPERSON: Mr Mpofo, please –
 2 MR MPOFU: He did not make – the record
 3 will show that he did not object, he simply answered the
 4 question, but be that as it may, what I'm saying, now that
 5 he has found it within himself to articulate his
 6 objection –
 7 CHAIRPERSON: Mr Mpofo, you know, it's –
 8 MR MPOFU: No, Chairperson, you didn't
 9 interrupt him when he was lecturing me condescendingly, now
 10 you want to tell me what I must do.
 11 CHAIRPERSON: Well, insults to
 12 colleagues –
 13 MR MPOFU: I don't, I'm not going to be
 14 subjected –
 15 CHAIRPERSON: If you can please –
 16 MR MPOFU: - [inaudible] inferiority
 17 complex or superiority complex by Mr Burger –
 18 CHAIRPERSON: Well, insults to colleagues
 19 isn't conducive to the profitable and advantageous working
 20 of this Commission. What is your answer to the objection?
 21 MR MPOFU: Okay, my answer is this; I
 22 have now framed the question. You have said, when I said
 23 it was a turning point you have said that he only said –
 24 CHAIRPERSON: It is becoming increasingly
 25 more serious.

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1 MR MPOFU: Yes, which is fair, so when
 2 you said then to me, Chair, that the use of the phrase
 3 "turning point" might not be appropriate I then, accepting
 4 that ruling, rephrased the question to say that if he says
 5 it became increasingly more seriously it means it's a
 6 relative thing. In other words he's saying there was
 7 something serious, it became more serious, and that is why
 8 I'm saying now in terms of the momentum – that's the word I
 9 used – in terms of the momentum the events of the 11th
 10 indicated to him a change in momentum, let's call it that,
 11 and that's really all I was questioning, and I want to know
 12 if that's objectionable.
 13 CHAIRPERSON: Do you want to reply to his
 14 – no. I think I'll allow the question, but I'll then ask a
 15 supplementary question of my own.
 16 MR MPOFU: Thank you.
 17 CHAIRPERSON: Do you accept what Mr Mpofo
 18 has given as a summary of what you were saying, that what
 19 you said, "It became apparent to me that the situation was
 20 becoming increasingly more serious," amounted to this, that
 21 you could see that the momentum had now increased? You
 22 accept that as an accurate paraphrase of what you said?
 23 MR DA COSTA: Well, I think when I made
 24 that comment – remember this was the first signs of
 25 physical conflict and groups of people, you know, getting

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1 into conflict situations with each other, so that was my
 2 assessment of the situation that things were starting to
 3 escalate.
 4 MR MPOFU: Thank you very much, Mr Da
 5 Costa. Ja, that's all I wanted to establish. So that we
 6 can understand the evolution or metamorphosis of these
 7 events from being good-natured to this horrific situation
 8 that was developing, I will then start with just confirming
 9 your own impressions were that when the first approach was
 10 made to you by the RDOs, actually the words that you have
 11 used is that the talks were very cordial, they were very
 12 respectful and I think another phrase that you have used is
 13 that the discussions were engaging. Is that how you would
 14 describe the good side before it evolved into something
 15 else? Would that be correct?
 16 MR DA COSTA: That's how I described it
 17 in my statement, yes, that's correct.
 18 MR MPOFU: Yes, and your own
 19 interventions.
 20 [10:17] One of your fears, of course when things were
 21 still good natured was that this thing might escalate into
 22 an unprotected strike, otherwise known as a wild cat
 23 strike, correct?
 24 MR DA COSTA: Yes I think I said so in my
 25 statement.

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1 MR MPOFU: Yes and one of the reasons why
 2 you took it upon yourself to do everything in your power to
 3 avoid such a wild cat strike eventuating was because you
 4 know from your own experience that those kinds of strikes
 5 are usually associated with violence.
 6 MR DA COSTA: Yes that's true.
 7 MR MPOFU: Correct and one can say in
 8 your favour as it were and I want to say as well that Mr
 9 Burger, when he was examining you in chief said that some
 10 people have criticised you for what you did. I just want
 11 to make it clear that I'm not one of those people. I
 12 actually commend you for what you did. But the point
 13 really, the question is one can therefore say that through
 14 your interventions, at least in July, your fears of a
 15 violent, unprotected strike were averted. Correct?
 16 MR DA COSTA: Well it seemed that way for
 17 a short period of time.
 18 MR MPOFU: Yes.
 19 MR DA COSTA: But then things changed.
 20 MR MPOFU: No but things changed – okay
 21 let's confine it. Remember the violent, wild cat, whatever
 22 strike that you were busy trying to avert was confined to
 23 Karee at that stage, correct?
 24 MR DA COSTA: When I was having my
 25 discussions with the rock drill operators, yes it was a

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1 Karee issue.
 2 MR MPOFU: Karee issue, ja. Insofar as
 3 there was any potential it was Karee strike that was
 4 completely averted, it never materialised.
 5 MR DA COSTA: Ja there was no wild cat
 6 strike at Karee alone, no.
 7 MR MPOFU: Yes, thank you. Right and
 8 throughout these discussions that you had with the people
 9 in Karee the demeanour of the – I call them strikers
 10 because eventually they went on strike, of the workers was
 11 normal and friendly, correct?
 12 MR DA COSTA: Well I think I do say in my
 13 statement that in some of the latter meetings when some
 14 additional representatives joined the group that things did
 15 become a little more tense and a bit more aggressive.
 16 MR MPOFU: No that's true, you did say
 17 that your statement. Now the task of my cross-examination
 18 is going to be to try and examine what you did vis-à-vis
 19 what was done at a later stage by Lonmin. Just remind me
 20 what was your experience in the mining industry as a
 21 manager.
 22 MR DA COSTA: In terms of –
 23 MR MPOFU: RPS, yes.
 24 MR DA COSTA: I've been in the industry
 25 for about 24, 25 years. As a manager probably about 15

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1 years.
 2 MR MPOFU: Okay and not to belabour the
 3 point, but in those 24 or 25 years you must have seen quite
 4 a lot of industrial relations related violence happening.
 5 When I say seen I don't mean physically, you must have
 6 known about it.
 7 MR DA COSTA: Well I've experienced a lot
 8 of industrial relations issues. Some were accompanied with
 9 violence, some not.
 10 MR MPOFU: Yes and therefore for a
 11 manager of your calibre and your experience it would be
 12 foreseeable that a wild cat strike might involve violence.
 13 MR DA COSTA: I'm sorry, a wild cat
 14 strike might?
 15 MR MPOFU: Involve violence. It might
 16 not, but it most possibly would involve violence.
 17 MR DA COSTA: There'd certainly be a
 18 possibility of violence accompanying a strike like that,
 19 yes.
 20 MR MPOFU: Yes I suppose that's why it's
 21 called a wild cat strike. Okay, now what I'm going to ask
 22 you in developing the next leg of what I'm saying you must
 23 take it from me as someone who has been a corporate manager
 24 at various levels. It's true that the corporate leader,
 25 one of the things that is expected from you is to be able

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1 to use your discretion in the interests of the company,
 2 correct? And the community, meaning the workers, the
 3 management, the company generally speaking, correct?
 4 MR DA COSTA: Your discretion?
 5 MR MPOFU: Yes in the sense that as a
 6 leader, that's why you are put there, so that – otherwise
 7 they would just put a robot, you are put there so that you
 8 can take decisions, crucial decisions sometimes without
 9 referring to anybody, depending on the situation that
 10 confronts you.
 11 MR DA COSTA: Yes, I suppose so.
 12 MR MPOFU: Ja. And those decisions are
 13 not usually straight forward, black or white kinds of
 14 decisions. Sometimes it's a grey area and choosing between
 15 the lesser of two evils rather than what's right and what's
 16 wrong. It's not always easy to be a corporate leader,
 17 correct?
 18 MR BURGER SC: Chair, I object to this
 19 line of questioning. If it deals with foreseeability
 20 that's an objectives test, but this what the witness
 21 believes is foreseeable or not doesn't help us. But more
 22 fundamentally, is my learned friend debating the CEO of a
 23 broadcaster or of a mine or of a shopping centre? What is
 24 the mandate of the CEO, what is the factual situation to
 25 which a discretion has to be applied and how is discretion

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1 addressed in the CEO's mandate from his board? We don't
 2 know any of those things. So I object to this line.
 3 MR MPOFU: Well, Chairperson, the first
 4 objection is without any foundation because I'm not talking
 5 about an objective test, I'm obviously relating this to the
 6 decisions that were made by this particular witness which
 7 they are contained in this statement once again. The
 8 second one is even less than notorious because by choosing
 9 advisably that when I'm saying corporate leader I'm talking
 10 generically. So I can't now be –
 11 CHAIRPERSON: All corporate leaders no
 12 matter what the nature of the corporation or company is –
 13 MR MPOFU: Yes, Chairperson.
 14 CHAIRPERSON: - that's the thrust of Mr
 15 Burger's –
 16 MR MPOFU: Ja well it's laughable. The
 17 question –
 18 CHAIRPERSON: No I don't think it's
 19 laughable, I mean what's the objection –
 20 MR MPOFU: The point I'm making,
 21 Chairperson, unless we were going to spend the whole day
 22 here saying now we're talking about the production manager,
 23 now we're talking about a commercial manager, now we're
 24 talking about the CEO, now we're talking about this, that's
 25 not what I'm saying. I'm saying at a particular level.

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1 This witness has said that he was – I think his expression
 2 was the ultimate manager, whatever that means.
 3 CHAIRPERSON: According his affidavit and
 4 his CV he was the vice president of Lonmin, responsible for
 5 mining operations at the Karee mine, that's what –
 6 MR MPOFU: Yes that's correct, but he has
 7 described himself as the ultimate manager at Karee. Is
 8 that correct, Mr Da Costa?
 9 MR DA COSTA: I did describe it as such
 10 in my statement. I was the person in charge of the Karee
 11 operations, ja.
 12 MR MPOFU: Okay your advocate –
 13 CHAIRPERSON: The objection was to a
 14 generalised about foreseeability on the part of corporate
 15 leaders. The objection was it wasn't related to the nature
 16 of the corporate leader that he was. Now if the question
 17 is reformulated to make it clear that that's what you're
 18 busy with then the objection may fall away. Providing
 19 also, of course, it's clear that you're not talking about
 20 foreseeability in the objective sense, but subjective
 21 foreseeability where he himself as the vice president
 22 responsible for mining operations at Karee mine. Then
 23 reformulate the question that way and we'll make some
 24 progress.
 25 MR MPOFU: Thank you, Chairperson.

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1 CHAIRPERSON: And we'll then take tea.
 2 You've had the answer.
 3 MR MPOFU: Okay. I want to make clear
 4 that I'm relating the question to yourself and to yourself
 5 as what you've described as the ultimate manager at Karee.
 6 I'm saying a person in that position would be expected to
 7 make decisions which involve the discretion that you and I
 8 have agreed on. And that the real thrust of the question
 9 was that sometimes those decisions are not straightforward
 10 between what is right and wrong, but involves weighing the
 11 lesser of two evils in a particular situation. Would that
 12 be fair?
 13 MR DA COSTA: I think it's fair to say
 14 that many of the issues that you're confronted with are
 15 complex and that it's not always a simple answer.
 16 MR MPOFU: Yes, thank you.
 17 MR DA COSTA: I wouldn't go as far as to
 18 say you know between right and wrong. I mean clearly duty
 19 stands on the side of right.
 20 MR MPOFU: Yes, no, thank you.
 21 MR DA COSTA: But yes things can be
 22 complex.
 23 MR MPOFU: No that's fair enough, that's
 24 good enough. Thank you, Chairperson.
 25 CHAIRPERSON: Can we now take the short

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1 comfort break?
 2 MR MPOFU: Yes, thank.
 3 CHAIRPERSON: The first comfort break, 15
 4 minutes.
 5 [COMMISSION ADJOURNS COMMISSION RESUMES]
 6 [10:49] CHAIRPERSON: The Commission resumes. Mr
 7 Da Costa, you're still under oath. Mr Mpofu, more
 8 questions for the witness?
 9 MR MPOFU: Thank you, yes. Mr Da Costa,
 10 it would be fair to say that what you did earlier was to
 11 fan the flames that you perceived could have arisen from
 12 the situation, from the grievances of the RDOs, correct?
 13 CHAIRPERSON: I don't think you mean,
 14 you're using -
 15 MR MPOFU: I mean to quell.
 16 CHAIRPERSON: Yes, to fan the flames, the
 17 fire to burn more, you don't mean that?
 18 MR MPOFU: Thank you, Chairperson. No,
 19 no, I'm sorry it was a slip of the tongue. It would be
 20 fair to say that what you did earlier was to quell the fire
 21 that might have resulted from the grievances of the RDOs,
 22 correct?
 23 MR DA COSTA: I think I was certainly
 24 trying to do that.
 25 MR MPOFU: To do that, yes. No, I say

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1 that because you used a very instructive metaphor or a word
 2 when you explained what happened around the 9th, when it was
 3 clear that the thing is brewing. You say, I was taken
 4 aback, because this indicated to me that the issue which
 5 the RDOs had previously raised with me could re-ignite,
 6 notwithstanding the RDO allowance. You'll understand where
 7 I'm coming from? Yes, I'm sorry, Chairperson, I'm reading
 8 from 6.1.

9 CHAIRPERSON: Yes, of the -
 10 MR MPOFU: That's correct. You'll
 11 understand?
 12 MR DA COSTA: I understand.
 13 CHAIRPERSON: The metaphorical fire which
 14 had been put out, was very much on the forefront of your
 15 mind as well?
 16 MR DA COSTA: It seems it was when I
 17 wrote my statement, yes. It wasn't right now.
 18 MR MPOFU: Thank you. Right, now, before
 19 the tea you and I were talking about the decision-making
 20 processes which might face a person in your position, and
 21 you were saying one does get faced with complex decisions.
 22 Now, coming to the relevant issues here, you would agree
 23 that you yourself, when there was this group of people who
 24 came to your office, you yourself were faced with quite a
 25 complex situation in terms of what to do? On the one hand,

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1 you knew that cabinet policy was that if this is about
 2 wages, it should be dealt with elsewhere, but you had to
 3 make a decision, because the people were here. Would that
 4 be fair?
 5 MR DA COSTA: I think initially it wasn't
 6 that complex. Groups of employees arrived at my office to
 7 speak to me. My first reaction was that I should get
 8 somebody in and speak to him and see what the issues are.
 9 After meeting with the guys, and it then surfaced that it
 10 was a wage issue, well, then some complexity started
 11 entering the conversation.
 12 MR MPOFU: Yes, thank you. And faced
 13 with that complexity, your decision-making, which kicked
 14 in, was that you should not refuse to talk to these people,
 15 but rather listen to them and then escalate it upwards, as
 16 it were, which is what you did, correct?
 17 MR DA COSTA: I made the decision, as I
 18 said, to speak to the guys that were there, so that I could
 19 first of all understand what the issue was. You know, at
 20 first I thought it may be an issue that I could deal and
 21 when it became clear that it was a wage issue, at that
 22 point, I realised that I don't have the authority to deal
 23 with this and I'd have to escalate it.
 24 MR MPOFU: Yes, but in actual fact, you
 25 didn't just stop there and just escalate it, you engaged

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1 them on the merits of the issues that they were raising.
 2 MR DA COSTA: I did engage them, because
 3 I wanted to fully understand how they'd come to that
 4 number, what their thinking was.
 5 MR MPOFU: Yes, you didn't even stop
 6 there, you escalated it forward, you asked clarity-seeking
 7 questions, that I will grant you, but you even expressed
 8 views as to whether the amount was reasonable or not, that
 9 they were asking for, correct?
 10 MR DA COSTA: Yes, I did. During some of
 11 the meetings, I did, yes.
 12 MR MPOFU: Yes.
 13 MR MPOFU: And yet, as I say, despite
 14 that getting into the issues, which by the way, you must
 15 get me right, I still commend you for doing, you knew if
 16 you were to play strictly by the book, you could have been
 17 within your rights to just say to them, look, this is
 18 beyond me, I'm not going to talk to you, you must go away.
 19 Strictly speaking, you could have done that?
 20 MR DA COSTA: I could have done that. It
 21 was an option that was open to me, yes.
 22 MR MPOFU: Yes. And in the exercise of
 23 your managerial discretion, you did not do that, even
 24 though you were entitled to do it?
 25 MR DA COSTA: That's correct.

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1 MR MPOFU: Yes.
 2 MR MPOFU: And that's where I'm going
 3 really with the issue, that when you are a leader, which is
 4 what you are when you are in a position like where you are,
 5 you are able to use your discretion to avert a catastrophe
 6 by sometimes not necessarily playing by the book.
 7 Obviously, you can't do something that's completely against
 8 company policy, but you can exercise your discretion to
 9 choose between two evils, as it were, correct?
 10 MR DA COSTA: I'm not sure that at that
 11 point I was faced with two evils. As I said, I mean, the
 12 company was encouraging line managers to engage with people
 13 and to get to issues and find out what's bothering people
 14 and try to find the resolution to that. So in terms of
 15 that, I wasn't doing anything against -
 16 MR MPOFU: Against policy. No, I accept
 17 that. In fact, you had, according to your so-called line
 18 of sight strategy, you were encouraged to communicate with
 19 employees and get to the bottom of whatever concerns they
 20 might have. So it was certainly not against company policy
 21 to talk to them, that I understand. Is that correct?
 22 MR DA COSTA: That's correct.
 23 MR MPOFU: In fact, one can say that the
 24 manner in which you exercised your discretion by engaging
 25 these workers, was approved by senior management, or let's

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1 put it this way, nobody disapproved or took you to task for
 2 doing it, correct?
 3 MR DA COSTA: That's correct, I wasn't
 4 taken to task for doing it.
 5 MR MPOFU: Yes. And one can say that
 6 senior management had acquiesced and had approved to your
 7 approach?
 8 MR DA COSTA: Yes, I believe so.
 9 MR MPOFU: And in fact, when you
 10 escalated the matter to – what is his name?
 11 MR DA COSTA: Mark Munroe.
 12 MR MPOFU: Mark Munroe. What was Mark
 13 Munroe's position?
 14 MR DA COSTA: He's the executive vice-
 15 president for the mining division.
 16 MR MPOFU: Yes. When you escalated the
 17 matter to Mark Munroe, he didn't say, Mr Da Costa, are you
 18 out of your mind? Why did you talk to these people? He
 19 actually took the matter forward to EXCO, correct?
 20 MR DA COSTA: Yes, that's correct.
 21 MR MPOFU: Now, well, fortuitously or
 22 fortunately, on the 10th of August you were at the LPD when
 23 the strikers came there, correct?
 24 MR DA COSTA: Yes, I was there.
 25 MR MPOFU: And again all accounts are

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1 that they came peacefully, correct?
 2 MR DA COSTA: Yes, it was fairly
 3 peaceful.
 4 MR MPOFU: Yes. And really they were
 5 still coming with the same demand or request that they had
 6 brought to you of R12 500, correct?
 7 MR DA COSTA: Yes, that's correct, as far
 8 as you could tell, yes.
 9 MR MPOFU: Yes. And they were still –
 10 no, I've already said they were still coming peacefully.
 11 And they again were coming on the basis that they did not
 12 want unions to be involved in this matter, correct?
 13 MR DA COSTA: I'm not sure if that was
 14 absolutely clear at that, at the point that they, at the
 15 time that they were marching to the offices.
 16 MR MPOFU: Yes. Okay, let me put it this
 17 way, it's common cause in the Commission that they
 18 specifically said there that they did not want to involve
 19 the unions and management told them, but, you know, there's
 20 an agreement and so on. So you can't dispute that,
 21 correct?
 22 MR DA COSTA: I'm not sure that I'm
 23 following you.
 24 MR MPOFU: No, I'm saying there is no
 25 dispute in the Commission that when they came on the 10th,

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1 as was the situation when they came to you in July, they
 2 were still of the mind that this matter of the R12 500,
 3 they did not want to convey it via the unions. You may,
 4 you may not know that, I'm just saying that's common cause.
 5 MR DA COSTA: If that's before the
 6 Commission, then that is so.
 7 MR MPOFU: You accept that?
 8 MR DA COSTA: Yes.
 9 MR MPOFU: So we can say that the
 10 similarities between what you were facing in July and what
 11 was being faced on the 10th of August were that they were
 12 coming peacefully, one. Two, they were raising the issue
 13 of the R12 500 and, three, they expressed the fact that
 14 they did not convey it via their unions. Do you accept
 15 that?
 16 MR DA COSTA: I accept those were the
 17 similarities, but there were differences as well.
 18 MR MPOFU: Okay, well, I'm asking you
 19 about the similarities for now.
 20 MR DA COSTA: But I think the differences
 21 are important, Chair.
 22 MR MPOFU: Yes, I'm sure in re-
 23 examination you will be asked about the differences. Then
 24 the other thing is, well, I suppose you're right, one of
 25 the differences was that when they came to you, they were

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1 RDOs of Karee, and when they came to LPD, it was the whole
 2 company. That's correct, isn't it?
 3 MR DA COSTA: That's one of the
 4 differences.
 5 MR MPOFU: Yes. Another difference is
 6 that when they came to you, there were about 300 or 500 and
 7 when they came as LPDs, they were a couple of thousand,
 8 correct?
 9 MR DA COSTA: That's correct, that's
 10 another difference, but that's not the significant
 11 differences though.
 12 MR MPOFU: Yes.
 13 CHAIRPERSON: Perhaps we should let the
 14 witness tell us what the significant differences are, so
 15 we'll understand what follows. It's not satisfactory
 16 enough to wait for Mr Burger to ask it during re-
 17 examination. Were there other significant differences, do
 18 you say? What were they?
 19 MR DA COSTA: Yes, Chair.
 20 CHAIRPERSON: What were they?
 21 MR DA COSTA: Well, when the RDOs
 22 approached me it was after hours, it was, they had
 23 completed their work shift and they were coming to me with
 24 a grievance or an issue, and all the meetings we held were
 25 after-hours, save one or two, where I asked the

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1 representatives to come and see me. On the 10th of August,
 2 the rock drill operators had refused to go underground to
 3 their working places, and in fact, they were embarking on
 4 an illegal, unprotected work stoppage by coming to us.
 5 That's the one significant difference in my mind. The
 6 other significant difference is the issue that they were
 7 bringing, we, as management, felt that we had considered
 8 the issue, we had dealt with the issue, we had given
 9 feedback on the issue, and that it had now been concluded,
 10 in our minds. I accept, in their minds, it may not been
 11 concluded, but from our perspective, the issue had been
 12 concluded and dealt with.

13 So it was quite significantly different to when
 14 they first came to see me. At that stage, I wasn't aware
 15 of what the issue was. It was a new issue, and something
 16 that had to be dealt with.

17 CHAIRPERSON: Are there any other
 18 significant differences?

19 MR DA COSTA: Well, to my mind, those are
 20 the important ones.

21 CHAIRPERSON: May I ask you one question?
 22 It's relevant partly to what you say and relevant to other
 23 issues later maybe, before Mr Mpofo carries on. You talked
 24 about we, as management, considered, now, there's reference
 25 in some of the documents to management in various contexts

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1 and I will be interested to know who all the management
 2 are. There's also at some stage there's talk of the
 3 "Lonmin executive management," and then there's generally
 4 management, as you say, and there's also reference
 5 sometimes to management team. Now, who, do those
 6 expressions all mean the same thing? Or who exactly was
 7 involved in "management" or "the management team" or "the
 8 Lonmin executive management?"

9 MR DA COSTA: Okay, I guess when we're
 10 referring to Lonmin executive management it's the people
 11 who sit on the EXCO. I've mentioned previously in my
 12 evidence, who those are. Senior management, I would be a
 13 member of the senior management, together with the EXCO,
 14 that's sort of my level of the organisation, and then
 15 there's various levels and layers of management below where
 16 I am, but the management I'm referring to in this instance,
 17 we had directive from the executive that the allowance was
 18 as far as we were going to go and that they didn't really
 19 want to entertain anything more on the 12 500 demand. So
 20 the management team that were in LPD that day, I mean that
 21 was the direction that we had got from the executive
 22 committee.

23 CHAIRPERSON: You got the direction from
 24 the executive committee?

25 MR DA COSTA: Yes.

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1 CHAIRPERSON: I see. Did you get the
 2 direction that morning from them?

3 MR DA COSTA: Yes. Frank Russo-Bello,
 4 who was with us, he was acting as the executive vice-
 5 president for mining at that stage, and he had consulted
 6 with some of the other executive members around that. I
 7 don't know exactly who, but I know that he had consulted
 8 with them, and that was the directive from the executive.

9 CHAIRPERSON: Yes, I see, thank you.

10 MR MPOFU: Thank you very much,
 11 Chairperson. Well, in fairness to you. I'm going to argue
 12 that the differences that you have highlighted were
 13 insignificant, or at the very least they were not as
 14 significant as the similarities between the two situations.
 15 Would you like to comment?

16 MR DA COSTA: Well, I disagree. I think
 17 that the points I raised were hugely significant and a lot
 18 more significant than the points that Mr Mpofo has raised.

19 MR MPOFU: So you think it was more
 20 significant that the one thing happened after-hours and
 21 another one happened a particular time, more significant
 22 than the fact that this was the same demand by the same
 23 category of workers, coming peacefully and expressing that
 24 they do not want to do it through the unions. You think
 25 the fact that they came at a particular time is more

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1 significant than that?

2 CHAIRPERSON: His point isn't just the
 3 time. His point that it came, the one on the 10th happened
 4 during an unprotected strike. The other one came after
 5 work.

6 MR MPOFU: I'm coming to that.

7 CHAIRPERSON: I see, alright. That seems
 8 to be the main thrust of what he's saying. Okay, well, you
 9 carry on.

10 MR MPOFU: Well, I don't know it's the
 11 main thrust, the first thing he said was this one that I'm
 12 dealing with. I'm dealing in sequence of what the witness
 13 dealt with. So he must have his own view of what was
 14 significant and why he mentioned the certain factors first.
 15 Do you think that the fact that it happened at this
 16 particular time of the day, was more significant than those
 17 four things that I've just listed?

18 MR DA COSTA: Chair, it's not the time of
 19 the day that's the issue, the issue is that it had to do
 20 with the fact that when the rock drill operators came to
 21 LPD on the 10th, they were participating in an illegal work
 22 stoppage.

23 [11:08] And they had been told that, they had been warned
 24 that they're participating in illegal work stoppage. There
 25 had been communication out the previous evening and that

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1 morning basically discouraging people from participating in
 2 this sort of action. They continued to participate in it.
 3 MR MPOFU: Okay.
 4 MR DA COSTA: That was the issue.
 5 Whether it was at 10 o'clock in the morning or 5 o'clock in
 6 the afternoon is not really significant.
 7 MR MPOFU: Is insignificant?
 8 MR DA COSTA: The time of the day is not
 9 significant.
 10 MR MPOFU: So why did you mention it when
 11 you said you were going to mention significant differences?
 12 MR DA COSTA: I, what I said was that
 13 they came to see me in the afternoon after their shift,
 14 after they had completed their work, outside of their
 15 working hours. So it was, in other words they were not
 16 participating in any kind of industrial action or anything
 17 like that –
 18 MR MPOFU: That's fine.
 19 MR DA COSTA: - previously.
 20 MR MPOFU: Alright.
 21 MR DA COSTA: And on the 10th it was
 22 different. They –
 23 MR MPOFU: Yes. No, that's fine, Mr Da
 24 Costa, we can deal with that in argument. Let's deal with
 25 what you now say is the only significant factor. Isn't it

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1 correct that actually that factor is a factor that would
 2 work in favour of engaging with the employees? And I'll
 3 explain it to you like this; you remember that for you one
 4 of the reasons that you spoke to them was to avert an
 5 illegal strike, correct?
 6 MR DA COSTA: Yes, it was one of the
 7 reasons.
 8 MR MPOFU: Yes, so that which you wanted
 9 to avert has now actually eventuated, there is an illegal
 10 work stoppage according to you. Isn't that the more reason
 11 that - it's no longer a fear now, it's a reality – that
 12 they should have been engaged so that what you feared
 13 theoretically, which has now eventuated, could be curbed
 14 and diverted? Wouldn't that be correct?
 15 MR DA COSTA: No, I don't concur.
 16 MR MPOFU: You think that if you are
 17 avoiding water coming into your house, or fire, to use your
 18 term, the fact that the fire has now started is less reason
 19 for you to act with urgency? Is that your evidence?
 20 MR BURGER SC: Well, the proposition is
 21 not analogous, so it's an unfair proposition put, Chair.
 22 CHAIRPERSON: I suggest you might like to
 23 rephrase it. Perhaps I can put a question on this topic.
 24 What Mr Mpofu, as I understand it, is putting to you is
 25 this; when there wasn't a strike you were quite happy to

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1 negotiate with the people, to engage with them and so on.
 2 Once they were striking the matter was more serious, it was
 3 of more concern to the company that the strike should be
 4 terminated as soon as possible and therefore he's
 5 suggesting to you it was all the more appropriate for you
 6 to engage with them in order to no longer avert the strike
 7 but to bring the strike as rapidly as possible to an end.
 8 I think that's your question, Mr Mpofu?
 9 MR MPOFU: Yes, and an illegal strike.
 10 CHAIRPERSON: It's, you know, there's a
 11 terminological problem. I don't know if it's correct to
 12 call it an illegal strike, but it's an unprotected strike
 13 and there are consequences that flow from that, but let's
 14 not go down that road. It's not going to help us. The
 15 point simply that's being put to you is that it's in a way
 16 more sensible, or more pressing perhaps to engage to try to
 17 terminate a strike than it would be just to avert a strike.
 18 That's the point he's putting. Now do you agree with that
 19 or not?
 20 MR DA COSTA: Well, I suppose if you, you
 21 know, if you're of the view that having discussions with
 22 the people who are participating in an unprotected strike
 23 and having understood the issues through those discussions
 24 you are able to resolve the issue and get people back to
 25 work, well you know, possibly, but normally in instances

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1 where there is unprotected industrial action going on or
 2 where there's an unprotected work stoppage we would engage
 3 only to find out what the issue is and then request people
 4 to go back to work. So you know, that communication had
 5 already gone out the previous evening when there was some
 6 talk about this happening. The communication had already
 7 gone out, but there's, as far as this issue is concerned
 8 the executive has made their decision on it, please do not
 9 embark on any unprotected work stoppage or industrial
 10 action. So you know, the, when the people arrived in front
 11 of the offices the decision was that we wouldn't engage
 12 them because of the issues that I mentioned.
 13 MR MPOFU: Yes. No, thank you, Mr Da
 14 Costa, I think that's helpful in terms of the factual
 15 situation of what happened, but it's not an answer to my
 16 question. I'm saying to you what you have isolated as an
 17 important difference is in fact an important similarity,
 18 except that it is worse, it is more aggravated, in that
 19 what you were faced with when you decided to engage the
 20 people was a potentially violent strike, or a strike,
 21 unlawful strike which may potentially turn violent. That's
 22 what you were faced with. What management was faced with
 23 on the 10th was an actual unlawful strike which has a
 24 potential to be violent.
 25 CHAIRPERSON: Unprotected, Mr Mpofu.

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1 MR MPOFU: Unprotected, ja, and unlawful
 2 in terms of the Labour Relations Act, not illegal but
 3 unlawful. Unlawful and unprotected are similar, synonymous
 4 in this context. You understand the question? And if you
 5 do understand it, do you agree with me or do you disagree?
 6 MR DA COSTA: I'm actually not sure that
 7 I understand the question.
 8 MR MPOFU: I'll simplify it. I'm saying
 9 you were faced with a potential unlawful or unprotected
 10 strike which has an inherent quality of potentially being
 11 violent, correct? Which you averted, correct? We've dealt
 12 with this before tea.
 13 MR DA COSTA: As I've said I averted it
 14 for a short while, which –
 15 MR MPOFU: Ja. Yes, for a short while,
 16 but now it was no longer – the only differentiation is that
 17 it was no longer a potential, it was now actual, correct?
 18 Because there was an unlawful work stoppage, correct?
 19 MR DA COSTA: Yes, that's correct.
 20 MR MPOFU: Yes, now I'm saying that the
 21 fact that there is – and that's why I was using the example
 22 of a fire, which Mr Burger did not like – think of any
 23 other catastrophe. The fact that you were dealing with a
 24 potential catastrophe and now you are dealing with an
 25 actual catastrophe is the more reason that you should

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1 engage, because remember when you were dealing with it you
 2 might have been wrong. It was potential. It may or may
 3 not have eventuated. Now it's here, so thus the more
 4 reason to engage the people, correct?
 5 MR DA COSTA: I'm not sure that it is
 6 correct. As I said, we felt that we understood what the
 7 issue was and the decision was that we were not going to
 8 engage. I mean we, it, the purpose of engaging the people
 9 would have been to find out what their issue is.
 10 MR MPOFU: Yes.
 11 MR DA COSTA: But we were of the opinion
 12 that we knew what the issue was and that we are not in
 13 favour of engaging people who are on a, who are
 14 participating in an unprotected work stoppage.
 15 MR MPOFU: Yes.
 16 MR DA COSTA: And that was the view that
 17 we took.
 18 MR MPOFU: Yes. No, that's correct.
 19 That I understand, and one of the key reasons why you
 20 refused to speak to them was because there's a two-year
 21 agreement which was still in process, correct?
 22 MR DA COSTA: That was part of the
 23 reason.
 24 MR MPOFU: Yes.
 25 MR DA COSTA: And as I said, from the

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1 executive's point of view the issue is that the group of
 2 people were bringing to us had been escalated to the
 3 executive. They had taken note of it. They had provided a
 4 solution to it and that was as far as they were prepared to
 5 go on the issue.
 6 MR MPOFU: Yes. No, my question is very
 7 simple. One of the reasons you refused to talk to them was
 8 because there was a two-year agreement in subsistence,
 9 correct?
 10 MR DA COSTA: We were not prepared to
 11 reopen wage negotiations, yes.
 12 MR MPOFU: Is that a yes?
 13 MR DA COSTA: Yes.
 14 MR MPOFU: Yes, and that again is another
 15 similarity. When you engaged them there was that same
 16 agreement in subsistence, correct?
 17 MR DA COSTA: Yes, it was in –
 18 MR MPOFU: Yes.
 19 MR DA COSTA: And – yes, it was. I
 20 pointed it out to them –
 21 MR MPOFU: Yes.
 22 MR DA COSTA: - to the people as well,
 23 yes.
 24 MR MPOFU: Yes, and despite the existence
 25 of that agreement, in your wisdom and good commendable

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1 managerial discretion you engaged them, even on the merits,
 2 as we have already established, correct?
 3 MR DA COSTA: Yes, I engaged them and I
 4 mean as I've said in my evidence previously I, at that time
 5 I also knew that there was a differential in pay across the
 6 industry and so on, so all of those things were in my mind
 7 when I was engaging the employees initially.
 8 MR MPOFU: Yes. In fact let's come to
 9 that. When you engaged them you were aware that there's a
 10 differential between what they were paid and what your
 11 peers in the platinum industry were paying them and yours
 12 was lower, correct?
 13 MR DA COSTA: At that time, yes.
 14 MR MPOFU: And on the 10th that was still
 15 the situation, correct?
 16 MR DA COSTA: Well, by the 10th the gap
 17 had been closed quite significantly.
 18 MR MPOFU: No, but Mr Da Costa, you know
 19 that they had rejected your counter offer. On the 10th the
 20 situation was still the same, correct?
 21 MR DA COSTA: Well, I mean at that point
 22 the allowance had been implemented.
 23 MR MPOFU: Is your evidence that by the
 24 implementation of the allowance the salary discrepancies
 25 between yourselves and your peers had been closed?

<p style="text-align: right;">Page 32880</p> <p>1 MR DA COSTA: The gap had been closed, 2 but not the, not necessarily to the level of parity, but 3 the gap had been closed. 4 MR MPOFU: Well, which is it? If the gap 5 is closed it's closed, then there's parity. If there isn't 6 parity then there isn't parity. Which one was it? 7 MR BURGER SC: Chair, we've had this 8 evidence before. We've spent lots of time on this. You 9 have an exhibit before you showing what the increase was, 10 what the shortfall was at the end of the day with the two 11 columns. We've had this evidence. 12 CHAIRPERSON: And there was cross- 13 examination on this evidence as well. I think the relevant 14 facts are before us already. 15 MR MPOFU: Chairperson, with the greatest 16 respect, surely I'm allowed to cross-examine a witness 17 about his view that a particular gap was closed or whether 18 it still remained, whatever has been – I'm not talking 19 about the objective evidence. I'm talking about his – 20 CHAIRPERSON: Alright, carry on. 21 MR MPOFU: Ja, thank you. 22 MR DA COSTA: Can I say that – 23 MR MPOFU: Yes, please. 24 MR DA COSTA: - in the view of management 25 and the executive the gap had been sufficiently reduced.</p>	<p style="text-align: right;">Page 32882</p> <p>1 MR DA COSTA: That's what I'm saying, 2 yes. Yes, Chair. 3 MR MPOFU: Yes, okay, my question was 4 slightly different. My question was that – and I'm 5 factoring in what your answer is now – was that as far as 6 you know, by the time they came on the 10th there was still 7 a gap between what you were paying and what the others were 8 paying, albeit it was now a smaller gap, correct? 9 MR DA COSTA: Yes, that's correct. 10 MR MPOFU: Ja, o that's the first factor. 11 The second factor is that you knew and they knew that at 12 Anglo Platinum RDOs had been engaged directly. That's 13 correct? 14 MR DA COSTA: I'm not sure that that is 15 correct. At Anglo Platinum I think the, their process was 16 as a subcommittee from their wage negotiation process, if I 17 remember correctly. So I think at Anglo Platinum the whole 18 process was being done through a subcommittee with all 19 labour representation on that. 20 MR MPOFU: Okay, you can correct me, but 21 my recollection, and I'm looking for it now, is that one of 22 the reasons that you cited for speaking to them was because 23 you knew that there had been a similar engagement in one of 24 the rival mines. It might not be Anglo Platinum. 25 MR DA COSTA: Ja, no, at Impala –</p>
<p style="text-align: right;">Page 32881</p> <p>1 MR MPOFU: Reduced, or closed? 2 CHAIRPERSON: He said significantly. 3 MR DA COSTA: It's sufficiently – 4 MR MPOFU: Reduced. 5 MR DA COSTA: You know Mr Mpofo doesn't 6 like the term that I use, "closed," so – 7 MR MPOFU: Reduced, no – 8 MR DA COSTA: - sufficiently reduced 9 then. 10 MR MPOFU: I like the – 11 CHAIRPERSON: You're entitled to use 12 whatever term you like – 13 MR MPOFU: Ja. 14 CHAIRPERSON: But obviously the gap, 15 there was still a gap. 16 MR MPOFU: Yes. 17 CHAIRPERSON: The question was whether 18 the reduction of the gap was – well, there's still a gap. 19 The question is whether the gap, originally the gap was 20 what they were earning, 12 500 minus what they were 21 earning. That has now been raised by 750 in the case of 22 some people and 500 in the case of others. So the gap had 23 been reduced to some extent. The question is whether that 24 was sufficient. You say in the minds of the executive it 25 was sufficient. Is that your answer?</p>	<p style="text-align: right;">Page 32883</p> <p>1 MR MPOFU: Impala, yes. 2 MR DA COSTA: Impala things were a bit 3 different. 4 MR MPOFU: Yes, that's the point I'm 5 making. I'm sorry for missing the wrong, for the wrong 6 person, the wrong company. You knew and they knew that at 7 Impala RDOs had been engaged directly, correct? 8 MR DA COSTA: Ja, I knew that. 9 MR MPOFU: You knew that, ja, and it was 10 a factor which you considered for speaking to them? 11 MR DA COSTA: No, not - 12 MR MPOFU: And you were of the view – I'm 13 sorry. I'm sorry to cut you. 14 MR DA COSTA: Not the fact that Impala 15 had engaged their rock drill operators directly. I mean 16 that didn't influence the way we went about our process, 17 but the fact that there had been wage adjustments at Impala 18 and Anglo, that did influence – 19 MR MPOFU: Okay. Well, okay, I withdraw 20 my apology. You said at 3.5 of OO17 – XXX1, Chairperson, 21 I'm told that's how it was reconfigured. You say there, "I 22 was also aware that Anglo Platinum was in talks with RDOs 23 employed by it." Is that a fact? 24 MR DA COSTA: That's what I said there, 25 yes.</p>

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1 MR MPOFU: Okay, and you knew that these
 2 people, you know, talk to each other, belong to the same
 3 unions and they might have been aware of that as well? We
 4 know that you are aware of it, but that the workers might
 5 also have been aware of it.
 6 MR DA COSTA: Well, they might, they
 7 might have been aware of it.
 8 MR MPOFU: Yes, and that situation also
 9 was still true on the 10th of August, correct?
 10 MR DA COSTA: Yes, I'm sure on the 10th of
 11 August if they were aware of it they would have been aware
 12 of it then, yes.
 13 MR MPOFU: Yes, thank you. So the
 14 factors that made you to speak to them were still there,
 15 except that there was a new additional factor. This time
 16 they also knew that in Karee the RDOs had been engaged
 17 directly. Is that correct? By the 10th of August they knew
 18 this new additional factor, which is that not only have the
 19 people at Anglo been speaking to the RDOs, but even here at
 20 home in Karee the RDOs had been engaged directly and
 21 outside of the union structures. They knew that, correct?
 22 MR DA COSTA: Yes, I am sure they would
 23 have done it.
 24 [11:28] MR MPOFU: And you will agree with me,
 25 and I will argue at the end that that was an additional

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1 reason which is postulated in what SAPS has said in their
 2 statement. An additional reason why the workers would have
 3 had legitimate expectation that they were going to be
 4 engaged.
 5 CHAIRPERSON: I think legitimate
 6 expectation - is a matter that the witness can't express an
 7 opinion on.
 8 MR MPOFU: No I'm talking about as in
 9 people English, Chairperson, not as a -
 10 CHAIRPERSON: You used the phrase
 11 legitimate expectation -
 12 MR MPOFU: Yes but it's not a legal
 13 phrase. It's simply an expectation.
 14 CHAIRPERSON: But the point is - as far
 15 as expectations, whether they were legitimate or not I'm
 16 not sure you can express an opinion on it or should be
 17 allowed to. But certainly the point put to you is that
 18 they would have an expectation about the matter based on
 19 the fact that only were there increases at Impala and Anglo
 20 Plat, but there had been negotiations between their
 21 colleagues at Karee and management through you. That they
 22 knew. You conceded that when you answered the last
 23 question and put the question again -
 24 MR MPOFU: Okay I'll put it differently.
 25 Chairperson don't like the word legitimate. Because of the

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1 factors that I have listed they had a reasonable
 2 expectation that they will be engaged because they had been
 3 engaged in Karee and their friends or comrades had been
 4 engaged at Anglo Platinum. That's the question I'm putting
 5 to you.
 6 MR DA COSTA: You see when we
 7 communicated the implementation of the allowance and we
 8 communicated it across the mining division, part of that
 9 communication was very clear that management would not want
 10 to open, re-open wage negotiations, that the reasons for
 11 the implementation of this allowance was articulated during
 12 that communication. And people were requested not to
 13 embark on any unprotected work stoppages in regard to this.
 14 So to say - and this happened sort of around the first two
 15 or three days in August. So to say that people would have
 16 arrived at LPD on the 10th of August with an expectation to
 17 engage I don't think is quite correct because I think there
 18 had been quite a lot of communication to the contrary that
 19 had gone out in the prior week.
 20 MR MPOFU: Yes, no I understand that, Mr
 21 Da Costa. I am saying, please listen to me carefully, some
 22 of the reasons that had been advanced even by you, which
 23 were - and I've already conceded to you that you were
 24 within your rights in raising those issues. Namely, for
 25 example that looked at the two year agreement, we can't

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1 just in the middle of that be talking about wage
 2 increments, those are some of the reasons that were
 3 advanced again by management even in those communications.
 4 But the point I'm simply making to you is that despite
 5 that, despite you being entitled to say to them listen here
 6 there's a two year agreement, goodbye. You, in your
 7 wisdom, to avert the fire and all the things that you and I
 8 have discussed, decided to engage them. Do you understand
 9 that?
 10 MR DA COSTA: I understand that.
 11 MR MPOFU: Yes, so all I'm saying is that
 12 where there's a mirror image of that situation despite some
 13 insignificant differences, like the numbers and all that.
 14 And with the existence of the factors that you sighted or
 15 that you overlooked and with the presence of new factors
 16 which would have created an expectation in them to be
 17 engaged, they were not engaged or Lonmin refused to engage
 18 them. And I know I've just made a long introduction but
 19 the simple point I was making to you was at least you would
 20 understand that from their point of view, because of those
 21 factors they would have had a reasonable expectation to be
 22 engaged despite the two year agreement and all that. You
 23 might have a different view, but that's what I'm going to
 24 argue.
 25 MR DA COSTA: Well I have a different

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1 view. I've pointed out why I think they should not have
 2 had that expectation to be engaged.
 3 MR MPOFU: Thank you, fair enough.
 4 CHAIRPERSON: You've taken the point as
 5 far as you can, all the material you need for the argument
 6 at the end, is I think on record.
 7 MR MPOFU: Thank you, that's why –
 8 CHAIRPERSON: There's a difference
 9 between you and the witness, but that's something we'll
 10 have to resolve later. I suggest you move on to the next –
 11 MR MPOFU: When I said that's what I'm
 12 going to argue I was indicating that I'm going to move to
 13 the next point. Just to close off the question of your
 14 actions. You said that you viewed it as, despite all these
 15 issues that you and I have discussed, I think the word you
 16 used you viewed it as prudent that you should engage them,
 17 correct?
 18 MR DA COSTA: I think I may have used
 19 that word, yes.
 20 MR MPOFU: Yes, thank you. And if you
 21 had taken the hard line view that look here we're not going
 22 to talk to you that may have been accordingly imprudent,
 23 correct?
 24 CHAIRPERSON: That would follow surely.
 25 It would be prudent to engage and it was imprudent not to

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1 engage.
 2 MR MPOFU: Life is not that simple,
 3 Chairperson. It's not sometimes that straightforward and
 4 linear. Is that correct? It would have been imprudent not
 5 to engage them?
 6 MR DA COSTA: I guess that follows. I've
 7 never thought of it in that way, but it probably follows.
 8 MR MPOFU: Thank you. And therefore –
 9 anyway no it's fine, we'll leave that for argument. We
 10 know that on the terms the line that was taken was
 11 different from yours which was we're not going to engage
 12 with them. That's a matter of record. Now the next issue
 13 is just one small issue. It seems to me and again I just
 14 want to be fair to you, it seems to me that the
 15 conventional wisdom among management which was repeated
 16 almost dogmatically was that when the tensions did arise
 17 one of the root causes or root problems was union rivalry
 18 between AMCU and NUM, is that correct? Do you know about
 19 that view and do you share it?
 20 MR DA COSTA: I think there was certainly
 21 was an element of rivalry amongst the two unions, but not
 22 just at that time. It had started some time before that.
 23 MR MPOFU: Ja well that was just an
 24 element, in fact whenever there was engagement between
 25 Lonmin and the police for example that was the first and

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1 even in the public domain in press statements released by
 2 Lonmin, that was the issue that was flagged as causative to
 3 the relative unrest. You were aware of that?
 4 MR DA COSTA: Yes, I'm aware of it.
 5 MR MPOFU: Yes. Now are you also aware
 6 for example that Lonmin and the police and the NUM held
 7 meetings twice a day to deal with the situations that had
 8 arisen?
 9 MR DA COSTA: I'm not aware of meetings
 10 like that, no.
 11 MR MPOFU: Okay.
 12 MR DA COSTA: I was certainly never
 13 involved in a meeting like that.
 14 MR MPOFU: Fair enough, ja. But if there
 15 were such meetings and there was union rivalry you would
 16 have expected that the two rivals would have been invited
 17 to those meetings, correct? If the rivalry was going to be
 18 addressed?
 19 MR DA COSTA: I would have expected so.
 20 If the two unions were prepared to go to meetings together
 21 which was sometimes an issue.
 22 MR MPOFU: No, that's fair. That's why I
 23 used the word invited, whether they would accept that
 24 invitation is their business, but you would have expected
 25 them to be invited at least.

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1 MR DA COSTA: Most likely, yes.
 2 MR MPOFU: Yes. Then finally there's a
 3 view which has been expressed in the light of this
 4 discussion that you and I have had, the view that we said
 5 has been expressed by NUM and other people that had there
 6 been more flexibility on the part of Lonmin in regard to
 7 the issues that you and I have discussed about whether to
 8 engage them or not, that the tragedy would have been
 9 averted. In the light of the discussion that you and I
 10 have had and the fact that you averted the "fire" would you
 11 agree with that view?
 12 MR DA COSTA: I'm not aware of that view
 13 expressed by NUM, perhaps my learned friend can help me on
 14 that.
 15 MR MPOFU: Chairperson, in the interests
 16 of time, I know that my learned friend was not here
 17 yesterday, but can he take my word that there is an article
 18 which indicates this and I'll make it available to him.
 19 Yes I think it was distributed. In fact the original
 20 intention yesterday was to use it with Mr X, if you
 21 remember, Chairperson. So I don't know if Mr Burger can
 22 accept that.
 23 CHAIRPERSON: It wasn't distributed
 24 because there was an objection made that it wasn't –
 25 MR BURGER SC: No, I'm happy to accept

1 that.

2 MR MPOFU: Thank you.

3 MR BURGER SC: But then I have an

4 objection to the line and the objection is the following.

5 There's going to be a major debate before you, Chair, on

6 causation. What led to this tragedy, was it the police

7 overreacting, was it the striking workers being aggressive,

8 was it my client not talking, was it NUM shooting, was it

9 Impala, that's a huge debate, that's a legal debate and

10 we'll address you on that in due course. It's irrelevant

11 and inadmissible to ask a lay witness what he thinks on

12 causation because us lawyers are going to differ on it and

13 whether he says he thinks it was a cause or it wasn't a

14 cause will not only not assist you, but will be

15 inadmissible. So I object on that basis to the question.

16 MR MPOFU: Thank you, Chairperson. My

17 response is that I'm not really addressing the legal

18 question of causation. What I am addressing, Chairperson,

19 is that a view which I obviously share that one of the

20 causes and I accept what Mr Burger is saying that it might

21 well not be the only cause or whatever. That's not where I

22 am, it might be that the strikers also contributed, SAPS

23 also contributed, in fact that is my case that it was a

24 collusion. So it obviously was not one or the other. So

25 Mr Burger is right in that respect, but what I'm discussing

1 with this witness is that he himself having foreshadowed a

2 potential relationship between refusing to talk to the

3 strikers which we can call the inflexible approach and

4 talking to them which – well lets term for the purposes of

5 what I'm saying, the flexible approach, would be the only

6 person really who can comment on somebody postulating that

7 situation that faced him with another situation. And

8 saying had the flexible approach, to use the quote, been

9 adopted what he feared, which was escalation of violence,

10 might have been averted. That's really the only reason I'm

11 putting it.

12 CHAIRPERSON: I must confess I don't

13 understand how the witness can help us because it's not

14 maybe within his power, he may well have feared that. It

15 would depend, of course, upon how the other side would have

16 reacted to the inflexible approach rather than the flexible

17 approach. And I'm not sure that he can help us. I can

18 understand, as Mr Burger says, there's going to be a lot of

19 argument on it. I would have thought that all the relevant

20 facts are probably before us. I'm not aware of any

21 relevant facts that are not before us which he can give us.

22 And it's for us to decide at the end of the day whether the

23 inflexible approach adopted led to the trouble and the

24 flexible one would not. I understand that's a very

25 relevant consideration that we have to examine. The

1 question is whether he can help us on that. Even if he

2 thinks one way or the other I'm not sure it's going to help

3 us at all.

4 MR MPOFU: Let me put it this way.

5 CHAIRPERSON: You can't argue the point.

6 MR MPOFU: No, I understand, Chairperson.

7 I accept your ruling. Is it a fact that you, placed in

8 that position of the prudent, to use your word, or

9 reasonable leader, overall leader, whatever the - I forgot

10 the term, ultimate leader, thank you, by adopting what I

11 have called the flexible approach when I was addressing the

12 Chairperson most probably averted violence, the escalation

13 of violence, you? Would it be fair to summarise your

14 involvement as such?

15 MR DA COSTA: Unfortunately not. I wish

16 I could, but you know even after all of my attempts,

17 engaging with people and so on we still ended up in an

18 unprotected work stoppage and unprotected industrial

19 action.

20 CHAIRPERSON: No, it's not quite as

21 simple as that. I think what Mr Mpofu is pointing to is

22 this, you adopted a flexible approach when they came to see

23 you. The result of that was there wasn't a violence, there

24 would have been violence if you'd adopted an inflexible

25 approach is a matter that we can't really answer to. But

1 you adopted a flexible approach and there was no violence.

2 Later on, on the 10th of August and inflexible approach was

3 adopted by the executive which was communicated to those

4 officers of the company who were in the what they call the

5 time office when the inflexible attitude was communicated

6 to the workers that were there. But he says now, I think

7 he's avoided the point to which successful objection was

8 taken, but he's asking you at the first part do you accept

9 that your flexible attitude averted, at that stage,

10 violence. That's the question.

11 MR DA COSTA: Well as I've said for a

12 period of a week it seemed that my efforts had averted that

13 outcome, but as it turned out the unprotected work stoppage

14 on the 10th happened. You know so the fact that that

15 happened in my mind my efforts weren't successful,

16 unfortunately.

17 CHAIRPERSON: Oh all right, thank you.

18 MR MPOFU: Okay fine then I put it to you

19 that I'm going to argue at the end that had Lonmin

20 management adopted your approach, your prudent approach to

21 the similar situation which faced them on the 10th then the

22 massacre would have been avoided.

23 CHAIRPERSON: I don't see how the witness

24 can be expected to answer that question, that's something –

25 MR MPOFU: I'm not asking him to answer.

<p style="text-align: right;">Page 32896</p> <p>1 CHAIRPERSON: All right, okay well then 2 you put your point then. 3 MR MPOFU: Yes that's what I'm going to 4 argue. 5 CHAIRPERSON: I understand. Is there 6 anything further you want to put to him? 7 MR MPOFU: No, Chairperson. 8 CHAIRPERSON: Thank you very much, Mr 9 Mpofo. I think we will now take the tea adjournment and 10 when we resume Mr Semenya will cross-examine. But I 11 understand that the evidence leaders wish to re-open their 12 cross-examination on a short point dealing with an email 13 they received from Lonmin yesterday. I don't know, perhaps 14 we can decide this before tea, I don't know whether they 15 want to do it, I'm might have to grant the application 16 because it seems to be yes it may well be material which 17 would help us. Do you want to do it before or after Mr 18 Semenya, Mr Budlender? 19 MR BUDLENDER SC: It's immaterial to me, 20 Chair, I don't think it makes any difference because I 21 don't think it's – well perhaps I'd better, just in case 22 something arises from it – 23 CHAIRPERSON: Yes well I think Mr Semenya 24 might conceivably want to ask some questions on that. Yes, 25 Mr Mpofo.</p>	<p style="text-align: right;">Page 32898</p> <p>1 without the involvement of any union. Management had 2 agreed to negotiate directly with the RDOs, and so on." 3 The real question I wanted to ask – 4 MR DA COSTA: R750. 5 MR MPOFU: I'm sorry, R750. 6 CHAIRPERSON: It wasn't as much as that 7 at all, we know what the correct figure is. 8 MR MPOFU: We know what the figure is. 9 The only question that I really want to put to you is, just 10 so that I'm not criticised later that I didn't put to you. 11 I think you've already partly answered this. You have 12 identified some of the people that you engaged with, and 13 you said you don't know some of them, correct? 14 MR DA COSTA: Yes, that's correct. 15 MR MPOFU: So you cannot say whether or 16 not Mr Booi was one of the people nominated to be 17 discussing with you. 18 MR DA COSTA: He was. 19 MR MPOFU: Oh, you know him. 20 MR DA COSTA: Yes, in my statement I make 21 the comment that there's one person that I didn't, that I 22 couldn't remember, but after I had written my statement, it 23 occurred to me that it was Mr Booi. 24 MR MPOFU: Mr Booi, thank you. Thank 25 you, Chairperson.</p>
<p style="text-align: right;">Page 32897</p> <p>1 MR MPOFU: I am very sorry, Chairperson, 2 if you just allow me. The point which is brought, I just 3 want to put to the witness which I omitted to put. 4 [11:48] CHAIRPERSON: Just put the point to the 5 witness, how many minutes do you need? 6 MR MPOFU: Two questions, Mr Chairperson. 7 CHAIRPERSON: Two questions, as in one 8 plus one. 9 MR MPOFU: Well, sometimes one plus one 10 is 11, Chairperson. 11 CHAIRPERSON: We're using straight 12 arithmetic today, one plus one. 13 MR MPOFU: Thank you. I'm sorry, Mr Da 14 Costa, this is just a formality, really. Mr Booi, who's 15 one of the people I intend to call, had put in his 16 statement, which is BBB3, he just says the following, I'll 17 read it very quickly. "A big group of RDOs demanded that 18 we should see a Mr Da Costa, who's one of the senior Lonmin 19 officials. Upon our arrival at the offices, the mine 20 security asked the group to remain outside the gate and 21 only allowed five persons to meet him. Mr Da Costa did 22 meet the staff on that day and listened to our grievances, 23 he also met us on at least two other occasions," and so on. 24 At the third such meeting, management offered us an 25 increase of 750 000. This small victory was achieved</p>	<p style="text-align: right;">Page 32899</p> <p>1 CHAIRPERSON: Well, we now take the tea 2 adjournment for 15 minutes, and then Mr Budlender will ask 3 his questions about the document we got, and thereafter Mr 4 Semenya will cross-examine. 5 [COMMISSION ADJOURNS COMMISSION RESUMES] 6 [12:09] CHAIRPERSON: The Commission resumes. Mr 7 Budlender, you're going to cross-examine now on this extra 8 material. The document I understand has been distributed. 9 Perhaps I should just remain the witness he's still under 10 oath. You're still under oath, Mr Da Costa. 11 MICHAEL GOMES DA COSTA: [s.u.o.] 12 CHAIRPERSON: The next number will be 13 XXX11, I think. 14 MR BUDLENDER SC: That's correct, Chair. 15 CHAIRPERSON: And we describe that as a 16 security control room duty roster issued by Mr DP Janse van 17 Rensburg, the vice president Middelkraal, of Lonmin. Long 18 description, but that's accurate. Mr Budlender. 19 MR WESLEY: Sorry, Chair, could I 20 interject here just to make an announcement and a request 21 that – 22 CHAIRPERSON: Oh, yes. Sorry [microphone 23 off, inaudible] invite you to make an announcement. 24 MR WESLEY: Thank you, Chair. 25 CHAIRPERSON: Would you please make the</p>

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1 announcement?

2 MR WESLEY: Yes. After Mr Da Costa's

3 testimony the next witness is going to be from Lonmin, Mr

4 Dewald Louw. The parties are requested to please let me

5 know by lunchtime who would like to cross-examine him and

6 approximately how much time they're going to need –

7 CHAIRPERSON: And on what topics.

8 MR WESLEY: - to cross-examine him, and

9 on what topics, of course. The witness after that is going

10 to be another security gentleman, Mr Julius Mosebe, if they

11 could also please apply their minds now to him and also

12 provide me that information, preferably this afternoon

13 already. It's Julius Mosebe.

14 MR TIP SC: Sorry, can we just clarify

15 that? There's a Joseph Mosebe and there's a Julius

16 Motlogelwa. Which is it?

17 CHAIRPERSON: [Microphone off, inaudible]

18 copy of the statement today, I don't know whether it's the

19 one of the witness which Mr Wesley is referring to. He is

20 Mogomotsi Mosebe, but we were also given a typed statement

21 in respect of Joseph Mosebe.

22 MR WESLEY: Yes, Chair, that's the same

23 gentleman. He's somebody apart from Julius Motlogelwa.

24 Julius Motlogelwa should be coming in on Monday. We're

25 going to send an email out in that regard. They are two

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1 separate people

2 CHAIRPERSON: Alright, so what we're

3 talking about is Joseph Mosebe, whose statement was

4 distributed this morning I think, typed statement, dated

5 the, it looks like the 1st of October 2012, and then there's

6 a manuscript statement which is headed "Marikana CAS," it

7 looks like, is it 107 or 167/08/2012.

8 MR WESLEY: It's 107, Chair.

9 CHAIRPERSON: 107, thank you, and that is

10 dated the 12th of August 2012. That's headed "J Mogomotsi

11 Mosebe." That's the same gentleman, you say.

12 MR WESLEY: That's the same gentleman.

13 CHAIRPERSON: Alright, okay. So what we

14 want to know is please by end of lunchtime today who wants

15 to cross-examine Dewald Louw and for how long and on what

16 topics and by the end of this afternoon who wants to cross-

17 examine Mr Joseph Mosebe, same information required.

18 MR WESLEY: Thank you, Chair.

19 CHAIRPERSON: Thank you. Yes, Mr

20 Budlender.

21 FURTHER CROSS-EXAMINATION BY MR BUDLENDER SC:

22 Thank you, Chair. Mr Da Costa, during the adjournment, or

23 I think the previous adjournment I gave you a copy of the

24 new exhibit which is now before the Commission. You have

25 that?

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1 MR DA COSTA: Yes, I have it.

2 MR BUDLENDER SC: And what that is, is a

3 memorandum from Mr Janse van Rensburg setting out

4 arrangements for a duty roster in respect of this security

5 control room and certain liaison arrangements which were

6 made.

7 MR DA COSTA: Yes, it's correct.

8 MR BUDLENDER SC: And I just want to ask

9 you for a bit of information about how this worked.

10 Firstly, can we just note that although the exhibit is, the

11 date stated on it is the 16th of August, in fact it refers

12 to deployments from the 13th of August onwards. So that

13 date of the 16th seems to be incorrect.

14 MR DA COSTA: Yes, I would imagine so,

15 because it definitely came out before the 16th.

16 MR BUDLENDER SC: Yes, and I understand

17 that in fact there are subsequent versions of this which

18 were brought out as and when required. Is that –

19 MR DA COSTA: That's correct, yes.

20 MR BUDLENDER SC: Then all I need to ask

21 you about this is the following. Firstly there were

22 managers who were placed on duty and there were vice

23 presidents who were on the duty roster. Did they generate

24 any reports arising out of their – produce any reports

25 arising out of the work which they did in this regard?

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1 MR DA COSTA: No, they, there were no

2 written reports or anything that were generated at the

3 time. They were, I mean part of the reason why the

4 managers were placed in the control room is to provide

5 liaison between the sort of security police, for activities

6 that were going on to provide liaison in connection between

7 that and operations management, which they were doing

8 verbally, not in any written report.

9 MR BUDLENDER SC: I understand. They

10 were liaising between Lonmin security, SAPS, and the Lonmin

11 executive. Is that – do I understand that correctly?

12 MR DA COSTA: Yes, that's correct, so

13 that the managers who were out at the operations were at

14 least to some extent aware of what was going on around the

15 property and the main issue was that the managers who were

16 on the operations would get timely notice of any kind of

17 danger or any risk that might be coming their way.

18 MR BUDLENDER SC: Yes, I understand, and

19 I think it's common cause that Lonmin had a presence in the

20 SAPS JOC so that Lonmin would be informed of what was

21 happening on that front as well and similarly could feed

22 information back to the SAPS.

23 MR DA COSTA: That's correct, yes.

24 CHAIRPERSON: [Microphone off, inaudible]

25 the point flows from the document. You talk about, or

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1 rather Mr Janse van Rensburg says in the penultimate
 2 paragraph of the text, "Mining personnel will act as
 3 liaison between Lonmin security, SAPS, and Lonmin executive
 4 management and will obtain mandates before taking
 5 decisions." So the mandates I take it would be obtained
 6 from Lonmin executive management. Is that right?
 7 MR DA COSTA: Yes, that's correct, and
 8 then the sort of mandate he's referring to there would be,
 9 you know, if they became aware of the fact that maybe there
 10 was some danger at a particular operation and we need to
 11 evacuate that operation, they would get a mandate for that
 12 first from the executive.
 13 CHAIRPERSON: Ja, but if the police
 14 negotiators came back from the koppie and said the miners,
 15 or strikers would like to negotiate with Lonmin in relation
 16 to this increased wage demand of theirs, then the mandate
 17 would be obtained as in order to enable those in the
 18 control room, security control room, to respond to such a
 19 request from the police. Would that not be correct?
 20 MR DA COSTA: Yes, I – you know,
 21 something like that would be relevant as well.
 22 COMMISSIONER HEMRAJ: Mr Da Costa, the
 23 position of Lonmin that they would not interact with the
 24 strikers as conveyed by Mr Kgotle and Mr Mokwena from time
 25 to time in that period, those decisions, by whom were they

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1 taken in management?
 2 MR DA COSTA: The decisions not to engage
 3 with the strikers?
 4 COMMISSIONER HEMRAJ: Yes.
 5 MR DA COSTA: That would have been taken
 6 at an executive level. You know, I think at that point in
 7 time the executive were having sort of daily meetings
 8 around whatever issues needed to be resolved, so ja, it
 9 would have been taken at an executive level.
 10 CHAIRPERSON: Remind me, who were the
 11 members of the executive who would have been involved in
 12 those daily discussions and who would have made those
 13 decisions?
 14 MR DA COSTA: Well, all the members of
 15 the executive, except Ian Farmer, Ian was ill, bedridden
 16 and was –
 17 CHAIRPERSON: I understand Ian Farmer was
 18 ill. He was in hospital.
 19 MR DA COSTA: Yes.
 20 CHAIRPERSON: But who were the others?
 21 Just remind me who they were. You did tell us before.
 22 MR DA COSTA: There was Simon Scott who
 23 was a CFO at that stage, Barnard Mokwena, Mark Munroe,
 24 Albert Jameson, I think Mohamed Seedat was involved at that
 25 stage, I'm not sure if he's involved in the, in all the

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1 daily meetings at that stage. I'm just trying to think.
 2 Oh, and Natasha Viljoen. I was –
 3 CHAIRPERSON: Natasha?
 4 MR DA COSTA: Natasha Viljoen.
 5 CHAIRPERSON: Yes.
 6 MR DA COSTA: Yes, so that would have
 7 been the members at that stage.
 8 CHAIRPERSON: Thank you.
 9 MR BUDLENDER SC: And then just one
 10 further matter, Mr Da Costa; we see from this that you were
 11 the person, you were the vice president on duty from 2PM on
 12 Thursday the 16th of August. Can you tell the Commission
 13 what was reported to you during the course of that
 14 afternoon?
 15 MR DA COSTA: Ja, that is, I was in my
 16 office and I wasn't in the control room because I was
 17 basically on standby, so around 4:30 I got word that there
 18 had been an engagement between the SAPS and the striking
 19 employees and that a number of people had been shot. So at
 20 that point I then got into my car and drove to the control
 21 room to assess the situation. So when I arrived at the
 22 control room I was updated on the situation and then, you
 23 know, after that I really just assisted more in terms of
 24 arranging logistics and so on, trying to assist with
 25 getting mobile lights out because it was getting dark at

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1 that stage and so I was around there until about 7 o'clock
 2 that evening, I think, and then I left.
 3 CHAIRPERSON: I think you told us the
 4 reason why people had to be on standby was so that they
 5 could receive briefings as to what was happening. Did I
 6 understand that correctly? It's one of the reasons, the
 7 reason you had to be on standby for example on Thursday the
 8 16th of August was so that you could receive briefings as to
 9 what was happening so that if necessary you could
 10 communicate that further, get a mandate and so on. Is that
 11 right?
 12 MR DA COSTA: Yes, that's correct.
 13 CHAIRPERSON: Now so did you receive
 14 information as it were during the course of the day when
 15 you were in your office on standby as to some of the things
 16 that were happening?
 17 MR DA COSTA: No.
 18 CHAIRPERSON: Did you know that the
 19 Provincial Commissioner addressed a media conference at
 20 half past 9 that morning?
 21 MR DA COSTA: I knew that, yes.
 22 CHAIRPERSON: And did you know that she
 23 announced that that day if the strikers didn't voluntarily
 24 lay down their arms, the police were going to proceed to
 25 what's called the tactical option, they were going to

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1 disarm the strikers, disperse and disarm the strikers even
 2 if they were going to, were not prepared to lay down their
 3 arms voluntarily? Did you know that?
 4 MR DA COSTA: I wasn't really aware of
 5 that at, you know, quite at that time, but the following
 6 day –
 7 CHAIRPERSON: I'm interested in the 16th.
 8 You see if you knew that there was a media conference and
 9 you knew that the Provincial Commissioner had made certain
 10 statements, I'm interested to know how much of the content
 11 of what she said was conveyed to you.
 12 MR DA COSTA: No, I wasn't really aware
 13 of the content of what she had said at that time, you know,
 14 on the 16th. I became aware of it later, but not on the
 15 16th.
 16 CHAIRPERSON: And of course there was a
 17 JOCCOM meeting at half past 1 that afternoon. I'm not sure
 18 whether the Lonmin representative as it were was in that
 19 meeting because certainly a person from Lonmin would have
 20 been in the JOC conveying information and so on, but there
 21 is a suggestion that to some extent they weren't involved
 22 in the deliberations and they would have been asked to
 23 excuse themselves at that time, but were you informed
 24 either at the time or shortly after that JOCCOM meeting
 25 that the operation, the so-called tactical option, the

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1 disarmament and dispersal was going to take place that
 2 afternoon?
 3 MR DA COSTA: I, you know, Chair, I don't
 4 recall being informed. As I recalled it the, you know the
 5 first I heard that there had been, let's say some sort of
 6 significant activity was at the time when the shootings
 7 happened, around 4:30.
 8 CHAIRPERSON: You mean after the
 9 shootings. The first –
 10 MR DA COSTA: Yes, sort of-
 11 CHAIRPERSON: The shootings had already
 12 taken place.
 13 MR DA COSTA: Very soon after the
 14 shootings, yes.
 15 CHAIRPERSON: I see, thank you.
 16 MR BUDLENDER SC: Just in relation to
 17 that, Mr Da Costa, can you recall who it was who informed
 18 you about the confrontation and the shootings which had
 19 taken place?
 20 MR DA COSTA: It was initially my HR
 21 manager, Mr Nkisi, and then shortly after that I got a call
 22 from the operations centre, I can't remember exactly who it
 23 was. By then I was already on my way to the control centre
 24 when I got a call.
 25 MR BUDLENDER SC: Would both of those

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1 calls have been received on your cell phone?
 2 MR DA COSTA: Well, Nkisi told me in
 3 person. I believe the call would have, I would have had it
 4 on my cell phone, yes.
 5 MR BUDLENDER SC: When you say Nkisi told
 6 you in person, you mean face to face?
 7 MR DA COSTA: Face to face, yes.
 8 MR BUDLENDER SC: So he would have
 9 received a phone message from somebody, I assume.
 10 MR DA COSTA: I assume so.
 11 MR BUDLENDER SC: And then he came and
 12 told you.
 13 MR DA COSTA: He walked into my office
 14 and said to me this had happened.
 15 MR BUDLENDER SC: Alright, and you –
 16 that's fine, thank you very much.
 17 CHAIRPERSON: Can you remember what time
 18 that was when Mr Nkisi came into your office?
 19 MR DA COSTA: Ja, I think it's in my
 20 statement. As I recall it was round about 4:30, if I –
 21 CHAIRPERSON: Could it have been earlier?
 22 MR DA COSTA: It could have been a bit
 23 earlier.
 24 CHAIRPERSON: Because you see the actual
 25 operation according to the evidence happened before 4

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1 o'clock, when within a space of about eight seconds before
 2 4 o'clock a number of people were killed at what we have
 3 described as scene 1, and I wonder how long after that it
 4 was reported to you that this has happened.
 5 MR DA COSTA: I can't remember exactly.
 6 It must have been round about 4 o'clock, 4:30, somewhere
 7 around there. I can't –
 8 CHAIRPERSON: You can't be more precise
 9 than that?
 10 MR DA COSTA: No, I'm afraid not.
 11 CHAIRPERSON: Thank you.
 12 MR BUDLENDER SC: Thank you, Mr Da Costa,
 13 thank you, Chair.
 14 CHAIRPERSON: Mr Semenya?
 15 CROSS-EXAMINATION BY MR SEMENYA SC:
 16 Thank you, Chair. I represent the South African Police
 17 Service, Mr Da Costa. Good afternoon to you.
 18 MR DA COSTA: Good afternoon.
 19 MR SEMENYA SC: The wage agreement
 20 concluded in 2011 was still extant by August of 2012, that
 21 we now know. Correct?
 22 MR DA COSTA: That's correct.
 23 MR SEMENYA SC: It is an agreement that
 24 had as one of its parties Lonmin, right?
 25 MR DA COSTA: Yes, that's right.

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1 MR SEMENYA SC: NUM.
 2 MR DA COSTA: Yes.
 3 MR SEMENYA SC: And AMCU was not a party
 4 to that agreement, was it?
 5 MR DA COSTA: They were not party to
 6 negotiating that agreement.
 7 MR SEMENYA SC: Neither was the rock
 8 drill operators as an entity party to that agreement. Am I
 9 right?
 10 MR DA COSTA: Yes, not as an individual
 11 entity, no.
 12 MR SEMENYA SC: Now I take it at the time
 13 there was an appreciation on behalf of Lonmin that the rock
 14 drill operators' demand for an increase was with some merit
 15 to it. Am I right?
 16 MR DA COSTA: I'm sorry, Chair, I didn't
 17 catch the last part of that question.
 18 MR SEMENYA SC: There was an appreciation
 19 on behalf of Lonmin that the demand by the rock drill
 20 operators had some merit, for a wage increase.
 21 MR DA COSTA: Which demand?
 22 CHAIRPERSON: The demand for more money.
 23 MR DA COSTA: But I mean at the point of
 24 time that they came to see me or during the wage
 25 negotiations? So it's not clear to me.

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1 MR SEMENYA SC: Let's locate it in August
 2 of 2012.
 3 MR DA COSTA: Well, when they tabled
 4 their demand to me and I thought about it, as I've said
 5 there was a discrepancy between our pay grades and some of
 6 our competitors, so there was some case.
 7 CHAIRPERSON: Wasn't it more significant
 8 than that, that what had happened was that Impala had given
 9 an increase earlier in the year, that had been followed by
 10 Amplats. Both of them had given increases to rock drill
 11 operators. That's correct, isn't it?
 12 [12:29] MR DA COSTA: Yes, so Impala had given
 13 increases to the entire workforce, Anglo had adjusted
 14 their, so Impala, the entire workforce, including the rock
 15 drill operators, Anglo had adjusted their salaries just
 16 prior to that -
 17 CHAIRPERSON: So the increases given by
 18 Impala and Amplats, did put some kind of pressure I take it
 19 on - well, let me ask another question first. You were
 20 aware of the fact that those increases had been given?
 21 MR DA COSTA: Yes.
 22 CHAIRPERSON: I take it you've got some
 23 kind of information network, you tell each other what's
 24 going on?
 25 MR DA COSTA: Yes, we were aware of it.

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1 CHAIRPERSON: You were aware of it, and
 2 that then must have put some pressure on Lonmin, because
 3 you were out of line. Your competitors were giving more
 4 money to their workers than you were, and that might have
 5 caused dissatisfaction in your workforce?
 6 MR DA COSTA: Ja, well, you know, that
 7 was certainly in my mind, that dissatisfaction could
 8 develop. So from the perspective that there was this gap,
 9 I suppose a request to make an adjustment may have some
 10 merit.
 11 MR SEMENYA SC: Yes, there was that
 12 appreciation that there is some merit to that claim for
 13 increase in salary, correct, by the drill operators? Yes?
 14 MR DA COSTA: Yes, but as I've said, I
 15 mean, I responded to that request, so I thought there is
 16 some merit in it.
 17 MR SEMENYA SC: Ja, but I want to locate
 18 the appreciation not at your level alone, I want to locate
 19 it at the level of the company, as Lonmin.
 20 MR DA COSTA: Well, I'm thinking that
 21 once I escalated it to the executive, that that
 22 appreciation was there, because they also reacted to it.
 23 MR SEMENYA SC: So there was no bar for
 24 Lonmin and/or NUM or parties to the 2011 agreement to
 25 reopen the conversation, am I right?

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1 MR DA COSTA: I'm sorry, I'm not hearing
 2 the question properly. There was no?
 3 MR SEMENYA SC: There was nothing
 4 precluding Lonmin and NUM in appreciation of the legitimacy
 5 of the demand to reopen the 2011 conversation?
 6 MR DA COSTA: Well, I suppose not, except
 7 for the fact that when the request or the demand was
 8 tabled, it was very clear that the guys didn't want any
 9 union involvement in the discussions. So had we involved
 10 the NUM, I'm not quite sure how credible those discussions
 11 would have been, seen from the eyes of the rock drill
 12 operators.
 13 MR SEMENYA SC: No, but there was nothing
 14 precluding both you parties to that agreement, because that
 15 was the bar, was it not? What hindered any conversation
 16 around salaries was this 2011 agreement, was it not? That
 17 it will still extend, and it was still going to, you know,
 18 until 2013. Am I right?
 19 MR DA COSTA: Well, that was one of the
 20 issues. So I suppose by mutual agreement, you could reopen
 21 it?
 22 MR SEMENYA SC: And there was nothing to
 23 preclude you from doing it? As Lonmin, that is.
 24 MR DA COSTA: No.
 25 MR SEMENYA SC: You just elected not to

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1 reopen the subject, despite your appreciation about the
 2 legitimacy of the demand?
 3 MR DA COSTA: I mean, the other issue is
 4 that that wage agreement doesn't refer only to rock drill
 5 operators. I mean, it covers people a lot broader than
 6 that. It covers all the occupations. So this issue was
 7 isolated to rock drill operators, and at that stage, it was
 8 rock drill operators at one portion of the operation.
 9 CHAIRPERSON: Yes, rock drill operators
 10 at one portion of the operations. When did Amplats give
 11 its increase? I think Impala was earlier in the year, but
 12 when was Amplats? What is the time gap – lapse of time
 13 between Amplats' increase and the approach that you
 14 received from the Karee rock drill operators?
 15 MR DA COSTA: It was just before. In
 16 fact, I'm not sure that Anglo had given their increases
 17 yet, but they, at that point in time, they were in
 18 discussion. So they would have given their increases right
 19 around June, when these discussions started with –
 20 CHAIRPERSON: Well, that the date we can
 21 ascertain, I'd imagine. Did anyone in Lonmin think it
 22 might sensible to pre-empt any approach from all workers?
 23 The climate had now changed, and clearly Amplats' increases
 24 and Impala's increase, would have put pressure on Lonmin to
 25 give an increase as well, because you'd have discontented

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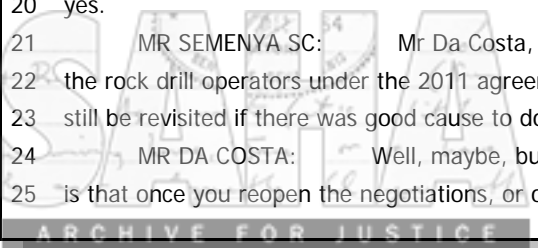
1 workforce, they talked among each other, isn't that so? So
 2 wouldn't it have been sensible for Lonmin to have pre-
 3 empted any approach from the workers, once they knew that
 4 these other increases had come?
 5 MR DA COSTA: Ja, it may well have been,
 6 and I know we were in discussion around increasing bonuses
 7 and increasing rock driller bonuses and that sort of thing,
 8 but I think Impala gave their increases round about mid-
 9 May, Anglo was soon after that, and even before we had too
 10 much time to think about it, this demand was on the table.
 11 So –
 12 CHAIRPERSON: But didn't – never mind
 13 Amplats, didn't the very fact hat Impala had given
 14 increases change the situation, create an atmosphere in
 15 your part of the platinum mining industry, that it was
 16 inevitable that there would have to be increases quite
 17 soon? Surely Impala must have put you people under
 18 pressure, surely, by the increases they gave?
 19 MR DA COSTA: There was a bit of that,
 20 yes.
 21 MR SEMENYA SC: Mr Da Costa, the wages
 22 the rock drill operators under the 2011 agreement could
 23 still be revisited if there was good cause to do so, no?
 24 MR DA COSTA: Well, maybe, but the issue
 25 is that once you reopen the negotiations, or once you

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1 revisit the agreement, it is not that easy to revisit it on
 2 a selective basis, so once you revisit it, you open up the
 3 agreement and you start wage negotiations all over again,
 4 which is not really something that we wanted to do.
 5 MR SEMENYA SC: Even when there is good
 6 cause to do so?
 7 MR DA COSTA: Well, as I pointed out,
 8 there may have been some merit regarding the rock drill
 9 operators, but not necessarily the entire workforce.
 10 MR SEMENYA SC: It may very well be, but
 11 there was nothing precluding you. You see, my difficulty
 12 is, if I follow the evidence, the argument is you could not
 13 deal with the demand of the RDOs, because there was still a
 14 wage agreement that was in place and was going to until
 15 2013, was that the reason why this salary increase demand
 16 was not seriously taken up by Lonmin?
 17 MR DA COSTA: I think, as I've said in my
 18 evidence previously, the fact that the wage agreement was
 19 still in force was a reason, it wasn't the reason.
 20 MR SEMENYA SC: Let's explore that as a
 21 reason. It was not one that was such a high bar, because,
 22 as parties to that agreement, you could amend it if good
 23 cause is shown, correct?
 24 MR DA COSTA: Well, as I've said, I mean,
 25 if you're going to reopen the wage negotiations just for

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1 rock drill operators, it would be a very difficult thing to
 2 do.
 3 MR SEMENYA SC: You're revisiting the
 4 proposition I'm putting to you, that if good cause was
 5 shown, there was nothing precluding you from revisiting the
 6 agreement?
 7 MR BURGER SC: Does my learned friend
 8 refer to you as Lonmin, or Lonmin or Lonmin and NUM as the
 9 two parties to the collective bargaining agreement?
 10 MR SEMENYA SC: Lonmin and the parties to
 11 the 2011 agreement.
 12 MR DA COSTA: Okay, so the parties would
 13 be the NUM, UASA and Solidarity, as I have it. So the
 14 point I'm making is that the wage agreement could be
 15 reopened, but having reopened it and you only discuss
 16 issues around the rock drill operator increases, that might
 17 not go down so well. So then you end up re-negotiating a
 18 wage agreement that you've negotiated just a few months
 19 before that. So that is a bit of a complication.
 20 MR SEMENYA SC: Yes, maybe you're
 21 anticipating the direction I'm going. I haven't explored
 22 whether or not there are those factors implicated, I merely
 23 asking, as parties to that agreement, if there was good
 24 cause to amend any portion of this, it was still open for
 25 you to do so. Isn't that right?



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1 MR DA COSTA: I've said by mutual
 2 agreement you could reopen it.
 3 MR SEMENYA SC: And I want to suggest to
 4 you that the reason Lonmin was not interested in opening
 5 it, is because you did not want to fully cover the demand
 6 that was raised by the rock drill operators at Lonmin?
 7 Okay, let me step back. Is it a fact Lonmin was not
 8 interested in reopening the 2011 agreement when that
 9 impasse occurred, am I right?
 10 MR DA COSTA: Yes, that's correct.
 11 MR SEMENYA SC: It is also correct that
 12 NUM, as a party to that agreement, was not interested in
 13 reopening discussions on the 2011 agreement, despite the
 14 impasse? Am I right?
 15 MR DA COSTA: I don't know if they were
 16 not interested. They didn't approach Lonmin around it, but
 17 I can't say they weren't interested in it.
 18 MR TIP SC: Chair, it needs more
 19 specificity, there's a very general proposition being put
 20 about NUM, and my learned friend must, in fairness to me,
 21 as well as Mr Da Costa, state whether he is of the view
 22 that there is evidence that NUM was approached to reopen
 23 the agreement and if so, on what terms, when, and by whom?
 24 MR SEMENYA SC: Okay.
 25 CHAIRPERSON: I'm sorry to interrupt, the

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1 evidence, in fact, is quite clear on the point, as far as I
 2 can remember, and I'm not sure that Mr Semenya stated it
 3 entirely correctly. Let me endeavour to do that. If I'm
 4 wrong, he'll correct me. My understanding is that NUM took
 5 up the stance, in fact, had meetings with the workers to
 6 say there's nothing we can do to increase the wages,
 7 because of a two year agreement, we've got to wait until
 8 next year, 2013. That was the NUM attitude. They appeared
 9 to have done that on the evidence we heard, through a
 10 misunderstanding of the provisions of the agreement. It
 11 was only when Mr – well, firstly, the Commission drew
 12 attention to that wording of the relevant section of
 13 agreement, which it didn't do, that you couldn't engage in
 14 any industrial action in order to get the wage terms
 15 changed. When Mr Zokwana came, he made it quite clear that
 16 NUM could have negotiated. There had been an incident in
 17 the past where the inflation rate went up dramatically over
 18 a short period, that it would have been possible to have
 19 negotiated, but it seemed clear from the evidence that that
 20 knowledge which Mr Zokwana had hadn't filtered down to
 21 branch level at Marikana, and that was why the NUM people
 22 adopted the attitude, the local ones, there's nothing we
 23 can do. They had meetings with the workers, in fact, told
 24 them there's nothing you can do, we must wait until 2013.
 25 I think that's an accurate statement of what happened.

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1 It's not suggested though, on the evidence, that Lonmin
 2 went to NUM and said, we'd like to reopen negotiations
 3 about the wages, in the light of what happened at Impala
 4 and Amplats, there's no suggestion that that happened. Am
 5 I understanding the position correctly, Mr Semenya?
 6 MR TIP SC: Well, perhaps I can respond,
 7 Chair, if I may? Because I think that it is important for
 8 my learned friend's questions to be put in a
 9 chronologically precise sequence, so that Mr Da Costa and I
 10 and the Commission are all aware of precisely when it is
 11 that my learned friend, Mr Semenya, says that some
 12 intervention could have been contemplated. The meeting to
 13 which the Chair has referred is dealt with in the evidence
 14 of Mr Setelele, and that was on the 9th of August 2012, once
 15 the RDOs had already taken the decision to embark on the
 16 strike action. He also testified that the question of
 17 R12,500 was never put to NUM, so that my learned friend's
 18 questions must –
 19 CHAIRPERSON: Put to NUM by whom?
 20 MR TIP SC: Well, by anybody. It was
 21 never put to NUM he says and that's unchallenged, so my
 22 learned friend, with respect, needs just to put this aspect
 23 of this cross-examination on the full basis.
 24 CHAIRPERSON: Mr Tip, when you're stating
 25 the facts, there's one fact you've left out, and that the

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1 strikers were holding banners, cardboard boxes and
 2 cardboard placards saying R12 500 wages. So the demand for
 3 R12,500 may not have been formally communicated either by
 4 email or by a lawyer's letter to NUM, but they knew very
 5 well that 12, 5 was the figure that the rock drill
 6 operators wanted.
 7 MR TIP SC: Chair, I don't want to begin
 8 to argue our case now, that placard, on the 10th of August
 9 outside the Lonmin offices, must be understood in
 10 conjunction with the, by then, very well-known position of
 11 the RDOs that they did not want NUM involved in anything.
 12 CHAIRPERSON: You've heard the debate
 13 between us, Mr Semenya, perhaps you can revisit your
 14 question and reformulate it in a way that avoids the
 15 objection that Mr Tip raised, which has got some substance
 16 in it, but I don't think you need worry about having to
 17 reformulate your question, because I suspect the thrust of
 18 your question will still remain?
 19 MR SEMENYA SC: You can accept it from
 20 me, Mr Da Costa, that an official of NUM addressed to the
 21 workers, who were RDOs, to say that they will not open the
 22 debate because there's a two year agreement in place. Now,
 23 I'm just pointing that to you, that that was the attitude
 24 of NUM, and I've cleared with you what the attitude of
 25 Lonmin was, haven't I?

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1 MR DA COSTA: Yes, I think so.
 2 MR SEMENYA SC: Yes. So the real parties
 3 to the agreement did not want it altered, even if there was
 4 good and sound reason to do so, in the light of you, as
 5 Lonmin, appreciating the legitimacy of the claim for a
 6 higher wage?
 7 MR DA COSTA: Well, I don't think that we
 8 wanted to reopen the wage negotiations, no.
 9 MR SEMENYA SC: You see, Lonmin, as a
 10 corporate citizen, would have been aware that South Africa
 11 was in some intractable position politically before 1990,
 12 right?
 13 MR DA COSTA: I believe so.
 14 MR SEMENYA SC: And there was an
 15 appreciation by those in leadership that there's no point
 16 in not negotiating with so-called terrorists, there must
 17 now be good ground to talk to them, that, as a corporate
 18 citizen, Lonmin was aware of it, correct? So formalism was
 19 put aside to answer to a very legitimate crying concern
 20 that there politically, am I right?
 21 MR DA COSTA: Are you referring to the
 22 discussions around 1990 to end apartheid?
 23 MR SEMENYA SC: Correct.
 24 MR DA COSTA: I must assume that Lonmin,
 25 as a corporate entity, was aware of that.

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1 MR SEMENYA SC: That there are instances
 2 where if a good cause is shown, there's no place for
 3 formalism. It's more important to avert a catastrophe that
 4 is looming.
 5 [12:49] That's the measure of good judgment by a leader,
 6 is it not?
 7 MR DA COSTA: No, possibly if it's clear
 8 that a catastrophe is looming and that by engaging in
 9 negotiations or whatever you can avert the catastrophe, it
 10 is a good thing to do, yes.
 11 MR SEMENYA SC: And I'm surprised – well,
 12 you do know, don't you, that the only request by the
 13 strikers on the koppie was to talk to management?
 14 MR DA COSTA: No, you know, I've covered
 15 this in my evidence earlier on in the Commission. I don't
 16 know that that was their only request. My understanding,
 17 and I wasn't directly involved in what was, in the meetings
 18 and discussions going on at that point. My understanding
 19 was that the strikers on the koppie wanted R12 500 and
 20 that's what they wanted from management, and when they
 21 wanted management to talk to them they wanted them to talk
 22 to them about the R12 500. So, but I have said that I
 23 wasn't directly involved in the discussions around this
 24 issue at that time.
 25 MR SEMENYA SC: Now I know as an

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1 individual you were not, but Mr Mokwena was representing
 2 Lonmin in these discussions around resolving the impasse.
 3 That you know.
 4 MR DA COSTA: Yes, I know that.
 5 MR SEMENYA SC: And I would expect that
 6 there would have been communication at management level
 7 that what the problem is, what the demands are, and whether
 8 or not they can be met, no?
 9 MR DA COSTA: Yes, and as I have said
 10 before in this Commission, my understanding of the demand
 11 was get management to the koppie and let them come and tell
 12 us how they're going to give us the R12 500. That was my
 13 understanding and – Chair, Mr Semenya is shaking his head.
 14 I assume he doesn't agree with me, but as I've said, I
 15 wasn't directly involved in the discussions and that, but
 16 having heard what came out of those discussions, that was
 17 my understanding of it.
 18 MR SEMENYA SC: I accept it as your
 19 understanding and it was the understanding of Lonmin that,
 20 1, the demand by strikers on the koppie was we want to talk
 21 to management, correct?
 22 MR DA COSTA: They wanted management to
 23 come to the koppie.
 24 MR SEMENYA SC: Yes, that was one part of
 25 their demand, correct?

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1 MR DA COSTA: Yes, that's correct.
 2 MR SEMENYA SC: And it's a demand Lonmin
 3 was not prepared to accede to.
 4 MR DA COSTA: It was and I believe I've
 5 covered that in my evidence as well as to why Lonmin was
 6 not prepared to accede to it.
 7 MR SEMENYA SC: No, but I haven't asked
 8 the why part. That's why I'm saying you're anticipating my
 9 questions. Mr Da Costa, it was a demand Lonmin was not
 10 prepared to accede to.
 11 MR DA COSTA: Yes.
 12 MR SEMENYA SC: And that was despite
 13 being offered an armoured escort to go to the koppie. Is
 14 that right?
 15 MR DA COSTA: It may well be. I've –
 16 again, I wasn't in the discussions but if you tell me that
 17 was offered I can't dispute it.
 18 MR SEMENYA SC: Now I'm a little
 19 perturbed. The representations and the stance and the
 20 position that Mr Mokwena was taking in relation to his
 21 discussions even with General Mpembe, were they mandated?
 22 Is it something that you as the executive knew to be the
 23 proper position he was taking?
 24 MR DA COSTA: I'm sure he was mandated,
 25 but just to make it clear, I don't sit on the executive

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1 committee. I'm not a member of the executive committee
 2 that provides these mandates.
 3 MR SEMENYA SC: But you're part of senior
 4 management and if you were, as the duty roster tells us,
 5 the one on duty on the 16th, and all the strikers wanted is
 6 to have a conversation, to have a discussion with
 7 management, that would have been a matter beyond your
 8 scope?
 9 MR DA COSTA: For me to go and have a
 10 discussion with the strikers?
 11 MR SEMENYA SC: No, no, no, for you as
 12 representing Lonmin to have management or the employer, as
 13 they were describing Lonmin, to go to the mountain.
 14 MR DA COSTA: Me personally?
 15 MR SEMENYA SC: You or anyone who would
 16 be duly authorised by Lonmin to go and meet with the
 17 strikers on the koppie.
 18 MR DA COSTA: You see, this is a, it's a
 19 little difficult for me, Chair, because I mean I'm, yes I'm
 20 a part of senior management, but I don't provide that sort
 21 of mandate or make those sort of decisions on behalf of
 22 Lonmin. So unfortunately me personally, it's a bit
 23 difficult. I have however previously in my evidence
 24 elaborated on the fact that the executive had these
 25 discussions and they decided not to go to the koppie.

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1 CHAIRPERSON: [Microphone off, inaudible]
 2 know by the way that the trade union presidents, both Mr
 3 Zokwana and Mr Mathunjwa had been there on the Wednesday
 4 and had spoken to the strikers from the safety and security
 5 of a Nyala through loudhailers and so on? Did you know
 6 that?
 7 MR DA COSTA: Yes, I'm aware of it. I
 8 think Mr Mathunjwa got out and –
 9 CHAIRPERSON: And Mathunjwa then went
 10 back and also spoke I think on the Thursday, but on the
 11 Thursday he actually got out of the Nyala, but on the
 12 Wednesday he and Zokwana remained in the Nyala. Now you
 13 knew that?
 14 MR DA COSTA: Ja, I'm aware of it.
 15 CHAIRPERSON: So I understand that the
 16 Lonmin executive perfectly appropriately was concerned for
 17 their safety if they went to the koppie unprotected as it
 18 were, because very awkward things could have happened, but
 19 were they informed of the fact that it's been asked that
 20 someone should go to the koppie, it's possible that someone
 21 can go as the trade union presidents did yesterday and
 22 remain in a Nyala and speak to the strikers in that way, or
 23 was that possibility not conveyed to them?
 24 MR DA COSTA: I'm not sure if it was. It
 25 may well have been, you know, but let me not elaborate. Mr

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1 Semenya has asked me not to elaborate, so –
 2 MR SEMENYA SC: No, you're welcome to
 3 elaborate if you so choose.
 4 MR DA COSTA: Okay, let me elaborate
 5 then. I mean I've said it previously in my evidence, you
 6 know, if the workers were asking for management, or if the
 7 employees were asking for management to come to the koppie
 8 to come and engage with them and talk to them and talk to
 9 them about R12 500, now you send an executive or a manager
 10 in a Nyala, he can't put his head out because then it's
 11 dangerous. So they don't know who it is, they don't know
 12 if they know the person, they don't know if they trust the
 13 person. You've got some person sitting in a Nyala speaking
 14 over a loudhailer, speaking to 3 000 angry people sitting
 15 on a koppie and the message that you're giving them is not
 16 particularly one that they would want to hear. I mean that
 17 whole situation is just not conducive to get into any kind
 18 of agreement. So you know, that put together with the risk
 19 of actually sending somebody there just doesn't make a lot
 20 of sense to me. That's my view, but I've said that before
 21 in the Commission.
 22 MR SEMENYA SC: But those imponderables
 23 you're pointing to did not inform the decision of the
 24 executive committee of Lonmin not to go to the koppie.
 25 MR DA COSTA: I'm not sure how Mr Semenya

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1 can say that.
 2 MR SEMENYA SC: Well, because the
 3 consistent position that was uttered by Mr Mokwena was that
 4 the only time that they will go to the, they will engage on
 5 this subject is if the workers come back to work, they laid
 6 down their weapons and they will talk to them through the
 7 union representatives. He did not mention the things you
 8 are mentioning now.
 9 MR BURGER SC: Chair, with respect, this
 10 is a debate for Mr Mokwena to have. This is an unfair
 11 debate with this witness and none of the executive members
 12 have given evidence yet. Perhaps my learned friend should
 13 pin that debate for the real people.
 14 CHAIRPERSON: How do you respond to that
 15 point, Mr Semenya? You know regard being had to the
 16 position this witness had in the company, there's only a
 17 limited amount of information he can give us. But anyway,
 18 how do you respond to the point Mr Burger –
 19 MR SEMENYA SC: If it is a subject about
 20 which the witness is unable to tell us he'll tell us that.
 21 I don't know what he knows. I don't know the information
 22 he knows. I don't know the meetings he has attended. I
 23 don't know whether this was even formally communicated in a
 24 meeting in which he was present by the executive.
 25 CHAIRPERSON: Mr Burger?

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1 MR BURGER SC: Yes, if my learned friend
 2 places him in a meeting where that's discussed, of course
 3 it's an absolutely fair question, but until such time it
 4 goes nowhere.
 5 CHAIRPERSON: Alright, well can you
 6 answer the question? Can you take us anywhere in response
 7 to the question Mr Semenya asked, or is this something that
 8 you can't deal with but Mr Mokwena or somebody else of that
 9 rank can?
 10 MR DA COSTA: Ja, you know, so as I've
 11 said, I wasn't in those meetings. So I have some
 12 information about what was said in some of those meetings,
 13 but I wasn't there. So it is difficult for me to answer –
 14 CHAIRPERSON: Mr Semenya, you may wish to
 15 keep your powder dry for Mr Mokwena when he comes.
 16 MR SEMENYA SC: Or even for lunch if you
 17 permit us, Chair.
 18 CHAIRPERSON: Alright, we'll take the
 19 lunch adjournment now. We'll resume at quarter to 2.
 20 [COMMISSION ADJOURNS COMMISSION RESUMES]
 21 [13:55] CHAIRPERSON: The Commission resumes,
 22 you're still under oath, Mr Da Costa. Mr Semenya?
 23 MR SEMENYA SC: Thank you, Chair. Mr Da
 24 Costa, I understand your evidence to be that the decision
 25 by Lonmin not to go to the mountain was taken by Exco?

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1 MR DA COSTA: Yes, I believe so.
 2 MR SEMENYA SC: Was it a decision so firm
 3 that that won't happen regardless?
 4 MR DA COSTA: You know I don't know.
 5 MR SEMENYA SC: Oh.
 6 MR DA COSTA: I don't, I wouldn't have
 7 thought that it was like that, but I don't know, I wasn't
 8 in those meetings.
 9 MR SEMENYA SC: Okay, in one of your
 10 responses some days later you said Lonmin in the future
 11 would do all it can to avert a recurrence of this type of
 12 tragedy.
 13 MR DA COSTA: Yes, and I believe that
 14 that is the position of the company.
 15 MR SEMENYA SC: So metaphorically if they
 16 go to the mountain Mohammed will go to the mountain this
 17 time?
 18 MR DA COSTA: Ja, it is probably an
 19 unfortunate chose of metaphor, but, well, I suppose so.
 20 MR SEMENYA SC: Do you know it occurs
 21 when one looks at the evidence that the demand by the
 22 strikers on the koppie was one which SAPS could not meet,
 23 am I right, the demand that they want to speak to their
 24 employer? It is one that SAPS could not meet?
 25 MR DA COSTA: Whether the SAPS couldn't

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1 meet that, I don't think that demand was being made to the
 2 SAPS.
 3 MR SEMENYA SC: So in some sense they
 4 were neutered as a player in the resolution of that
 5 impasse, am I right?
 6 MR DA COSTA: When you say the resolution
 7 of the impasse, the resolution to the unprotected strike?
 8 MR SEMENYA SC: Yes, was there a little
 9 that SAPS could do apart from attempting to make the two
 10 parties to meet and talk?
 11 MR DA COSTA: Yes, but I don't think at
 12 any point were SAPS expected to bring an end to the
 13 industrial actions that were going on.
 14 MR SEMENYA SC: The unrest at least, they
 15 were –
 16 MR DA COSTA: The unrest, the
 17 unlawfulness and probably some of the criminal activity
 18 that were linked to this unprotected action, but I don't
 19 think it was expected of the SAPS to bring an end to the
 20 strike.
 21 MR SEMENYA SC: Yes, and the repeated
 22 attempts by the SAPS leadership, General Mpembe and others
 23 just to persuade Lonmin to go to the koppie was rebut
 24 repeatedly, are you familiar with that evidence?
 25 MR DA COSTA: You know I am aware of the

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1 fact that the Lonmin executives did not want to go to the
 2 koppie for the reasons that I've outlined, ja.
 3 MR SEMENYA SC: In fact the real
 4 likelihood existed that the impasse could have been avoided
 5 by Lonmin going to the koppie.
 6 MR DA COSTA: Well, the impasse was there
 7 already. Ja, Chairman, if the suggestion is that had
 8 Lonmin gone to the koppie the issue would have been
 9 resolved and –
 10 MR SEMENYA SC: No –
 11 MR DA COSTA: - and the shootings
 12 wouldn't have taken place, I do not know.
 13 MR SEMENYA SC: No, I'm not going there,
 14 I'm saying there was a real likelihood that Lonmin going to
 15 the koppie could have resolved the impasse that was
 16 existing at that time.
 17 MR DA COSTA: I'm not sure that I agree
 18 that one can make that assumption.
 19 MR SEMENYA SC: Why not, that's the only
 20 demand they had?
 21 MR DA COSTA: You see in my mind that
 22 wasn't the only possible outcome. If the Lonmin executive
 23 had gone to the koppie and spoken to the people, I think
 24 you are then saying that that should have ended the
 25 impasse.

<p style="text-align: right;">Page 32936</p> <p>1 MR SEMENYA SC: There was a real 2 likelihood, I'm trying to use that phrase. 3 MR DA COSTA: No, I don't agree that 4 there was a real likelihood because there was probably an 5 equal or maybe even a higher likelihood that if the Lonmin 6 executive had gone there with the wrong message it could 7 have aggravated the situation even more, so that I would 8 put as being, you know a definite likelihood as well. So, 9 I don't think that you could say that. 10 MR SEMENYA SC: Well, there is nobody who 11 is supposed to take a wrong message there, they could 12 equally have said, okay, we have heard you now, we will 13 consider your demand. Was that not a possibility? 14 MR DA COSTA: It was a possibility but 15 again, you know I'm hearing that your thinking is that had 16 they been there instead I hear your demand, that that would 17 have brought an end to the impasse. 18 MR SEMENYA SC: No, - 19 MR DA COSTA: It may not have. It may 20 have had the sense of aggravating the situation even more, 21 that is also a definite possibility. 22 MR SEMENYA SC: No, I accept that there 23 are all those possibilities, but to a demand that, come and 24 speak to us as an employer, but I'll put the question, and 25 for the employer to say, okay, I've come to listen to you,</p>	<p style="text-align: right;">Page 32938</p> <p>1 but if it was not successful the opposite could have 2 happened as well, so you know with hindsight as a benefit 3 one tends to see things a lot clearer but you know at the 4 time when these deliberations are taking place the people 5 having to make the decisions don't have the benefit of 6 hindsight and at that time there are a number of 7 permutations that could flow out of certain actions that 8 you take and you've got to try to consider them, which I'm 9 sure our executive would have. 10 MR SEMENYA SC: To an argument that it 11 was easy for Lonmin to meet the request of going to the 12 koppie and the failure to do so, must have contributed to 13 aggravating the situation resulting in the loss of lives 14 that happened up to the 16th, your response would be? 15 MR DA COSTA: You know based on what I've 16 been saying for the last few minutes, I don't think if you 17 can make that assertion. 18 MR SEMENYA SC: Okay, now it is 19 commonplace when, say the SAPS comes to address any 20 criminality happening say in Lonmin, that you would assist 21 their effort, correct? 22 MR DA COSTA: That's correct. 23 MR SEMENYA SC: And to this extent it is 24 sound practice that you would have offered them your 25 premises for locating the JOC, right?</p>
<p style="text-align: right;">Page 32937</p> <p>1 that I suggest would have had a reasonable likelihood of at 2 least meeting in part with that type of demand. 3 MR DA COSTA: Ja, you know so I've 4 outlined what my understanding of the situation was and why 5 the executives didn't go there. I would assume in their 6 deliberations they considered the issues that we're 7 debating now but I assume so, I wasn't in those 8 discussions. 9 MR SEMENYA SC: Yes. 10 MR DA COSTA: So I can't say that for 11 sure. 12 MR SEMENYA SC: But drawing an 13 inspiration from how you handled the 21 June request, it 14 was a success. 15 MR DA COSTA: Ja, and I think that I have 16 pointed out as well that the conditions and the situation I 17 was facing on the 21st of June were significantly different 18 to the environment and the situation and the mood when the 19 group of employees had congregated on the koppie. So it 20 was two very different situations in my view. 21 MR SEMENYA SC: The latter one if 22 successful would have averted what was brewing already and 23 showing indications and mayhem that had happened until the 24 Sunday. 25 MR DA COSTA: Well, again if successful,</p>	<p style="text-align: right;">Page 32939</p> <p>1 MR DA COSTA: I believe so. 2 MR SEMENYA SC: And giving them such 3 information as was available to you through the security 4 personnel that you have? 5 MR DA COSTA: Yes, I think if it existed 6 in the SAPS executing their duties it is the right thing to 7 do. You know whether you're a corporate citizen or a 8 normal citizen in the country, I think that should be the 9 right thing to do. 10 MR SEMENYA SC: And subsequent to your 11 request that the heightened security alertness it would 12 have been possible to take, - sorry, by that you included 13 videotaping the individuals who were in this unprotected 14 strike, right? 15 MR DA COSTA: Well, to the extent that we 16 were able to, ja, I mean certainly through our surveillance 17 cameras and so on we were tracking what was going on, where 18 we did. 19 MR SEMENYA SC: And you would have been 20 able to have from your data an ability to tell who the 21 individuals who are involved in this unprotected strike? 22 MR DA COSTA: No, I don't think that's 23 true, you know I mean there were quite a lot of people 24 involved in this and you know a lot of that camera imaging 25 is not that good that you can specifically identify</p>

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1 individuals. In some cases you can, depending where the
 2 cameras are located and where the people are, but not in
 3 all cases.
 4 MR SEMENYA SC: Are you familiar that the
 5 view of the security of Lonmin was that these individuals
 6 are faceless and they couldn't be identified, are you
 7 familiar with that evidence?
 8 MR DA COSTA: No, I'm not sure that they
 9 were faceless.
 10 CHAIRPERSON: No, they obviously weren't
 11 faceless but what is suggested, the evidence in fact is
 12 that for example when the police went, General Mbombo and
 13 others, the top generals in the police force came to
 14 Marikana on the Monday, the 13th and had a meeting that
 15 evening with the police and there had actually been an
 16 earlier meeting I think on the Monday morning, and what was
 17 said by the Lonmin representatives to the police generals
 18 was, we don't know the cause, the faceless people, - we
 19 will not negotiate with faceless people. Now were you
 20 aware that that was the stance adopted by Lonmin in their
 21 discussions with the police as early as the 13th of August?
 22 MR DA COSTA: I think what was meant by
 23 faceless and again it is my understanding of that, is that
 24 this is a group of employees who were out there who we know
 25 that the majority of them are our employees, however we're

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1 not sure who represents them and who the representatives
 2 are and on that basis it was, we weren't sure who we would
 3 be negotiating with because you know when we approached the
 4 NUM they said that they were not representing the guys out
 5 on the koppie there and that demand must be made to them
 6 and when we approached AMCU, AMCU said they were not
 7 involved in this and anyway they weren't the bargaining
 8 agent, so they couldn't assist. So, there were no
 9 representatives of the group and I think that is what was
 10 meant by faceless.
 11 CHAIRPERSON: You see in the statement,
 12 I'm not sure if it has got an exhibit number but the
 13 statement, I don't if it has got an exhibit number yet, the
 14 witness statement by Mr Sinclair who was the Group Mining
 15 Emergency and Security manager of Lonmin and in his
 16 statement, at page 95 of the Lonmin bundle, he says in
 17 paragraph 25, he is talking about the events of the 10th,
 18 the Friday, the 10th and he says, he actually spoke to the
 19 strikers and he asked for their demands in writing and they
 20 said they were illiterate and they couldn't write and so
 21 on, and they said they want to speak directly to
 22 management. And he says he and Mr Blou and a member of
 23 SAPS then went to the management of Lonmin at the LPD. Now
 24 that, I take, it must be to you, you were a representative
 25 of Lonmin, one of the representatives of Lonmin at the LPD

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1 on the Friday, is that correct?
 2 MR DA COSTA: Yes, I was there.
 3 CHAIRPERSON: Alright, and he says the
 4 three of them went to the management of Lonmin at LPD to
 5 inform them of the position and to take further
 6 instructions on what to do, and he then says the crowd then
 7 simply walked passed the police and came to the LPD
 8 themselves while it was happening. He says, "I was in
 9 communication with Mr Abie Kgotle," I can't get the click
 10 right, but it is K-G-O-T-L-E, "the executive manager for
 11 Human Capital at Lonmin and other members of the management
 12 team in connection with this issue." So he was in
 13 communication with a number of people including you, is
 14 that right?
 15 MR DA COSTA: Yes.
 16 CHAIRPERSON: Alright, then he goes on to
 17 say, "It was clearly indicated to me from the management
 18 team that management would not speak to "a faceless crowd"
 19 when there were recognised and established structures in
 20 place at Lonmin to convey demands to management. About
 21 12h00," that's noon, "I conveyed this message to
 22 representatives of the crowd." So mention of a faceless
 23 crowd happened at the meeting on the 10th when you were
 24 there, is that correct?
 25 MR DA COSTA: Ja, I was in that meeting,

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1 you know I did hear that term faceless on a few occasions
 2 and again as I said, my view on that, my interpretation of
 3 that is non representative people, so they're not
 4 represented by anybody.
 5 CHAIRPERSON: That's not exactly what
 6 faceless means, the same thing was repeated to the police
 7 on the 13th, we can't negotiate with faceless people. Now
 8 the difficulty I've got with that and I must put it to you
 9 so that you can deal with it is, the photographs had been
 10 taken all the time, there was video footage and that kind
 11 of thing, of the people and it was also obvious, I take it,
 12 who the five were who came forward and spoke to you people
 13 at the LPD on the Friday. Now surely it would have been
 14 possible through the HR section to say who are these
 15 people, surely it would have been possible to have
 16 identified the leaders.
 17 MR DA COSTA: Well, nobody spoke to us on
 18 the Friday, I mean there were the five people that spoke to
 19 me at Karee.
 20 CHAIRPERSON: No, the five people, no, on
 21 the 10th the evidence is that five people were allowed into
 22 the building, is that correct?
 23 MR DA COSTA: No.
 24 CHAIRPERSON: Am I wrong on that, nobody
 25 came in at all?

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1 MR DA COSTA: No.

2 CHAIRPERSON: Well, that evidence which

3 we heard may not be correct, but there were, it was surely

4 possible to ascertain who the leaders were of the crowd who

5 were at the LPD on the Friday?

6 MR DA COSTA: No, I think the crowd that

7 were at LPD on Friday had no, it was not clear who the

8 leaders were. There were, I think it may be possible that

9 some people came forward and spoke to Sinclair and –

10 CHAIRPERSON: Yes –

11 MR DA COSTA: - and Blou and a person

12 from the SAPS.

13 CHAIRPERSON: That I think is the

14 evidence.

15 MR DA COSTA: So maybe at the stop street

16 or somewhere, somewhere out there, that is a possibility.

17 CHAIRPERSON: And they could have been

18 photographed, or were they photographed?

19 MR DA COSTA: I am really not sure.

20 CHAIRPERSON: If you wanted to know who

21 the faceless people really were that could easily have been

22 done and then surely the HR people could have been asked,

23 various shaft foremen and people of that kind, if they

24 could identify from among the rock drill operators who

25 these people were. Yes, my attention is being drawn to a

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1 further passage in Mr Sinclair's statement, paragraph 22.

2 Now, to be fair you may not have been aware of this. But I

3 am investigating a wider question. "The crowd which had

4 gathered in Wonderkop had by – this is the same day earlier

5 on.

6 [14:15] "The crowd which had gathered at Wonderkop had by

7 this time moved to the LPD four-way crossing. It was here

8 that Blaauw, the SAPS commander and I," that's -

9 "approached the crowd to ascertain what they wanted. About

10 six people came forward and intimated that they wanted to

11 speak to management. We were speaking in Fanagalo. I

12 informed them on the instructions of management that

13 management was not willing to negotiate with them if they

14 were not following the existing channels for negotiations."

15 And then he goes on to say that Blaauw and the SAPS member

16 and himself, and I read that passage to your earlier at

17 paragraph 24, went to the management of Lonmin to inform

18 them of the position, and so on, and take further

19 instructions, and they were then told we won't speak to a

20 faceless crowd.

21 Now if the facelessness was the problem then

22 surely it could have been arranged for photographs to be

23 taken of these people, HR people to be asked can you

24 identify these people. It wouldn't have been very

25 difficult, would it, to have identified these six people

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1 approximately who'd come forward and spoken on behalf of

2 the strikers?

3 MR DA COSTA: If they'd been filmed,

4 maybe, but I'm not sure that they had been. I mean we do

5 normally video record marches and stuff, but I don't if

6 that specific –

7 CHAIRPERSON: I'm actually busy with a

8 wider point. If there had been the idea of possibly

9 negotiating with these people, as opposed to a intrinsic

10 reluctance you would entertain the idea of negotiating with

11 them, then arrangements could have been made to ascertain

12 who they were inter alia by having photographs taken of

13 them and then the HR people asked to identify them. So in

14 other words if Lonmin had wanted to find out who the

15 leaders were and had wanted to negotiate with them it was

16 possible for it to be done. Is that correct?

17 MR DA COSTA: I suppose we could have

18 asked them for representatives, so yes, it –

19 CHAIRPERSON: If you had the photographs,

20 you could have just asked for representatives yes.

21 MR DA COSTA: Well yes, you know, but so

22 just, so just going back to what I was saying earlier, so

23 I, personally I never used the phrase "faceless," but my

24 understanding is when it was used it was used in the sense

25 of the people out there are, have no formal representation,

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1 so they're not represented by NUM, NUM says they're not

2 representing the people. They're not represented by AMCU,

3 AMCU says they're not representing the people. So who is

4 representing the people? Just some guys from within the

5 crowd somewhere, and that's my understanding where the

6 faceless comment came from.

7 MR SEMENYA SC: Mr Da Costa, whether or

8 not the individuals belonged to one or other union I

9 suggest was irrelevant because you knew as in June that

10 this is the category of workers who say they don't want

11 unions' involvement in this discussion with you. So it was

12 known to Lonmin already.

13 MR DA COSTA: Well, that is so, but I

14 must say as well that as the strike progressed, and I've

15 said this before, it developed to more than just an RDO

16 issue. It developed to an entire workforce was out on

17 strike and everybody that was sitting on the koppie wasn't,

18 weren't all RDOs. There was, there were different

19 occupations sitting there, so ja, and I mean as time went

20 on we actually became unsure about who was representing the

21 people. We became unsure of whether everybody there still

22 didn't want union representation.

23 MR SEMENYA SC: The fact that they belong

24 or don't belong to a union did not bar you from talking to

25 them in June.

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1 MR DA COSTA: No.

2 MR SEMENYA SC: And we're talking about

3 the same people in August.

4 MR DA COSTA: Yes, and I'll say it again,

5 the conditions to, the conditions in June and the

6 environment in June when I engaged with the, with my

7 employees who came to see me were vastly different to when

8 everybody was congregated on the koppie.

9 MR SEMENYA SC: I accept that. I'm

10 asking this; does it really matter that the circumstances

11 are changed, only this time you can only talk to them

12 through the union?

13 MR DA COSTA: Well, I think it mattered.

14 MR SEMENYA SC: You're saying that was a

15 significant difference, a historical fact that you knew?

16 That was the bar for management to speak to workers in

17 August simply because they're not coming through the union?

18 MR DA COSTA: No, that's not what I'm

19 saying. I think I've been very clear on why I engaged with

20 the employees during August and I think I've been fairly

21 clear on why Lonmin did not want to engage with the

22 employees once they were on the koppie.

23 MR SEMENYA SC: Those are the questions I

24 have for the witness, Chair.

25 CHAIRPERSON: Thank you, Mr Semenya. Re-

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1 examination, Mr Burger?

2 RE-EXAMINATION BY MR BURGER SC: Yes,

3 thank you, Chair. Mr Da Costa, there is going to be an

4 argument, we're told, that it would have been prudent for

5 Lonmin to speak to the striking workers in the period from

6 10th of August 2012. Against that background I want to ask

7 you a few questions. In your 20 or 24 years in the mining

8 industry have you been involved in wage negotiations?

9 MR DA COSTA: Yes, on a number of

10 occasions.

11 MR BURGER SC: I see. In these

12 negotiations does one negotiate one wage for everybody or

13 are there different categories of workers negotiating

14 perhaps the same or perhaps a different increase at any

15 given point in time?

16 MR DA COSTA: No, I've been involved in -

17 I think most companies have had setups where you have a

18 bargaining forum for certain categories of workers and

19 another bargaining forum for other categories of workers,

20 like the more sort of skilled categories tend to be in one

21 forum and the lesser skilled categories in another forum.

22 But once you're in that forum and you're bargaining on

23 wages then you generally bargain for everybody. There

24 might be some differentials that you agree to on, in some

25 wage categories, one or the other, but when the agreement

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1 is concluded it's concluded for that bargaining forum and

2 then the various, you know, maybe different increments and

3 so on are then detailed in the body of the agreement.

4 MR BURGER SC: I just want to make sure

5 that I understand that. If you speak for an employer and a

6 trade union speaks for a body of employees, do I understand

7 it correctly that at the end of the negotiation typically

8 one would get a say 10% increase for everybody in all

9 categories, or you may say a 10% for the lower categories

10 and 9% for the top categories?

11 MR DA COSTA: Ja, generally it turns out

12 that way, yes.

13 MR BURGER SC: I put that to you because

14 I want to understand and I'd like to put that before the

15 Commission that the ballpark would either be the same or

16 very similar, 9% to 10%. You won't have one category

17 getting a 1% increase and the other one a 20%, typically.

18 MR DA COSTA: I've never experienced such

19 a big differential in increases, no.

20 MR BURGER SC: Still by way of

21 background, the little bundle -

22 CHAIRPERSON: Before you move on to

23 something else, by categories - Mr Burger's word - is it

24 meant grades? Because there's a lot of talk in the papers

25 about Paterson grades and as far as I could see from some

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1 of the agreements that I've looked at there appears to be a

2 particular wage set for a particular Paterson grade of

3 workers. Is that right?

4 MR DA COSTA: Yes, so grades or

5 categories, yes.

6 CHAIRPERSON: And then as far as I could

7 see from some of the minutes I read of wage negotiations a

8 lot of the debate turns simply on the percentage increase

9 for particular grades. In other words at some stage in the

10 past wages were agreed for particular grades of people and

11 then what seems to happen in many of the minutes I have

12 read, the negotiation next time around simply deals with

13 what percentage increase should be given to a particular

14 grade. Is that also the way things normally happen or do

15 things happen differently perhaps?

16 MR DA COSTA: It is generally like that.

17 So there are wage bands set for each category or Paterson

18 grading of whatever, and then generally what has happened

19 in the, certainly in the past has been that you talk about

20 a percentage increase on, you know, on those wage bands

21 that are set. I mean that changed slightly in the most

22 recent negotiations we've had, but generally in the past

23 that was the case.

24 CHAIRPERSON: Thank you. Sorry, Mr

25 Burger, you were moving on to another point.

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1 MR BURGER SC: No, I'm not. I'm just
 2 developing the background. Thank you, Chair. I assume
 3 there will be outliers over a 20-year period in negotiation
 4 of wages and you'll have a particularly exceptional year
 5 where there's an outlier increase, but in your experience
 6 what would be the typical range of increases yielded by
 7 these annual negotiations in the platinum mining industry?
 8 MR DA COSTA: I would say, you know, over
 9 the last five years or so where it tended to be around sort
 10 of 7, 8% for the more skilled categories and then in the
 11 lower categories round about 9 to 10%. I think there was
 12 one year when we were doing pretty well that we settled on
 13 13%, round about 2006 or so, but generally 9, 10%.
 14 MR BURGER SC: We've handed in a little
 15 bundle called XXX3. If you have a look at page 20 and 21
 16 of that bundle, just to get a feel for the basic salaries
 17 of RDOs at the relevant time, that's the document with the
 18 different columns, giving us a pre-increase and a post-
 19 increase, and at my page 21 I have page 2 of a document
 20 which has at the top table 2, "Remuneration post October
 21 increase." You have that?
 22 CHAIRPERSON: [Microphone off, inaudible]
 23 265 overall of the Lonmin bundle.
 24 MR BURGER SC: 265 at the top. You can
 25 really look at the screen, Mr Da Costa. You would

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1 recognise the document. For my purposes do I read it
 2 correctly that the basic salary there for Lonmin after the
 3 increase was just under R6 000, R5 891?
 4 MR DA COSTA: Yes, that's correct.
 5 MR BURGER SC: Correct. What did you
 6 understand after your discussion with the RDOs in June of
 7 2012, what did their R12 500 demand relate to?
 8 MR DA COSTA: As I said, initially when
 9 they tabled that I thought it related to the 9 761 at the
 10 bottom, but then when I clarified it with them they were
 11 clear that it was, the demand was in relation to their
 12 basic. So the line that says "current basic 5 891," that
 13 was it.
 14 MR BURGER SC: Now this argument that's
 15 going to be addressed to the Commission is what we would
 16 call a hypothesis. It says if this had happened we tried
 17 to understand what the result would have been. Now I want
 18 to invite you into my crystal ball. Let's do it. Let us
 19 assume for the moment that Lonmin had spoken to the
 20 striking workers round about say the 10th of August 2012.
 21 Assume that for purposes of my crystal ball. You're with
 22 me?
 23 MR DA COSTA: Yes, I'm with you.
 24 MR BURGER SC: Assume at the same time
 25 that those workers had agreed to nominate people to speak

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1 for them, because it's unrealistic I put to you to expect
 2 that Lonmin would speak to 3 000 people, or 300 people for
 3 that matter. Assume there's a subcommittee who can speak
 4 for the rest.
 5 MR DA COSTA: Yes.
 6 MR BURGER SC: You're still in the
 7 crystal ball with me?
 8 MR DA COSTA: Yes.
 9 MR BURGER SC: Assume further that there
 10 was a safe place for negotiations. So assume for the
 11 moment that the LPD on the 10th was such a safe place where
 12 you could negotiate with spokespeople for the people
 13 outside. You're with me?
 14 MR DA COSTA: Yes, I'm with you.
 15 MR BURGER SC: Assume for my postulate
 16 that there would not be an objection by the incumbent trade
 17 union NUM to you talking to RDOs or a representative of a
 18 group of people directly. Assume all of that in place.
 19 MR DA COSTA: Yes, okay.
 20 MR BURGER SC: Now let's start the
 21 negotiation. Let's now do the postulate. You now
 22 negotiate for Lonmin and the five people negotiate for the
 23 people outside. Presumably in our postulate that
 24 negotiation goes something like this; you know that the
 25 basic salary for a category of people, very important in

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1 this debate, is R5 891 per month.
 2 MR DA COSTA: Yes, that's right.
 3 MR BURGER SC: The spokesperson for the
 4 five, the chief person, he says to you 'We want a basic of
 5 12 and a half thousand.' Where does the debate go from
 6 there?
 7 MR DA COSTA: Well, probably downhill
 8 very quickly. That's –
 9 MR BURGER SC: Why do you say that?
 10 MR DA COSTA: Well, you know when a
 11 demand like that is tabled it's so, well it's hugely
 12 unaffordable. There's just no way we can concede to that.
 13 MR BURGER SC: Let's take the hypothesis
 14 further and the spokesperson says to you, 'I'll settle for
 15 12 000.'
 16 MR DA COSTA: It's still hugely
 17 unaffordable. We cannot – there's just absolutely no way
 18 we can –
 19 MR BURGER SC: He says to you, 'I'll bend
 20 over backward, Lonmin, because I really want to defuse the
 21 situation.' We're still in the crystal ball. 'I'll take
 22 11 and a half thousand basic.'
 23 MR DA COSTA: No, it remains
 24 unaffordable. I mean it will close the company at that,
 25 those increases.

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1 MR BURGER SC: Have you in your 24 years
 2 ever been party to a negotiation where wages went up by
 3 100%?
 4 MR DA COSTA: No.
 5 MR BURGER SC: By 50%?
 6 MR DA COSTA: No.
 7 MR BURGER SC: Now we're still in the
 8 crystal ball because that's our exercise. We now have
 9 reached the point where we can't reach each other. You
 10 can't go to 11 and a half, and the spokesperson can't go
 11 down further. What do you think happens now?
 12 MR DA COSTA: Well, it's a – that's
 13 probably end of discussion and they walk out and give
 14 feedback to the people that have congregated outside to say
 15 that no, we were not reaching any agreement with the
 16 management, they don't want to give us the demand that
 17 we've tabled.
 18 MR BURGER SC: Now it's a difficult
 19 question, I don't want to be unfair to you but what happens
 20 then? On the probabilities.
 21 MR DA COSTA: Well, I've got to say I
 22 don't know what happens then, but you know, the possibility
 23 is that you're going to have some very, very highly
 24 irritated and angry people out there who are really quite
 25 upset with what management is doing to them, I guess.

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1 CHAIRPERSON: [Microphone off, inaudible]
 2 carry on.
 3 MR DA COSTA: No well, that's –
 4 CHAIRPERSON: I want to approach the same
 5 matter, same point from a slightly different angle. In
 6 your experience - you've been asked by Mr Burger what would
 7 probably happen – have you in your experience encountered
 8 cases where anything happened, where there was a deadlock,
 9 the company couldn't go down below a certain figure –
 10 sorry, couldn't go above a certain figure, I'm sorry. The
 11 company couldn't go above a certain figure and the
 12 negotiators on behalf of the workers couldn't go below a
 13 certain figure and there was an apparently unbridgeable
 14 gap. Have you encountered that situation in the course of
 15 your 24 years in the mining industry?
 16 MR DA COSTA: Yes, I've encountered it,
 17 and you know, normally when you get to that sort of
 18 position then it ends up being referred to the CCMA or to
 19 some sort of mediation process and then ultimately ends up
 20 in a strike, but you now, on many occasions in a protected
 21 strike. So that's generally the road that you go down
 22 there, thinking –
 23 CHAIRPERSON: [Microphone off, inaudible]
 24 sorry, just to follow it up on Mr Burger's question, in
 25 other words it's not just a guesswork thing. You were

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1 asked to say what would probably happen in that situation
 2 and probably the most scientific way, if it's the correct
 3 word, of finding out what would probably happen in that
 4 situation is to look at what's happened in the past in that
 5 situation and you say well, what often happens then is that
 6 there's a strike. They go to the CCMA, the CCMA can't
 7 conciliate and a certificate is given and there's a
 8 protected strike.
 9 MR DA COSTA: Yes, I mean that's –
 10 CHAIRPERSON: That's not just from recent
 11 experience from any of the –
 12 MR DA COSTA: No, I'm saying that the –
 13 CHAIRPERSON: We're talking in your 24
 14 years.
 15 MR DA COSTA: That's when the
 16 negotiations are conducted in a proper manner with the
 17 organised labour representatives and so on. And then you
 18 know, the mediation processes are followed.
 19 [14:35] But you know, in this instance I would imagine
 20 that the most likely outcome would be that if people are
 21 getting that sort of feedback where management refuses to
 22 see to the demands they would most likely be very, very
 23 upset and could then create some anarchy.
 24 MR MPOFU: Chairperson, ja, I would like
 25 to object to this line of questioning, of this, going down

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1 this hypothetical line forever. I did not object initially
 2 because I think most of what Mr Burger has put as
 3 assumptions were in fact what happened, but as far as the
 4 issue of what might or might not have happened when the
 5 RDOs were engaged, we do have a reference point which is
 6 what actually did happen after the tragedy because those
 7 direct discussions did take place and they did not lead any
 8 chaos. In fact they led to a solution.
 9 CHAIRPERSON: - argument but to be fair
 10 to Mr Burger, I haven't heard what his reply is to you but
 11 I would, my own response is this, Mr Semanya asked the
 12 witness a number of hypothetical questions based on the
 13 proposition that if Lonmin had been prepared to negotiate
 14 then there wouldn't have been the tragedy and therefore it
 15 is Lonmin's fault, to some extent at least and I
 16 understand, and the argument put to the witness which he
 17 didn't agree with, was that the probability was that if
 18 Lonmin had been prepared to negotiate there wouldn't have
 19 been the problem. And Mr Burger's question as I understand
 20 it, are designed to interrogate that aspect of the matter.
 21 It is hypothetical, but the questions he is interrogating
 22 were in themselves hypothetical.
 23 MR MPOFU: Yes, -
 24 CHAIRPERSON: I don't know how much
 25 further he is going to go, I understand your point which is

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1 a matter for argument of course, but one can look at what
 2 happened after the tragedy and when everybody came together
 3 under the shock of what had happened and there were
 4 facilitators who came in like Bishop Seoka and so on, who
 5 were able, it may well be argued, partly because of the
 6 tragedy to achieve a situation that perhaps we wouldn't
 7 have used it otherwise, but those are matters for argument,
 8 I'm not deciding them one way or the other, but I think we
 9 should let Mr Burger carry on a bit more because
 10 essentially he is re-examining, trying to deal with the
 11 point raised by Mr Semenya, whether he succeeds in that
 12 we'll see of course.

13 MR MPOFU: Yes, Chairperson, I understand
 14 that, if I may, ja, I accept that. You might remember that
 15 it is not only Mr Semenya who pushed that line, I did it
 16 for most of the morning, so I understand that but all I'm
 17 saying is that in both myself and Mr Semenya in pushing
 18 that line, will not relating that to some hypothetical
 19 situations but to the actual experience of this witness in
 20 handling a similar situation.

21 CHAIRPERSON: I understand that but I
 22 would allow the questions to proceed. I take it you're
 23 near the end of this particular point, Mr Burger, are you?

24 MR BURGER SC: Well, I don't make any
 25 promises, I have to close it off because I have –

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1 CHAIRPERSON: No, no, no, I understand,
 2 no, -

3 MR BURGER SC: No, I'm -

4 CHAIRPERSON: No, -

5 MR BURGER SC: But I accept that.

6 CHAIRPERSON: Yes, frivolity is something
 7 that we have here occasionally, we don't encourage it but
 8 we can't stop it –

9 MR BURGER SC: Well, as long as I'm not
 10 laughable, let me try again. I would like to develop this
 11 further with you, Mr Da Costa, on this basis, have you in
 12 your experience in the past 24 years ever been party to
 13 wage negotiations with workers in an unprotected strike,
 14 while they were in the unprotected strike?

15 MR DA COSTA: Not in wage negotiations,
 16 no. I've dealt with other issues during unprotected
 17 strikes but not wage negotiations.

18 MR BURGER SC: No, I'm talking 12,500
 19 down to 11,500 against 6, wage negotiations?

20 MR DA COSTA: No.

21 MR BURGER SC: Have you ever been aware
 22 of this happening at any other platinum mine, that an
 23 employer will negotiate wages with a crowd of people while
 24 they're in an unprotected strike?

25 MR DA COSTA: I think it may have

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1 happened at Impala earlier on in the year, but it is
 2 certainly not a typical practice, no.

3 MR BURGER SC: I want to clear up
 4 something which may be, might have left a misunderstanding.
 5 There was a reference this morning by my learned friend, Ms
 6 Barnes, referring to the notice of the mass meeting and
 7 there was a suggestion that what was handed up as Exhibit
 8 XXX10 was a clearer copy of the notice of a mass meeting
 9 you've debated in your evidence at page 3, I'll get the
 10 reference now, if you'll bear a moment, at page 30,322.
 11 You'll remember in that portion of the record you were
 12 asked to translate the Fanagalo into English and you do so.

13 MR DA COSTA: Yes, I remember.

14 MR BURGER SC: But you do so from a
 15 different document than what is today XXX10. Just have a
 16 look at XXX10 and you may want to look at the document, the
 17 very indistinct one which you had looked at before.

18 CHAIRPERSON: That's page 157, it would
 19 appear?

20 MR BURGER SC: I'm indebted to you.

21 CHAIRPERSON: Of the Lonmin bundle.

22 MR BURGER SC: I'm indebted.

23 CHAIRPERSON: That's Annexure B.

24 MR BURGER SC: All I'm pointing out is,
 25 157 is not the same as XXX10.

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1 CHAIRPERSON: Because the date is
 2 missing.

3 MR BURGER SC: The date is missing.

4 CHAIRPERSON: The document we were given
 5 today has got a clear date, 19/05.

6 MR BURGER SC: Yes.

7 CHAIRPERSON: 19/05, this one, the date
 8 section is blank and the word "offices" is at the bottom of
 9 the one we were handed and Annexure B to your affidavit, it
 10 is just office in the singular, so it is clearly not the
 11 same document.

12 MR BURGER SC: Ja, Chair, we've looked at
 13 it, I don't think it affects the translation but I just
 14 wanted to make sure that we are, we have no
 15 misunderstanding as to which document it is –

16 CHAIRPERSON: The point would be, yes, of
 17 course the document we were handed in today of course does
 18 seem to indicate that there was still a dispute and there
 19 is going to be a mass meeting because they wanted entry to
 20 their offices and that was on the 19th of May whereas the
 21 agreement had already been signed, giving them the right to
 22 have offices. It does look as if offices hadn't actually
 23 been made available at that time, but of course the point
 24 you're making is that the dispute relating to overtime had
 25 arisen earlier and that's supported or an attempt is made

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1 to support it by Annexure B, which can no longer be
 2 dismissed as a May document, that's the point you make, I
 3 take it.
 4 MR BURGER SC: Then just finally, Mr Da
 5 Costa, the whole faceless debate, you've explained to us
 6 how you understand faceless being, the crowd was not
 7 representative of any identifiable body, be it the trade
 8 union or a group of people. What I want to ask you in
 9 conclusion is, would that problem raised in that context
 10 have been addressed by taking a photograph of them?
 11 MR DA COSTA: No.
 12 MR BURGER SC: Thank you, Sir, those are
 13 the only questions in re-examination.
 14 CHAIRPERSON: Well, why it wouldn't it
 15 have been addressed by taking photographs? You've taken
 16 the photograph and gone to the HR people and said, whose
 17 face is this and they said, oh, that's Mr Mambush Noki, if
 18 he had still been in your employ, and then you would have
 19 known who the leader was.
 20 MR DA COSTA: No, I think that the point
 21 I was making and the way I understood Mr Burger is that my
 22 interpretation of faceless was that there was no formal
 23 representation for the group of people, so, you know taking
 24 photographs of some informal leaders would not have solved
 25 their problem. So my understanding is when reference has

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1 been made to faceless people that that was what the
 2 reference meant.
 3 CHAIRPERSON: Anything arising from the
 4 re-examination? I hope not, - oh, from my questions, oh,
 5 I'm sorry, I asked questions. Yes, certainly.
 6 MR MPOFU: One or two, Mr Da Costa, I
 7 just want to ask you, are you aware, firstly are you aware
 8 that according to the police witnesses and, Chairperson, I
 9 must apologise, I don't have the statement at hand but if
 10 there is an objection I'll deal with it. Are you aware
 11 that -
 12 CHAIRPERSON: How will you deal with it
 13 if you haven't got the statement at hand?
 14 MR MPOFU: Well, then I'll probably
 15 withdraw the question. Are you aware that according to the
 16 police evidence of the people who were present when the
 17 faceless statement was made, that what was being said by
 18 Lonmin was twofold? What they were saying was that these
 19 were faceless people who are not our employees, that was
 20 the thrust of the statement and SAPS' response was then to
 21 bring photographs and so on and then that statement was
 22 withdrawn. Are you aware that it was, it was not merely
 23 about two face, it was, these are people who, these are
 24 faceless people who are our employees and actually General
 25 Mpmembe I think said he was annoyed and then, - were you

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1 aware of that?
 2 MR DA COSTA: No.
 3 CHAIRPERSON: No, you weren't aware of
 4 it, okay.
 5 MR MPOFU: Okay, secondly, - sorry,
 6 Chairperson, yes, you were not aware, thank you.
 7 CHAIRPERSON: I see your statement of the
 8 evidence is correct, General Mbombo was the one who
 9 suggested looking at photographs.
 10 MR MPOFU: That is correct.
 11 CHAIRPERSON: But, okay, the second
 12 question?
 13 MR MPOFU: The second question is,
 14 apropos the suggestion that Mr Semenya, I think and also
 15 the chairperson to some extent, made about photographs and
 16 so on, is it your evidence at least that one of the people
 17 who was legitimate representatives of the RDOs when you
 18 spoke to them, was Mr Booi, correct?
 19 MR DA COSTA: He was one of the
 20 representatives that I spoke to, yes.
 21 MR MPOFU: Yes, and it is the evidence of
 22 Mr X at least, whom we didn't rely on very much but of
 23 other people as well, that the same Mr Booi was one of the
 24 people who were mandated to speak to management at LPD, can
 25 you accept that for now?

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1 MR DA COSTA: No, I can accept that, I
 2 wasn't aware of that but that's fine.
 3 MR MPOFU: Yes, so therefore had the
 4 suggestions that have been made by Mr Semenya and the chair
 5 had been taken of the representatives at least, somebody
 6 like you would have said, well, there is Mr Booi, he is one
 7 of our employees, he is not faceless, at the very least
 8 that problem would have been resolved, that he is an
 9 employee, would you agree?
 10 CHAIRPERSON: Before you answer and you
 11 would have gone further and you would have said, not only
 12 is he Mr Booi and not only is he one of our employees, he
 13 is one of the people, the representatives of the RDOs at
 14 Karee who spoke to me about the matter last month, that's
 15 correct, isn't it? That's what you would have said?
 16 MR DA COSTA: Yes, I mostly likely would
 17 have.
 18 MR MPOFU: Thank you, Chairperson.
 19 MR SEMENYA SC: Chair?
 20 CHAIRPERSON: Yes, Mr Semenya?
 21 MR SEMENYA SC: May I just put one matter
 22 that arises?
 23 CHAIRPERSON: Yes.
 24 MR SEMENYA SC: Mr Da Costa, the
 25 adjustment in the salaries or wages of the RDOs in Impala,

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1 it was not done through an allowance, was it?

2 MR DA COSTA: No, I think Impala

3 increased the actual salaries of the employees, at Anglo

4 Platinum it was done by way of an allowance.

5 MR SEMENYA SC: That is all, Chair.

6 CHAIRPERSON: It appears actually from

7 this exhibit, page 264 and 265 where the memorandum that Mr

8 Kgotle wrote to Mr Munro and Mr Mokwena, dealing with the

9 decision that should be made regarding the allowance, gave

10 comparative tables and the Impala one has in the column RDO

11 allowance naught and the Lonmin proposed one has the same

12 and then in the case of Anglo there was R750, so Lonmin

13 appeared to have got the idea of a 750 RDO allowance from

14 Anglo's and of course the basic salary at Anglo's was

15 substantially higher, but that's not a matter we need to

16 discuss at this stage. That's right, isn't it?

17 MR DA COSTA: Ja, I'm not quite sure how

18 they can arrive at the 750 –

19 CHAIRPERSON: Well, look at the –

20 MR DA COSTA: No, that –

21 CHAIRPERSON: Look what's on the screen.

22 MR DA COSTA: That's what's on the table,

23 yes.

24 CHAIRPERSON: Alright.

25 MR DA COSTA: That's what reflects on the

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1 table.

2 CHAIRPERSON: That shows you, when your

3 people and we weren't party to it, you made another

4 suggestion they didn't accept, but when your people decided

5 upon the 750 allowance for unassisted RDOs, they looked at

6 this comparator table and they took the 750 which was the

7 Anglo figure, that's right, but the basic salary is

8 different, a R1,000 difference, that's correct too, that's

9 what the document says.

10 MR DA COSTA: Ja, so it is most likely,

11 yes.

12 CHAIRPERSON: Ja, ja, alright. I don't

13 see anyone else wanting to ask you questions arising, so

14 you'll be excused from further attendance. Thank you for

15 coming, for giving us your evidence. If it is necessary

16 for you to come back, I don't think it is likely but it is

17 possible, then you must agree that you'll come back without

18 us having to send you a subpoena, but if you're prepared to

19 give me that undertaking you'll be excused from further

20 attendance.

21 MR DA COSTA: No, that's fine, I'll give

22 you that undertaking, Chair.

23 CHAIRPERSON: Thank you.

24 [NO FURTHER QUESTIONS - WITNESS EXCUSED]

25 CHAIRPERSON: Alright, shall we now take

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1 the tea adjournment before we get to the next witness who

2 is going to be Mr Louw, I believe, 15 minutes.

3 [COMMISSION ADJOURNS COMMISSION RESUMES]

4 [15:16] CHAIRPERSON: The Commission resumes. Mr

5 Van As, I believe you're dealing with the next witness.

6 MR VAN AS: Thank you, Mr Chairman. I

7 understand my learned friend Mr Wesley has some time

8 periods he wants to allocate before we start with the

9 witness.

10 CHAIRPERSON: Yes, that's correct. Yes,

11 quite right. Mr Wesley, would you please inform the

12 assembled gathering of the time allocations?

13 MR WESLEY: Thank you, Chair. In chief

14 there will be 60 minutes allocated, the evidence leaders 60

15 minutes, thereafter NUM and Mrs Fundi 120 minutes, that's

16 two hours, then the injured and arrested 45 minutes, SAPS

17 90 minutes and AMCU 20 minutes. The LRC and the families

18 have no cross-examination for this witness.

19 CHAIRPERSON: Thank you. Mr Van As, you

20 now call the witness?

21 MR VAN AS: We call Mr Louw to the

22 witness box, Mr Chairman. Mnr Louw, sal u asseblief

23 opstaan? Is u bereid om getuienis onder eed af te lê?

24 MNR LOUW: Ja, mnr die Voorsitter.

25 VOORSITTER: U sweer dat die getuienis

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1 wat u gaan aflê voor hierdie Kommissie die waarheid gaan

2 wees, die hele waarheid, en niks anders as die waarheid

3 nie. Sal u, u regterhand oplig en sê, "Ek sweer, so help

4 my God."

5 DEWALD LOUW: Ek sweer, so help my God.

6 VOORSITTER: Dankie. U mag sit.

7 CHAIRPERSON: Yes, so what is happening

8 is the evidence in Afrikaans will be interpreted here after

9 the evidence is given, but in the room across the way the

10 Xhosa interpreter is present and he will be interpreting

11 the Afrikaans evidence into Xhosa and those in the chamber

12 who've remembered to bring their hearing apparatus with

13 them will be able to follow Xhosa translation both of the

14 English questions and of the Afrikaans answers. Mr Van As.

15 MR VAN AS: Thank you, Mr Chairperson.

16 Mr Chairperson, we're going to number the exhibits, some of

17 which are already before the Commission. We rely on the

18 statement of Mr Louw dated 16 August 2012. That I

19 understand has to be given a new exhibit number. I'm told

20 it's DDDD1.

21 CHAIRPERSON: Yes, that is so.

22 MR VAN AS: We're also relying on the

23 statement of Mr Louw dated 25 October 2012, that's already

24 an exhibit before the Commission. It's AAAA36.

25 CHAIRPERSON: That's so.

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1 MR VAN AS: The shooting incident report
 2 dated 21 August 2012, if you could please make that DDDD2.
 3 CHAIRPERSON: It will be so marked.
 4 MR VAN AS: A series of photographs of
 5 damage to a bakkie that Mr Louw and a Mr Vorster were
 6 travelling in on the 12th of August, if that could please be
 7 DDDD3. I think there's six of them, if that could be
 8 DDDD3.1 to 3.6, please.
 9 CHAIRPERSON: Yes.
 10 MR VAN AS: And then finally –
 11 CHAIRPERSON: The photographs will be so
 12 marked.
 13 MR VAN AS: And then finally two
 14 photographs that are already before the Commission, that's
 15 exhibit JJJ27.9472 and JJJ29.265.
 16 CHAIRPERSON: Those you say they are
 17 already before us.
 18 MR VAN AS: Already before the
 19 Commission.
 20 CHAIRPERSON: Yes, thank you, please
 21 proceed.
 22 EXAMINATION BY MR VAN AS: Thank you. Mr
 23 Louw, where are you employed?
 24 MNR LOUW: Ek is huidiglik "employed"
 25 deur Lonmin Marikana, die Intervensie Eenheid, Sekuriteit.

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1 MR VAN AS: And how long have you been
 2 working there?
 3 MNR LOUW: Huidiglik tot en met die 16de
 4 van hierdie, 16de Junie van hierdie jaar, ses jaar.
 5 MR VAN AS: There's a bundle of documents
 6 before you –
 7 CHAIRPERSON: Sorry.
 8 MR MAHLANGU: The answer didn't come very
 9 clear to me.
 10 MNR LOUW: Die 16de Junie, ses jaar.
 11 MR VAN AS: You have a bundle of
 12 documents before you. I'd like you to please refer to the
 13 first tabulated document in the bundle. Can you identify
 14 that document, please?
 15 MNR LOUW: Ja, ek kan, mnr die
 16 Voorsitter.
 17 MR VAN AS: What is that document?
 18 MNR LOUW: Dis 'n beëdigde verklaring wat
 19 afgelê is deur myself aan die Suid-Afrikaanse Polisie en
 20 dit was gewees op die 16de Augustus 2012.
 21 MR VAN AS: Do you stand by the contents
 22 of the statement?
 23 MNR LOUW: Ja, mnr die Voorsitter, maar
 24 as dit mnr die Voorsitter behaag wil ek graag net
 25 byvoegings maak tot hierdie verklaring en ook die volgende

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1 een, as dit moontlik is.
 2 MR VAN AS: What are those additions?
 3 MNR LOUW: Op die eerste verklaring is
 4 daar geen melding gemaak van die hoeveelheid rondtes, of
 5 die aantal rondtes en die tipe rondtes wat afgevuur is
 6 tydens die 12de, die aanval op onself nie. Ek sal graag
 7 net addisionele, op die verklaring ses rubber rondtes wat
 8 ons uit gevuur het daardie oggend byvoeg, en dan een AAA-
 9 rondte wat ons uitgeskiet het toe ons deurgegaan het om te
 10 kyk of mnr Fundi en mnr Mabelane nog reg is.
 11 MR VAN AS: You talk about "we" or "ons."
 12 Did you fire these rounds yourself?
 13 MR MAHLANGU: If I could just be given
 14 the chance –
 15 MR VAN AS: I beg your pardon.
 16 MR MAHLANGU: - to interpret what has
 17 been said.
 18 MR VAN AS: Did you personally fire this
 19 ammunition, discharge this ammunition?
 20 MNR LOUW: Dis korrek, Meneer.
 21 MR VAN AS: And how many rounds did you
 22 discharge on the 12th of August 2012?
 23 MNR LOUW: Ek het 'n totaal van sewe
 24 rondtes afgevuur.
 25 MR VAN AS: And what were those rounds?

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1 MNR LOUW: Dit was ses rubber rondtes en
 2 een AAA-rondte.
 3 CHAIRPERSON: Did you interpret what he
 4 said about Mr Fundi?
 5 MR MAHLANGU: That was part of the
 6 question, yes, and he added - that was before the question,
 7 and the shots that were fired –
 8 MNR LOUW: Mnr die Voorsitter, as ek dalk
 9 net kan teruggaan, ek het dalk seker bietjie vooruit
 10 gehardloop. Ek het bedoel met die ses rubber rondtes wat
 11 ek afgevuur het was tydens die aanval op myself en mnr
 12 Vorster, en dan het ek ook een AAA-rondte afgevuur toe ons
 13 inbeweeg het om vir mnr Fundi en vir mnr Mabelane te gaan
 14 help.
 15 MR VAN AS: You've made no mention of the
 16 discharge of those rounds in your first statement?
 17 MNR LOUW: Nee, ek het nie, mnr die
 18 Voorsitter.
 19 MR VAN AS: If we can then please look at
 20 exhibit AAAA36, the second tabulated item in the bundle, Mr
 21 Louw. Can you please identify this document?
 22 MNR LOUW: Ja, mnr die Voorsitter, dit is
 23 ook 'n verklaring wat afgelê is deur myself tydens ons
 24 "ICAM" verhoor wat ons gehad het by Lonmin se interne
 25 ondersoek, en dit was gewees, en dis geteken op die 25ste

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1 Oktober 2012.

2 MR MAHLANGU: Mr Chairperson, if I could

3 ask the –

4 CHAIRPERSON: You used the expression in

5 Afrikaans, "ICAM verhoor." That's a description of the

6 internal investigation held at Lonmin. Is that correct?

7 MNR LOUW: Dis korrek, Meneer.

8 CHAIRPERSON: Thank you.

9 MR MAHLANGU: Chairperson, if I could

10 possibly be given a copy of this document because reference

11 is being made to dates and times which I –

12 MR VAN AS: Or perhaps we should take it

13 slowly. When did you complete this ICAM statement?

14 MNR LOUW: Die ICAM statement, soos ek

15 gesê het, Meneer, is geteken en was afgehandel op die 25ste

16 Oktober 2012.

17 MR VAN AS: And if you look at page 4 of

18 the statement, is that your signature?

19 MNR LOUW: Dis korrek, mnr die

20 Voorsitter.

21 MR VAN AS: And if I could please take

22 you to page 3 of the statement, the top paragraph on page

23 3 –

24 MNR LOUW: Ja, Meneer.

25 MR VAN AS: In the first paragraph, if I

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1 could read it, you say in the second line, "I also opened

2 fire and managed to get off two shots before ordering

3 Vorster to get back into the vehicle so that we could

4 retreat."

5 MNR LOUW: Dis korrek, mnr die

6 Voorsitter.

7 MR VAN AS: Did you fire any further

8 shots during that incident?

9 MNR LOUW: Dis korrek, mnr die

10 Voorsitter.

11 MR VAN AS: Can you please explain to the

12 Chairperson under what circumstances and how many shots you

13 fired?

14 MNR LOUW: Mnr die Voorsitter, ek het 'n

15 addisionele vier rondtes nog afgevuur, wat al vier rubber

16 rondtes was, vanuit die binnekant van die voertuig.

17 MR VAN AS: And then if you please go to

18 tabulated document number 3, Mr Chairperson –

19 CHAIRPERSON: Before we get to that, in

20 the sentence that you first read "I also opened fire and

21 managed to get off two shots," was that live ammunition you

22 were talking about or rubber bullets?

23 MNR LOUW: Mnr die Voorsitter, dis

24 negatief, dit is rubber rondtes wat ek op daardie stadium

25 uit gevuur het.

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1 CHAIRPERSON: Thank you.

2 COMMISSIONER HEMRAJ: And the second lot

3 of four rubber bullets that you fired, was that where you

4 drove through the crowd, leaving the scene as you say in

5 the second paragraph on page 10?

6 MNR LOUW: Ja, die vier rondtes wat ek

7 daar uitgeskiet het, Kommissaris, was tydens die aanval op

8 ons en dis toe ons besig was om te probeer wegbeweeg van

9 die onmiddellike aanval.

10 MR VAN AS: Did you file a shooting

11 incident report in respect of the shooting incident?

12 MNR LOUW: Ja, ek het, mnr die

13 Voorsitter.

14 MR VAN AS: If you go to tabulated

15 document 3, that will be exhibit quadruple 2, Mr

16 Chairperson.

17 CHAIRPERSON: DDDD2.

18 MR VAN AS: DDDD2. Is this the shooting

19 incident report that was filed?

20 MNR LOUW: Dis korrek, mnr die

21 Voorsitter. Ek wil net graag, as dit die Voorsitter

22 behaag, ook net op hierdie verslag wat ek ingevul het ook

23 net melding maak van die byvoeging wat ek graag wil doen in

24 terme van die rondtes wat ek afgevuur het, en hierso het ek

25 heeltemal nagelaat om melding te maak van die een AAA-

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1 rondte wat ek afgevuur het.

2 MR VAN AS: Alright, now let's go back to

3 the 12th of August 2012, and if I can please ask Mr Bennett

4 to put up the Google map of the Wonderkop area. If you

5 could please go to EPL, Eastern Platinum. Right, can you

6 perhaps show, Mr Louw, can you show us where exactly you

7 people were at EPL when you got the –

8 CHAIRPERSON: Sorry, tell me, is this an

9 exhibit? I know we have had Google maps in the past. Is

10 this one actually an exhibit? So what concerns me is how

11 we can get a permanent record of what you're now going to

12 be shown onto the record. Now we've had some Google Earth

13 maps in the past before us. I'm not sure whether this, and

14 certainly parts of what we can see here we've certainly

15 seen on those. If he shows us things, but perhaps you can

16 describe in words - otherwise I'll have to do it - describe

17 in words what he's showing and you can give attention

18 possibly overnight to the question as to whether we should

19 put some document in as an exhibit which will assist those

20 who follow the record later, and not only those of us who

21 have to read the record for the argument and when the

22 report is being written, but I fear others in the – well,

23 not fear, I anticipate that others in the future will read

24 the record, or parts of the record of this Commission, and

25 we've got to have a complete record for them to see and for

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1 ourselves to read as well, of course, when we're preparing
2 for the matter.

3 MR WESLEY: Chair, if I can just
4 interject. What we've done, what we propose to do with
5 Google maps, Mr Bennett has the ability to save any picture
6 that you see on the screen at any moment and for instance
7 if we were to decide that this is a photograph that we wish
8 to use, Mr Bennett can immediately save it, we can
9 immediately assign it an exhibit number and it is then in
10 the record. We will have it then.

11 CHAIRPERSON: So the concerns I've raised
12 can be addressed.

13 MR WESLEY: They can be addressed and –

14 CHAIRPERSON: Fine, thank you. I'm
15 pleased to hear that.

16 MR WESLEY: I'll interject every now and
17 then to make sure that we do remember to save them.

18 CHAIRPERSON: Perhaps we can have a
19 special exhibit ledger for all the saved maps, because it
20 may not only be with this witness, and the hardcopies can
21 be printed in due course for us. But also I'm also
22 concerned, because as I say when he points something out,
23 if that could please be described in words for us so that
24 we understand that. Alright, let's proceed.

25 MR VAN AS: Mr Louw, can you take us to

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1 EPL where you started your shift that morning?

2 MNR LOUW: Kan Meneer dalk net die fokus
3 'n klein bietjie kan uitbring sodat ek myself net kan
4 oriënteer op die kaart? As ek dan die persoon wat die
5 kaart monitor of beheer net vra om na die regterkant van
6 die – kan nog na die regterkant toe gaan, kan nog regs
7 beweeg. Kan ek vra dat die fokus net 'n klein bietjie uit
8 gebring word, as u nie omgee nie. Kan u ook dan die kaart
9 net vir my klein bietjie opskuif na die boonste kant toe?

10 MR VAN AS: Perhaps we can circumvent
11 this if we can just maybe zoom in on the Marikana hostel
12 where the actual incident took place and we can get back to
13 the other stuff later.

14 MNR LOUW: Kan u nog 'n klein bietjie
15 links gaan? Links, asseblief. Okay, u kan daar stop,
16 Meneer. Kan ek voortgaan, mnr die Voorsitter?

17 MR VAN AS: Sorry, can I interject?
18 Craig, please save it as DDDD4.1.

19 COMMISSIONER HEMRAJ: Mr Van As, can I
20 just ask what date are we dealing with?

21 MR VAN AS: We're dealing with the Sunday
22 the 12th of August, Commissioner.

23 COMMISSIONER HEMRAJ: Thank you.

24 MR VAN AS: Mr Louw, can you point out
25 with your strobe light where you stopped the bakkie? You

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1 make mention in your statement that the bakkie, you and Mr
2 Vorster stopped your vehicle. Can you perhaps show us
3 exactly where you stopped?

4 MNR LOUW: Dis korrek, mnr die
5 Voorsitter, as ek dalk kan vra dat u vir ons in daardie
6 omgewing net bietjie kan in fokus. U kan nog 'n klein
7 bietjie na u regterkant toe gaan. Ekskuus tog, links, want
8 die kaart moet regs geneem word. As u kan daar stop. Mnr
9 die Voorsitter, om voort te gaan met my getuienis –

10 CHAIRPERSON: No, no, sorry, I take it on
11 the right-hand side we can see the rugby stadium – the
12 football stadium rather, or the grandstand, and then as one
13 goes to the left there's a crossing, there's a road that
14 runs below the football stadium and it reaches an
15 intersection and at that intersection on the north-eastern
16 corner of the intersection, that's where he's indicating at
17 the moment.

18 MR VAN AS: Correct. Is that where you
19 stopped your vehicle?

20 MNR LOUW: Daarso waar ek nou wys,
21 meneer, ons het in daardie omgewing -

22 [15:36] CHAIRPERSON: It's not where the hand
23 was, but immediately below the point that I referred to,
24 effectively on the south eastern corner of that
25 intersection there is what amounts to a traffic island and

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1 which goes eastwards from the point that we're talking
2 about. And the point the witness indicated was a point
3 what really amounts to the north western corner of the
4 island, the traffic island.

5 MR VAN AS: Thank you, Mr Chair. And
6 where do you come from, Mr Louw?

7 MR MPOFU: Chairperson, I'm sorry to
8 interrupt. I just wanted to place on the record that
9 insofar as the Google map is current and situational I know
10 that there have been some changes in some of those areas
11 some of which I have noticed. If there's any significant –
12 and unfortunately the people I represent have had to leave
13 early. I believe they would know the area better because
14 of the tragedy. If we pick up any changes between what the
15 situation is now and what it was then, then we'll raise it
16 maybe tomorrow, but I just wanted to.

17 CHAIRPERSON: No, no I appreciate that.
18 Obviously the rugby, I just call it rugby, I'm sure it's
19 association football actually, the soccer stadium I take it
20 is still in the same place.

21 MR MPOFU: I think so, Chair.

22 CHAIRPERSON: I take it the traffic
23 island is still in the same place too. Mr Lotz is right.

24 MR CHASKALSON SC: Chairperson, the way
25 of resolving this problem because we can use an historical

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1 photograph, so maybe if Craig could go to the photograph, I
 2 know there's one from January 2013. And I think there's –
 3 there isn't one from August 2012, but there's certainly one
 4 January 2013 and there's one a little bit before August
 5 2012. If he could just use the photograph that's closest
 6 to August 2012 we'll avoid this problem.

7 COMMISSIONER HEMRAJ: - that he used
 8 depicting this area, Mr Tip, during his cross-examination
 9 put an exhibit depicting this area very clearly.

10 MR CHASKALSON SC: Yes they depict the
 11 area clearly. I think Mr Mpofu's problem is that this is
 12 an aerial photograph from May 2014 and the area may have
 13 changed. But we can change that base aerial photograph.

14 CHAIRPERSON: Anyway do we have to do it
 15 now? It looks to me as if what we're seeing at the moment
 16 is probably the way it was in August 2012. Overnight we
 17 can ask Craig to find the photographs to which Mr
 18 Chaskalson referred and we can carry on with that tomorrow
 19 and if there are any changes Mr Mpofu says they can mention
 20 it. But I imagine for the moment the area that we're
 21 talking about is the same now or certainly was the same in
 22 May 2014 as to what it was in August 2012.

23 MR MPOFU: Yes I accept that,
 24 Chairperson. I'm happy to proceed on that basis. I just
 25 wanted to place it on record in case I raise something

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1 tomorrow and then you say why did I keep quiet. Thanks,
 2 Chairperson.

3 CHAIRPERSON: Let's carry on shall we?
 4 MR VAN AS: Thank you, Mr Chair.
 5 CHAIRPERSON: We got to the point where
 6 the vehicle is stopped and what amounts to the north
 7 western corner of that traffic island.

8 MR VAN AS: In which direction was the
 9 vehicle facing, Mr Louw.

10 MNR LOUW: Die voertuig het na die ooste
 11 kant gewys met sy neus na voor. Ekskuus tog, ek wil myself
 12 net herstel, - Wes, ekskuus tog.

13 CHAIRPERSON: It was facing away from the
 14 football stadium.

15 MNR LOUW: Dis korrek, mnr Voorsitter.
 16 MR VAN AS: And who was in the vehicle.
 17 MNR LOUW: Myself en Martin Voster was in
 18 the voertuig gewees.

19 MR VAN AS: And can you remember what
 20 time this was more or less?
 21 MNR LOUW: Dit was ongeveer hier by 9:35,
 22 9:40. Ek is nie seker nie.

23 MR VAN AS: And can you tell the
 24 Commission in your own words what you observed?
 25 MNR LOUW: Mnr Voorsitter, ons het in die

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1 pad in 'n noordelike rigting beweeg van die BMR se kant af,
 2 hierdie kant toe. Ons het met die voertuig hier ingegaan
 3 en daar gestop. Op daardie stadium was die mynwerkers wat
 4 besig is met hulle strike, het beweeg van die koppie af in
 5 hierdie rigting, van die ooste se kant af na die weste se
 6 kant toe. Toe ons nou stop was hul al reeds in hierdie
 7 area hier gewees en –

8 CHAIRPERSON: The point he shows is
 9 directly opposite on the other side of the road where his
 10 vehicle had stopped and he indicated that the strikers
 11 moved from the koppie which is in the extreme left of this
 12 photograph, but from the koppie. They had obviously moved
 13 in an easterly direction towards the section opposite the
 14 football stadium. Is that correct?

15 MNR LOUW: Mnr Voorsitter, hulle het van
 16 die koppie af beweeg in 'n westerse se rigting in. Met
 17 ander woorde van links.

18 CHAIRPERSON: If the north as indicated
 19 on the exhibit is correct, the top right-hand corner, is it
 20 north? If that's correct then it must follow that if one
 21 moves from the right-hand side of the photograph to the
 22 left-hand side of the photograph one must be moving from
 23 east to west. The koppie is in the extreme, to the left of
 24 the photograph and they moved from the koppie to where the
 25 vehicle is, they must have moved in a easterly direction.

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1 From west to east. That's if the north is correctly
 2 depicted which I think it is on the top right-hand corner
 3 of the photograph.

4 MNR LOUW: Mnr Voorsitter, ek vra om
 5 verskoning, ek is verskriklik op my senuwees. Noord is
 6 daar, oos, suid en wes. Hulle het van 'n westelike rigting
 7 af beweeg na 'n oostelike rigting toe. Met ander woorde
 8 van links na regs.

9 CHAIRPERSON: You indicate that they more
 10 or less came to – I don't know whether they stopped moving
 11 but the point that you're talking about they were on - to
 12 the west of your vehicle or effectively on the other side
 13 of the road. And near the continuation of the road which
 14 runs from east to west on the western side of the
 15 intersection. Is that right.

16 MNR LOUW: Dis korrek, mnr Die
 17 Voorsitter.

18 MR VAN AS: And how many of them were
 19 there approximately?
 20 MNR LOUW: Mnr Voorsitter, ek het mos
 21 klaar beskryf daar was twee groepe gewees. In die voorste
 22 groep was daar plus minus 50 na 70 mense en in die agterste
 23 groep was daar meer as 1000. Ek kon nie regtig bepaal nie.

24 CHAIRPERSON: Can you show us where the
 25 first group was and where the second group was?

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1 MNR LOUW: Mnr Voorsitter, die eerste
2 groep het hierso kom stop, nou net aan die begin van die
3 pad daarso. Die tweede groep was omtrent na 30 na 40 metre
4 agter hulle –
5 CHAIRPERSON: What you indicate is that
6 the – sorry, sorry, Mr Interpreter. What you indicate is
7 the first group was the other side of the road from you
8 where you were. In other words on the western side of the
9 road which runs from the south to the north. They were
10 more or less opposite where your vehicle was and you
11 indicate the second group was to the west of that. I think
12 you said about 30 metres to the west of that and they
13 appeared to be in a line which stretched from around about
14 the continuation of the road which runs from east to west
15 through the intersection and down parallel with the road
16 going in the northerly direction to a point. It looked
17 from what you showed is it was opposite the road which is
18 at the bottom of the island as it were, as one looks at the
19 photograph.
20 MNR LOUW: Dis korrek, mnr Die
21 Voorsitter.
22 MR VAN AS: And were they armed?
23 MNR LOUW: Ja hulle was almal gewapen,
24 mnr die Voorsitter. Almal was gewapen.
25 MR VAN AS: What weapons did they have?

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1 MNR LOUW: Mnr Voorsitter, dit het
2 gewissel van 'n verskeidenheid van tuis gemaakte spiese tot
3 soms wat ons kan sê is gekoopte spiese, pangas,
4 knobkerries, stokke, metaal ysters.
5 MR VAN AS: And how were they dressed?
6 MNR LOUW: Die meeste van hulle was
7 geklee in overalls en bo die oorpakke het hulle of komberse
8 of lap oor gehad.
9 MR VAN AS: And did you get out of the
10 vehicle?
11 MNR LOUW: Ja, mnr Voorsitter, toe ons
12 gaan stop het ons dadelik uit die voertuig geklim.
13 MR VAN AS: Were you driving?
14 MNR LOUW: Nee mnr Martin Voster het
15 bestuur.
16 MR VAN AS: And what did you do once you
17 got out the vehicle?
18 MNR LOUW: Toe ons uit die voertuig
19 geklim het ons dadelik vir die groepie wat voor was, wat in
20 ons onmiddellike weste se kant was het ons aangedui om te
21 stop.
22 MR VAN AS: You used the word aangedui,
23 did you verbally speak to them or did you –
24 MNR LOUW: We used hand signals. We hand
25 signalled.

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1 CHAIRPERSON: You indicated to them to
2 stop.
3 MNR LOUW: Ja, mnr Voorsitter.
4 CHAIRPERSON: Without actually saying to
5 them you must stop but you indicated by your hand I take
6 it.
7 MNR LOUW: Mnr Voorsitter, ons het vir
8 hulle gewys om te stop en ons het ook verbal gespreek en
9 gesê stop.
10 CHAIRPERSON: You showed with your hand,
11 raising your left hand as if you're giving an impersonation
12 of a traffic constable at an intersection.
13 MNR LOUW: Ja, mnr Voorsitter, dat kan
14 dalk so voorkom. As ek net 'n verduideliking van dit mag
15 gee. My wapen was in my regte skouer, dit was na die skare
16 toe gerig en ek met die linker hand het ek vir hulle gewys
17 om te stop.
18 MR VAN AS: Continue, what happened then?
19 MNR LOUW: Op daardie stadium het die
20 skare wat voor was, die klein groepie, was in hierdie
21 omgewing, hier geleë en hulle he ons prober flankeer aan
22 ons regte kant, na daai area toe daar. Hulle het so ver
23 beweeg as om –
24 CHAIRPERSON: No we've got to take it
25 slowly. You indicated they were opposite you as I've

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1 indicated previously on the left-hand side or on the – the
2 western side of the road where you were parked. And you
3 indicated that they moved in a northerly direction to block
4 you off from proceeding from the island on which you were
5 to the intersection beyond. Is that correct?
6 MNR LOUW: Mnr Voorsitter, dit is korrek
7 ja. In hierdie omgewing het hulle kom stop, mnr Die
8 Voorsitter. Hulle het met 'n half skuifelende beweging het
9 hulle probeer om aan ons regte kant, die flank daarso te
10 maak.
11 CHAIRPERSON: The side being the south
12 western, well it's actually the north eastern corner of the
13 intersection that we're talking about.
14 MNR LOUW: Dis korrek, mnr Voorsitter.
15 Martin Voster het sy wapen in hulle rigting gewys. Op
16 daardie stadium was ek op die radio en ek het vir
17 addisionele sekuriteit om ons te kom – by ons uit te kom
18 aan hierdie kant. Die oomblik toe Martin Voster sy wapen
19 in hulle rigting wys het hulle terug gekeer na die middel
20 van die – omdat die skare dopgehou het, het ek gesien dat
21 daar –
22 CHAIRPERSON: As you indicate that's of
23 course to the south western corner of the intersection.
24 MNR LOUW: Dis korrek, mnr Die
25 Voorsitter. Toe Martin Voster sy wapen in hulle rigting

<p style="text-align: right;">Page 32992</p> <p>1 wys het hulle terug beweeg in die groep in wat toe op daai 2 stadium half uitgerek was. My oog het dadelik 'n person 3 gevang met 'n wit oorpak aan en ek kan dit onthou omdat hy 4 een van die laastes was wat by die groep weer aangesluit 5 het. En omdat ek op die radio was het hulle probeer om ons 6 toe aan ons linker kant, die flank aan hierdie kant toe te 7 maak. Op daai stadium was hulle daar. En hulle het toe 8 probeer om ons aan die regte kant, aan ons linker kant, 9 hulle regte kant die flank toe te maak.</p> <p>10 CHAIRPERSON: What you've showed was they 11 moved in a southerly direction down that road next to which 12 you were stationery and moved slightly in an easterly 13 direction at the road which is along the southern side of 14 the traffic island.</p> <p>15 MNR LOUW: Dis korrek, Mnr Voorsitter. 16 Op daardie stadium het ek my wapen na hulle toe getoon en 17 gewys, met my loop na voorentoe en hulle het hier as 'n 18 groep bymekaar gekom.</p> <p>19 CHAIRPERSON: There he indicates again 20 the south western corner of the intersection.</p> <p>21 MNR LOUW: Dis korrek, mnr Voorsitter. 22 Daar het hulle bymekaar gekom en almal van hulle het in 'n 23 hurk posisie ingegaan. Van daar het ek bespeur dat die 24 dieselfde man wat ek gesien het, wat stadig na die groep 25 terug beweeg het met die wit oorpak aan het 'n groterige</p>	<p style="text-align: right;">Page 32994</p> <p>1 besig was om te skiet het die groep ons gestorm en albei 2 ons in die voertuig – as ek nie 'n sekonde kan terug gaan, 3 ek daardie tyd vir Martin Voster gesê om terug te kom in 4 die voertuig sodat ons 'n plan kan maak om uit te kom daar. 5 Op daai stadium het hulle ons in die voertuig toegemaak. 6 Martin Voster het die voertuig voor my binne gegaan. Op 7 daardie stadium toe ek in die voertuig ingaan, soos ek die 8 voertuig binne beweeg het was ek al reeds met 'n klip op my 9 linker bobeen gegooi.</p> <p>10 CHAIRPERSON: Bo been that'll be his arm 11 I think. Was it your arm or the upper part of your leg? 12 MNR LOUW: My upper leg, Sir. 13 CHAIRPERSON: Upper leg, I see, sorry. 14 MR VAN AS: So you were hit with a rock, 15 you were stoned on your upper leg. 16 MNR LOUW: Ekskuus tog, Meneer. 17 MR VAN AS: You were hit with a rock on 18 your upper leg. 19 MNR LOUW: Dis korrek, Meneer. 20 MNR LOUW: Soos ek die voertuig binne 21 beweeg het was ek met 'n knobkerrie op die linker skouer en 22 ook in die linker sy geslaan. 23 [15:55] Ons het die deur toegeslaan en op daardie 24 stadium, ek kan ook vir die rekord sê toe ons gestop het, 25 het ons, was ons voertuig nog aangesluit gewees. Ek weet</p>
<p style="text-align: right;">Page 32993</p> <p>1 klip na ons kant toe gegooi. Op daardie stadium het mnr 2 Voster en myself albei rondtes afgevuur. Vir die rekord 3 wil ek ook net meld dat op daardie stadium het ons 4 uitgeklim met die rondtes almal nog in die magasyn van die 5 haelgeweer, maar daar was nog geen rondte in die kamer nie.</p> <p>6 CHAIRPERSON: Sorry for interrupting. 7 You say firearm, he actually used the word haelgeweer which 8 is more accurately a shotgun.</p> <p>9 MR MAHLANGU: Oh yes. He mentioned that 10 at that time there was still no round in the chamber.</p> <p>11 MNR LOUW: Ja daar was rondtes in die 12 magasyn maar geen rondtes in die kamer nie. Op daardie 13 stadium moes ons eers ons wapens oor haal om te vuur. Ons 14 het – ek kan nie onthou hoeveel – Martin Voster het op 'n 15 later stadium aangedui hy het twee rondtes afgeskiet.</p> <p>16 MR VAN AS: And how many rounds did you 17 fire? 18 CHAIRPERSON: He said Martin Voster 19 indicated that he fired two rounds.</p> <p>20 MNR LOUW: Dis korrek, mnr Voorsitter, 21 maar soos ek sê ek kan glad nie getuig namens hom, hoeveel 22 rondtes – al wat ek kan herhaal is die twee wat ek op die 23 verslag gesit, mnr Voorsitter. Op daardie stadium was ek 24 in staat gewees om twee rondtes af te vuur wat albei rubber 25 rondtes was. Die groep het ons toe gestorm. Terwyl ons</p>	<p style="text-align: right;">Page 32995</p> <p>1 nie wat het fout gegaan nie, maar toe ons in die voertuig 2 in klim het die voertuig dood gegaan en Martin moes toe 3 weer sukkel om die voertuig op daardie stadium aan die gang 4 te kry, of die engine weer. Op daardie stadium was ons 5 toegepak gewees met mense wat ons hele voertuig omsingel 6 het en hulle het ons met spiese, knopkieries, pangas en die 7 ander wapens wat hulle in hulle hande gehad het, aangeval.</p> <p>8 MR VAN AS: Carry on? 9 MNR LOUW: Op daardie stadium het Martin 10 die voertuig weer aan die gang gekry en ek kan onthou ons 11 het eers gesukkel om weg te kom en ek het vir Martin 12 geskree, "Ry Vos, ry." 13 MR VAN AS: And is that when you 14 discharged the other four rubber rounds? 15 MNR LOUW: Dit is korrek, mnr die 16 Voorsitter, op daardie stadium omdat Martin met die 17 voertuig gesukkel het, het ek my wapen in my hande gehad en 18 ek het basies gesit aan die linkerkant van die voertuig, 19 die passasierskant.</p> <p>20 CHAIRPERSON: Was it still the shotgun? 21 MNR LOUW: Dit is korrek, mnr die 22 Voorsitter. 23 CHAIRPERSON: So it wasn't a firearm, it 24 was a shotgun? 25 MNR LOUW: Dit is dieselfde haelgeweer of</p>

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1 shotgun wat ek nog die heelyd van melding maak, mnr die
 2 Voorsitter.

3 MR VAN AS: And did you shoot through the
 4 window or was the door open when you discharged these four
 5 rubber rounds?

6 MNR LOUW: No, mnr die Voorsitter, op
 7 daardie stadium was die venster al klaar gebreek, toe hulle
 8 ons aangeval het.

9 MR VAN AS: So you discharged them
 10 through the broken window?

11 MNR LOUW: Dit is korrek, mnr die
 12 Voorsitter, en daar was ek in staat om nog vier rubber
 13 rondtes af te skiet, af te vuur. Ek en Martin Voster het,
 14 waar ons was, ek kan onthou ons het eers gesukkel om weg te
 15 kom daarso omdat die handrem van die voertuig nog op was en
 16 ons het reguit deurbeweeg deur die skare. Ek kan nie
 17 onthou of ons iemand raak gery het of nie, maar ons het
 18 hierdie pad hierso weer in 'n suidelike rigting teruggevat.
 19 As ek die meneer wat die kaart reguleer net kan vra om die
 20 kaart vir ons op te skuif.

21 MR WESLEY: Before we do that can I just
 22 place on record what we got now? It has been marked as
 23 Exhibit DDDD4.2.

24 CHAIRPERSON: In fact he said this road,
 25 can he indicate it to us again, please?

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1 MNR LOUW: Mnr die Voorsitter, dit is die
 2 pad wat aan die westekant van die eiland is.

3 CHAIRPERSON: Did you go down in a
 4 southerly direction?

5 MNR LOUW: Ja, mnr die Voorsitter, ons
 6 het in 'n suidelike rigting weer gery.

7 MR VAN AS: I would like you to go back
 8 to the bundle of documents and to tabulated point number 4.

9 CHAIRPERSON: Mr Van As, it is now four
 10 o'clock.

11 MR VAN AS: Perhaps we can do this
 12 tomorrow –

13 CHAIRPERSON: I wonder whether we can
 14 tabulate point number 4 at nine o'clock tomorrow morning,
 15 is that convenient for you?

16 MR VAN AS: It is convenient, thank you,
 17 Chairperson.

18 MR BUDLENDER SC: Chair, before we
 19 adjourn may I just remind the parties that we have a
 20 meeting now to discuss the question of the expert witnesses
 21 and that will be across the way in the overflow room.

22 CHAIRPERSON: Yes, thank you. On that
 23 note we will adjourn until nine o'clock tomorrow morning.

24 [COMMISSION ADJOURNED]
 25

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