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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 276

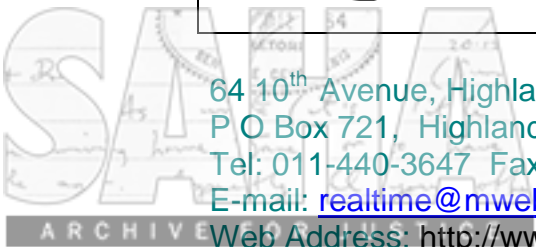
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1 [PROCEEDINGS ON 19 AUGUST 2014]
 2 [09:07] CHAIRPERSON: The Commission resumes. We
 3 did state earlier that the first order of business today
 4 would be the argument in relation to the ruling that we
 5 should separate phase 1 from phase 2. So I think the
 6 witness will be excused and I take it it's not necessary
 7 for the argument to be interpreted. So the witness can be
 8 excused until – we will, I anticipate, finish the hearing
 9 on that aspect sometime in the course of the morning and
 10 then Mr Mtshamba can come back.

11 I did say yesterday that we might well start with
 12 Mr Mtshamba, but that was on the basis that some of the
 13 parties might need extra time to prepare their argument. I
 14 was informed this morning before we began that that's not
 15 the case and the problem is that if we take Mr Mtshamba now
 16 and then stop, have the argument and then start again it
 17 means there will be two interruptions in the course of his
 18 evidence, which is not desirable. Mr Budlender – Mr
 19 Chaskalson, are you going to start the debate?

20 MR CHASKALSON SC: Chairperson, I will
 21 start the argument. We've received submissions from Lonmin
 22 in a letter dated 8 August 2014 against the withdrawal of
 23 the existing ruling separating phases 1 and 2 and the
 24 actual nature of the Lonmin submission is not entirely
 25 clear from that letter because on the one hand it seems to

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1 be a contention that the existing ruling should not be
 2 withdrawn, but running through the letter there also seems
 3 to be a contention that phase 2 should be abandoned in its
 4 entirety.

5 Now if the latter contention is being advanced by
 6 Lonmin it can be rejected out of hand. The Commission has
 7 been tasked by the President to conduct a particular
 8 inquiry, which includes phase 2. By way of illustration,
 9 clause 1.1.3 of the Terms of Reference oblige it to
 10 investigate, and I quote, "whether Lonmin by act or
 11 omission created an environment which was conducive to the
 12 creation of tension, labour unrest, disunity amongst its
 13 employees, or other harmful conduct," and the Commission
 14 has to investigate that at least insofar as the environment
 15 in question was relevant to what happened in the week of 9
 16 to 16 August. It can't simply abdicate its
 17 responsibilities in that regard. That would be unlawful.

18 So I'm going to focus my submissions on the
 19 former contention, which is a contention that the existing
 20 ruling separating phases 1 and 2 should be kept in place
 21 and that the Lonmin executives who come to testify in
 22 relation to phase 1 issues should not be exposed to cross-
 23 examination on phase 2 issues.

24 If we look at Lonmin – if we look at their
 25 letter, the basis of the complaint appears to be fourfold,

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1 two primary reasons. The first we see in paragraphs 5.3
 2 and 5.4 and it's a contention that it wouldn't be practical
 3 to run a phase 2 inquiry because once clause 1.5 of the
 4 Terms of Reference was deleted – that was the clause
 5 dealing with governmental responsibility – we can no longer
 6 look at issues like housing without looking at the
 7 responsibility of government in this regard. Paragraph 5.3
 8 for instance they say "To inquire into Lonmin's housing
 9 policies in isolation will lead nowhere." So that's the
 10 one submission.

11 The second submission one sees at paragraph 8.4
 12 and it's broadly a submission that it's not fair to Lonmin
 13 because there isn't enough time.

14 There are two further complaints which can now be
 15 dealt with summarily. Paragraph 7.1 we see Lonmin
 16 complaining that it will be difficult for them to address
 17 phase 2 because they've had a turnover of senior management
 18 and there's quite a lot of pressure on them in the
 19 Commission at the moment. Well, that's unfortunate, but we
 20 can't really do anything about that.

21 Then in paragraph 6.6 they complain about the
 22 unpredictability of the situation in the absence of the
 23 evidence leaders' phase 2 report. Well, they now know
 24 what's in the phase 2 report, the preliminary report, they
 25 received it on Friday.

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1 So the first two contentions, the one is that
 2 phase 2 goes nowhere because 1.5 has been deleted, and the
 3 other is it's unfair to Lonmin. If we take the unfairness
 4 complaint first, our submission is that Lonmin's complaints
 5 of unfairness are primarily of their own making. They made
 6 some phase 2 discovery in March 2013. In November 2013 the
 7 evidence leaders' researcher, Dr Forrest was appointed and
 8 in the eight months from November 2013 to July 2014 the
 9 evidence –

10 CHAIRPERSON: What was the date of the
 11 first discovery? You say they may some discovery in?

12 MR CHASKALSON SC: March 2013.

13 CHAIRPERSON: March 2013. You then say
 14 that Dr Forrest was appointed in November 2013, ja, some
 15 discovery in March 2013. Is that right?

16 MR CHASKALSON SC: Indeed.

17 CHAIRPERSON: Dr Forrest appointed in
 18 November, yes, and in the eight months since then?

19 MR CHASKALSON SC: Then eight months
 20 passed between November 2013 and July 2014 and in this
 21 period the evidence leaders and Dr Forrest repeatedly
 22 addressed requests to Lonmin for further phase 2 documents
 23 and information. It was done in writing, at various
 24 meetings with Lonmin's legal team, and in telephone
 25 conversations between Dr Forrest and the Lonmin legal

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1 representatives. If needs be we can prepare a full
2 schedule of all of these requests. There are very many of
3 them.

4 While Lonmin always indicated a reasonable
5 attitude of cooperation to those requests for the most part
6 prior to the last week of July 2014, it didn't comply with
7 them, and it finally started to comply meaningfully with
8 the requests in the last week of July and the first week of
9 August 2014, and what appears to have triggered this
10 response was the threat of a subpoena and why the evidence
11 leaders resorted to that threat was that at a meeting of
12 the parties in the second-last week of July my learned
13 friend Mr Burger made statements in the presence of all of
14 the legal representatives, suggesting that Lonmin would be
15 taking the attitude that phase 2 should be abandoned in its
16 entirety. So at that point the evidence leaders started to
17 wonder whether notwithstanding the attitude of cooperation
18 that had been expressed, Lonmin had an intention of
19 providing the information that they had always suggested
20 they would.

21 But it goes quite a lot further than that because
22 if we go to Lonmin's letter of the 8th of August, in
23 paragraph 8.3 of that letter we see that almost two years
24 after the Commission was established with Terms of
25 Reference which made clear that Lonmin would be

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1 investigated in relation to phase 2 issues, Lonmin had
2 apparently ignored those issues. Can I just read what they
3 say in paragraph 8.3, it's after the dash in the second
4 line, "But our legal team has not considered the phase 2
5 documentation prepared on these issues, consulted with
6 potential witnesses, nor prepared witnesses' statements
7 dealing with phase 2."

8 So essentially what the Lonmin complaint is, is
9 the following. They've elected to ignore phase 2 for the
10 better part of two years and now it's unfair to ask them to
11 deal with it in the remaining five weeks. That is
12 essentially what their complaint is. It's a complaint
13 which is quite astonishing, with respect.

14 But it not just astonishing; it reflects an
15 attitude which is quite convenient for Lonmin to adopt
16 because what the evidence leaders' phase 2 investigation
17 has shown is that there is a strong prima facie case that
18 Lonmin flagrantly breached its obligations to build 5 500
19 houses for its migrant workforce and the obligation in
20 question was an obligation which it had undertaken to
21 build, undertaken in the social and labour plans that form
22 part of its applications to convert the old order mineral
23 rights of Eastern Platinum Limited –

24 CHAIRPERSON: How many houses did you say
25 they had to build?

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1 MR CHASKALSON SC: 5 500.

2 CHAIRPERSON: Thank you.

3 MR CHASKALSON SC: And I want to make
4 clear, Chairperson and Commissioners, that the construction
5 of these houses, it wasn't an act of largesse on Lonmin's
6 part, it was a legally binding obligation imposed on the
7 two mining subsidiaries, Eastern Platinum and Western
8 Platinum, and that flows from section 25(2)(f) of the
9 Mineral and Petroleum Resources Development Act, which
10 makes clear that the holder of a mining right is obliged to
11 comply with the provisions of its social and labour plans.
12 It's not within their discretion, it's a legal obligation.

13 Now this is plainly an issue which falls within
14 clause 1.1 [microphone off, inaudible] of the Terms of
15 Reference and it's an issue which is addressed in less than
16 eight pages in the evidence leaders' phase 2 report. Now
17 I'd just like to quote from some passages, just to give an
18 extent, give a flavour of what we're dealing with here.

19 CHAIRPERSON: Now that report is not
20 before us at the moment. I believe it's been circulated to
21 the parties.

22 MR CHASKALSON SC: Yes, Lonmin received
23 it on Friday.

24 CHAIRPERSON: Yes. I take it if you want
25 to quote from it, it should be handed in as an official, as

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1 an exhibit, as it were.

2 MR CHASKALSON SC: Yes, Chairperson, if
3 we may. I don't have a hardcopy to hand but we can just
4 give it an exhibit number.

5 CHAIRPERSON: That can be done in due
6 course, the hardcopy, but if it's going to be an essential
7 part of your argument that we have regard to those eight
8 pages they must be before us and everyone else who's
9 following the debate should also have access to that
10 document. So what we'll call it –

11 MR CHASKALSON SC: All parties have had a
12 copy of the report.

13 CHAIRPERSON: Yes, no, I understand that,
14 but the broader public listening to the debate also – we've
15 had openness and transparency throughout the life of this
16 Commission. It would be a pity to stop that now. So
17 NNNN1? I suppose it will only be one document –

18 MR CHASKALSON SC: It is only one
19 document.

20 CHAIRPERSON: And the letter should go in
21 too, I suppose. So let's make NNNN1 Lonmin letter of 8
22 August 2014 and NNNN2 is the evidence leaders' – how do I
23 describe it? - evidence leaders' phase 2 report?

24 MR CHASKALSON SC: The title page is
25 "Evidence leader's phase 2 preliminary report 15 August

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1 2014.”

2 CHAIRPERSON: Yes, I've seen it

3 electronically also but it should be before the Commission

4 I think. Evidence leaders' phase 2 provisional report

5 dated? Preliminary, sorry.

6 MR CHASKALSON SC: 15 August 2014.

7 CHAIRPERSON: Let me get that right. I

8 got it wrong. Evidence leaders' phase 2 preliminary report

9 dated 15, is it?

10 MR CHASKALSON SC: 15 August 2014.

11 CHAIRPERSON: 15 August 2014, two years

12 minus one day after the killings on the 16th. Now you're

13 quoting, what page of that report are you quoting from?

14 MR CHASKALSON SC: I'll start at page 54

15 where the following is stated with reference to Lonmin's

16 own documents. "By the end of the 2010 financial year

17 Lonmin ought to have constructed 4 400 houses and converted

18 92 hostels. However, in the 2010 financial year it built

19 no houses and converted only five hostel blocks, leaving it

20 4 397 houses and 59 hostel conversions behind its target.

21 In its 2010 SLP report it unilaterally and

22 unambiguously repudiated the housing and hostel conversion

23 obligations it had assumed in its SLPs. It stated the

24 following, 'The financial situation of the company was

25 unfavourably impacted by the global economic crisis and

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1 falling prices of platinum. A decision was therefore taken

2 to review the housing and hostel upgrade programme. Lonmin

3 thus invested in the development of a human settlement

4 strategy intended to address housing and living conditions

5 challenges.

6 The primary objective of this strategy is to

7 facilitate decent affordable accommodation for our

8 employees, to contribute towards the eradication of

9 informal settlements and to create a competitive edge for

10 our business. It's anticipated that the strategy will be

11 implemented in financial year 2011. In view of the impact

12 of the global economic meltdown and the consequent

13 financial position of the company the target of building

14 5 500 houses and converting 124 hostel blocks into family

15 units by 2011 will not be achieved. The conversion of 124

16 hostel blocks will however be achieved by 2014.”

17 It then unilaterally reduced its hostel

18 conversion target for 2010 from 22 conversions to five

19 conversions. That would mean a cumulative reduction from

20 92 between 2006 and 2010 to 34, and in its annual SLP

21 report to the department it awarded itself 100% for

22 achieving the unilaterally reduced target.

23 Then a little lower down the page on page 55,

24 "Although the 2010 SLP report had suggested that the new

25 human settlement strategy quotes to facilitate decent

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1 affordable accommodation for our employees would be

2 implemented in the 2011 financial year, this did not take

3 place. No houses were built in the 2011 financial year.

4 However, 26 hostels were converted in 2011, giving a

5 cumulative total of 60 hostel conversions over the 2007 to

6 2011 period in which the entire 114 hostel conversion

7 programme was designed to take place.”

8 Over the page on page 56, "It appears that no

9 additional houses were constructed in 2012 or 2013. By the

10 time that Lonmin produced its draft close-out reports on

11 its SLPs in 2013 it could point to no houses that had been

12 built beyond the three show houses.”

13 CHAIRPERSON: I take it what is relevant

14 for us is only the situation as it existed in August 2012.

15 What happened thereafter may be relevant insofar as it

16 throws light backwards on what happened in the period we're

17 concerned with, but the situation after 2012 is not

18 directly relevant, save for that purpose. Is that correct?

19 MR CHASKALSON SC: That is correct,

20 Chairperson. Then lower down the page on page 56 we

21 confront this Lonmin complaint about the removal of clause

22 5 and the report states the following –

23 CHAIRPERSON: Clause 1.5.

24 MR CHASKALSON SC: 1.5.

25 CHAIRPERSON: You're still on page 56?

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1 MR CHASKALSON SC: Still on page 56.

2 CHAIRPERSON: Still on page 56.

3 MR CHASKALSON SC: "Lonmin cannot be held

4 solely responsible for the deplorable state of housing in

5 which its migrant workforce resides. The provision of

6 decent housing in the Marikana area is primarily a

7 government responsibility and in view of the removal of

8 paragraph 1.5 of the original Terms of Reference the

9 failures of national, provincial and local government in

10 this regard are no longer a matter which the Commission is

11 empowered to investigate. To the extent that this chapter

12 addresses the culpability of Lonmin in relation to housing

13 provision it may present something of a one-sided picture.

14 Nevertheless in our view it remains fair to question

15 Lonmin's failure to provide decent housing for its migrant

16 workforce," and we offer two reasons in this regard.

17 First we cite Lonmin itself and quoting from the

18 report, "First as recognised by Lonmin itself in the

19 aftermath of the Marikana tragedy if government has not

20 provided sufficient decent housing for the Lonmin workforce

21 to be accommodated, Lonmin cannot slough off its

22 responsibilities to its employees by paying them a living-

23 out allowance which to the knowledge of Lonmin will not

24 enable them to find decent accommodation.”

25 We then quote a speech from Mr Phillimore, the

1 chairperson, at the Lonmin AGM of 31 January 2013 where Mr
2 Phillimore recognised that "Lonmin has a duty to its
3 employees to ensure that they" - and we're quoting from his
4 speech - "have access to decent accommodation and the
5 essential utilities of fresh water, proper sanitation and
6 electricity." So Lonmin itself recognises that obligation.

7 But there's a second and much more compelling
8 reason to hold Lonmin accountable for the absence of decent
9 housing for its migrant workforce, and that goes back to
10 the SLPs. In its application for conversion of its old
11 order mineral rights Lonmin expressly assumed an obligation
12 to provide this housing. As a condition for the conversion
13 of the old order right Lonmin undertook in its social and
14 labour plans that it would convert all of its existing
15 hostel blocks to decent single and family units by 2011 and
16 would in addition, and I emphasise in addition, build 5 500
17 new houses for its employees over the period 2007 to 2011.
18 Those were obligations it undertook.

19 CHAIRPERSON: I'm sorry to interrupt you,
20 Mr Chaskalson. I just very briefly read that section of
21 the report, so I can't remember to what extent you deal
22 with the point I'm now going to ask you about. But you
23 remember when Mr Ramaphosa gave evidence it was put to him,
24 and he agreed that when you convert a hostel you and don't
25 provide anything in addition.

1 [09:27] You reduce the housing stock by 87.5% because you
2 had rooms that were accommodating 16 people would then be
3 converted into family units for only two people and rooms
4 that accommodated eight people would be converted into
5 rooms for occupation by a single person and Mr Ramaphosa
6 agreed with that. I think you deal with that somewhere in
7 the reports. It's relevant at this point is it?

8 MR CHASKALSON SC: It is an observation
9 in the point. For present purposes we point out that the
10 5 500 new houses that Lonmin was supposed to build
11 alongside the hostel conversion process would have
12 addressed most but not all of the problem. It certainly
13 wouldn't have addressed all of the problem, but if those
14 houses had been built a very clear majority of the migrant
15 workers at Lonmin would have had decent housing before the
16 Marikana massacre, a year before the Marikana tragedy, a
17 year before the tragedy.

18 Then on page 57 we make the point that we have
19 not seen a reasonable explanation for Lonmin's failure to
20 comply with these obligations. I'm not saying there isn't
21 one, we're just saying we haven't seen one. The primary
22 justification put forward for Lonmin for its non-compliance
23 with its housing obligation was the constraints of the
24 economic climate after the financial crisis. But the first
25 point is that Lonmin started defaulting on its housing

1 obligations before the financial crisis, in fact when it
2 was going through an unprecedented platinum boom.

3 The second point and possibly more telling is
4 that throughout the period in which it was defaulting on
5 its housing obligations it continued to pay dividends to
6 its shareholders. Indeed as we show in the report, if we
7 compare the budgets for housing provision in the social and
8 labour plans, even in the period from the financial crisis,
9 so ignoring the period of the boom, if we compare those
10 budgets with the dividends paid by Lonmin over the period
11 in which Lonmin defaulted on the obligations, we can see
12 that notwithstanding the entire financial crisis,
13 notwithstanding the financial crisis, the entire program
14 would have been covered by the amount paid out by Lonmin in
15 dividends to its shareholders. So while it was pleading
16 poverty in relation to the financial crisis it was still
17 paying dividends to its shareholders which if reallocated
18 to the housing obligation would have covered that
19 obligation in its entirety. Now if we've got anything
20 wrong in this regard Lonmin can point it out to us and it
21 can hardly be suggested that they don't have time to
22 respond. The entire chapter which deals with these
23 obligations is addressed in barely more than seven pages.

24 The director who was responsible for –

25 CHAIRPERSON: Sorry to interrupt you, the

1 rest of the report, you say they effectively to deal with
2 seven pages. The rest of the report will that call for any
3 response from them or any difficult, time consuming
4 response?

5 MR CHASKALSON SC: We don't believe that
6 it will. The rest of the report addresses three separate
7 topics at this stage. The first is an attempt based on
8 Lonmin's own statistics to analyse the composition of the
9 strikers and the arrested and injured persons on the
10 koppie. I can't see Lonmin having any difficulties with
11 that. There is a very brief section on micro lending and
12 garnishee orders, again based entirely on documents Lonmin
13 provided itself and I don't think it's controversial.
14 There is a fairly lengthy chapter addressing the living
15 conditions and the lived experience of Lonmin's underground
16 migrant workforce. Lonmin may have some difficulties with
17 some propositions that are put in there, but for the most
18 part that is background information. If Lonmin has
19 particular difficulties with particular propositions there
20 they can raise them and my submission is that they can
21 confront any issues with which or which they dispute in the
22 time that remains in this Commission. The crux of the
23 charge against Lonmin is set out in the fifth chapter which
24 deals with their obligations and the SLPs, that's just over
25 seven pages long and sourced almost exclusively from

<p style="text-align: right;">Page 35233</p> <p>1 Lonmin's own documents. Now the issue of whether the 2 ruling should be withdrawn in relation to all of this that 3 turns on who the remaining witnesses are and what they can 4 speak to. Now the director who was responsible for 5 Lonmin's SLPs was Mr Mokwena. He's scheduled to testify 6 from 5 September, that's in 17 day's time and will be a 7 full three weeks after Lonmin received the evidence 8 leader's report. We are of a view that when Mr Mokwena 9 comes to testify he should have to explain why Lonmin chose 10 not to comply with its obligation to build 5 500 houses for 11 its category 3 to 9 employees and why it lagged behind on 12 its hostel conversion program. There's ample time to 13 prepare for his testimony. At the risk of repeating 14 myself, the case against Lonmin in this regard is based 15 almost exclusively on their own documents and runs to less 16 than eight pages.</p> <p>17 After Mr Mokwena, Mr Jamieson is coming to 18 testify, he could shed light on some substantial recurring 19 payments, that Lonmin South African Mining subsidiaries, 20 Eastern and Western Platinum Limited, seem to have been 21 making to Lonmin Head Office and to a wholly owned 22 subsidiary of Lonmin in Bermuda at the same that they were 23 defaulting on their housing obligations under the SLPs and 24 pleading poverty and the financial crisis as a 25 justification for those defaults. But we can see no reason</p>	<p style="text-align: right;">Page 35235</p> <p>1 which would be two weeks before he testifies. In relation 2 to Mr Jamieson we have a slight difficulty because we have 3 addressed a request to Lonmin for the documents relating to 4 the payments made to Lonmin Head Office and the payments 5 made to the Bermuda subsidiary which is Western Metal Sales 6 Limited. That's why we haven't received those documents 7 from Lonmin, so we can't identify which documents we'd want 8 to put to Mr Jamieson until we get the documents from 9 Lonmin itself. But we can turn it around within 48 hours.</p> <p>10 CHAIRPERSON: I take it to be fair, 11 depending on the documents you get in relation to that 12 issue, you may not wish to proceed with the cross- 13 examination –</p> <p>14 MR CHASKALSON SC: That is also a 15 possibility. But, Chairperson, whatever the situation is 16 in relation to Mr Jamieson, certainly in relation to Mr 17 Mokwena we can't see any unfairness in his being subjected 18 to cross-examination on those phase 2 issues. And if 19 Lonmin responds to our request for the documents that we 20 have identified as necessary for our inquiries with Mr 21 Jamieson we hope that we'll be able to reach a fair 22 arrangement in relation to his cross-examination as well. 23 Those are our submissions. We'd ask you to withdraw the 24 ruling, we would tender to provide Mr Mokwena with a list 25 of all documents on which we would want cross-examine him</p>
<p style="text-align: right;">Page 35234</p> <p>1 why Mr Jamieson should not assist the Commission with the 2 benefit of his knowledge in this regard. Now the 3 particular issues that the evidence leaders would want to 4 canvass with Mr Mokwena and Mr Jamieson are set out in 5 chapter 5 of the phase 2 report. It's less than eight 6 pages, but never mind that, the Commission follows a 7 practise in terms of which witnesses are given notice of 8 the particulars with which they'll be confronted in cross- 9 examination. It's more than two weeks before Mr Mokwena or 10 Mr Jamieson will testify and in the circumstances we submit 11 that there'll be no unfairness to either of them or to 12 Lonmin if they're subjected to questioning on phase 2 13 issues.</p> <p>14 CHAIRPERSON: Now sometimes, of course, 15 notice of these documents is given very shortly before the 16 witness testifies. Now have you any suggestions in regard 17 to the fixing - on the assumption that your application is 18 granted, the fixing of the time by which notices of 19 documents to be relied on in cross-examination should be 20 given? I can understand Mr Mokwena and Mr Jamieson might 21 well be very embarrassed if they were cross-examined on a 22 mass of documents which they only got notice of a day or 23 two before.</p> <p>24 MR CHASKALSON SC: In relation to Mr 25 Mokwena would could give notice before the end of this week</p>	<p style="text-align: right;">Page 35236</p> <p>1 by the end of this week. And within 48 hours of being 2 given access to the documents we've requested from Lonmin 3 in relation to the payments to head office and Western 4 Metal Sales Limited we would give notice to Mr Jamieson of 5 any documents we would want to rely on in cross-examination 6 of him.</p> <p>7 CHAIRPERSON: You intended Mr Mokwena 8 notice of documents to be relied on in cross-examination by 9 the end of the week.</p> <p>10 MR CHASKALSON SC: Indeed which would be 11 a clear two weeks before he testifies.</p> <p>12 CHAIRPERSON: And as far as Mr Jamieson 13 is concerned?</p> <p>14 MR CHASKALSON SC: 48 hours after we 15 receive the documents that we've requested from Lonmin.</p> <p>16 CHAIRPERSON: But if you're going to 17 persist in that point.</p> <p>18 MR CHASKALSON SC: Indeed.</p> <p>19 CHAIRPERSON: Yes, thank you. Obviously 20 I'm going to call on you to reply Mr Burger, but let me 21 find out before I call on you to reply whether any of the 22 other parties – there was a suggestion that some of them 23 might want to speak on this point as well. I think it only 24 fair that those who wish to support the application should 25 get a chance to speak first and you should get a chance to</p>

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1 reply to them. Those who wish to support the stance to be
 2 adopted by Lonmin can obviously speak after you've spoken,
 3 if there's anything left that they consider it necessary to
 4 say. So may I enquire which parties, if any, wish to
 5 address the Commission in regard to the evidence leaders'
 6 application.

7 MR TIP SC: Yes, Chair.

8 CHAIRPERSON: NUM right. So it's NUM.

9 May I ask whether you're going to support the evidence
 10 leaders or support NUM.

11 MR TIP SC: Well I'll certainly support
 12 NUM.

13 CHAIRPERSON: No, no sorry, oh dear.
 14 Sorry to be so tired so early in the morning. I should say
 15 support the evidence leaders or support Lonmin.

16 MR TIP SC: We'll support the withdrawal
 17 of the ruling - and then if I may make one or two comments
 18 on -

19 CHAIRPERSON: So you would speak then
 20 before Mr Burger.

21 MR TIP SC: Yes I believe so.

22 CHAIRPERSON: Any other party wish to
 23 speak?

24 SPEAKER: The Legal Resources Centre.

25 CHAIRPERSON: The LRC.

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1 SPEAKER: Yes, Mr Chairman.

2 CHAIRPERSON: Which side of the debate
 3 will you be?

4 SPEAKER: Against Lonmin.

5 CHAIRPERSON: Against Lonmin, I see.
 6 Well I think it would be more sensitive against the
 7 arguments to be advanced by Lonmin.

8 SPEAKER: In favour of the arguments that
 9 been advanced by the evidence leaders.

10 CHAIRPERSON: Ms le Roux I see you turned
 11 your light on.

12 MS LE ROUX: Chair, yes the Human Rights
 13 Commission would also like to address the Commission.

14 CHAIRPERSON: On which side?

15 MS LE ROUX: In line with the LRC's
 16 position.

17 CHAIRPERSON: I see, so you also would
 18 speak before Mr Burger so he'd get a chance to deal with
 19 what you have to say.

20 MS LE ROUX: Yes, Chair.

21 CHAIRPERSON: If he considers it
 22 necessary to do so. Does anybody else wish to speak, Mr
 23 Mpofo.

24 MR MPOFU: Yes, thank you, Chairperson.

25 CHAIRPERSON: Which side are you going to

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1 be on?

2 MR MPOFU: You'll be surprised,
 3 Chairperson.

4 CHAIRPERSON: Nothing in this Commission
 5 surprises me

6 MR MPOFU: No. Chairperson, I don't
 7 think one can strictly say which side we are supporting.

8 CHAIRPERSON: No all I want to know is do
 9 you speak with - would you prefer to speak before Mr Burger
 10 or after?

11 MR MPOFU: After, ours is just a short
 12 statement, Chairperson, which just wants to put across our
 13 position.

14 CHAIRPERSON: No I understand that. I'm
 15 not trying to pin you down, but I'm trying to be fair to Mr
 16 Burger. If you're going to say something which Mr Burger
 17 may wish to deal with then it's only fair you speak first.

18 MR MPOFU: No I'm sure Mr Burger will be
 19 pleased by what I'm going to say.

20 CHAIRPERSON: I see, all right. Mr
 21 Ntsebeza. So I'll put you on the other side of the column.
 22 INAP. Mr Ntsebeza.

23 MR NTSEBEZA SC: Mr Chairman, I'm not so
 24 sure that we are going to be making a statement, but we're
 25 supportive of the evidence leaders, but we are with the

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1 AMCU and families.

2 CHAIRPERSON: I'll put you in the
 3 evidence leader's column in my notebook. You speak on
 4 behalf of the families, did you talk about AMCU as well -

5 MR NTSEBEZA SC: And AMCU as well.

6 CHAIRPERSON: So you're going to speak on
 7 behalf of AMCU as well.

8 MR NTSEBEZA SC: Yes.

9 CHAIRPERSON: All right, anybody else?
 10 The police? Are you sitting this one out, Mr Semanya?

11 MR SEMENYA SC: We're making no address,
 12 Chair.

13 CHAIRPERSON: Anybody else? No. All
 14 right, Mr Tip.

15 MR TIP SC: I address firstly the
 16 question of the ruling separating phases 1 and phase 2 and
 17 we support the withdrawal of that ruling and I should like
 18 to indicate very briefly why that is and it is essentially
 19 because it has, as the Commission will be aware, been our
 20 position throughout the course of these proceedings since
 21 October 2012 and remains the case now, that we do not see
 22 any fundamental reason to maintain a distinction between
 23 phases 1 and 2. In the light of this particular
 24 perspective which is the one that we have sought to
 25 articulate previously, namely, that although it may be

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1 conceptually and practically useful to have evidence
 2 divided into phases 1 and 2 ultimately there is a single
 3 standard that has to be brought to bear on that evidence
 4 irrespective of whether it's phase 1 or phase 2, namely the
 5 criterion of relevance and that criterion is necessarily a
 6 function exclusively of the terms of reference that govern
 7 the work of this Commission.
 8 So in other words we respectfully see no
 9 functional reason to maintain a distinction where there is
 10 ultimately one criterion that address both. Now that's the
 11 essence of our position. Chair, I want to add a few
 12 remarks about the preliminary report. In the email that we
 13 received yesterday we were requested to make any submission
 14 that we thought appropriate in respect of the approach of
 15 the evidence leaders that are set out in this preliminary
 16 report and although, of course, that there has been
 17 precious little time to give proper consideration to it and
 18 to the various questions that might arise, it may be of
 19 assistance for me just to outline in essence what we feel
 20 that we can say at this stage. This preliminary report
 21 consists of four substantial chapters and I want to make
 22 just one or two comments about each of them. The first
 23 chapter of consequence deals with the composition of the
 24 strikers on the koppie and that as my learned friend, Mr
 25 Chaskalson, has indicated sets out in some detail material

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1 that essentially was obtained from Lonmin and in our view
 2 very usefully and necessarily informs the Commission on
 3 just who the strikers were on the koppie. And a number of
 4 different perspectives have been set out there. It won't
 5 be helpful for me to summarise what is in the chapter, but
 6 that is essential information and our respectful submission
 7 that the Commission and all who read its report in time
 8 should understand just who the strikers were, where they
 9 come from - helpfully in that analysis. So we consider
 10 that to be -
 11 CHAIRPERSON: Sorry you better repeat
 12 what you said and then I can ask you questions.
 13 MR TIP SC: Sorry I nudged the button on
 14 the mike. I just perhaps wanted to repeat that the
 15 information that has been gathered in chapter 2 dealing
 16 with the composition of the strikers on the koppie is
 17 patently in our view very pertinent and very relevant and
 18 it gives a proper understanding to who those people were.
 19 And for example gives some deeper understanding of why it
 20 is that the people on the koppie responded for instance
 21 differently to Mr Zokwana and to Mr Mathunjwa. All of that
 22 leads to an enrichment of a grasp of what was happening.
 23 In other words that chapter very comfortably satisfies our
 24 view of relevance. So too the next chapter which deals
 25 quite extensively with the lived experience of underground

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1 workers.
 2 [09:47] It also, from a somewhat different tangent, but
 3 in our view with equal cogency describes more fully for
 4 those who are concerned with a proper understanding of
 5 these events, what the lives were of the people who were
 6 involved in these events, and that too, if I may use the
 7 word again, enriches one's understanding of the dynamics of
 8 the interaction in the way that we consider to be pertinent
 9 to a proper discharge of the terms of reference. It may
 10 be, as Mr - my learned friend, Mr Chaskalson has said that
 11 there may be some queries in respect of particular aspects
 12 that Lonmin may have, well, if that is so, then we
 13 align ourselves with the consideration that that should
 14 be clarified and that can then be evaluated. The third
 15 chapter is one that -
 16 CHAIRPERSON: You are now dealing with
 17 chapter 4?
 18 MR TIP SC: I am now dealing with chapter
 19 4, Chair, which is entitled "Lending and debt collection."
 20 Now, that is the subject that we have previously touched on
 21 incidentally in the course of various debates in relation
 22 to the question of phases 1 and 2, and the terms of
 23 reference and that is a chapter concerning which I would,
 24 with respect, want to just place a cautionary question mark
 25 over, and I deliberately don't want to make a submission

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1 that is in any stronger terms than that, and the caution is
 2 this, that when one reads that chapter, a number of
 3 substantial banking institutions are identified by name,
 4 and there is also an analysis which goes around the topics
 5 of matters such as unscrupulous lending practices, reckless
 6 lending, garnishee orders, the manner in which repayments
 7 are enforced, and matters of that kind also are clearly
 8 part of the lived experience of a great many mineworkers in
 9 the Marikana area, and of course, elsewhere in South
 10 Africa. The caution is -
 11 CHAIRPERSON: Sorry, I'd like to ask you,
 12 I've just now been handed a copy. I see there's reference
 13 to the UBank. Am I correct in understanding that that's
 14 partly owned by NUM? So is that the source of the
 15 relevance of your complaints, possible complaints?
 16 MR TIP SC: No, not at all -
 17 CHAIRPERSON: Am I correct in saying that
 18 UBank is half-owned by NUM or indirectly half-owned?
 19 MR TIP SC: There is a very indirect
 20 connection, but that doesn't concern me at all, Chair, it's
 21 - that's not a major bank, but it's - what I am saying is
 22 the caution, I am not defending NUM here, I am defending
 23 the integrity of a chapter in the report that the
 24 Commission will need to consider. There are other more
 25 major banks involved, and they are identified by name. The

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1 caution is simply this, that if a chapter of that kind were
 2 to find its way into the ultimate conclusions of the
 3 Commission as a whole, then it may be that institutions of
 4 that kind will query how they came to be the subject of the
 5 finding, which is at least inferentially prejudicial and
 6 they would want to know that arose out of the terms of
 7 reference, and they would very likely want to know how it
 8 was that these findings and remarks about them have been
 9 made when they have not at any time been a party to the
 10 proceedings. All of that, that entire chapter consists a
 11 matter that hasn't been ventilated as far as I know in the
 12 course of these proceedings and public at all. So I say,
 13 deliberately it's a cautionary question mark.

14 CHAIRPERSON: I see, what you are, I am
 15 endeavouring to summarise what I understand you to be
 16 saying, is that we must be cautious in relation to this
 17 chapter, and it may well be that we should out of
 18 consideration of fairness to financial institutions
 19 implicated in the chapter, possibly exclude that evidence
 20 from consideration, alternatively, only rely on general
 21 statements without identifying particular institutions.
 22 Would that be correct? I can understand the argument.

23 MR TIP SC: Yes.

24 CHAIRPERSON: I haven't read this chapter
 25 at all, but I can understand an argument that, I don't know

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1 if it will be put up, but it may be put up that the housing
 2 is irrelevant, the deplorable housing conditions which we
 3 saw when we went on our inspection in October 2012, were
 4 somehow not related to the assertion which presumably, it's
 5 certainly made by some people, that that created a
 6 tinderbox so that one spark caused all – not all, but
 7 caused a substantial degree of trouble. Now the argument
 8 may well be put up that those deplorable housing conditions
 9 at not causally connected to what happened, but that the
 10 facts set out in a previous chapter, the financial
 11 implications of reckless lending, garnishee orders in the
 12 way they are administered, and so on, are. So it may well
 13 be that Lonmin for example, may well wish to rely on the
 14 content of that chapter, if the ruling is reversed.

15 MR TIP SC: Well, that -

16 CHAIRPERSON: I've officially allowed
 17 now, perhaps unwisely, but that's the point that I think I
 18 should put to you, so you can deal with it.

19 MR TIP SC: Chair, yes, in broad terms,
 20 with respect, those are precisely the kinds of concerns
 21 that I am trying to articulate, that there may well be ways
 22 of dealing with that information, that neutralise the role-
 23 players but still capture some of the essence of it,
 24 subject of course always to the overriding consideration of
 25 whether or not that material is in any event of sufficient

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1 relevance in respect of the events that formed the subject
 2 matter of the terms of reference, so that the notional bank
 3 about whom I am postulating a possible response, they say
 4 well, whatever you have to say about lending practices, how
 5 did this cause deaths in the course of this week of the 9th
 6 to the 16th of August 2012? So that that also is something
 7 that one would need perhaps to put through the process.

8 CHAIRPERSON: But I was really putting to
 9 you, was that if we decide to reverse the ruling, if we
 10 don't then – well, it falls away, if we decide to reverse
 11 the ruling, then there might well be questions of relevancy
 12 in regard to some of the contents of this report, which
 13 would have to be considered at that stage. Is that your
 14 point?

15 MR TIP SC: That is perhaps the absolute
 16 essence of what I am submitting to you this morning, Chair,
 17 that the removal of the notion of distinction between
 18 phases 1 and 2, in effect enhances the applicability of
 19 what is in any event an overriding criterion, namely,
 20 relevance, so that that has to be the guiding star in
 21 respect of the evaluation of any material.

22 CHAIRPERSON: What you said, I think
 23 quite clearly, is you support the application by the
 24 evidence leaders but you caution us that if we go down that
 25 route, we will have to concentrate very carefully on this

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1 question of relevance, is that a fair summary of what you
 2 are saying?

3 MR TIP SC: With respect, for some –

4 CHAIRPERSON: Particularly, well, I think
 5 only really so far in relation to chapter 4.

6 MR TIP SC: That sort of enterprises.
 7 The only chapter of its kind in this preliminary report, so
 8 that it may be something that bears another material a
 9 well.

10 CHAIRPERSON: Yes.

11 MR TIP SC: Either directly or
 12 indirectly.

13 CHAIRPERSON: What do you say about
 14 chapter 5?

15 MR TIP SC: Chapter 5 is a chapter that
 16 we're really not in a position to say anything about, and
 17 that is because it deals very substantially with
 18 interaction between Lonmin and the evidence leaders. We
 19 are not privy to a great deal of that, and it would I think
 20 be wrong for me to stand on one side or the other of that
 21 particular difference. So those are our submission, Chair.
 22 We hope that they may be of some assistance.

23 CHAIRPERSON: Yes, thank you, Mr Tip.
 24 The next is Num. So you are NUM? I beg your pardon. NUM,
 25 LRC is next.

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1 MR NGCUKAITOBI: Thank you, Mr
 2 Chairperson. We have written submissions. I just wanted a
 3 copy to be given to Lonmin, two copies.
 4 CHAIRPERSON: Yes alright.
 5 MR NGCUKAITOBI: But we have handed up to
 6 the panel as I understand.
 7 CHAIRPERSON: Yes, Mr –
 8 MR NGCUKAITOBI: Ngcukaitobi, Mr
 9 Chairman.
 10 CHAIRPERSON: I know. I am trying to get
 11 my tongue around it, but it is Ngcukaitobi.
 12 MR NGCUKAITOBI: Yes, indeed, Chair.
 13 CHAIRPERSON: And you've handed up your
 14 heads.
 15 MR NGCUKAITOBI: Yes, I did. There is a
 16 substantial -
 17 CHAIRPERSON: I don't – it's 14 pages, I
 18 presume you are not going to read them out to us, but –
 19 MR NGCUKAITOBI: No, I don't intend to.
 20 CHAIRPERSON: - the main. You've give a
 21 copy to your learned friends –
 22 MR NGCUKAITOBI: Yes. At any rate,
 23 there's a substantial overlap between what is said here and
 24 what Mr Chaskalson said on behalf of the evidence leaders.
 25 I just want to cover aspects that I believe require

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1 emphasis. The first relates to the question of the mandate
 2 of the Commission which is dealt with in page 2, from
 3 paragraph 5 onwards. There is a suggestion in the
 4 objection by Lonmin that there is a possibility that an
 5 inquiry into phase 2 might trespass the terms of reference.
 6 We argue there that there is no such a possibility. In
 7 fact, quite the contrary, it is clear that the topics that
 8 are covered in phase 2, constitute an essential part of the
 9 terms of reference of the Commission, and if that is the
 10 starting point, then it is upon Lonmin to illustrate why an
 11 item that belongs in the terms of reference should
 12 nevertheless be excluded from consideration by the
 13 Commission. In fact, if the Commission did not attend to a
 14 matter that falls within its terms of reference, the
 15 Commission itself might well be acting outside its terms of
 16 reference, and hence, unlawfully.
 17 The next issue that we want to deal with is from
 18 paragraph 10 onwards, and this is this, we are not asking
 19 for an open-ended inquiry into Lonmin. We are asking for a
 20 specific inquiry into specific topics, and that is
 21 determined through three criteria that we set out at
 22 paragraphs 10.1, 10.2 and 10.3, and the first criteria, and
 23 that's the position that was taken by Mr Tip, is relevant.
 24 So in other words, the evidence that belongs to phase 2,
 25 must be relevant to the terms of reference. But in

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1 addition to relevance, the evidence must show causation at
 2 paragraph 10.2, and then there's a third final element
 3 which is that the evidence must show legal responsibility
 4 on the part of Lonmin. We have chosen these three in order
 5 to limit the scope of what is called phase 2 with the
 6 issues that will constitute not just a part of the terms of
 7 reference, but also will meet the test of relevance in a
 8 much narrower sense.
 9 So that, Mr Chair, if evidence is led which does
 10 not meet the three criteria of relevance, causation and
 11 legal responsibilities is led, it will be up to the panel
 12 to exclude that evidence and it will be up to the panel to
 13 refuse any requests for cross-examination which do not meet
 14 this criteria. We have dealt with the issue of fairness to
 15 Lonmin and Mr Chaskalson addressed that. I don't intend to
 16 repeat it except to say that we submit in full the
 17 submissions that have been made. Another point that is
 18 taken by Lonmin relates to what has happened in relation to
 19 witnesses which have given evidence to date, particularly
 20 Lonmin contends at page 3, paragraph 4.6 of its letter that
 21 witnesses who have testified to date have not been cross-
 22 examined on its policy procedure, practice and conduct
 23 relating to its employees and organised labour. We say at
 24 paragraph 17, that in fact the evidence has covered those
 25 aspects. There have been extensive evidence led and cross-

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1 examination on issues about organised labour and how Lonmin
 2 did not in fact deal with the matter as it should have.
 3 One of the examples is the statement given by Mr Da Costa,
 4 which traces the genesis of the dispute to the events of
 5 May 2011 particularly the situation at the Karee Mine, and
 6 it places it in two factual issues. The first is the
 7 general unrest in the platinum belt as a whole, so that
 8 Lonmin should not be seen in isolation. And then the
 9 second is the strike of May 2011, at the Karee Mine. Those
 10 are not strictly speaking phase 1 issues in the sense that
 11 they do not deal with the responsibility of the police and
 12 those are in general terms phase 2 issues, but they have
 13 been allowed, and they have continued to be allowed. So
 14 what I am trying to say, Mr Chairman, is that phase 2 has
 15 always been alive and if Lonmin complains that they have
 16 not had an opportunity to prepare properly for phase 2,
 17 well, that is their fault. So, Mr Chairman, if phase 2 has
 18 remained alive, there were two additional points that were
 19 made at the time of the separation. The one was that there
 20 will be consideration given to phase 2 being given by way
 21 of affidavit but even when that provisional ruling was
 22 made, it was always clear that the Commission will reserve
 23 the right to call specific witnesses of Lonmin to give
 24 evidence on oath, so they should have prepared for it.
 25 Then, Mr Chairman, I want to deal with the issue

<p style="text-align: right;">Page 35253</p> <p>1 of whether Lonmin is being singled out in isolation, 2 because that is one of their complaints in their letter. 3 The problem – 4 CHAIRPERSON: This is paragraph 19 of 5 your heads? 6 MR NGCUKAITOBI: Yes, paragraph 19 of my 7 heads of argument. The problem with this complaint is 8 twofold. The first is that we have not heard the full 9 version of Lonmin. We've only heard I think two – four 10 witnesses. 11 CHAIRPERSON: Yes, we've heard more than 12 two witnesses. 13 MR NGCUKAITOBI: Four witnesses. But the 14 full version is yet to be spelt out by Lonmin, particularly 15 the two witnesses that are pertinent to the so-called phase 16 2 questions, Mr Jamieson and Mr Mokwena have not yet given 17 evidence. So they have enough time to prepare in relation 18 to phase 2 questions but Mr Chairman, what are these phase 19 2 questions that the LRC intends canvassing? We have 20 isolated three topics that we say meets the criteria that 21 we have suggested. The one is housing. We covered some of 22 this ground in relation to the evidence of Mr Ramaphosa. 23 You will recall that some of the questions were deflected 24 to Lonmin. We were told that management will give us 25 responses to these questions. The second area is in</p>	<p style="text-align: right;">Page 35255</p> <p>1 transpired in 2010/2011 22 000 workers that previously, 2 that were employed by Lonmin were previously made owners of 3 the business of Lonmin via an employee share scheme. That 4 was taken away in 2011 when Shanduka acquired the 9% stake 5 in Lonmin. This is an issue that is pertinent to us 6 because not simply to show that Lonmin did not comply with 7 its obligations under the BEE legislation, but to show that 8 if workers remained in part owners of the business, this is 9 an issue that would have been relevant to their social 10 conditions and that at the time that a decision was taken 11 that their stake should be liquidated so that by 2012, when 12 Shanduka became the sole BEE partner of Lonmin, workers 13 were no longer in contention. 14 The point that we want to make here in relation 15 to the shareholding and that is why we want this issue to 16 remain alive in relation to the topics, is that one way of 17 dealing with labour discontent is extending shareholding to 18 workers, and that one of the responses that could 19 legitimately have been given by Lonmin to the very demands 20 on the strike, is that the workers themselves remained part 21 owners of the business, and that depending on the 22 fluctuations of the price of platinum at the future date, 23 they could in fact earn dividends qua-shareholders in 24 Lonmin. So, our submission, we've made the submission in 25 relation to what criteria should be used to allow phase 2</p>
<p style="text-align: right;">Page 35254</p> <p>1 relation to the social and labour plans of Lonmin. Mr 2 Chaskalson has already addressed the Commission that this 3 is not an act of charity on the part of Lonmin but it is a 4 legal obligation flowing from the legislation, but there is 5 a third element which- 6 CHAIRPERSON: It's further than that, 7 isn't it? It's a legal obligation which was a counter- 8 obligation to the acquisition by them of certain new order 9 rights. They got new order rights – 10 MR NGCUKAITOBI: Yes. 11 CHAIRPERSON: - in exchange for 12 obligations to address issues of housing and so forth in 13 the manner set out in the social labour plan, is that 14 correct? 15 MR NGCUKAITOBI: Yes, that is the 16 submission, Mr Chairman. The issue of housing has been 17 dealt with extensively by Mr Chaskalson. We dealt with it 18 in brief with Mr Ramaphosa last week. There is a third 19 topic, Mr Chairman, and I know I was excluded when I tried 20 to cross-examine on this question, but now that we are 21 dealing with the opening, or re-opening of phase 2 in full, 22 I want to put this back on the agenda. This is the issue 23 of the shareholding of employees, particularly in the form 24 of employee share schemes. What we were able to find in 25 our examination of the reports by Lonmin, is that what</p>	<p style="text-align: right;">Page 35256</p> <p>1 evidence, but we also want to make submission on the 2 substance of the phase 2 issues so that it's not an over- 3 arching and never-ending inquiry. There are three topics 4 that we say are relevant here, social and labour plans, 5 housing obligations and the issue of the shareholding. 6 [10:07] So in conclusion, Mr Chairman, we say that it is 7 clear that phase 2 forms part and parcel of the Terms of 8 Reference of the Commission. We say that we have proposed 9 a practical way that would accommodate every party and that 10 will lessen the unfair impact of Lonmin in terms of how to 11 distinguish between an issue that might be a phase 2 issue 12 but not relevant for purposes of this Commission, and we 13 say that we've also suggested three topics that the LRC 14 intends cross-examining on. 15 So with those submissions we say that the 16 application by the evidence leaders, subject to the 17 qualifications we have given, should be granted. 18 CHAIRPERSON: Yes, thank you. Ms Le 19 Roux, I think you're next. 20 MS LE ROUX: Thank you, Chair. Chair, I 21 do intend to address you on the withdrawal of the ruling 22 and its effect, but first I do think it's important to have 23 on the record that we need to take a step back and record 24 again why the phase 2 questions are so important and it's 25 that only when we understand these systemic issues and</p>

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1 questions that the opportunity that this Commission
2 presents could be seized to really understand what led to
3 the killings, but it's the investigation of all of these
4 surrounding circumstances that phase 2 was meant to
5 encompass.

6 Of course, Chair, the phase 1/phase 2 ruling
7 unquestionably had utility, and has utility in the
8 Commission process that we were able to focus on the
9 policing questions, and as the Human Rights Commission has
10 always understood the ruling it was always the intention
11 that the two phases would run in parallel and that the
12 phase 2 issues would receive the necessary sufficient and
13 satisfactory attention that they deserved –

14 CHAIRPERSON: It's not correct to say
15 that we were entitled, we were enabled to focus only on the
16 policing issues. There were other issues which were also
17 relevant in relation to the conduct of the strikers which
18 preceded the events of the 16th. It's also been covered in
19 evidence, also very relevant also. It would be unfair to
20 suggest that only the police have received, their conduct
21 has received scrutiny. The other parties have as well, the
22 unions and so forth also, and also Lonmin too to the extent
23 that it will be contended, as I understand it will be, that
24 their obduracy and their refusal to negotiate was part of
25 the problem. So it's not fair to say we have only been

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1 were looking at the time at the other issues that we were
2 looking at directly and it was a matter of approach; we
3 just differed from the Human Rights Commission. We
4 received those letters and we I think indicated that we
5 didn't agree. But anyway, that's not an avenue we need go
6 down now.

7 MS LE ROUX: Of course, Chair, and
8 obviously we were seeking to assist the Commission to try
9 to understand what the procedure would be to dealing with
10 the phase 2 questions. My learned friends have referred to
11 the question of whether it would be oral or written
12 evidence, how much time would be allocated to these, and
13 then the scope of the phase 2 themes themselves.

14 In addition throughout the period since the start
15 of the Commission the Human Rights Commission has sought
16 discovery through the Commission process from Lonmin as
17 well as –

18 CHAIRPERSON: I must say I always thought
19 that phase 2 would definitely involve a different approach
20 and would far more be devoted to examination of documents
21 and objectively ascertainable facts. I wasn't prepared to
22 sit for a week hearing evidence about how many hostels
23 there were and how many houses there were, with lengthy
24 cross-examination by some of the cross-examiners who've
25 excelled in lengthy cross-examination on topics of that

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1 looking at the police so far. We looked much further than
2 that.

3 MS LE ROUX: Correct, Chair. I've used
4 the policing theme as a shorthand, which you're correct,
5 does not capture that phase 1 focussed on the events of the
6 9th to the 16th of August and the roles that the various
7 parties played in those immediate days that led to the
8 tragedy of the 16th, and phase 2 rather relates to the
9 surrounding circumstances and actions by various
10 stakeholders that gave rise to some of the material
11 conditions that made the strikers go to the koppie, seek a
12 wage increase and the various roles that all of the other
13 stakeholders played in those demands.

14 But to return to the utility of the ruling; it
15 was always the Human Rights Commission's understanding that
16 the two phases would run in parallel and these questions
17 would receive the necessary sufficient and satisfactory
18 attention, and Chair, I hardly need to remind you that
19 since 2012 the Human Rights Commission has repeatedly
20 written to you, recording its concern that there seems to
21 be a de-prioritisation of some of these phase 2 questions,
22 and you know, throughout 2013 –

23 CHAIRPERSON: They certainly were
24 received but we didn't agree with the comment because it
25 was always intended to look at the phase 2 questions. We

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1 kind. I would have thought that we could find out how many
2 houses were built, or to take housing as an example, as a
3 matter of objective fact by looking at the Lonmin documents
4 and how many houses they built. So though there are
5 important issues to be covered in phase 2, even what's
6 left, many of them are susceptible of being solved by
7 reference to documents and objective facts rather than
8 disputes of facts as to who shot whom when.

9 MS LE ROUX: Yes Chair, and in order to
10 assist the Commission in ascertaining those objective facts
11 relating to the phase 2 themes the Human Rights Commission
12 made requests to Lonmin, to the Department of Mineral
13 Resources, to the Madibeng and Rustenburg Local
14 Municipalities, as well as to the Bapo Ba Mogale
15 leadership. We obviously understand the Commission's
16 reluctance to compel production from these parties, but
17 what has meant is that we now find ourselves under
18 significant pressure, probably constrained to only deal
19 with Lonmin related issues, and being asked to do so in the
20 five weeks that remain –

21 CHAIRPERSON: Isn't that largely the
22 result of the deletion of paragraph 1.5 of the terms of
23 reference?

24 MS LE ROUX: Well Chair, given that our
25 discovery to these other parties related obviously in part

1 to Lonmin's role in the communities it was, you knew, there
2 would have been responsive discovery if we'd been able to
3 get it out of these entities, it would have assisted even
4 in the things that remained for the Commission's attention.

5 Chair, I must confirm again that the Human Rights
6 Commission intends to assist the Commission to the limited
7 extent that it's able to in the remaining time. As you're
8 aware from the correspondence addressed to the Commission
9 on the 4th of August we are finalising submissions which
10 relate to phase 2 questions, specifically an analysis of
11 the SLP system, the entire regulatory and legal framework
12 that sets up those obligations and that system, as well as
13 a limited analysis of Lonmin's compliance with its
14 obligations under the SLPs, in addition to the housing
15 obligations that have received some attention in the
16 Commission process.

17 But of course these are incredibly limited
18 submissions, limited due to the lack of discovery by Lonmin
19 as well as the lack of time to be able to do any meaningful
20 analysis when we only received discovery from the DMR and
21 from Lonmin in the last two weeks.

22 In addition we intend to make a submission
23 relating to the corporate accountability framework in which
24 Lonmin's conduct could be assessed and evaluated by the
25 Commission. Those submissions should be, they're in the

1 process of being finalised and they will be with the
2 Commission we hope by the end of the week. So Chair, given
3 the limitations, and the significant limitations –

4 CHAIRPERSON: If they're going to call
5 for an answer from Lonmin it's obviously important that
6 Lonmin get them as soon as possible also, if we're going to
7 change the ruling.

8 MS LE ROUX: Yes, Chair. So Chair, given
9 the significant limitations of time, discovery, the
10 available hearing time and whether we will have the correct
11 witnesses before the Commission in its programme, we ask
12 the Commission in essence to try to salvage what it can
13 from the missed opportunity that is unfortunately phase 2.
14 We hope that the ruling on the withdrawal of the ruling
15 will enable the Commission to do the best that it can,
16 because in essence whether the ruling remains in place or
17 not, we face these significant limitations in terms of the
18 record that is available to this Commission, as well as the
19 time available and the resources of the parties available
20 to delve into these questions with the necessary depth and
21 detail.

22 But again, pragmatically we encourage the
23 Commission to try to salvage what it can and will continue
24 to assist the Commission to the extent that our team can
25 when these questions come up in the remaining five weeks.

1 Thank you, Chair.

2 CHAIRPERSON: Yes, thank you. The next
3 party wishing to address us on this matter – well, there
4 are two who are going to address us simultaneously, as it
5 were, the families and AMCU. Mr Ntsebeza.

6 MR MPOFU: Chairperson, before Mr
7 Ntsebeza addresses you, can I ask that you reconsider the
8 sequence? I think it would be –

9 CHAIRPERSON: Okay, if you want to argue
10 now then –

11 MR MPOFU: No, no, no –

12 CHAIRPERSON: This is an appropriate
13 stage for me to –

14 MR MPOFU: No –

15 CHAIRPERSON: - seeing you're now
16 addressing us, to express our congratulations to your
17 attorney Mr Tlhatlha and his wife who I believe were
18 blessed with the birth of a healthy bouncing daughter
19 yesterday, and I'm sure all of us here involved in the
20 Commission will wish to express our pleasure and
21 congratulations to them and wish them well in the years to
22 come. Yes, after that non-controversial note, what would
23 you like to say, Mr Mpofo?

24 MR MPOFU: Thank you very much,
25 Chairperson, that is very kind. We appreciate that. No,

1 what I wanted to say, Chairperson, was Mr – if I could
2 speak before Mr Burger because although as I said some of
3 things that I'm going to say might please him, some might
4 not, so that he can –

5 CHAIRPERSON: The point is if you're
6 going to say things that he may wish to answer –

7 MR MPOFU: Yes.

8 CHAIRPERSON: - it's appropriate that you
9 speak before him.

10 MR MPOFU: Yes, thank you.

11 CHAIRPERSON: So on that point the only
12 remaining question is whether you should speak before Mr
13 Ntsebeza.

14 MR MPOFU: No, certainly not.

15 CHAIRPERSON: Let us allow Mr Ntsebeza to
16 decide that matter for us.

17 MR NTSEBEZA SC: Thank you, Mr Chairman.
18 Mr Chairman, I had indicated that we may not –

19 CHAIRPERSON: No, no, you're not
20 understanding me. The question that arises for us to
21 decide now is whether you are going to address us before Mr
22 Mpofo and I say I have to decide that but I'm delegating to
23 you the responsibility of deciding that issue for me.

24 MR NTSEBEZA SC: I always defer to Mr
25 Mpofo. We have agreed that. Mr Chairman, there are just

<p style="text-align: right;">Page 35265</p> <p>1 one or two things that I would like to deal with which 2 arise out of the submissions that have already been made. 3 The first one is simply to state that phase 2 issues are 4 matters AMCU and the families, and more particularly AMCU 5 would be keen to have ventilated in the context of your 6 Terms of Reference, and that should be obvious in its own 7 terms. The housing issue has been a burning issue. It 8 continues to be a burning issue for AMCU. 9 The question of reckless lending which has been 10 alluded to by my learned friend Mr Tip, we certainly do not 11 share NUM's dividends that for instance some of the issues 12 that are covered under the head "Lending and debt 13 collection" may not have a bearing on the tragic events 14 that took place during the time that the Commission is 15 considering the events between the 10th and the 16th of 16 August. 17 I think either in a nuance form or even in a 18 direct form there would be argument that could be made to 19 show the relevance of those "mashonisas," or the lending 20 schemes in relation to which the Chairman talked about 21 UBank and the tragedies that took place particularly on the 22 16th. So we are of the firm view that – 23 CHAIRPERSON: [Microphone off, inaudible] 24 anyway because counsel for NUM was addressing us at the 25 time and –</p>	<p style="text-align: right;">Page 35267</p> <p>1 Mr Chairman, further Mr Ngcukaitobi's submissions 2 are not just about liquidation of mineworkers' shareholding 3 in Lonmin, but critically to whom those shareholders 4 eventually ended is a matter of grave concern. The Deputy 5 President of the Republic of South Africa is key and 6 central to the consortium that took over those shares and 7 if no enquiry could be made into how the transaction took 8 place, how ordinary workers, qua shareholders in their own 9 right, ended up forfeiting those shares and how those 10 shares ended up in a consortium led by one who now is the 11 Deputy President of the Republic of South Africa. If we 12 could not enquire into that then it would be self- 13 defeating, and as far as – 14 CHAIRPERSON: [Microphone off, inaudible] 15 the question of the relevance of such investigation will 16 only arise if we, well it will arise if we reverse the 17 ruling and proceed with phase 2 issues as well. 18 Alternatively if by some process we're able to finish phase 19 1 in time to deal with phase 2 separately the issue could 20 then arise. But what I'm putting to you is that in either 21 of those events - the second is unlikely, I think, regard 22 being had to the time that elapsed and that's available, 23 but it's a question of relevance and that question of 24 relevance doesn't arise for decision at this stage. 25 MR NTSEBEZA SC: Yes, Mr Chairman, as Mr</p>
<p style="text-align: right;">Page 35266</p> <p>1 MR NTSEBEZA SC: Yes, Mr Chair. 2 CHAIRPERSON: - I wondered whether that 3 was why NUM was concerned in that issue, but he assured me 4 that that wasn't so. 5 MR NTSEBEZA SC: No, I heard also his 6 response. He tried to downplay the relevance of NUM's 7 participation or shareholding in UBank and the view that we 8 may take that UBank in fact is not a far distance from 9 Abil, which has been in the news in the recent past, as Mr 10 Chairman will take judicial notice thereof. 11 CHAIRPERSON: No, I don't think we're 12 going to go there, Mr Ntsebeza. 13 MR NTSEBEZA SC: We won't go there, Mr 14 Chairman. 15 CHAIRPERSON: It won't be appropriate. 16 MR NTSEBEZA SC: But I'm just citing it 17 as an example. But having said that, you see if it is so 18 that the National Union of Mineworkers had a shareholding 19 in that bank then it is relevant, especially in the context 20 of what happened, and some of us have always held the view 21 that there is running throughout this entire Commission an 22 intercession between State, labour and obviously the 23 capital. So it is a topic that it would be tragic if the 24 Commission were not able to deal with simply because of the 25 opposition that has been put up by Lonmin.</p>	<p style="text-align: right;">Page 35268</p> <p>1 Chairman always does you have read my mind because that was 2 going to be my next submission, and my next submission is 3 that I find myself in a curve stick precisely because on 4 the one hand I do appreciate the fact that there is very 5 little time left and for that reason I have firm 6 instructions from the Socioeconomic Rights Institute to 7 support the evidence leaders' application for revisitation 8 of these so-called phase 2 issues. 9 Mr Chairman, it must be remembered that when the 10 division between phase 1 and phase 2 was arrived at or was 11 agreed it was not because there was any expression at that 12 time that it is irrelevant, or it is not in terms of the 13 Terms of Reference that that enquiry should be made. It 14 was purely for procedural convenience that there was this 15 view that phase 1 and phase 2 issues can be dealt with in 16 that kind of way. 17 The fact of the matter of course now, the reality 18 is that we have come to virtually the end of our life. The 19 issues that have been raised are so critically important, 20 and I've just raised two, and it seems to me that the – and 21 I think Mr Mpofu will deal about this more appropriately – 22 if it is so that in terms of one of the clauses of the 23 Terms of Reference this Commission is able to determine a 24 portion or an aspect of its own enquiries to another body 25 to deal with, that probably would be what the Commission</p>

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1 could do, to say this aspect must be referred to another
 2 Commission, possibly chaired by you, Mr Chairman –
 3 CHAIRPERSON: You know, I always thought
 4 of you as a friend of mine, Mr Ntsebeza, I realise I was
 5 possibly wrong but –
 6 MR CHASKALSON SC: With different
 7 evidence leaders, Mr Chairperson.
 8 MR NTSEBEZA SC: Mr Chairman shouldn't
 9 opt out. But I mean in a more serious vein.
 10 [10:26] If it is so that your terms of reference allow
 11 you to make a recommendation that as a particular aspect
 12 and this aspect, the phase 2 aspect is something that can
 13 be referred to another inquiry then perhaps that is
 14 something that would be preferable because it is in the
 15 interests of dealing with that aspect very thoroughly and
 16 with a little bit more time than the remainder or the
 17 period in the life of this Commission would allow for the
 18 matter to be dealt with in. My problem, of course, is that
 19 if any commissions I've been involved in are anything to go
 20 by when once recommendations are made then it's out of your
 21 hands and that day may never come. And we would have
 22 missed an opportunity of dealing with –
 23 CHAIRPERSON: Do I understand you to be
 24 saying this, if I am misunderstanding you please correct
 25 me. What you're saying is we could start with some of the

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1 phase 2 issues and if, however, we find at the end that we
 2 haven't been able to deal with them as fully as they
 3 require then we could recommend that a further commission
 4 be appointed. But if we feel that we're able, with the
 5 material before us, to make certain definitive
 6 recommendations we should do so, but it would be premature
 7 at this stage for us to assume what the position will be.
 8 But certainly to be in a position to make recommendations
 9 for a further commission for example, if that were to be
 10 the route to go it would be necessary for us to have, if
 11 possible, some evidence, the sort of points that would
 12 arise before such a proposed commission. Is that so? And
 13 it may be that -
 14 MR NTSEBEZA SC: Mr Chairman, I couldn't
 15 have put it better myself. I think that's the summation of
 16 what I'm saying. Rather have in the real time that we have
 17 something on the basis of which we can either make
 18 substantive findings or to make the recommendation that
 19 some other commission must deal with. So those our
 20 submissions, Mr Chairman.
 21 CHAIRPERSON: Our attention has been
 22 drawn to the fact that it's now half past ten, so perhaps
 23 we can defer the pressure of hearing Mr Mpofu till after
 24 we've had the first comfort break.
 25 MR MPOFU: Thank you, Chairperson.

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1 MR NTSEBEZA SC: As Chairman pleases.
 2 [COMMISSION ADJOURNS COMMISSION RESUMES]
 3 [10:50] CHAIRPERSON: The Commission resumes. Mr
 4 Mpofu, I understand one of your colleagues also wishes to
 5 participate in the discussion before Mr Burger does. Mr
 6 Rampela, do you wish to speak before Mr Mpofu or after?
 7 You indicated to me during the -
 8 MR RAMPHELA: I think it should be before
 9 Mr Mpofu so that you know, he can sweep any other thing I
 10 may leave out.
 11 CHAIRPERSON: Alright. Remind us with
 12 whom you are appearing.
 13 MR RAMPHELA: Thank you, Chair, Rampela
 14 appearing for Mabebe Family and Mabelane Family.
 15 CHAIRPERSON: Yes, thank you.
 16 MR RAMPHELA: Chair, as I've indicated,
 17 you know, the Chair will excuse me if I actually become a
 18 bit out of order because I've been out of the Commission
 19 for some time. Just that I think this issue of phase 2 is
 20 quite critical and I would like to make an input on it
 21 because in my view, it will be very sad indeed and I agree
 22 with my learned brother Adv Ntsebeza that the actual causes
 23 of Marikana are actually in phase 2, who and how so and so
 24 was shot, is more something that one could - fact and I
 25 believe that some of the issues that are important are

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1 issues relating to how the police, and that is why I think
 2 not only Lonmin is important in phase 2, but how the police
 3 or how as a country, we have managed to transform our
 4 police from a force into a service.
 5 Throughout the Commission we've not really dealt
 6 with the community participation in the policing, so the
 7 issue of community policing forum, the manner in which this
 8 whole thing was approached including important stakeholders
 9 as to who AMCU was involved in the policing, how NUM,
 10 whether there was any forum where the community could have
 11 been involved. So all of these, I believe are phase 2
 12 issues that are critical and that may actually assist us to
 13 avoid another Marikana in the future.
 14 The second issue that I think is important, and
 15 that is why phase 2 has to be looked into is an issue that
 16 we raised during cross-examination but did not really go
 17 into and that is the issue of corporate governance, not
 18 only of Lonmin, but generally, and the involvement of
 19 important stakeholders in corporate governance in the South
 20 African Mining Industry especially because if one reads the
 21 evidence of Da Costa, his was a situation and this is in
 22 re-examination by Mr Burger SC, this is a situation where
 23 there was probably anarchy that was going to ensue and is
 24 this from the evidence, one gathers was a decision taken by
 25 an executive and probably a board on the one side, with an

<p style="text-align: right;">Page 35273</p> <p>1 important stakeholder in the industry being the union, the 2 workers and the final decision on the issue one not knowing 3 what the other have actually taken a decision on, and 4 almost a wall having been built amongst or between the two 5 disagreeing parties.</p> <p>6 So I believe that phase 2 has to also look at 7 these kind of issues. The other reason why I concur with 8 the evidence leaders as well as the suggestion by Adv 9 Ntsebeza is, in our interaction with some of the community 10 members in Bapong, actually I have documents of about more 11 than 150 young people who said they made an application to 12 Lonmin and some of them were young mothers who are entitled 13 to social grants, but after the application was made, they 14 were registered by the Department as employees of Lonmin. 15 They were just applicants probably having gone through a 16 fitness test, but not employed, and yet this phase where 17 probably the applications were being considered, was given 18 as information to other stakeholders including government 19 as these people being employees of Lonmin. Now how Lonmin 20 as a corporate entity in South Africa dealt with their 21 complaint is an issue that I think has to be ventilated, if 22 not by this Commission, then as Adv Ntsebeza has said, by a 23 body that the Commission can suggest in view of the time 24 that this Commission has. So I believe, and the Chair has 25 noted in my cross-examination that I said that deaths by</p>	<p style="text-align: right;">Page 35275</p> <p>1 complex. Firstly, it cannot be denied that the events 2 which occurred on the 9th to the 16th of August had 3 underlying causes, going back to the discovery of diamonds 4 and gold in the 19th century, arguably up to 1652. For 5 example, Chairperson, the migrant labour system is 6 obviously directly related to the issue of housing which is 7 raised there and the insufficiency of the money and by 8 Lonmin workers, hence they resort to unscrupulous 9 moneylenders and mashonisa, and nobody is denying this. I 10 don't understand Lonmin to be denying this as well. So the 11 issue of relevance doesn't even arise. It's relevant, it's 12 pertinent, it's – I think on that we are all on the same 13 side. What is in contention, Chairperson, is whether these 14 underlying causes known as phase 2 in the Commission's 15 parlance, can be properly ventilated in a Commission of 16 this kind, and more specifically their causal connections 17 to the massacre and related events. In all honesty, 18 Chairperson, and for completely different reasons, we agree 19 with Lonmin that no justice can be done to such an inquiry 20 in proceedings of this kind and more specifically in this 21 Commission which is by its very nature, necessarily so 22 legalistic in its approach since it is partly aimed at 23 identifying wrongdoing among other things. So our 24 approach, Chairperson, is simply that the present – 25 CHAIRPERSON: Are you saying that the</p>
<p style="text-align: right;">Page 35274</p> <p>1 hunger is more painful than being shot at. And the second 2 phase is about those kind of issues and those are the 3 issues that actually led to Marikana, and I think those are 4 the issues that this Commission has got a very historical 5 opportunity to actually say something about and address for 6 or posterity. Thank you, Chair.</p> <p>7 CHAIRPERSON: Thank you, yes, Mr Mpfu? 8 MR MPOFU: Thank you very much, 9 Chairperson. Chairperson, I'd just like to start by saying 10 the reason why I could not place myself on either side of 11 this divide, is exactly because I either agree with 12 everybody or disagree with everybody. The issue here, 13 Chairperson, is quite simple, it's a question of 14 practicality. Lonmin in their letter say the following 15 that they consider the scope of the Commission's mandate 16 and explain why to now embark on phase 2 inquiry is 17 impractical and might well fall outside the mandate of the 18 Commission. We obviously differ with them very sharply on 19 the second part of that sentence. The inquiry into phase 2 20 obviously falls into the terms of reference. But on the 21 first leg of what they say, which is that it is 22 impractical, we agree with them very much.</p> <p>23 Chairperson, I am just going to make five or so 24 points. The first one is that our position and this is, 25 even if I say so myself, quite a new one and in a way</p>	<p style="text-align: right;">Page 35276</p> <p>1 president erred in including what amounts to phase 2, the 2 phase 2 issues in our terms of reference? 3 MR MPOFU: No, Chairperson, in the 4 following – 5 CHAIRPERSON: A legalistic body, judge 6 presiding, senior counsel, and there are two other 7 Commissioners. 8 MR MPOFU: No, Chairperson, no, and 9 that's where the nuance is, because remember I am saying 10 those issues are relevant, so inevitably it can hardly ever 11 be expected that the Chairperson and the Commissioners are 12 going to say, look, the only issues as you correctly 13 pointed out in your exchange with Ms Roux, the Chairperson 14 can't say, look, we are just going to close our eyes and 15 start on the 9th up to the 16th, or at worst, we will start 16 with Mr Da Costa and stop on the 16th. Obviously, even the 17 witness that I have just called now, Chairperson, have 18 given evidence, Mr Mtshamba, about for example, he says 19 apartheid still exists at Lonmin. Those are the wider 20 issues. So they are relevant to your inquiry. And indeed, 21 we, of all the parties, have canvassed those issues with 22 many witnesses, with Mr Ramaphosa, with our own witnesses, 23 and so on. So they are certainly relevant. However, the 24 question is, is whether – well, let me put it this way, we 25 say that the Commission must concentrate on the phase 1</p>

1 issues, and I'll explain why we say that, which answers the
 2 next – though your question, this is not to say that it
 3 cannot mention and refer to the underlying causes, the
 4 Commission. Insofar as evidence has been led in relation
 5 thereto or insofar as these issues have been referred to in
 6 the seminars and so on. And as I say, many witnesses have
 7 given evidence relevant to these issues including Mr
 8 Magidiwana, Mr Phatsha, Mr Da Costa, Mr Ramaphosa and Mr
 9 Mtshamba, as I've just mentioned. However if justice is to
 10 be done to the issue of the underlying causes, then a
 11 separate and different inquiry and this is what Mr Ntsebeza
 12 was alluding to, I was going to address, must be done.
 13 This must be a Commission much like the one I can think of,
 14 is the Wiehahn Commission, that type of Commission, not
 15 this type of an inquiry which is a) not time bound, b) not
 16 adversarial and dominated by lawyers but other types of
 17 professional and academics, economists and so on who can
 18 delve deeply into these underlying issues.
 19 The weakness of the present inquiry is that some
 20 of the witnesses quote unquote, you know, who might have
 21 played like Cecil John Rhodes or whoever who started the
 22 mining industry, cannot be called and Lonmin cannot be
 23 expected to answer for them. And in fairness, Chairperson,
 24 if this, and that deals with your direct question, if what
 25 I've just said calls for a belated amendment of the terms

1 of reference, well then so be it. The issue, Chairperson,
 2 is that in the six weeks that remains, no justice can be
 3 done on these issues, and the danger is that once, if they
 4 are dealt with superficially, then everyone is going to
 5 relax as Mr Ntsebeza has alluded to and assume, that oh,
 6 well, it was dealt with, it's done now. The answer we
 7 think lies in paragraph 5 of the terms of reference, which
 8 reads as follows, "The Commission shall where appropriate
 9 refer any matter for prosecution, further investigation, or
 10 the convening of a separate inquiry to the appropriate law
 11 enforcement agency, government department or regulator
 12 regarding the conduct of a certain person or persons."
 13 This section, I had a debate with two of my
 14 colleagues in the morning about it, and I think it has been
 15 incorrectly and narrowly interpreted to mean that it only
 16 refers to prosecution. That is not my reading of the
 17 paragraph. It says, "The Commission shall where
 18 appropriate refer any matter for prosecution, further
 19 investigation or the convening of a separate inquiry." So,
 20 it's not confined to matters of prosecution. It also
 21 envisages further investigations and the convening of
 22 separate inquiries. And there are many bodies – well, I
 23 would agree with my learned friend Mr Ntsebeza that since
 24 the Chairperson is well steeped in the issues, if you were
 25 available, you might well be the appropriate person to do

1 it, but there are other institutions in South Africa,
 2 constitutional institutions which deal with these broader
 3 human rights issues that are envisaged here.
 4 So in short, Chairperson, our position is
 5 motivated by the belief that these issues are too important
 6 rather than to say they are unimportant, and if I can just
 7 quote one example, which has been cited here, we believe
 8 very strongly as Mr Ngcukaitobi alluded to that Shanduka's
 9 acquisition of the broad based BEE deal which included the
 10 workers, and when they took that deal, they narrowed it
 11 down to a few individuals, but had that not been done, then
 12 the massacre might not have happened because remember,
 13 Chairperson, that if the workers had a stake as they did
 14 before the Shanduka takeover, then their own disposition at
 15 the koppie, in fact they probably would never even have
 16 gone to the koppie, for starters, would have been
 17 different, but more importantly, Chairperson, just like
 18 Shanduka, they would have had a representative on the board
 19 of Lonmin directly or indirectly, and surely that person or
 20 persons would have said, just go and talk to them, or I'll
 21 go and talk to them or whatever. So those issues, it goes
 22 back to your earlier question, Chairperson, are clearly
 23 relevant and may or may not be depending on whether we have
 24 argued this successfully, be causally connected to the
 25 actual incident. But they need to be delved into very

1 properly. We need to sit here and analyse those
 2 shareholder agreements, I think Mr Ramaphosa in fairness to
 3 him, even considered that they are, they themselves are
 4 looking into re-broadening if there's such a word, that
 5 empowerment deal which is a concession that shows that the
 6 current structure is deficient. So those issues are
 7 definitely important and it is exactly because they are
 8 very important that we say they can't be dealt with in the
 9 remaining six weeks span of this Commission or no justice
 10 can really be done with them in dealing with them. So we
 11 say this is one situation where the adage, half a loaf is
 12 better than no bread, does not apply. We'd rather have the
 13 whole loaf and we'd rather have it done separately and
 14 without detracting from the important answers that are
 15 required by - the people we represent want answers.
 16 Obviously like all South Africans they want answers to the
 17 underlying issues but primarily they want answers to what
 18 happened which led to these specific issues that are dealt
 19 with in phase 1. And we cannot compromise those answers at
 20 the expense of the wider answers that we all need. And in
 21 fairness, Chairperson, you know that we've taken a stance
 22 that's very adversarial towards Lonmin but why must Lonmin
 23 – why must Lonmin be visited with the sins of the whole
 24 industry? Why? Just because they happen to be a party
 25 here in these particular proceedings. If for example what

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1 Mr Mtshamba is saying, that apartheid still existed at
 2 Lonmin, then I can put my last dollar that it's not just at
 3 Lonmin, it might be across the entire industry, and we
 4 cannot therefore expect the one party that happened to be
 5 here in front of us to then be answering for the sins of
 6 the industry.
 7 [11:10] And our successive governments of the past which
 8 may have colluded with capital. To do so would be the
 9 same, it would be like asking SAPS to be answerable for the
 10 rand revolt of the 1920s and the massacre in Sharpeville
 11 and this one and that one. We can't.
 12 What we are here to look at is the specific, what
 13 we've called the specific collusion between Lonmin and SAPS
 14 in relation to this particular matter, not the general
 15 historical things as I say of either SAPS or Lonmin, which
 16 cannot be visited upon one company that just happens to be
 17 the one in front of us. Thank you, Chairperson.
 18 CHAIRPERSON: Thank you. Yes, Mr Burger.
 19 MR BURGER SC: Chair, we made written
 20 representations at the invitation of the evidence leaders.
 21 In a note of the 27th of July, which we received from the
 22 evidence leaders they said the following. I unfortunately
 23 don't have copies of these, but they're on record and if I
 24 may read them into the record, it will be brief –
 25 CHAIRPERSON: Yes, of course.

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1 MR BURGER SC: And it may facilitate the
 2 process.
 3 CHAIRPERSON: Yes, of course.
 4 MR BURGER SC: They delivered it to us
 5 and I read selectively –
 6 CHAIRPERSON: I'm sorry to interrupt you.
 7 If it's relevant we can put copies in as exhibit NNNN3, if
 8 you desire that.
 9 MR BURGER SC: They wrote to us and said
 10 "In relation to oral evidence on phase 2 issues the
 11 evidence leaders are of the view that the ruling separating
 12 phases 1 and 2 should be withdrawn now that most of the
 13 issues originally to be canvassed in phase 2 have been
 14 removed from the Commission's Terms of Reference by the
 15 deletion of clause 1.5 of the original Terms of Reference
 16 in proclamation [so and so]. Most of the remaining issues
 17 that were originally to be addressed in phase 2 are issues
 18 relevant to the responsibility of Lonmin for the Marikana
 19 tragedy. Some of the Lonmin executives who will be called
 20 to testify in relation to phase 1 issues are witnesses with
 21 whom the evidence leaders would like to canvass phase 2
 22 issues relevant to Lonmin."
 23 And then the note concluded thus, "The evidence
 24 leaders have accordingly approached the Commissioners to
 25 withdraw their original ruling separating the hearing on

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1 phases 1 and 2. Any parties who want the original ruling
 2 to remain in place are invited to address written
 3 submissions to the Commissioners on or before the close of
 4 business" on a certain date and that date was extended and
 5 we then filed our written response which is now NNNN1, and
 6 we wrote at the end of that to say, "Should the Commission
 7 be inclined to revoke the earlier direction that phase 1 be
 8 addressed we would urgently request the opportunity to
 9 present oral argument in open Commission to explore further
 10 the issues which have due to time constraints been referred
 11 to above." And that's why we're here today.
 12 The issue has narrowed now. This is not an issue
 13 as to whether you should abandon phase 2. You cannot
 14 abandon it. That's your mandate. It's also not an issue
 15 anymore as to whether those remaining issues to be enquired
 16 into in the context of Lonmin should proceed as the issues
 17 for the next six weeks. The issue now is a very narrow
 18 one. It is should phase 2 be introduced into this
 19 Commission on chapter 5 of the interim report, whether
 20 Lonmin has complied with its SLP obligations. That's the
 21 issue. So it's not surprising today that all my colleagues
 22 argue for an opening up of the inquiry and Lonmin is the
 23 only side saying do not open up.
 24 But Chair, you would have heard the discomfort
 25 with Mr Ntsebeza. He's clearly uncomfortable with this

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1 because he says you enquire into this, but this is not
 2 phase 2; this is a component part of phase 2. So what he
 3 suggests, as I understand him and I don't want to do him a
 4 disservice, he says start on this partial inquiry - you're
 5 not going to finish it – and then make a recommendation
 6 that somebody else should pick it up and complete it in its
 7 enlarged form. That's really a scenario too ghastly to
 8 contemplate.
 9 My learned friend Mr Mpofo has got the same
 10 discomfort. He sees that to now enquire into the housing
 11 of Lonmin doesn't serve his purpose. Certainly he wants to
 12 enquire into Shanduka. He wants to know what happened to
 13 the Deputy President of the country. He's got other fish
 14 to fry. So this is not going to work, but in fairness, he
 15 does say this; he says why single out Lonmin and their
 16 housing obligations and the SLP and convert phase 2 into
 17 that. Well, there's no answer to that. That's unfair.
 18 It's outside the mandate, we will submit, and it shouldn't
 19 be done. Why should Lonmin be singled out on this debate?
 20 But I'm running ahead of myself. I'm explaining
 21 why I'm alone in opposing the introduction of phase 2 now.
 22 We will make three fundamental submissions with your
 23 permission, Chair and Commissioners. First is that
 24 Lonmin's housing obligations fall outside your mandate.
 25 Secondly that probing Lonmin's housing obligations in the

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1 context of the SLP in a vacuo is not meaningful. I mean
 2 that is you can't probe that without looking at the
 3 municipality, the province, the government, education,
 4 sanitation, clean water, the whole array of social ills.
 5 You can't do this piecemeal. You either look at –
 6 CHAIRPERSON: I'm sorry, what is the
 7 relevance in regard to the simple question as to whether
 8 Lonmin complied with its legal obligations which it
 9 voluntarily assumed on the strength of which it got its new
 10 order mining rights? What is the relevance of possible
 11 failures by other bodies to comply with other obligations
 12 of theirs in the housing area?
 13 MR BURGER SC: That enquiry is not in the
 14 mandate of the Commission, with respect. The Commission's
 15 mandate –
 16 CHAIRPERSON: No, I understand that.
 17 MR BURGER SC: Yes.
 18 CHAIRPERSON: But what I'm saying to you
 19 is if Lonmin's failed to comply with their obligations, if
 20 they did –
 21 MR BURGER SC: Yes.
 22 CHAIRPERSON: - legal obligations –
 23 MR BURGER SC: Yes.
 24 CHAIRPERSON: - the non-compliance with
 25 obligations by other bodies would have no relevance on

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1 that. They can't put up as an excuse we didn't build
 2 houses because other people didn't build houses. If the –
 3 MR BURGER SC: What the –
 4 CHAIRPERSON: Sorry, can I finish? If
 5 the breach of those obligations led to their workforce
 6 being obliged to live in conditions of squalor, which even
 7 the former non-executive director Mr Ramaphosa conceded
 8 could lead to trouble, there are other statements that had
 9 been referred to by Lonmin officials saying that this was a
 10 ticking bomb and so on, whether there is a causal
 11 connection of course is a matter which will arise for
 12 consideration under the proposed inquiry, but the point I'm
 13 putting to you is that if it is so that there may well be a
 14 causal connection between their failure to comply with
 15 their specific obligations and the creation of what
 16 amounted to a tinderbox which led to the trouble which has
 17 brought us here, if that's so how can it be relevant to say
 18 well they're excused - making all the assumptions against
 19 them, which may not be correct of course – but they're
 20 excused because other bodies also failed? I don't
 21 understand the relevance of that submission.
 22 MR BURGER SC: No, I'm dealing with –
 23 CHAIRPERSON: You must explain it more
 24 fully to me.
 25 MR BURGER SC: I will in due course. I'm

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1 dealing with the second main argument. That is one can't
 2 consider that in vacuum. The answer to the question you
 3 posed to me, Chair, lies in the first one, on causation,
 4 but in the second one it lies in this; it is unhelpful to
 5 probe in the context of the deaths of the people in this
 6 inquiry whether Lonmin had provided houses, without at the
 7 same time comparing what houses were provided by the
 8 municipality, by the province. Could Lonmin provide houses
 9 if there was no sanitation? Could Lonmin build houses if
 10 there was no running water and whose responsibility was
 11 running water? Could Lonmin provide houses, getting
 12 200 000 people in the North West province from the Eastern
 13 Cape, seeing the educational infrastructure in that
 14 province, is that feasible? It's not an isolated enquiry.
 15 It's a sophisticated multifaceted enquiry which falls
 16 outside of your mandate because - that's the first point –
 17 your mandate is particularly linked to the events of a
 18 certain period of time. It's the only point I make on this
 19 second one.
 20 The third main argument I want to address is that
 21 it will be unfair at this stage, two years down the line,
 22 six weeks to go, to start enquiring into this issue and to
 23 expect Lonmin alone to address that at this stage of the
 24 game. Those are the three main arguments, but let me make
 25 two observations by way of introduction.

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1 Firstly, Lonmin accepts that decent accommodation
 2 for all people living and working at Marikana is a
 3 priority. I'm not defending the squatter camps under the
 4 trees in that area. My client doesn't do that. If I may
 5 ask you to have a look at NNNN2, which is the interim
 6 report, and you'll find the interim report, page 53, there
 7 is a quote from the Lonmin chairman of January of last year
 8 where he said the following, and this is the attitude of
 9 Lonmin, page 53 of NNNN2, "In the 1990s Lonmin and other
 10 mining companies in consultation with the unions and
 11 associations and with the approval of the Department of
 12 Mineral Resources created a living-out allowance scheme as
 13 a first step in moving away from the shared accommodation
 14 single-sex hostels in which most miners had lived during
 15 the apartheid era. An unintended consequence of the
 16 living-out allowance was the many workers who chose to live
 17 in shacks close to the mines either because they
 18 reallocated the allowance to other priorities, or due to a
 19 lack of access to decent accommodation. Lonmin recognises
 20 that it and the industry as a whole need to rethink this
 21 approach. We must ensure that this unintended consequence
 22 is eliminated or at least minimised. Employees must have
 23 access to decent accommodation and the essential utilities
 24 of fresh water, proper sanitation and electricity."
 25 That's a major debate, but that's not your

1 debate, Chair. In fact we have information that the
 2 Department of Mineral Resources statutorily assess
 3 compliance with the mining charter. Given that the
 4 charter's 10-year target timeframe ends in 2014 all
 5 companies are to be assessed. The DMR has commissioned a
 6 consultant called Moloto Solutions to conduct an assessment
 7 of Lonmin's charter compliance earlier this year. That
 8 assessment will be completed by the end of 2014 and no
 9 doubt the DMR and the relevant authorities will have a look
 10 at that. That's not a debate for this Commission. It is
 11 far too wide-ranging. As my learned friend Mr Mpofu says
 12 you need less lawyers and more experts in that type of a
 13 debate.

14 But I'm still dealing with the preliminary
 15 statement to say Lonmin does not defend the unacceptable
 16 social conditions in the Marikana area. I want to quote a
 17 second example of that in that same report at page 56. I
 18 now quote the previous chair of Lonmin, January 2013, and
 19 in the middle of the last paragraph there the interim
 20 report says, "As Mr Phillipmore stated in his speech to the
 21 Lonmin AGM on 31st January 2013 Lonmin has a duty to its
 22 employees to ensure that they have access to decent
 23 accommodation and the essential utilities of fresh water,
 24 proper sanitation and electricity." That my client
 25 accepts. So whatever I say today should be read against

1 that backdrop.

2 I want to make a second introductory comment, and
 3 it is this; criticism of Lonmin for failure to produce
 4 documentation timeously has no merit. You would have seen
 5 that in the report, page – in the introduction to the
 6 interim report on page 3 of NNNN2, the second paragraph
 7 says, dealing with the production of documentation, "The
 8 production of the phase 2 report was impeded by the delays
 9 in obtaining information on phase 2 issues from Lonmin.
 10 Ultimately certain requests for documentation and
 11 information which had been addressed to Lonmin since last
 12 year were only complied with in the last two weeks before
 13 the report was produced."

14 That unfortunately obliges me to take you briefly
 15 through the history we all know. Chair, you will remember
 16 that in Rustenburg we had what we called pre-hearings.
 17 That was late in 2012 and early 2013. The pre-hearings
 18 were conducted by the evidence leaders to consider the
 19 preliminary list of themes for consideration in phase 2 and
 20 for us to make submissions on those issues. Lonmin
 21 participated in that process. We gave a list of topics
 22 that we would not seek to address in phase 2. We suggested
 23 that some of these things fall outside of your scope and I
 24 think one of those was migrant labour for example. That
 25 was too heavy a subject to introduce here and we had that

1 debate, and we then made the proposal that the ambit of all
 2 these topics be limited in scope by their usual connection
 3 to the deaths and injuries to persons and the damage to
 4 property during that period. That's going to be a theme
 5 through my debate because that's your mandate. You have to
 6 enquire into these things against the backdrop of those
 7 incidents.

8 Following upon those pre-hearings the evidence
 9 leaders did not respond to our proposal that led to a
 10 further request for us in December and in the end on the 6th
 11 of March 2013 the evidence leaders reverted to my attorney
 12 with a rider that the topics to be identified will be
 13 limited in scope by their relevance to the deaths, injuries
 14 to persons and damage to property at Lonmin's mining
 15 operation for the period 9 to 16 August 2012. So far so
 16 good; we're under the impression we're on the same page.

17 In January 2013 Lonmin is informed of the
 18 appointment of Dr Forrest – sorry –

19 CHAIRPERSON: I think that must be
 20 January 2014.

21 MR BURGER SC: 2014, I'm sorry.

22 CHAIRPERSON: Because she was only
 23 appointed late last year.

24 MR BURGER SC: 14, that's quite right,
 25 14, and we are informed that she's been appointed as the

1 Commission's senior researcher. She is in the process of
 2 arranging seminars and would like to be able to approach
 3 some of the clients of the parties participating to invite
 4 them to participate and to conduct interviews concerning
 5 some of the topics, and we're told that the Commissioners
 6 would like to know if any of the parties have objections to
 7 Dr Forrest doing so and if the parties are agreeable to it,
 8 whether they would like to suggest any protocols to be
 9 observed.

10 We were then furnished with a timetable for phase
 11 2 and it said inter alia, "The parties are to make
 12 discovery in relation to the topics which they propose to
 13 address and in relation to any additional topics in respect
 14 of which they have been called upon to make discovery by
 15 the 18th of March 2014." This must be a typo there. But
 16 importantly that timetable states, "The discovery
 17 obligations in paragraph 2 are subject to the following
 18 conditions: 1, the topics do not in any way supersede the
 19 Terms of Reference of the Commission. So a party is
 20 obliged to make discovery of documents in relation to a
 21 topic only insofar as the topic is relevant to the events
 22 in Marikana which led to the deaths of approximately 44
 23 people," and the rest we know. So we're still on the same
 24 page. It is still within the narrow confines of the
 25 tragedy of August.

<p style="text-align: right;">Page 35293</p> <p>1 On the list of issues to be inquired into of 2 particular relevance was issue 13. Chair, you may remember 3 there were black typing and red typing. 4 [11:30] I don't have to go there, but black was 13 and 5 one of the issues, Lonmin's obligations, point 1, the 6 extent to which Lonmin complied with its social obligations 7 under 13.1.1, the social and labour plan applicable to its 8 mining right; 13.1.2, the mining charter; 13.2, the extent 9 to which DMR took appropriate steps in relation to any non- 10 compliance; 13.3, educational obligations of Lonmin. 11 We then sought clarification of that from the 12 evidence leaders in a letter on the 18th of February and I'm 13 going to read you the questions and the answers we got to 14 explain to you what led to the discovery by Lonmin in March 15 of this year. 16 On the 18th of February 2014 my attorney wrote to 17 the evidence leaders and said, "When are these topics 18 likely to be addressed and before which tribunal or body?" 19 The answer came back, "The topics in black ink will be 20 addressed before the Commission. This will be done when 21 the evidence in respect of phase 1 has been concluded." I 22 read that again. "This will be done when the evidence in 23 respect of phase 1 has been concluded. (One can however 24 not exclude the possibility that some evidence relating to 25 phase 1 will become available and be introduced at a later</p>	<p style="text-align: right;">Page 35295</p> <p>1 participate." So at least we know now that phase 2 is 2 coming somewhere in the future and there are a multitude of 3 parties who are going to make representations. 4 In response to the invitation – and I must go 5 quicker here because it's taking too long – my attorney 6 writes to Dr Forrest. They exchange views and my attorney 7 decides, instructs Lonmin and Lonmin decides that we will 8 not take part in the public seminars simply because it's an 9 open-ended debate. It is not structured. We don't think 10 it's going to stay within the mandate of the Commission, 11 and that's accepted. The seminars are held, I'm not sure 12 all of the seminars planned were held but some seminars 13 were held and Lonmin did not partake and everybody knew 14 that we were not going to partake. 15 On the 18th of March Lonmin made extensive 16 discovery and that in fact, Chair, if I may ask you to 17 consider that discovery, and you'll see that really seems 18 to me the source of the interim report. You find that in 19 NNNN1, that's our written submission, and it's annexure A 20 to it, and you'll see this is a discovery made in March of 21 this year, under different headings, and I don't know how 22 many files it were but it must have been a number of files, 23 actual financial reports, the social and labour plans. 24 That's where they come from. Section 3 sustainable 25 development, 4, policy documents, 5, agreements, land</p>
<p style="text-align: right;">Page 35294</p> <p>1 stage, presumably after the phase 2 evidence.)" 2 The next question, "When in the period between 3 now and the end of April 2014" – that's where we still 4 believed that the Commission would terminate April 2014. 5 "When in the period between now and the end of April 2014 6 will these matters be addressed?" The answer, "It is not 7 possible at this stage to answer this question. We hope 8 that this will become clearer in the near future." 9 The next question, skip 1, "To the extent that 10 the matters are to be addressed 'fully,' how many witnesses 11 are anticipated to give evidence and what sources of 12 information will the Commission rely upon to arrive at 13 recommendations?" The answer, "The Commission will decide 14 this in the light of all the information received by it." 15 I refer again to a paragraph in another letter. 16 Then 1.6, "To which parties have these requests 17 been directed?" The answer, "The list of topics with the 18 invitation to submit relevant information has been sent to 19 all the parties and to other persons or institutions. The 20 Chamber of Mines had been invited, like other parties the 21 Minister of Police has been invited to submit relevant 22 information. All parties have been invited to submit 23 relevant information on the identified topics. The parties 24 include the Minister of Police, SAPS, the Department of 25 Mineral Resources, the other institutions is entitled to</p>	<p style="text-align: right;">Page 35296</p> <p>1 issues in section 6, housing in section 7, micro lending in 2 section 8. These documents are produced. 3 I have said to you that there was a decision 4 taken by Lonmin not to take part in the public seminars. 5 You'll find the justification for that in this same letter 6 in paragraph 6.4. I'm not going to read it out, but there 7 is a, with respect a considered view why we thought that 8 fact-finding mission was going nowhere. It's not going to 9 assist the Commission and it's not going to stay within the 10 mandate of this Commission. Perhaps I should just read 11 those three paragraphs. 12 CHAIRPERSON: Yes, I think you should. 13 MR BURGER SC: Yes, I should. 6.4, 14 "Lonmin was also invited [says the letter] by Dr Forrest to 15 participate in what was termed the Marikana Commission of 16 Inquiry Phase 2: Underlying causes. Our client's response 17 to this was conveyed in a letter to the evidence leaders on 18 the 27th of March," and now I quote three paragraphs from 19 the letter. "The events which the Commission is mandated 20 to investigate are causally linked to the tragic events at 21 Marikana from 9 to 18 August." That should read 9 to 16 22 August 2012. "The causal relationship between the matters 23 to be investigated and the events to which they are linked 24 provide the framework for the Commission's mandate. Having 25 regard to this our client is concerned that the seminars</p>

<p style="text-align: right;">Page 35297</p> <p>1 arranged under the banner of the Commission deal with 2 topics which are open-ended and which may ultimately result 3 in phase 2 covering matters well beyond the ambit of the 4 Commission's Terms of Reference. Our client's concern in 5 this regard is exacerbated by the fact that the Commission 6 has already run for a long time at enormous cost and with a 7 significant time commitment. In this regard our client's 8 situation is not made any better by the fact that it is in 9 the midst of a prolonged strike with enormous cost 10 implications which has fundamentally impacted upon our 11 client's resources both from a time and a financial 12 perspective. In addition to the ambit of the topics which 13 are identified for discussion in the panels our client is 14 also concerned about whether or not the matters identified 15 for panel discussion can, having regard to the powers 16 granted to the Commission and the duties visited upon the 17 Commission, be colloquially speaking outsourced to panel 18 discussions. The Commission's Terms of Reference require 19 the Commission to investigate the matters which fall within 20 its Terms of Reference and also requires the Commission to 21 enquire into and make findings and to report on and make 22 recommendations concerning matters which fall within its 23 Terms of Reference. There do not appear to be any powers 24 granted to the Commission to appoint panel discussions for 25 purposes of facilitating the work of the Commission."</p>	<p style="text-align: right;">Page 35299</p> <p>1 spirit of cooperation. 2 Then there's a request for further documents on 3 the 12th of May 2014, against this backdrop. In May 2014 4 the evidence leaders emailed my attorney to request certain 5 information from Lonmin in relation to phase 2 and pointed 6 out issues which it would like Lonmin to canvass. In 7 addition to this the evidence leaders also sought 8 information from Lonmin in relation to phase 1 and 9 commenced planning for Lonmin's phase 1 witnesses to 10 testify. At a meeting held at the offices of my learned 11 friend Mr Bham and the evidence leaders it was pointed out 12 to the evidence leaders that it was going to be extremely 13 difficult to accommodate expansive requests for information 14 where Lonmin was still in the midst of a long-enduring wage 15 strike. Lonmin then sought to reduce its liability where 16 possible by instructing non-striking employees to take 17 their accumulated leave and thereafter statutory leave 18 where possible. This meant that people who could assist in 19 collection of relevant documentation were not available to 20 do so, and there was a whole list of complications then. 21 I don't want to read it all, but that was the 22 debate between counsel in an endeavour to come, to assist 23 in providing this documentation. We captured the 24 highlights, although there are many, of the difficulties we 25 experienced and what we said at that stage was that we're</p>
<p style="text-align: right;">Page 35298</p> <p>1 I must say I don't know, and it may just be my 2 ignorance, I don't know what Dr Forrest's mandate was. I 3 don't know who she spoke for, what she had to enquire into 4 and what recommendations she could make. That may be a 5 debate for another day. In fact I've indicated that our 6 stance of not taking part did not meet with any disapproval 7 as far as we know from the evidence leaders or Dr Forrest. 8 Chair, at this time - and I'm still dealing with 9 the criticism of Lonmin's delay - not only is Lonmin in the 10 beginning, in the middle of a strike, but phase 1 is 11 putting a lot of stress on our resources. We started this 12 trial, I was briefed for two months. It's now two years. 13 We started with five counsel. We today have three and two 14 of them are half. My learned friend Mr Bham and I exchange 15 seats on a regular basis simply because we can't be here 16 all the time. So not only is there a financial constraint; 17 there's a time constraint for the company. We're committed 18 - he has done certain sections and I've done certain 19 section and in that same process we try our very best to 20 assist the evidence leaders with requests which keep 21 coming. They ask huge amount of documentation and we lean 22 on our attorney and that's given, and if there's an opening 23 in a week and there's no witness we try to accommodate and 24 we give witnesses. But we really work as hard and as 25 diligently as we can to assist this Commission in the</p>	<p style="text-align: right;">Page 35300</p> <p>1 not - to use a colloquialism again - kicking for touch. 2 We're doing our best to assist. 3 But speaking for myself, my accent was the whole 4 time on phase 1. That is the phase with which we're 5 dealing. That is the phase coming up in the very near 6 future. This is the first time in two years that Lonmin 7 has an opportunity with reference to the witness statements 8 filed to produce its case to the Commission. That takes 9 most of our time, and that's where we concentrate on. 10 So against that backdrop - and I don't want to 11 waste more time on this - we say it's unfortunate to now 12 see criticism in the interim report on the cooperation, and 13 Chair, if you look at the glossary to that interim report 14 it is made up of Lonmin documentation and interviews with 15 witnesses. I have not had time to look at any great 16 detail, but I haven't seen DMR documentation. 17 MR CHASKALSON SC: There's quite 18 extensive DMR documentation as well. 19 MR BURGER SC: Then I stand to be 20 corrected. Can I just look at that annexure so that I 21 don't do anybody a disservice. That you'll find in NNNN2 22 from page 61 through to 65, and I don't want to go through 23 it; you will if you are so advised, Chair and 24 Commissioners, look at that, but we would think this is 25 substantially documentation coming from Lonmin and</p>

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1 assistance received from Lonmin.
 2 Let me deal with the first point, the first of
 3 the three points I would like to address you on and that is
 4 your mandate, Sir. We address this in our letter from
 5 paragraph 4.2 to 4.7. Perhaps I can take it from –
 6 CHAIRPERSON: Paragraph?
 7 MR BURGER SC: 4.2 to 4.7 of NNNN1. In
 8 fact I should pick it up from 4.1, and this is a quote from
 9 your mandate. That's really the starting point. Our
 10 learned friends have put some accent on 1.1.3, which we
 11 quote, "Whether it [that's Lonmin] by act or omission
 12 created an environment which was conducive to the creation
 13 of tension, labour unrest, disunity amongst its employees,
 14 or other harmful conduct." But one can't read that in
 15 isolation. You have to read it with the introductory
 16 paragraph which we quote in 4.2. This is all in a causal
 17 context of the tragedy. That's the question being posed.
 18 This is not an unfair dismissal inquiry where you have an
 19 employee who says I've been unfairly dismissed and the
 20 inquiry now is did he have proper housing, did he have
 21 sanitation, was his water clean and was the – this is an
 22 inquiry into death and what the State President says to the
 23 Commission is people died, 44 people died; will you enquire
 24 in the context of these deaths into 1.1.3? You with
 25 respect don't have a mandate, Commission, to enquire

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1 whether these omissions might have led to cars being burned
 2 at Lonmin, because there's no suggestion of that happening,
 3 of people picking up a dispute between two trade unions.
 4 There's just no factual basis for that, it was never
 5 probed. Of one trade union shooting at the representatives
 6 of others or at people non-unionised – not been asked.
 7 This does not cover you to enquire on that tragic death on
 8 the Tuesday when the body is found at the koppie lying
 9 there, as whether this was contributed because of the
 10 housing provided by Lonmin. That's not the enquiry. There
 11 must be a causal link.
 12 So it's with respect quite wrong to suggest that
 13 you in this narrow one can also pick a few extra subjects;
 14 you can pick micro lending, especially the bank by NUM.
 15 You can't do that, with respect. That's not your mandate.
 16 Or senior people's shareholding, or BEE payments made. We
 17 have now for two years listened to this Commission. I have
 18 not heard one injured party or one family member or one
 19 trade unionist suggesting that housing caused the shooting.
 20 I would have cross-examined him on that, but I haven't
 21 heard that. So to suggest we should read 1.1.3 and have
 22 the answer is with respect, we submit not correct.
 23 What is also not covered here, with respect,
 24 Chair and Commissioners, is whether Lonmin complied with
 25 its SLP obligations. That's not within your domain. The

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1 Chamber of Mines and the DMR can enquire into that in due
 2 course.
 3 In fact you will see how this is addressed in the
 4 interim report. Quite surprisingly in the interim report
 5 NNNN2 at page 52 the Gordian knot is simply cut and the
 6 author says in the second sentence, "The living conditions
 7 of Lonmin migrant workers must have contributed to the
 8 alienation." Well firstly you don't enquire into an
 9 alienation, but that is assuming an axiom which I haven't
 10 heard in –
 11 CHAIRPERSON: Well, the paragraph does go
 12 on to say, having made the point you quote, that the living
 13 conditions of Lonmin's migrant workers must have
 14 contributed to that alienation.
 15 MR BURGER SC: Yes.
 16 CHAIRPERSON: Then they go on to say, as
 17 described in the report, lived, experience, etcetera, "The
 18 bulk of Lonmin's migrant labourers live either in
 19 unacceptable single-sex hostel accommodation or in shacks
 20 in informal settlements, which do not have access to proper
 21 municipal services."
 22 MR BURGER SC: Yes.
 23 CHAIRPERSON: Then it goes on, "The need
 24 to address mineworker living conditions in order to achieve
 25 labour peace has been recognised in the platinum wage

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1 agreement, which includes the establishment of the joint
 2 task team."
 3 MR BURGER SC: Yes.
 4 CHAIRPERSON: So the point they're
 5 making, whether it's a good point or a bad point is
 6 something we may have to decide if we are against you on
 7 the point you're arguing at the moment, but the point
 8 they're making is not simply confined to the single
 9 sentence which you've quoted, which is the second sentence
 10 of the paragraph. It follows on that the fact that these
 11 people live in unacceptable accommodation, or in shacks
 12 without proper access to services and so on is relevant in
 13 regard to the point made in the next sentence dealing with
 14 the need to address mineworker living condition in order to
 15 achieve labour peace.
 16 MR BURGER SC: We accept –
 17 CHAIRPERSON: Whether that's a good point
 18 or a bad point –
 19 MR BURGER SC: We accept that 100%.
 20 That's why –
 21 CHAIRPERSON: Well, you can't just say
 22 the point they make is confined to the second sentence of
 23 the paragraph. You've got to read the whole paragraph.
 24 That's the only point I'm making to you.
 25 MR BURGER SC: No, but with respect, the

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1 point I make is simply that there's no causal connection
 2 established.
 3 [11:49] It's no good to say adverse living conditions
 4 which is common cause between us and our colleagues. This
 5 must have contributed to the killing, I say that's a
 6 startling proposition, that's what you would enquire into.
 7 Can I read on, on that same page, Chair, just after the
 8 quote, the quote from the Lonmin Director of Corporate
 9 Affairs? The report then goes on. "The fashion and labour
 10 plans adopted by Lonmin in its application for the
 11 conversion of old or the mineral held by Eastern Platinum
 12 and Western Platinum were designed in part to address the
 13 housing needs of Lonmin migrant workers and if properly
 14 implemented would probably have produced a less alienated
 15 workforce by August 2012." Now I have not heard that
 16 evidence from anybody. Nobody has suggested that. No
 17 worker of Lonmin has come here I was alienated because I
 18 was living in a shack. He comes here and says I didn't get
 19 enough pay. He comes here he says, I may differ from him
 20 but he says the people won't talk to me. I come here
 21 because NUM shoots at me. I haven't heard a whisper about
 22 living conditions making them angry or marching in an
 23 illegal march. But this conclusion is simply drawn in the
 24 interim report.
 25 CHAIRPERSON: I'm sorry to interrupt you,

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1 Mr Burger, it's been suggested to me it would be
 2 appropriate for us to take the tea adjournment now. If you
 3 want to round off the point before we do so –
 4 MR BURGER SC: If I may just round off.
 5 CHAIRPERSON: Then we'll take the tea
 6 adjournment and then you can move on.
 7 MR BURGER SC: Let me just say this. If
 8 I say that no evidence was led I don't mean it as a
 9 criticism. The explanation for that is we're dealing with
 10 phase 1. We agree that phase 1 is being inquired into in
 11 the context as you've ruled, Sir. So I wouldn't have
 12 expected this evidence to be led. All I say and I'm going
 13 to deal with this on fairness, Lonmin cannot now be
 14 expected to be put on our guards and start running a case
 15 which for two years was not on the table. But perhaps
 16 after tea that we'll debate.
 17 CHAIRPERSON: We'll take the tea
 18 adjournment now.
 19 [COMMISSION ADJOURNS COMMISSION RESUMES]
 20 [12:13] CHAIRPERSON: The Commission resumes.
 21 Yes, Mr Burger. I said yes.
 22 MR BURGER SC: Thank you, Chair, thank
 23 you. I apologise, I didn't hear that. I was busy with the
 24 first main issue and that is on the causal link between the
 25 mandate and the Inquiry. It seems as if the authors of the

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1 interim report are aware of this. If you have a look at
 2 the report, Chair, at page 3 they seek to confine the scope
 3 of the report and they address it under two bullets. The
 4 first bullet they said first it addresses factual issues
 5 which are relevant to the events of the 9 to 16 August and
 6 those really are all the chapters except for chapter 5 and
 7 I have no qualms if that is used simply as a backdrop, it
 8 can't do any harm it's chicken soup and that's in fact what
 9 they say at the last sentence there. "These chapters are
 10 included, not for the purposes of making findings against
 11 any parties, but because they provide important contextual
 12 information.' Of course there's no causal connection
 13 between debt collecting and the debt, but I don't mind if
 14 they want to write in a report about debt collecting and if
 15 somebody wants to read it in future no harm done.
 16 CHAIRPERSON: But remember that in the
 17 public debates that followed on the events of August 2012
 18 indeed speeches by cabinet ministers and others reference
 19 was made to the debt collecting aspects and garnishee
 20 orders and micro lenders acts and so on. And there
 21 certainly is a public perception out there that there is a
 22 link and so it would not be inappropriate for us to present
 23 the objective evidence which has been obtained which bears
 24 –
 25 MR BURGER SC: That's why I say we have

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1 no qualms with that. I think there's a real concern out
 2 there, but, Chair, the simple point I'm making you cannot
 3 make a finding on that or a recommendation on that. That's
 4 outside of your mandate because you have no indication that
 5 there's a link between micro lending and the police
 6 shooting protestors, that's missing. But then they come to
 7 the second bullet –
 8 CHAIRPERSON: I don't want to take up too
 9 much of your time, it's not quite as simple as that. The
 10 police shooting protestors is the end of a chain. What you
 11 have before that is certain behaviour by the protestors.
 12 You call them protestors, I call them strikers. The
 13 evidence that we have is that the strikers firstly embarked
 14 on an unprotected strike. The evidence tends to indicate
 15 or it may be a controversial matter, but tends to indicate
 16 that some at least of those involved in the unprotected
 17 wanted to enforce the strike by what I call murder and
 18 mayhem. In other words violence and intimidation and
 19 damage to property and so on. That conduct then in turn as
 20 the next link of the chain caused the police to bring
 21 substantial reinforcements to the area and that culminated
 22 in the events of the 10 deaths as we know before the 16th
 23 culminated on the 10th in the shooting of 34 people. But
 24 it's not a simple matter of a connection between event A
 25 and shooting by the police. The shooting by the police was

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1 the end of a chain and the facts – if all the events that
 2 preceded – the relevant events which preceded the shooting,
 3 if they are linked and if they are part of the chain then
 4 obviously one has to start at the beginning of the chain
 5 and ask what caused the first event, the second event and
 6 so on. So I don't think we have an extensive debate on it.
 7 All I'm saying to you to say simply that shooting by the
 8 police is this thing that happened a year before linked to
 9 the shooting by the police. It's not just a question of
 10 well where is the link with the shooting by the police and
 11 the first event, you've got to look at the whole chain.
 12 MR BURGER SC: No, with respect –
 13 CHAIRPERSON: There may be questions of
 14 foreseeability and other things as well in remoteness, but
 15 these are all matters that I'm afraid we have to look at.
 16 MR BURGER SC: No but I'm addressing you
 17 in the context of legal causation. This is not a debate in
 18 the air. My learned friend, Mr Mpofu is quite right. On a
 19 broad spectrum a non-legal approach, this started when
 20 diamonds were discovered in 1880 in Kimberly. This started
 21 with migrant system in this country, this started with
 22 apartheid, but, Sir, that's not your mandate. You can't
 23 enquire into that. That's why I say you can't enquire into
 24 my micro lending, we know it was one of these multitudes of
 25 background facts, that's outside of your mandate. And if

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1 you bring out a finding that's why my learned friend, Mr
 2 Tip is quite right, you can't bring out a finding that the
 3 banks are overcharging and they're unkind to the people.
 4 That would be outside of your mandate and it's in that
 5 context that I say –
 6 CHAIRPERSON: I don't want you to be
 7 under any misapprehension, this is a prima facie for you
 8 obviously, I don't think it's as simple as that. If
 9 overcharging by the banks, to take the example you put to
 10 me, is in fact causally linked and remember causation is a
 11 question firstly of facts and secondly a question of legal
 12 liability. So on the factual point then one applies, I
 13 take it, the doctrine of causa sine qua non, you have to
 14 look at but for facts, look at all the facts which
 15 contribute causally to the result. But that, of course,
 16 takes you very, very far back and the courts don't do that,
 17 they limit the factual causation by principles of legal
 18 responsibility.
 19 MR BURGER SC: Correct.
 20 CHAIRPERSON: And there are various tests
 21 that operate there.
 22 MR BURGER SC: Correct.
 23 CHAIRPERSON: Anyway I don't want to go
 24 into a debate about the so-called subtle test of causation
 25 really –

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1 MR BURGER SC: On any test micro lending
 2 is not an issue, on any test.
 3 CHAIRPERSON: We don't have to debate
 4 that now, but all I'm saying to you is the inquiry is a
 5 two-fold one, factual which of course goes back to enormous
 6 lengths and also legal responsibility as well. But I don't
 7 think it's necessary for you and me to have a difference on
 8 that issue, I understand the significance of the point you
 9 make.
 10 CHAIRPERSON: Chair, the only importance
 11 for me is to convey my submissions to you and your
 12 commissioners otherwise I'm not performing my function.
 13 Why I'm confident that micro lending is not an issue here,
 14 I would have been wrong if there was evidence in the
 15 preceding two years by strikers, by injured people to say
 16 had it not been for the garnishee I wouldn't have needed
 17 12 500, I could have lived, but these don't, they really
 18 charge – that opens up a causal link and he says then "and
 19 that's why I was very angry and I went to the koppie." We
 20 have none of that and what is left now are some experts
 21 come in and Lonmin, they're not going to talk on micro
 22 lending, they're not concerned with that. So I'm confident
 23 that that link has not been established and in fact the
 24 authors of the interim report knows that, that's why they
 25 say for chicken soup we're going to file something, but we

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1 won't ask anybody to bring out a recommendation on that.
 2 But I want to go to the second bullet here on
 3 page 3. Second it addresses the specific failures on
 4 Lonmin's part to comply with housing. Now one reads with
 5 interest what is the causal connection between housing and
 6 the shooting. And they say, I pick it up four lines from
 7 the end, "The evidence leaders are of the view that Lonmin
 8 should be held accountable for its breach and repudiation
 9 of the hostel conversion and housing obligations in its
 10 social and labour plans." Where does that mandate come from
 11 one asks. The evidence leaders sees no unfairness in
 12 calling upon Lonmin to answer specific allegations in
 13 chapter 5 within the remaining time. Well with respect
 14 that would be reviewable, that' outside of your mandate,
 15 there's no basis for that.
 16 CHAIRPERSON: I'm sorry, there's some
 17 ladies in the chamber, at the back who are talking among
 18 themselves, having a conversation. May I suggest if they
 19 want to have a conversation they have it outside. We can't
 20 hear exactly what they say, not that we wish to do so, but
 21 the fact that they're talking is disturbing and makes it
 22 difficult for us to hear what counsel is submitting.
 23 MR BURGER SC: Then the authors go on at
 24 page 4 where they say "This research report is the product
 25 of a small part of the total research conduct of the phase

<p style="text-align: right;">Page 35313</p> <p>1 2 process. In order not to waste the resources that were 2 devoted to phase 2 both before and after the deletion of 3 clause 1.5 the phase 2 researcher will file her 4 comprehensive report with the Commission together with the 5 evidence leaders' written arguments. The Commissioners 6 will not be asked to make any findings on the basis of this 7 comprehensive report, but they will be requested to forward 8 it to the President together with their report so that the 9 government departments and agencies that are ultimately 10 tasked to investigate all the issues that were to be 11 traversed in phase 2 can have the benefit of the research 12 that was conducted by the Commission in this regard." Well 13 we with respect submit that the mandate, which we haven't 14 seen, would not have been that wide. We would suspect the 15 mandate would have been the lady would have been shown the 16 mandate of the Commission as per the Government Gazette and 17 that's really the starting point and the end of that 18 debate. But let me go to the second issue, the submission 19 that probing these obligations in vacuo is not helpful. 20 May I just read from a report which we've been handed in 21 this –</p> <p>22 CHAIRPERSON: Sorry, you said probing 23 these allegations in vacuo is it?</p> <p>24 MR BURGER SC: Probing these obligations 25 in the context of the SLPs in vacuo is not meaningful.</p>	<p style="text-align: right;">Page 35315</p> <p>1 government. I was at a community celebration, they had 2 invited the Mayor, we were launching a community project 3 where we had built a community hall, a road, quite a few 4 facilities. And speaker after speaker including the Chief 5 were saying to this municipality guy that every time they 6 go to the municipality for help they get told you you're 7 the children of the mine. Whatever your needs are you go 8 and ask the mine. Don't come here, we have lots of other 9 communities that don't have mines that look after them. 10 This happens within government as well. I was told by the 11 municipality in May "We don't have rubbish bins and every 12 time we go and ask for a budget this we are told go to the 13 mines and ask for the budget from them. The Mayor gets 14 told this and she goes to ask for budget from the 15 Province." I read that because I illustrate to you that to 16 look at Lonmin's failure to provide housing in a vacuum is 17 unhelpful. And if we're going to prove that, if the order 18 is phase 2 Lonmin housing, we would like to consider 19 subpoenaing the Mayor, the MSC for housing in the North- 20 West Province, the National Minister of Housing, people, 21 who have, under the constitution, the prior responsibility 22 for housing and we would like to probe how does development 23 take place. How does sanitation and water and electricity 24 take place? What are your schools like? It is an enquiry 25 which we simply cannot embark upon at this late stage of</p>
<p style="text-align: right;">Page 35314</p> <p>1 Chair, we've been handed a report which I'll ask my 2 attorney to hand up to you. I think she might have 3 received from the evidence leaders. It's a report by a 4 gentleman called Ralph Hamann, H-A-M-A-N-N. It's heading, 5 Lonmin's Mining Charter Compliance And The Social 6 Conditions Around Mines Near Marikana. The introduction 7 says - this is a briefing paper submitted to Kallie Forest, 8 senior researcher phase 2 at the Marikana Commission Of 9 Inquiry. "The Commission's mandate is to investigate the 10 matters of public, national and international concern 11 arising out of the tragic incident at the Lonmin Mine at 12 Marikana in the North-West Province." I'm more interested 13 in page 25 of that report. The author says the following, 14 "The capacity constraints of local government are well 15 known. So it possible that mining companies are filling 16 these widespread gaps. However, it is likely that there is 17 systematic shift in government special emphasis that 18 expects mining companies to fill these gaps and de facto 19 replace the state in mining areas. This expectation is 20 explicit in various levels of government." Then a quote 21 and the quote comes from an interview. 22 "The municipality saw this as a way to deliver on 23 their agenda to get companies to put in roads and so on. 24 It should have been about augmenting what government does, 25 but it became so that companies became delivery agents for</p>	<p style="text-align: right;">Page 35316</p> <p>1 the debate. We address this in our –</p> <p>2 CHAIRPERSON: I'm sorry, if you had been 3 sued I assume by the Department of Mineral Resources for 4 compliance with the conditions which were part of the 5 social labour plan to which Mr Chaskalson referred, could 6 you have raised those matters as a defence?</p> <p>7 MR BURGER SC: It's a different question. 8 I don't know whether I could raise it. I don't know 9 whether – do you mean by sue I get sued in a court of law? 10 I would probably – the Department –</p> <p>11 CHAIRPERSON: I'm sorry to interrupt you. 12 I understand that from time DMR issue directives to Lonmin 13 to comply with their obligations.</p> <p>14 MR BURGER SC: Yes. 15 CHAIRPERSON: And they appear not to have 16 done so. 17 MR BURGER SC: Yes. 18 CHAIRPERSON: If the Department – 19 MR CHASKALSON SC: No, Chairperson, they 20 did, they did. This was one of the documents that Lonmin 21 disclosed to us in the last two weeks. 22 CHAIRPERSON: That's right, I didn't say 23 – sorry what did you think I said? I said my understanding 24 was that the DMR sent them directives. Yes that's what I 25 said and I take that the whole purpose of the debate is</p>

<p style="text-align: right;">Page 35317</p> <p>1 that the directives weren't complied with otherwise we 2 wouldn't have the problem. Now if the Department had 3 brought an application against Lonmin for an order 4 directing that they comply with the directives could Lonmin 5 have raised as a defence well we didn't comply, if they 6 didn't, I assume for the purposes of the question they 7 didn't, we admit we didn't comply, but the Province didn't 8 do what they should have done. The municipality didn't do 9 what they should have done, the National Department didn't 10 do what they should have done, therefore we have a good 11 defence to a claim directed to us to comply with our 12 obligations. Would such a defence have been sustainable? 13 MR BURGER SC: I don't know. I suppose 14 and I would have to take instructions on that. That would 15 depend on Lonmin saying to me I can build a house, but I 16 don't provide electricity, electricity must come to my 17 township, there's no electricity. I can provide taps in a 18 house, but I don't provide water, that's not my obligation 19 that's the municipality's obligation to provide water and 20 we've tried, we can't get water in there. I will provide 21 houses, but the roads and that's a major complaint in here, 22 the roads are the responsibility of the Department of 23 Roads. I don't know who they are. They're not provided so 24 you can't get – I don't know there may be defences out 25 there, but it is a multi-faceted inquiry which is not in</p>	<p style="text-align: right;">Page 35319</p> <p>1 Now you asked me, Sir, rhetorically would you have a 2 defence. I would say I'd take instructions, but there's a 3 plea hidden in here, there's an answer here, it may not be 4 a complete answer, but it's clearly opening up a larger 5 debate than the one sought to be explored in the interim 6 report. And in 5.4 we conclude then to say this issue 7 cannot be decided in isolation. My third point if you'll 8 just bear with me, Sir. We submit as a third point for not 9 opening up this inquiry that to the extent that the 10 Commission's inquiry at this late stage wish to include 11 phase 2 that'll be unfair to Lonmin. And we say this for a 12 number of reasons. Thusfar and for understandable reason 13 the causal link between any possible housing debate and the 14 deaths have not been explored. For example and I've just 15 noted a few witnesses with whom it should have been 16 explored. 17 [12:33] The Bishop Seoka, I didn't ask him about that 18 because he didn't offer that as a reason for the tragedy. 19 The trade union leaders, I didn't ask it for Mr Mathunjwa, 20 Mr Zokwana, I didn't go there, because nobody suggested 21 that. The injured and arrested people and the families, 22 none of them suggested this link, not surprisingly, we 23 didn't explore it. Da Costa, Da Costa was cross-examined 24 in the context of he spoke to the workers and later on 25 Lonmin should have spoken. Nobody asked him whether they</p>
<p style="text-align: right;">Page 35318</p> <p>1 this Commission's mandate, for which you're not equipped to 2 inquiry into. And my second point is simply to inquire 3 into Lonmin's alleged breach of its SLP obligations. It's 4 not going to help anybody, there's no causal connection and 5 it goes nowhere. But I've really made that submission, 6 we've made that submission in the letter NNNN1 in paragraph 7 5.3 and 5.4. May I just end off on this issue with that? 8 CHAIRPERSON: Paragraph 5.3 – 9 MR BURGER SC: 5.3 on page 3 of that 10 letter, Sir. 11 CHAIRPERSON: 5.3 and – 12 MR BURGER SC: 5.4. 13 CHAIRPERSON: And 5.4, thank you. 14 MR BURGER SC: I pick it up four lines 15 from the top. "But housing for employees also involves an 16 inquiry into matters such as housing and infrastructure 17 development by the local authority concerned." And the day 18 when we settled this letter I just quote an article from 19 Business Day. In Business Day of Thursday 7 August a 20 spokesman for Human Settlements Minister Sisulu is quoted 21 as having said "A lot more could have been done to develop 22 mining towns if administrative processes at local 23 governments were more efficient. Municipalities are 24 expected to make land available for housing development and 25 a housing development agency has been set up to assist."</p>	<p style="text-align: right;">Page 35320</p> <p>1 complained about housing. In fact his evidence is they 2 complained they wanted more money, and it wouldn't follow 3 with respect, that if they have a good house, they don't 4 want more money. If one's experience is anything to go by 5 the better your house, the more money you need. So those 6 issues have simply not been explored and to now suggest, 7 Lonmin must simply bite the bullet and on two witnesses 8 identified by the evidence leaders address those issues and 9 get rid of it. Well, that would be hugely unfair, hugely 10 unfair in a process where the police has led an non-expert 11 Brigadier Mkhwanazi for 18 days. He professed he doesn't 12 he doesn't know anything about the subject so he was led 13 for 18 days. General Annandale was cross-examined for I 14 think a month. My client gets 11 days to call six 15 witnesses. I haven't started on phase 2, because I don't 16 know whether it's in. Oh, that will be unfair. And with 17 respect to the extent, and I can say this because I've 18 complained for a long time about the pace. To allow 19 extensive cross-examination as being fair, and then to put 20 my client into this time straightjacket will be unfair. 21 We do not accept that there's an axiomatic link 22 between housing and the deaths during the period in issue 23 and to the extent that the interim report seems to assume 24 that, we differ from that assumption. A second reason why 25 this is unfair is, I don't know whether this phase 2 is</p>

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1 going to be introduced and if it is going to be introduced,
 2 what issues in phase 2 will be introduced? But once I know
 3 that, and once I have seen a comprehensive report, I will
 4 then be in a position, hopefully, I lean on my learned
 5 friend, Mr Bham, to go and prepare that, to consult with
 6 witnesses, to research it, to get expert advice, to file
 7 expert and lay witness statements and to call witnesses, to
 8 consider whether to ask for other witnesses to be
 9 subpoenaed from other institutions. Well, there is simply
 10 no time for that. My learned friend, Mr Mpfu, is again
 11 correct, until the end of September this process cannot be
 12 accommodated in this Commission.

13 May I, in this context, draw your attention,
 14 Chair, Commissioners, to the interim report page 52, to
 15 show you what type of investigation will have to be
 16 launched. At page 52, in the middle, there is a quote, it
 17 starts off, "Senior Lonmin Managers have long cognisant of
 18 the risk linked to housing and social conditions around the
 19 mines, probably more so than other companies. Lonmin's
 20 director of corporate affairs said in 2002, 'You don't have
 21 to be a genius to see that the real threats are in the
 22 area, unemployment, crime, the disruptive social fabric
 23 created by the migrant system and the fact that you have a
 24 lot of single men living in hostels in proximity to your
 25 operation.'"

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1 Now you can see the social ills here being
 2 identified. They are still there, tragically but housing
 3 is but one sub-component of that. If you look at the
 4 footnote, Chair, you'll see the footnote takes us to page
 5 64. That was an interview with Tony Riley, the Lonmin
 6 corporate affairs director on the 7th of April 2002, and
 7 there's a whole history behind that statement and an
 8 inquiry to be made. Now, I'd like to speak to this
 9 gentleman, if he's still around, and get a statement from
 10 him, put that into perspective and address these issues, if
 11 it is going to form part of phase 2 of this debate. Well,
 12 it will be very difficult to do it, at this round.

13 And this preparation will have to be done at this
 14 stage certainly, without a final report from Dr Forrest
 15 while we are in the midst of preparing the phase 1
 16 witnesses with whoever counsel is available to do that,
 17 without yet having identified any witnesses to deal with
 18 any new issues to be opened up and of course, obviously
 19 before we even have a ruling on whether phase 2 will be
 20 part of the process.

21 I deal briefly with the submissions by my learned
 22 friend, Mr Chaskalson, and I've made it clear that we
 23 didn't ask for phase 2 to be abandoned, that would be
 24 wrong. What we say is, phase 2 cannot now be introduced on
 25 the harrow issue of Lonmin housing for the reasons I have

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1 given.

2 The unfairness. My learned friend addresses by
 3 saying that's of our own making. Well, that's with
 4 respect, not correct. We still today don't know whether
 5 phase 2 is going to be part of this, and we play no role in
 6 that. We play no role, we've assisted and supported the
 7 phase 1 identification and until today, that is the status
 8 quo.

9 My learned friend says Mr Mokwena is responsible
 10 for the SLPs and therefore he can give evidence to that.
 11 Well, it's a non-issue, as I've submitted to you, so his
 12 evidence on SLP's compliance is unrelated to the mandate of
 13 this Commission. Mr Jamieson, we are told which shed light
 14 on the recurring payments to the BEE context, that's a non-
 15 issue. I am sure some of my colleagues would love to
 16 explore that and see where the money went, that's a debate
 17 for perhaps another forum and another day.

18 My learned friend, Mr Tip, stresses that
 19 causation is important. We agree with that. He says that
 20 the other chapters of the interim report enriches one's
 21 understanding of the social fabric, I agree with that. It
 22 can go in, it does no harm. But he warns, quite correctly,
 23 that if one goes for example, into micro-lending, one
 24 should be sensitive that findings cannot be made, and of
 25 course, if findings are not made the inquiry is not a very

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1 helpful one, and perhaps not surprisingly has no
 2 submissions on chapter 5 of the interim report.

3 I don't want to deal with all the other
 4 submissions. Ms Le Roux, my learned friend, says what she
 5 envisages in introducing phase 2 is a limited exercise due
 6 to limited discovery by Lonmin in limited time. Well,
 7 that's really like the Roman, the Holy Roman Empire, they
 8 are suspect in all three of its components. This is not a
 9 limited exercise, it's a massive one. There was not
 10 limited discovery, there was extensive discovery and the
 11 limited time is the problem, not the solution. And I've
 12 dealt with, for a change, positively with my learned
 13 friend's Mr Ntsebeza and Mr Mpfu, where we see eye to eye
 14 that this is not the time and the place to go onto new
 15 ventures in this Commission. So if there's anything I have
 16 omitted, I apologise for that, but those are the
 17 submissions on behalf of Lonmin.

18 CHAIRPERSON: Thank you, Mr Burger. Mr
 19 Chaskalson?

20 MR CHASKALSON SC: Mr Chairperson, I'll
 21 address three points in reply. The first is to say
 22 something about the timetable or the timing of the
 23 emergence of documents because Mr Burger is wrong on two
 24 counts. On one count, he's cheated his client out of a
 25 year, on another he has been too generous to his client.

<p style="text-align: right;">Page 35325</p> <p>1 The second point is his, that I'll address is his 2 proposition is one cannot investigate this without the 3 state, because housing is just, is impossible if one 4 doesn't have a service infrastructure that the state 5 addresses and lastly, I will deal with his terms of 6 reference points. So to start with the timing, Mr Burger 7 was with respect, unfair to Lonmin in respect of when they 8 made discovery. They made discovery in 2013, not 2014. It 9 was March 2013. The disputes that we have with Lonmin 10 relate to requests for discovery of further documents that 11 were made consistently over the period November 2013, to 12 July 2014, and that were made by Dr Forrest, by the 13 evidence leaders in writing at meetings. Those documents 14 that were requested in the period – documents and 15 information that were requested in the period November 2013 16 to July 2014 are the documents and information which for 17 the most part, arrived in the last week of July 2014 and 18 the first week of August 2014. And my learned friend, Mr 19 Burger, says well, look at the interim report, you see the 20 documents that were discovered by Lonmin. With respect, 21 that's partially true. You also see a fair, if one charts, 22 follows the references in the interim report, one sees a 23 fair amount of references to documents and information that 24 were forthcoming only in the two weeks before the interim 25 report were produced, and part of the reason why the</p>	<p style="text-align: right;">Page 35327</p> <p>1 deliver. Now, in principle, we agree with him, but this 2 Commission after he deletion of clause 1.5 has no 3 jurisdiction to investigate the state's failure to deliver. 4 And so the question then remains, what failures on the part 5 of Lonmin are possible to investigate in a context where 6 you cannot look at the state's failure to deliver. And 7 that's where we get to the social and labour plans because 8 that's an obligation that was resting on Lonmin independent 9 of the state. My learned friend, Mr Burger, seems to be of 10 the view that it wasn't independent of the state, because 11 without services, Lonmin couldn't build the houses. With 12 respect, he is misinformed, because if one goes to the 13 Lonmin social labour plans, Lonmin undertook an obligation 14 not only to build the houses but to service the stands as 15 well. So if one – maybe we should introduce the Western 16 Platinum Limited social labour plan as a new exhibit 17 because I will give a reference to the relevant passage. 18 If that's NNNN4. If one goes to page 71 of the – 19 CHAIRPERSON: Just identify the exhibit. 20 The Western Platinum? 21 MR CHASKALSON SC: Limited social labour 22 plan. In fact – 23 CHAIRPERSON: SLP, okay. 24 MR CHASKALSON SC: SLP. Both, the social 25 labour plans of Western and Eastern are identical, they are</p>
<p style="text-align: right;">Page 35326</p> <p>1 interim report looks the way that it does, is that for the 2 most part, Dr Forrest had to depend on the documents that 3 were provided in 2013, because the documents that she 4 wanted to look at that were forthcoming, that she was 5 requesting in the period from November 2013 through to July 6 2014, were not forthcoming. So how the interim report was 7 ultimately settled is that what it reflects is what Dr 8 Forrest was able to address comprehensively on the basis of 9 she received from Lonmin and other parties up to March 2013 10 and then on the basis of the follow up documents that were 11 finally provided in late July or early August 2014. What 12 she was able to address comprehensively and what she was 13 able to address in the manner that would give Lonmin a fair 14 opportunity to respond to it within the remaining five 15 weeks. If she could have written a full report 16 supplemented with bits and pieces that came dribbling in, 17 in July and August, and there wasn't a constraint of time, 18 the report would have looked much fuller but she 19 acknowledged that all could reasonably be expected of 20 Lonmin to answer is within another five weeks, was what was 21 in that report. So the delays in producing information had 22 a very real effect on what's in that report. 23 He next point of Mr Burger's, his constant 24 refrain that one cannot investigate Lonmin's housing 25 obligations without looking at the state's failure to</p>	<p style="text-align: right;">Page 35328</p> <p>1 joint labour plans. But my reference is, the pagination is 2 slightly different, and my reference is to page 71 of 3 Western, and there you'll see that at the time that they 4 submitted their social labour plan, they had already 5 serviced 780 stands. And in their social labour plan, they 6 committed to servicing another 4 800. And if add you 780 7 to 4 800, you get more than 5 500, you get 5 580. That was 8 to be done by 2010/11, and there was a capital budget of 9 R96 million that was to be allocated to that purpose. So 10 with respect to Mr Burger, this was not something that 11 depended on the local state. It was an obligation that was 12 undertaken by Lonmin essentially as a turnkey obligation. 13 Now that brings us to the terms of reference 14 point which seems to be the most important point advanced 15 by Mr Burger. 16 CHAIRPERSON: The question I want to ask 17 you about that, is on page 2 of exhibit NNNN1, Lonmin makes 18 a statement, makes the following statement, "Importantly 19 though, the specific matter is the Commission was appointed 20 to enquire into and report upon, is," I take it they mean 21 "are," "prefaced by an introductory paragraph which 22 requires the causal link between those matters and the 23 events at Marikana mine," etcetera. Now where exactly is 24 the causal link to which they refer, to be found in the 25 introductory paragraph of the terms of reference?</p>

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1 MR CHASKALSON SC: Mr Chairperson, with
 2 respect to Mr Burger, he is approaching this Commission of
 3 Inquiry as if it were a trial on a cause of action for
 4 delict, relating to death and damage to property caused in
 5 the week of 9th to 16th.
 6 CHAIRPERSON: I understand that, but
 7 before we get there, he wording of the introductory
 8 paragraph I couldn't find, unless I was looking incorrectly
 9 at it, I couldn't find a reference to a causal link.
 10 MR CHASKALSON SC: No –
 11 CHAIRPERSON: They make the statement,
 12 they've got the passage in quotation marks, the causal link
 13 part is not part that's covered by quotation marks. So
 14 what is the wording in that paragraph which justifies them
 15 in saying that a causal link is required. The relevant
 16 paragraph is 1.1.3 which reads as follows, "Whether by it,"
 17 that's Lonmin, "by act or omission created an environment
 18 which was conducive to the creation of tension and labour
 19 unrest, disunity amongst its employees, and other harmful
 20 conduct." Now Mr Burger says, well, you would expect a
 21 striker to come along and say "I was in an environment that
 22 was conducive through creation of tension and labour
 23 unrest." I am not sure that an unsophisticated striker can
 24 be expected to make a statement of that kind. But the
 25 question I am asking you is, where is this requirement of a

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1 causal link?
 2 MR CHASKALSON SC: Well –
 3 CHAIRPERSON: Apart from the use of the
 4 word "conductive" which presumably would introduce concepts
 5 such as indirect causation.
 6 MR CHASKALSON SC: Well, Chairperson, if
 7 one looks at the terms of reference as a whole, one sees
 8 that what the president is asking this Commission to do is
 9 to go beyond the test of causation that one would apply in
 10 a delictual trial. Because each one of the paragraphs –
 11 the sections of the terms of reference have as their last
 12 paragraph, that test. So 1.1.6 in relation to Lonmin,
 13 whether by act or omission directly or indirectly caused
 14 loss of life or damage to persons or property. That's one
 15 inquiry that –
 16 CHAIRPERSON: Can't I understand it that
 17 conjunctive is it?
 18 MR CHASKALSON SC: Indeed, they are all
 19 conjunctive.
 20 CHAIRPERSON: The paragraphs are all,
 21 and, and, and. Not, or, or, or.
 22 MR CHASKALSON SC: Absolutely Chairperson
 23 so the cause – so the legal causation inquiry is one of
 24 several inquiries that this Commission must do, and it's in
 25 that context that 1.1.3 is significant because if one sees

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1 what the president wants this Commission to look at in
 2 relation to SAPS, to AMCU, to NUM, like Lonmin, it also
 3 wants the Commission to look at them in relation to the
 4 question whether by act or omission they directly or
 5 indirectly caused loss of life or damage to properties or
 6 persons. So that category of the investigation is common
 7 to everyone. But in relation to Lonmin there is a unique
 8 category of investigation which is 1.1.3. You don't see a
 9 parallel to 1.1.3 anywhere else in the terms of reference,
 10 and that is whether by act or omission Lonmin created an
 11 environment which was conducive to the creation of tension,
 12 labour unrest.
 13 [12:52] Disunity amongst its employees or other harmful
 14 conduct."
 15 CHAIRPERSON: So if the idea of some kind
 16 of causal link is to be implied in the introductory
 17 paragraph which is quoted in paragraph 4.2 of the letter,
 18 then one would be surprised to find express mention of
 19 causation in some of the succeeding paragraphs relating to
 20 some of the other parties.
 21 MR CHASKALSON SC: Indeed, Chairperson,
 22 and it goes to what the nature of a commission of inquiry
 23 is, and if I can just refer to the SARFU judgment of the
 24 Constitutional Court, there the Constitutional Court
 25 pointed out a commission of inquiry is an adjunct to the

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1 policy-making function of the executive. Now you don't
 2 make policy –
 3 CHAIRPERSON: I'm sorry to interrupt you.
 4 What's the reference of the SARFU case?
 5 MR CHASKALSON SC: 2000 (1) SA 1 (CC).
 6 CHAIRPERSON: Thank you.
 7 MR CHASKALSON SC: The passage to which I
 8 refer is paragraph 147. It's an adjunct to a policy-making
 9 function. You can't make policy on the basis of
 10 investigations that apply a test of legal causation. You
 11 can't go that narrow if you're making policy. You have to
 12 apply a broader test of relevance, and so where the
 13 introductory passage comes is that must, there must be some
 14 relevance shown to what happened in the week 9 to 16 August
 15 and an environment created by Lonmin which was conducive to
 16 the creation of tension, labour unrest, disunity amongst
 17 its employees, or other harmful conduct. That relevance
 18 isn't to be investigated on as narrow a basis as a test of
 19 legal causation. It's much broader because it's about
 20 policy formation.
 21 What the President wants to come out of this
 22 Commission is policy recommendations which will hopefully
 23 ensure that we never again have another Marikana tragedy,
 24 and we were to be constrained by tests of legal causation,
 25 which are perfectly appropriate for apportioning liability

<p style="text-align: right;">Page 35333</p> <p>1 in the Law of Delict, we're not going to get to sensible 2 policy recommendations because you cannot apply a test that 3 is that narrow and is framed for individual disputes 4 between two individual parties to a policy formulation 5 process that is really aimed at recommendations to deal 6 with a social problem and to prevent social outcomes, 7 undesirable social outcomes. 8 So we would submit that if it appears that the 9 living conditions of Lonmin workers are part of an 10 environment that formed the context that is relevant to the 11 tragic events of 9 to 16 August then Lonmin's 12 responsibility for those living conditions falls squarely 13 within the Terms of Reference. 14 CHAIRPERSON: Can I go back to the 15 wording of 1.1.3; whether it's by act or omission – you say 16 there was an omission to comply with its social labour plan 17 obligations. "Whether it by omission created an 18 environment which was conducive to the creation of 19 tension," if the omission was conducive to the creation of 20 tension and labour unrest then that would be enough, 21 wouldn't it? 22 MR CHASKALSON SC: Well, as Mr Burger 23 says if there was just, you know, someone cannot come off 24 the streets and say well I was unfairly dismissed by Lonmin 25 last week, I want you to investigate whether a certain</p>	<p style="text-align: right;">Page 35335</p> <p>1 sorts of work and research and investigation and so on. 2 What do you say about that? 3 MR CHASKALSON SC: Chairperson, the Terms 4 of Reference mean what they say. If we are correct in our 5 interpretation of the Terms of Reference they have meant 6 what we say they mean for two years. Lonmin has had two 7 years to do those exercises. It was never suggested to 8 parties that they could wait until the end of phase 1 9 before they started preparing their phase 2 cases. It 10 could never, that could never have been conceived. If 11 Lonmin finds itself now in a position where it is unable to 12 prepare as well for a phase 2 submission as it would like 13 to be, well then with respect it has itself to blame, 14 nobody else. 15 CHAIRPERSON: Mr Burger, you did quote 16 from some letters, I think, in the course of your address. 17 Would you be able to provide us with copies of them? 18 Obviously not now. You know, you referred to 19 correspondence – 20 MR BURGER SC: Yes, I'm hesitant because 21 I've scratched on mine and my attorney has left now, but we 22 will certainly make that available – 23 CHAIRPERSON: I wanted to say I didn't 24 expect you to hand over your copies now, but in a day or 25 two. As you know, we're not sitting until next Monday</p>
<p style="text-align: right;">Page 35334</p> <p>1 environment that was created by Lonmin in relation to my 2 dismissal was conducive to the creation of tension, labour 3 unrest, disunity. There has to be relevance to the events 4 of 9 to 16 August shown, but we would submit there's 5 obvious relevance to the events of 9 to 16 August. It's 6 recognised by Lonmin themselves. At their first AGM after 7 the tragedy what do they do? They announce they're going 8 to sort out the living conditions of their workers. Why? 9 Because they understand those living conditions to be 10 relevant to what happened, as does everybody else. 11 One couldn't sue Lonmin in delict for loss of 12 support - the families can't sue Lonmin in delict for loss 13 of support because they didn't build houses and as a result 14 of all of that somebody died in the week 9 to 16 of August. 15 But that's not the enquiry. It's not a legal causation 16 enquiry. It's a much broader social causation, if one 17 wants to put it that way, because we're dealing with a 18 policy-making process here, not a microscopic apportionment 19 of legal liability in terms of principles of delictual 20 causation. Those are our submissions, Chairperson. 21 CHAIRPERSON: What do you say about the 22 unfairness argument? Mr Burger laid considerable stress on 23 the submission that it's unfair at this late stage to 24 expect his clients to deal with that part of phase 2, that 25 they'd have to subpoena all sorts of people and do all</p>	<p style="text-align: right;">Page 35336</p> <p>1 because, for various reasons. So in the interim if you 2 could provide clean copies – if that's the right word – of 3 that correspondence, I'd be grateful. Thank you. 4 MR BURGER SC: In the usual spirit of 5 cooperation from Lonmin, we'll do so forthwith. 6 CHAIRPERSON: Thank you, Mr Burger. 7 That's the end of the argument. We will make our ruling on 8 the matter as soon as we can. We can't do it obviously 9 now. We'll now adjourn until quarter to 2. We will 10 continue with the evidence of the witness who was 11 testifying before us yesterday, Mr Mtshamba. 12 [COMMISSION ADJOURNS COMMISSION RESUMES] 13 [13:48] CHAIRPERSON: The Commission resumes. Mr 14 Mahlangu, would you remind the witness he's still under 15 oath. Mr Chaskalson. 16 SHADRACK ZANDISILE MTSHAMBA: [s.u.o. 17 through interpreter] 18 MR MAHLANGU: Confirmed, Chairperson. 19 CROSS-EXAMINATION BY MR CHASKALSON SC (CONTD.): 20 Thank you, Chairperson. Mr Mtshamba, before we start today 21 can we just introduce those two maps on which your 22 movements were marked, and I'm going to ask that they be – 23 copies have been made available to the Commissioners, but 24 I'm going to ask that they be put up on the screen, and 25 Chairperson, I've lost my record of where we are on the</p>

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1 exhibits. Quadruple M –
 2 CHAIRPERSON: According to my notes
 3 we're –
 4 COMMISSIONER HEMRAJ: 7 was the movement
 5 of the front group of strikers.
 6 CHAIRPERSON: Yes, yes that's correct.
 7 MMMM7 is as far as we got and I described it as witness's
 8 description of movement of strikers sitting in front
 9 between the two koppies.
 10 MR CHASKALSON SC: And Mr Mtshamba, can
 11 you just confirm that this reflects your markings of the
 12 movement of that group of strikers that were sitting on the
 13 ground between the two koppies before the shootings?
 14 CHAIRPERSON: This is MMMM8.
 15 MR MTSHAMBA: It is so, Sir.
 16 CHAIRPERSON: Mr Chaskalson, this is
 17 MMMM8. No, no, no, 7 we've already had. This is now 8.
 18 MR CHASKALSON SC: If we can
 19 provisionally call it 8, we may have to –
 20 CHAIRPERSON: Where is Ms Pillay when we
 21 need her? Oh, here she is.
 22 MR CHASKALSON SC: She's arrived to save
 23 us, Chair.
 24 CHAIRPERSON: How do I describe it?
 25 Witness's annotated copy of JJJ10 point –

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1 MR CHASKALSON SC: It is in fact 7. It
 2 has apparently been entered already.
 3 CHAIRPERSON: Without these marks?
 4 MR CHASKALSON SC: I think we gave it –
 5 CHAIRPERSON: Without these marks?
 6 MR CHASKALSON SC: I think that we gave,
 7 the witness undertook to – the witness took your copy and
 8 put the marks on it and I think that's the basis on which
 9 it became 7.
 10 CHAIRPERSON: Okay, so it's already
 11 before us. I don't have to enter it as a new exhibit.
 12 While we're about it, let's do the other one. We've got
 13 this one with the white arrows, that will be MMMM8 and that
 14 is copy of – we gave it an exhibit number yesterday, didn't
 15 we, and then I took my copy away. Or rather I took my copy
 16 out and gave it to the witness in a moment of ill-advised
 17 generosity.
 18 MR CHASKALSON SC: Copy of JJJ10.4547.
 19 CHAIRPERSON: Copy of JJJ10.4547 marked
 20 by witness.
 21 MR CHASKALSON SC: That's correct,
 22 Chairperson, and Mr Mtshamba, can you –
 23 CHAIRPERSON: Right, thank you.
 24 MR CHASKALSON SC: Can you confirm that
 25 these arrows broadly describe your movement from koppie 2

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1 to koppie 3?
 2 MR MTSHAMBA: It is correct, Sir.
 3 MR CHASKALSON SC: Now Mr Mtshamba,
 4 before I begin today's cross-examination there's something
 5 I need to say so that my questions are not misunderstood.
 6 So I would ask you just to listen to what I have to say to
 7 explain the nature of my questions. What you experienced
 8 and saw on the 16th of August was truly terrible. I'm not
 9 asking for responses. I just want to clarify something in
 10 advance. It's something the horror of which I don't think
 11 I can imagine and it's something that nobody should ever
 12 have to experience.
 13 You sat hiding behind rocks while the SAPS fired
 14 large volumes of sharp-point ammunition in the direction of
 15 your position. Some of these bullets killed eight people
 16 who were within 15 metres of your position and other
 17 ricocheted off rocks nearby to you. I don't dispute any of
 18 those facts and nothing I say today should be taken to cast
 19 doubt on the true horror of what you saw and experienced.
 20 I also want to thank you for having the courage
 21 to come to this Commission to testify about events which
 22 are extremely traumatic, but after having said all of that
 23 I nevertheless have to question you about some of the
 24 details of your evidence because we need to test the
 25 correctness of your evidence, even if we don't dispute the

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1 horror of what you were clearly subjected to. So I am
 2 going to ask you questions to test the correctness of
 3 certain details.
 4 I want to start with what you say at paragraphs
 5 19 and 20 of your statement. "I observed the rolling out
 6 of the barbed wire by the police Nyalas and I also saw a
 7 group of protesters reacting to these movements by moving
 8 and running mostly towards Nkaneng settlement via the road
 9 which runs in front of the small kraal, which had been used
 10 as the main access route to and from the koppie by the vast
 11 majority of the protesters."
 12 I'm now getting to the passage that I want you to
 13 pay particular attention to. "I followed other people,
 14 moving in the same direction, with the aim of escaping into
 15 Nkaneng. Most of the people who were on koppie 2 managed
 16 to escape via the path to Nkaneng. Those of us who were on
 17 koppie 1 took longer and walked behind the leaders,
 18 including Mr Noki. We were all intending to escape into
 19 Nkaneng like the others. About a few metres from the
 20 koppie I heard gunshots and many protesters fell down and I
 21 saw other protesters running in different directions. I
 22 then started to run as well. I ran towards the Marikana
 23 town direction."
 24 Now Mr Mtshamba, I have to put to you that this
 25 description in your statement is not consistent with the

<p style="text-align: right;">Page 35341</p> <p>1 evidence that you gave yesterday about what your movements 2 around, or at the time of the shootings at scene 1 were. 3 If I understood your evidence correctly yesterday you 4 testified yesterday that you moved from koppie 1 to koppie 5 2, but didn't really move in any real sense from koppie 2 6 towards the kraal. Now that's not what you say in your 7 statement. So the first question I want to ask is which is 8 the correct version? Did you move towards the kraal, close 9 to the kraal, or did you stay on koppie 2? 10 MR MTSHAMBA: I first stopped at the 11 second koppie, from the first to the second koppie where I 12 stopped. My intention was to proceed to Nkaneng. 13 MR CHASKALSON SC: Did you proceed to 14 Nkaneng? 15 MR MTSHAMBA: No. 16 MR CHASKALSON SC: So why does your 17 statement then say that you did proceed towards Nkaneng? 18 MR MTSHAMBA: If you look towards the end 19 of chapter 19, Mr Chairperson, you will see that my 20 intention was to go towards Nkaneng. 21 MR CHASKALSON SC: But then in chapter 20 22 you say, "About a few metres from the koppie I heard 23 gunshots and many protesters fell down." 24 MR MTSHAMBA: That is correct. 25 MR CHASKALSON SC: You see Mr Mtshamba,</p>	<p style="text-align: right;">Page 35343</p> <p>1 metres from koppie 2 in the direction of Nkaneng where my 2 intention was to go to. 3 MR CHASKALSON SC: And are you saying 4 that you were there or that's where things happened that 5 you heard? 6 MR MTSHAMBA: Listen very carefully, Mr 7 Interpreter. I am stationary at koppie 2. The shooting is 8 a few metres away in front of koppie 2 in the direction of 9 Nkaneng. 10 MR CHASKALSON SC: The shooting is in 11 fact about 165 metres away from koppie 2. 12 MR MTSHAMBA: I did not count the metres. 13 I said a few. 14 MR MPOFU: Chairperson, just for the 15 record, we will contest that estimation, but if we do go 16 and do an inspection then we'll all ascertain it. 17 CHAIRPERSON: [Inaudible, speaking 18 simultaneously with interpreter]. No, no, seriously, you 19 know representatives of various parties can then agree on – 20 MR MPOFU: Yes. 21 MR CHASKALSON SC: Chairperson, it's a 22 measurement that I have done on Google Earth. 23 MR MPOFU: Okay, I'm a lot better than Mr 24 Chaskalson. I've done it with my feet, so I can't claim to 25 be [inaudible, speaking simultaneously with interpreter]</p>
<p style="text-align: right;">Page 35342</p> <p>1 I've always read that to mean that you were a few metres 2 away from the koppie. 3 MR MTSHAMBA: I mean from the koppie 4 where I was towards where the shooting was taking place, 5 that was a few metres that I travelled. 6 CHAIRPERSON: Is that koppie 1? You were 7 on koppie 1, weren't you? 8 MR MTSHAMBA: At the time of the 9 shooting, Chairperson, I was proceeding from the second 10 koppie. 11 CHAIRPERSON: To where? 12 MR MTSHAMBA: I was at koppie 2, not at 13 koppie 1. 14 CHAIRPERSON: Where were you proceeding 15 to? 16 MR MTSHAMBA: Possibly the question was 17 not - I was at koppie 2, I said, Chairperson. 18 CHAIRPERSON: Yes, I understand that, you 19 were on koppie 2. Were you just stationary or were you on 20 the way somewhere? Were you proceeding somewhere? 21 MR MTSHAMBA: I had stopped at koppie 2. 22 MR CHASKALSON SC: So what do you mean in 23 paragraph 20 when you say about a few metres from the 24 koppie? 25 MR MTSHAMBA: I'm referring to a few</p>	<p style="text-align: right;">Page 35344</p> <p>1 certainly not [inaudible]. 2 CHAIRPERSON: It sounds about [inaudible, 3 speaking simultaneously with interpreter] it's not 4 necessarily precise. It's not five metres, it's 165 or in 5 that vicinity. 6 MR CHASKALSON SC: Let us say it's 7 certainly over 120 metres away. 8 MR MTSHAMBA: I wouldn't be able to say. 9 I'm not sure. 10 MR CHASKALSON SC: And why were you 11 seeking to escape to Nkaneng rather than to your home, 12 which is in the other direction from Nkaneng? 13 MR MTSHAMBA: Because Nkaneng was nearer 14 and most of the people were going towards that direction. 15 MR CHASKALSON SC: Then there are three 16 other issues that you mention in your statement that you 17 clarified in some respect with Mr Mpofu, and I refer to the 18 passage in your statement where you talk about a Nyala 19 running someone over, the passage in your statement where 20 you speak about shooting from the helicopter, and the 21 passage in your statement where you talk about Nyala 22 running someone over. The passage in your statement where 23 you speak about shooting from the helicopter. 24 [14:08] And the passage in your statement where you speak 25 about strikers being shot when they were surrendering. And</p>

<p style="text-align: right;">Page 35345</p> <p>1 I understood your evidence in relation to the Nyala and the 2 helicopter in certain cross-examination and in fact in 3 evidence in chief to be that you accept that you may have 4 got that wrong. But you do stand by your evidence that 5 strikers were shot when they were trying to surrender. Now 6 none of these three issues that you address in your 7 statement were included in your IPID statement. That's 8 MMMM3 and you said to Mr Mpfu that you didn't mention them 9 in your IPID statement because you were scared. You were 10 in police custody and the people who were asking you 11 questions were from the police. But if we go to paragraph 12 6 of your IPID statement there you do mention that police 13 kicked you and hit you with rifle butts. You state "As we 14 were coming down from the hill with our hands above our 15 heads the police ordered us to lie down on our stomach and 16 they started to assault us by hitting us with the rifles 17 and also kicking us all over the body." Now why were you 18 not scared to say that, but scared to say that people were 19 killed while they were surrendering? 20 MR MTSHAMBA: Because as we were arrested 21 they could see that the people arrested were assaulted. 22 Some had swollen faces, they had been kicked. That was 23 obvious the people were there. The killing was something 24 different from that. 25 MR CHASKALSON SC: Were you not worried</p>	<p style="text-align: right;">Page 35347</p> <p>1 MR MPOFU: Chairperson, I want to object 2 to this question or this line of questioning and I don't 3 want to suggest answers to the witness, but Mr Chaskalson 4 has established and the witness has agreed that he for 5 right, for good or bad reasons deliberately concealed the 6 idea of people being shot at point blank to put it broadly. 7 So I don't know how you then can ask – once he has made 8 that decision consciously he can't then say something 9 that's consistent with exactly what he's concealing. So 10 one can't then pursue the question him on the basis that 11 you've decided to conceal something, let's accept – whether 12 we accept your reasons or not, but then why did you not say 13 it in another sentence? It doesn't make sense. 14 CHAIRPERSON: Mr Chaskalson, what do you 15 say to the objection? 16 MR CHASKALSON SC: Chairperson, there are 17 two points I'd like to make. The first is that I don't 18 think I've established that the witness deliberately 19 concealed that people were shot at point blank range. What 20 I hope I've established is that the witness couldn't see 21 exactly who did the shooting of the people who he saw shot 22 and whether it was at point blank range or not. But that's 23 irrelevant to the objection. My question is not why didn't 24 you say people were shot while they were surrendering, it's 25 why did you say the exact opposite.</p>
<p style="text-align: right;">Page 35346</p> <p>1 that you'd make yourself a target by saying that you were a 2 witness to police kicking people, hitting them with rifle 3 butts? 4 MR MTSHAMBA: I was also injured, I could 5 show them where I was injured. 6 MR CHASKALSON SC: But you also say 7 something else in paragraph 6. You don't say that the 8 police shot people while they were surrendering, you say 9 essentially the opposite. The words that you use are "The 10 police fired at us until we raised our hands above our 11 heads to show that we were not fighting." Why did you say 12 that? 13 MR MTSHAMBA: After the shooting of the 14 people, the people were shot whilst their hands were raised 15 and after that shooting the police ordered us to put our 16 hands behind our heads as he demonstrated and whilst going 17 out of that place. And then we were made to lie down. 18 MR CHASKALSON SC: But why did you 19 actually say the police fired at us until we raised our 20 hands above our heads to show we were not fighting? 21 MR MTSHAMBA: I wouldn't have been able 22 to remember everything at the same time, Chairperson. 23 MR CHASKALSON SC: Well you must have 24 remembered that some people were killed while they were 25 trying to surrender.</p>	<p style="text-align: right;">Page 35348</p> <p>1 CHAIRPERSON: Mr Mpfu, what do you say 2 to that? 3 MR MPOFU: Chairperson, that's just 4 semantics. If you say did I go through that door and I say 5 I didn't go, that's the opposite of going through the door. 6 So you can't then say why does he say the opposite. The 7 mere fact that you are saying this did not happen implies 8 the opposite. I don't understand – 9 MR CHASKALSON SC: Maybe if I can put the 10 question in a different way, Chairperson. 11 MR CHASKALSON SC: Put the question, Mr 12 Chaskalson, let's see whether it's an objection again. 13 MR CHASKALSON SC: Why did you not just 14 stay quiet about what was happening, what happened when 15 people tried to surrender? 16 MR MAHLANGU: Why did he not just stay 17 quiet? 18 MR CHASKALSON SC: Say nothing about what 19 happened when people tried to surrender. 20 MR MPOFU: Chair, okay no I think that's 21 a different question. Thanks, Chairperson. 22 MR MTSHAMBA: I had to make a statement, 23 Chairperson. 24 MR CHASKALSON SC: Were you specifically 25 asked to say what happened when people surrendered?</p>

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1 MR MTSHAMBA: No, I wasn't asked that
2 question.
3 MR CHASKALSON SC: So why did you deal
4 with it if this was something that you were scared of
5 addressing?
6 MR MTSHAMBA: I did not mention that in
7 my statement, Chairperson.
8 MR CHASKALSON SC: No, no but you see you
9 do say in your statement "The police fired at us until we
10 raised above our heads to show that we were not fighting."
11 MR MTSHAMBA: I did not say – not to
12 kill. I didn't say they killed.
13 MR CHASKALSON SC: No I know that. My
14 question is why did you positively say they fired until we
15 put our hands up.
16 MR MPOFU: Chairperson, I'm sorry I
17 really don't want to interrupt, but again this is a logical
18 –
19 MR CHASKALSON SC: Sorry, Chairperson,
20 I'm happy to leave it at this point. I have five minutes
21 left, let me move on. I just have one last set of
22 questions, Mr Mtshamba. You came back on the 13th of August
23 from leave.
24 MR MTSHAMBA: It is correct, Chair.
25 MR CHASKALSON SC: When you came back

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1 were you told that there had been a clash between strikers
2 and police on that day?
3 MR MTSHAMBA: I heard that from the
4 workers, some over the news.
5 MR CHASKALSON SC: Did you find out that
6 SAPS had killed 3 strikers?
7 MR MTSHAMBA: Over the news, yes.
8 MR CHASKALSON SC: And did you find out
9 that the strikers had killed two members of SAPS?
10 MR MTSHAMBA: Also over the news.
11 MR CHASKALSON SC: And did you find that
12 out on the 13th or –
13 MR MTSHAMBA: It was before in the news.
14 MR CHASKALSON SC: But it was before you
15 went to the koppie on the 15th.
16 MR MTSHAMBA: Yes.
17 MR CHASKALSON SC: I want to show you
18 slide 168. We've taken the original video out so that it
19 can be shown independent of exhibit L because exhibit can't
20 be played on the computer that we have available, but it is
21 the video that is in slide 168. And before we play it it's
22 a video that was I think mentioned to you by Mr Mpofu
23 yesterday where a speaker says that we will finish off
24 these policemen from the homelands. And you were told that
25 the – you were asked what the name of the – whether you

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1 knew the name of the person who made that speech. You said
2 that you'd been told that his name was Bhele. I have to
3 put it to you that this man is not Bhele. I don't know if
4 you know that.
5 MR MTSHAMBA: Not the one you are showing
6 now, that's not him.
7 MR CHASKALSON SC: He is the one who made
8 the speech that Mr Mpofu was referring to, but maybe if we
9 can play the video so you can hear the speech. You confirm
10 that this man who we see on screen is not Bhele. And do
11 you know him by the name Kaiser or Madala?
12 MR MTSHAMBA: I don't know this person.
13 MR CHASKALSON SC: Well let's play the
14 video.
15 [VIDEO SHOWN]
16 MR CHASKALSON SC: Now do you recall that
17 this speech was made shortly after Mr Noki had made a
18 speech saying there is no space for two bulls in one kraal?
19 MR MTSHAMBA: Yes, Sir.
20 MR CHASKALSON SC: And Mr Noki was
21 referring to SAPS being the one bull and the strikers being
22 the other bull.
23 MR MTSHAMBA: Yes, Sir.
24 MR CHASKALSON SC: And he was suggesting
25 that one of the bulls would have to give way.

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1 MR MTSHAMBA: That's right.
2 MR CHASKALSON SC: Now yesterday when Mr
3 Mpofu asked you about this speech you said you thought it
4 was just a joke.
5 MR MPOFU: Sorry, Chairperson, I'm sorry
6 that's -
7 MR CHASKALSON SC: Sorry, the speech of
8 this man who we see on the screen, not the speech of Mr
9 Noki.
10 MR MTSHAMBA: Yes.
11 MR CHASKALSON SC: But I have
12 difficulties with that answer and let me put these
13 difficulties to you. You knew that the strikers had killed
14 two members of SAPS a few days previously, do you accept
15 that?
16 MR MTSHAMBA: Yes.
17 MR CHASKALSON SC: You'd just heard Mr
18 Noki say there's no space for two bulls in one kraal.
19 MR MTSHAMBA: Yes, Sir.
20 MR CHASKALSON SC: And you knew that what
21 he meant by that was either SAPS or the strikers would have
22 to give way.
23 MR MTSHAMBA: I agree with you.
24 MR CHASKALSON SC: So how could you see
25 it as a joke when a speaker coming after Mr Noki says we're

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1 going to finish off these homeland police?
 2 MR MTSHAMBA: He wasn't talking of
 3 killing anybody, I don't know how you understand it.
 4 MR CHASKALSON SC: I certainly understand
 5 it as embracing the possibility of killing people.
 6 MR MTSHAMBA: That's possibly how you
 7 understand it. I did not understand it that way.
 8 CHAIRPERSON: How do you finish someone
 9 off without killing him?
 10 MR MTSHAMBA: What I understood firstly,
 11 Sir, was that in the kraal where there are two bulls one
 12 has got to move out and the other one to remain.
 13 CHAIRPERSON: No but you were being asked
 14 about the second statement, not by Mr Noki, the other
 15 person, the person that we've just seen on the screen.
 16 MR MPOFU: Chairperson, I'm sorry. I'm
 17 not objecting to your question. The problem was the way
 18 the question was formulated and I'm hoping that you are
 19 going to reformulate it because the two things were linked
 20 by Mr Chaskalson. But I hear where you're going, it's to
 21 separate them out.
 22 CHAIRPERSON: I'm not concerned with what
 23 Mr Noki said, I'm concerned with the statement that the
 24 person we saw on the screen made, namely that the policemen
 25 from the homelands is going to be finished off. Now how do

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1 you finish someone without killing him?
 2 MR MTSHAMBA: One other thing,
 3 Chairperson, I didn't say those things and it's difficult
 4 for me to explain what this man actually meant.
 5 CHAIRPERSON: Okay we'll leave it at that
 6 point. Mr Semanya you are next to cross-examine are you or
 7 is it Mr van As?
 8 MR CHASKALSON SC: Sorry, Chairperson,
 9 just before whoever is next, I do want to thank Mr Mtshamba
 10 again because I think it takes incredible courage to come
 11 to this Commission and testify about events like this that
 12 you witnessed.
 13 MR MTSHAMBA: I thank you, Sir, too.
 14 CHAIRPERSON: All right on that note
 15 we'll ask Mr Semanya to cross-examine. You are cross-
 16 examining next are you and Mr Van As?
 17 [14:28] CROSS-EXAMINATION BY MR SEMENYA SC: As
 18 is practice now, I must say good afternoon to you.
 19 MR MTSHABA: I greet you back.
 20 MR SEMENYA SC: In October 2012, Mr Mpoфу
 21 told us that in the opening statement that there was an
 22 Nyala that was riding over a striker. Are you aware of
 23 that?
 24 MR MTSHABA: Yes, that's something I also
 25 mentioned in my statement.

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1 MR SEMENYA SC: And this was
 2 approximately two months after the events had occurred in
 3 Marikana? I am right?
 4 MR MTSHABA: I do not know, Sir, you say
 5 Mr Mpoфу mentioned it, not me.
 6 MR SEMENYA SC: October is just but two
 7 months away from the days when these things were happening
 8 in Marikana.
 9 MR MTSHABA: Yes, but Mr Semanya, you are
 10 saying Mr Mpoфу said so, not me. That doesn't include me.
 11 MR SEMENYA SC: Mr Mtshamba, please
 12 listen to me, October was but two months after the things
 13 had happened in Marikana.
 14 MR MTSHABA: Yes, that's two months.
 15 MR SEMENYA SC: And the things are
 16 relatively still fresh in the memory of those who had
 17 witnessed the events in Marikana, right?
 18 MR MTSHABA: Yes.
 19 MR SEMENYA SC: And the horror and the
 20 trauma that Mr Chaskalson is referring to were relatively
 21 fresh.
 22 MR MTSHABA: I think so.
 23 MR SEMENYA SC: What do you mean, you
 24 think so? I am talking about you.
 25 MR MTSHABA: Mr Chair, it depends on the

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1 person how the person perceived that because it's like if
 2 you are watching television, you can stop and pause
 3 whatever you are watching, and look at it closely, but this
 4 is not the case here, when something happens, then it plays
 5 out in front of you. You cannot pause have a good look at
 6 it.
 7 MR SEMENYA SC: Your memory of the events
 8 was a little better than it must be today, really?
 9 MR MTSHABA: That is so.
 10 MR SEMENYA SC: Now when you make the
 11 assertion to Mr Mpoфу that there is an Nyala riding over
 12 somebody, you knew that's a very serious and damaging
 13 statement to make over the police.
 14 MR MPOFU: Chairperson, I don't know why
 15 Mr Semanya is so presumptuous. I've allowed this to carry
 16 on, seeing that it was the logical, hoping the logical
 17 connection will be shown. I don't know where Mr Semanya
 18 gets this idea that I got this information from this
 19 witness. I represent more than 300 people.
 20 MR SEMENYA SC: But the witness has just
 21 told us, he said it.
 22 MR MPOFU: No, he never said that, he
 23 said – you said I said something in October 2012, which is
 24 true, and the witness never said that I got it from him.
 25 And I am telling you as a matter of fact that I didn't get

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1 it from him.

2 MR SEMENYA SC: Did you mention in your

3 consultations that you witnessed this event?

4 MR MTSHABA: Yes, I once mentioned it.

5 MR MPOFU: No, Chairperson, Mr Semenya is

6 making a quantum leap in logic.

7 CHAIRPERSON: I am sorry, Mr Mpofo, you

8 are now objecting to an answer the witness gave. You

9 raised an objection to the question, Mr Semenya

10 reformulated the question, put – got an answer from the

11 witness.

12 MR MPOFU: Ja, but just because he

13 reformulated doesn't mean it has cured the problem I am

14 raising, Chairperson. I am saying, Mr Semenya has to, if

15 he wants to follow this line, which he is entitled to do,

16 he must then show that I, by the time I made the statement

17 here in October, I had consulted with this witness. If I

18 consulted with this witness last week, then what he is

19 saying is void of any logic.

20 CHAIRPERSON: Cross-examiners don't have

21 to show any – let me try and resolve the problem. When did

22 you first consult with Mr Mpofo?

23 MR MTSHABA: I am not clear, I don't

24 remember exactly when it was.

25 CHAIRPERSON: How long after the

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1 shootings did it happen?

2 MR MTSHABA: I am not sure, Mr Chair, I

3 don't know whether it was two or three months after.

4 MR SEMENYA SC: Chair, the focus of my

5 question is not that the witness himself, I am saying the

6 case for the arrested and injured in the opening, contained

7 this information which he is talking about. I can't be

8 wrong on that point. Can I please proceed?

9 MR MPOFU: No, Chairperson –

10 CHAIRPERSON: Let's see what question he

11 asks. If his next question is also, in your submission

12 objectionable, then you can raise an objection and we'll

13 deal with it.

14 MR MPOFU: No, I am not objecting to his

15 next question, I am objecting to his last question. I am

16 saying that what – he clearly implied in that question that

17 I received this information from this witness. It's a

18 simple thing. He has to establish a basis for that.

19 CHAIRPERSON: Cross-examiners don't

20 normally have to establish a basis before they ask

21 questions. Mr Mpofo, we won't deal with the objection now.

22 Mr Semenya, carry on and see if you can ask a question that

23 doesn't elicit an objection.

24 MR SEMENYA SC: Making an allegation of

25 that nature, would be a very damaging allegation to make

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1 against the police, do you agree at least to that?

2 MR MTSHABA: I agree.

3 MR SEMENYA SC: And he can only really

4 make it if it is factually correct. Am I right?

5 MR MTSHABA: I agree.

6 MR SEMENYA SC: You would have actually

7 have had to see a Nyala roll over a person who is lying on

8 the ground. Correct?

9 MR MTSHABA: I agree,

10 MR SEMENYA SC: And with your ability to

11 see over 100 metres people lying down, you clearly would be

12 able to see if what he is going over is a blanket.

13 Correct?

14 MR MTSHABA: Mr Chair, I explained

15 earlier on in my statement, that there was dust, there was

16 teargas smoke, one could not see things clearly.

17 MR SEMENYA SC: If it is a blanket, you

18 will be able to see that the Nyala is going over a blanket.

19 Is that factually correct or not?

20 MR MTSHABA: I am not sure.

21 MR SEMENYA SC: Are you not sure when you

22 see something you will be able to say you saw it?

23 MR MTSHABA: Repeat the question please.

24 MR SEMENYA SC: I say, if you see an

25 Nyala go over the blanket you will say, I am seeing an

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1 Nyala go over a blanket, am I right?

2 MR MTSHABA: Yes, I will say so.

3 MR SEMENYA SC: And you won't say an

4 Nyala is going over a striker, am I right?

5 MR MTSHABA: No, I won't say so.

6 MR SEMENYA SC: So you'd only say an

7 Nyala is going over a person because you have witnessed it?

8 Am I right?

9 MR MTSHABA: No, you are not right.

10 MR SEMENYA SC: Oh, when you see an Nyala

11 go over a person, you won't be able to say so?

12 MR MTSHABA: I will say so.

13 MR SEMENYA SC: And that didn't happen,

14 am I right?

15 MR MTSHABA: I said later that it did not

16 happen.

17 MR SEMENYA SC: Now before we go "later,"

18 I am talking about when you make the statement, you did not

19 see an Nyala go over a human being?

20 MR MTSHABA: When I made a statement, at

21 that time I said I saw an Nyala running over a person.

22 MR SEMENYA SC: You said it, knowing it

23 to be factually false?

24 MR MTSHABA: No.

25 MR SEMENYA SC: You said it, having

<p style="text-align: right;">Page 35361</p> <p>1 witnessed an Nyala go over a human being? 2 MR MTSHABA: That's what it looked like, 3 that's what it appeared like, an Nyala was running over a 4 person. 5 MR SEMENYA SC: That's my understanding 6 of isiXhosa. If you had intended to say that I saw, as 7 though or it appeared to me that an Nyala was driving over 8 a person you would have been able in isiXhosa to say so. 9 MR MTSHABA: I don't know what parts of 10 my answer Mr Semenya does not understand. I am saying, 11 what I saw appeared to be that the Nyala was running over a 12 person. That is what I said later, after I was told that 13 that did not happen, but initially before I was corrected 14 and told that it did not happen, I said I saw an Nyala 15 running over a person. 16 MR SEMENYA SC: You say the opposite in 17 your statement. You don't say it appeared as though an 18 Nyala was going over a striker. You stated in positive 19 language that it's what you witnessed = 20 MR MPOFU: Chairperson, I am sorry, 21 honestly, the witness has just said exactly what Mr Semenya 22 seems to be – he said that initially he said an Nyala ran 23 over a person. He didn't say it looked like. He says he 24 only said that once he was corrected. But he says exactly 25 that, he said positively an Nyala ran over a person. He</p>	<p style="text-align: right;">Page 35363</p> <p>1 you were well within your ability to say in your statement 2 that it only appeared to you that way, not that it 3 happened. Am I right? 4 MR MTSHABA: Yes, you can put it that 5 way. 6 MR SEMENYA SC: You consciously elected 7 not to put it as you saw it. 8 MR MTSHABA: That is what I believed I 9 saw at that time. 10 MR SEMENYA SC: Okay. So you are capable 11 of that type of error of stating things that you only 12 believe, and you think you saw them happen. 13 MR MTSHABA: No, I don't make such 14 mistakes. 15 MR SEMENYA SC: That's what you just 16 confessed to one. 17 MR MTSHABA: That could be the first 18 mistake in my life, so do not put it like I am used to 19 making such mistakes. 20 MR SEMENYA SC: Well, well, but let me 21 examine having, you only retracted once you are confronted 22 with objective evidence that belied that assertion. 23 MR MTSHABA: I don't know what Mr Semenya 24 wants me to say, how I must respond to this. I admitted 25 that I made a mistake, now what must I say? Do you want me</p>
<p style="text-align: right;">Page 35362</p> <p>1 didn't say it looked like or it appeared or whatever. 2 CHAIRPERSON: Yes, but Mr Mpofu, Mr 3 Semenya is entitled to say to him, that if in fact the 4 Nyala didn't go over the protester, the striker, and only 5 gone over the blanket, then he couldn't have seen what he 6 says he saw. There may be all sorts of answers to that, 7 but I don't think I can disallow that as a question. 8 MR MPOFU: No, Chairperson, I accept 9 that, I think maybe I didn't articulate my objection 10 correctly. I can see what Mr Semenya is probing, and he is 11 fully entitled to do so, all I am saying that in the last 12 answer the witness says, "I did not say initially it looked 13 like the Nyala ran – I said positively did. Only once I 14 was corrected I then said it looked like." So that's all I 15 am – 16 CHAIRPERSON: Mr Semenya, you've had the 17 benefit now of the elucidation by Mr Mpofu. Perhaps you 18 can ask the question – 19 MR SEMENYA SC: I would like also Chair, 20 to use my hour profitably. 21 CHAIRPERSON: Yes, I am sure. 22 Reformulate the question, and let's carry on. The witness 23 originally conceded he originally said he saw the Nyala 24 going over a person. 25 MR SEMENYA SC: I am saying in isiXhosa,</p>	<p style="text-align: right;">Page 35364</p> <p>1 to change that statement now? 2 MR SEMENYA SC: It is your motive that I 3 am questioning, Mr Mtshamba. But you say that was the only 4 one? 5 MR MTSHABA: I think so. It could be the 6 first and the last mistake. 7 MR SEMENYA SC: Well, I take it you say 8 you see a helicopter and police shooting from the 9 helicopter. You state it in positive terms, don't you? Am 10 I right? 11 MR MTSHABA: Yes, I said so. 12 MR SEMENYA SC: And you knew that to be a 13 very, very damning statement to say about the police in a 14 tragedy like Marikana. 15 MR MTSHABA: I did not see it as a 16 damning statement to make. 17 MR SEMENYA SC: It was a compliment? 18 MR MTSHABA: There are worse things that 19 the police have done, worse than this. 20 MR SEMENYA SC: One of those being 21 shooting people from the helicopter. 22 MR MTSHABA: One of them being when they 23 want to shoot, or shoot at people who are passing by, pass 24 in front of them. 25 MR SEMENYA SC: One of them being</p>

<p style="text-align: right;">Page 35365</p> <p>1 shooting people from the helicopter.</p> <p>2 [14:47] MR MTSHAMBA: And the other one is</p> <p>3 shooting people who are surrendering, raising their hands.</p> <p>4 MR SEMENYA SC: Does it also include</p> <p>5 police shooting people from the helicopter? It's a</p> <p>6 straight question. Give me an answer, please.</p> <p>7 MR MTSHAMBA: No.</p> <p>8 MR SEMENYA SC: But it needs to be</p> <p>9 included to embellish this police bad behaviour, right?</p> <p>10 MR MTSHAMBA: Mr Chair, I already</p> <p>11 admitted that the shooting by the police from the</p> <p>12 helicopter, I could have been mistaken about that.</p> <p>13 MR SEMENYA SC: That's the second one</p> <p>14 now.</p> <p>15 MR MTSHAMBA: I can agree to that.</p> <p>16 MR SEMENYA SC: And it is a version you</p> <p>17 shared with some of your fellow strikers who were arrested.</p> <p>18 Am I right?</p> <p>19 MR MTSHAMBA: Yes, because the shooting</p> <p>20 was coming from different directions and if a helicopter is</p> <p>21 circling above you or passes over your head and there is</p> <p>22 shooting going on, you will not know where the bullet is</p> <p>23 coming from.</p> <p>24 MR SEMENYA SC: And you shared that</p> <p>25 version with those you were arrested with.</p>	<p style="text-align: right;">Page 35367</p> <p>1 officer shooting from a helicopter.</p> <p>2 MR SEMENYA SC: Stating it in your</p> <p>3 statement you knew that it is a falsehood as far as it</p> <p>4 relates to you.</p> <p>5 MR MTSHAMBA: No.</p> <p>6 MR SEMENYA SC: Sorry, I missed your</p> <p>7 answer.</p> <p>8 MR GOIRANA: The answer was no.</p> <p>9 MR SEMENYA SC: You stated it knowing it</p> <p>10 to be false as far as your own observation was concerned?</p> <p>11 MR MTSHAMBA: No.</p> <p>12 MR SEMENYA SC: Because you tell us that</p> <p>13 whenever shooting happened you actually dipped your head,</p> <p>14 as you repeated now.</p> <p>15 MR MTSHAMBA: Yes, I said so.</p> <p>16 MR SEMENYA SC: And therefore you could</p> <p>17 not have witnessed it. Am I right?</p> <p>18 MR MTSHAMBA: Yes.</p> <p>19 MR SEMENYA SC: And in fact it's worse</p> <p>20 because Mr Mmusi, the erstwhile junior to Mr Mpofu, told</p> <p>21 the Chairman during the inspection in loco that the police</p> <p>22 were firing from the helicopter. That's consistent with</p> <p>23 your version, right?</p> <p>24 MR MTSHAMBA: I do not know about that,</p> <p>25 Sir.</p>
<p style="text-align: right;">Page 35366</p> <p>1 MR MTSHAMBA: Yes.</p> <p>2 MR SEMENYA SC: And so they also</p> <p>3 perpetuate the untruth that you have admitted to now.</p> <p>4 MR MPOFU: No, Chairperson, with the</p> <p>5 greatest respect, what is Mr Semenya talking about? What</p> <p>6 untruth? Has Mr Semenya established that there was no</p> <p>7 shooting from the helicopter? That's not what the witness</p> <p>8 is saying. He's saying he could have been mistaken, he</p> <p>9 could have been right, he could have been wrong. Where's</p> <p>10 the untruth? He can't put a proposition like that to the</p> <p>11 witness. Mr Chaskalson demonstrated, showed the people</p> <p>12 hanging from a helicopter. Whether they shot or not, I</p> <p>13 don't know. I'm sure the witness doesn't know. I'm sure</p> <p>14 Mr Semenya doesn't know. So he can't tell us about</p> <p>15 untruths.</p> <p>16 MR SEMENYA SC: Mr Mtshamba, did you see</p> <p>17 a policeman in a helicopter shooting at people?</p> <p>18 MR MTSHAMBA: Mr Chair, the helicopter</p> <p>19 was above us. There was shooting from different directions</p> <p>20 and every time they were shooting we would lower our heads.</p> <p>21 That is why I believe the helicopter also fired, or some</p> <p>22 shots were fired from the helicopter.</p> <p>23 MR SEMENYA SC: Mr Mtshamba, did you see</p> <p>24 a policeman fire a firearm from the helicopter?</p> <p>25 MR MTSHAMBA: No, I did not see any</p>	<p style="text-align: right;">Page 35368</p> <p>1 MR SEMENYA SC: Now you only retract that</p> <p>2 version yesterday when Mr Chaskalson says to you there is</p> <p>3 no evidence of that being correct. Am I right?</p> <p>4 MR MTSHAMBA: Yes.</p> <p>5 MR SEMENYA SC: Until that time you were</p> <p>6 going to maintain that untruth.</p> <p>7 MR MTSHAMBA: That is so, yes.</p> <p>8 MR SEMENYA SC: Let's traverse another</p> <p>9 area. You see a striker stand up with arms raised and</p> <p>10 uttering the following words, "Let us surrender."</p> <p>11 MR MTSHAMBA: Yes, that is so.</p> <p>12 MR SEMENYA SC: You actually hear him use</p> <p>13 those words, "Let us surrender"?</p> <p>14 MR MTSHAMBA: I heard him.</p> <p>15 MR SEMENYA SC: And you see him being</p> <p>16 shot at the hand, or the arm?</p> <p>17 MR MTSHAMBA: Yes, that's how I saw it.</p> <p>18 MR SEMENYA SC: And you also hear him</p> <p>19 repeat that "Please let us surrender."</p> <p>20 MR MTSHAMBA: Yes, Sir.</p> <p>21 MR SEMENYA SC: And at that time you see</p> <p>22 him being struck and shot at, at the tummy and he falls</p> <p>23 down and goes on his knees. You witness this?</p> <p>24 MR MTSHAMBA: I saw that.</p> <p>25 MR SEMENYA SC: And this is not a belief;</p>

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1 it's something that you physically saw happen.
 2 MR MTSHAMBA: Yes, I saw that.
 3 MR SEMENYA SC: Okay. Now Mr Chaskalson
 4 tells you of all the deceased persons who were there nobody
 5 has the type of bullet injuries that you describe of a
 6 person being shot in the tummy and shot at the right thigh,
 7 correct?
 8 MR CHASKALSON SC: No, no, Chairperson,
 9 that's not what I put at all. There is in fact a deceased
 10 person with those injuries. Mr Ngxande does have those
 11 injuries.
 12 CHAIRPERSON: The point was that no one
 13 had injuries, shot in the arm and the – the arm or the hand
 14 – and those other two injuries.
 15 MR SEMENYA SC: That's what I'm saying.
 16 CHAIRPERSON: No, no, you didn't. You
 17 put it –
 18 MR SEMENYA SC: I put it wrongly. Okay –
 19 CHAIRPERSON: You put it wrongly. Put it
 20 correctly this time.
 21 MR SEMENYA SC: What Mr Chaskalson then
 22 put to you is there is nobody there with injuries
 23 consistent with your description.
 24 CHAIRPERSON: I think in fairness to the
 25 witness he should be told that what Mr – reminded actually

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1 because it's his own cross-examination, that what Mr
 2 Chaskalson had said, there was no one who had an injury in
 3 the hand or the arm and in the stomach of course, and in
 4 the thigh. No one had that combination of three injuries
 5 who was on the scene as a deceased person.
 6 MR CHASKALSON SC: Chairperson, I think
 7 what I put is none of the people who I identified as
 8 possible candidates for the person who Mr Mtshamba says he
 9 saw had a wound in their arm. I didn't mention stomach or
 10 thigh. I steered clear of that.
 11 MR MPOFU: Ja, Chairperson –
 12 CHAIRPERSON: Arm or hand, but anyway Mr
 13 Chaskalson I think has now clarified and in the light of
 14 that clarification Mr Semenya will I'm sure reformulate his
 15 question.
 16 MR MPOFU: Can I say my piece?
 17 CHAIRPERSON: Well, if it's an objection
 18 to the question that hasn't been formulated yet then –
 19 MR MPOFU: No, Chairperson –
 20 CHAIRPERSON: – it may be a waste of
 21 time. But anyway, say your piece if you want to say your
 22 piece. I don't want to be discourteous to you, and if
 23 you've got a good point I will uphold it, and if you
 24 haven't I won't.
 25 MR MPOFU: [Microphone off, inaudible]

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1 MR SEMENYA SC: You're out on that one,
 2 Mr Mtshamba, was that this person must have escaped.
 3 MR MTSHAMBA: Which person are you
 4 talking about?
 5 MR SEMENYA SC: This one who said you
 6 must surrender and he got shot in the right arm or right
 7 hand.
 8 MR MTSHAMBA: Mr Chair, Mr Chaskalson was
 9 saying amongst the people who died who were found there,
 10 there was no one who had such wounds or hand or arm injury,
 11 and then I said it's possible that the person did not die.
 12 MR SEMENYA SC: Yes, I'm exploring that
 13 with you. Is that your explanation?
 14 MR MTSHAMBA: Yes, that's what I'm
 15 saying.
 16 MR SEMENYA SC: Did you see him escape?
 17 MR MTSHAMBA: No.
 18 MR SEMENYA SC: It's a version you just
 19 fathomed yesterday for the first time. What is the answer?
 20 MR MTSHAMBA: Mr Chair, I was responding
 21 to Mr Chaskalson's statement when he said amongst the
 22 people who died who were at that scene no one was injured
 23 on the hand. I was answering to that.
 24 MR SEMENYA SC: It's a version you
 25 conjured up only yesterday that he may have escaped.

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1 MR MTSHAMBA: I did not say he escaped.
 2 MR SEMENYA SC: No, your evidence, you
 3 say he must possibly have escaped.
 4 MR MPOFU: Sorry, Chairperson, I think in
 5 fairness to Mr Semenya, it's just a problem of
 6 interpretation. How it was interpreted is the word
 7 "escaped" was interpreted as ran away and that's what the
 8 witness was responding to, and Mr Semenya meant escape in a
 9 different sense, that he escaped death.
 10 MR MTSHAMBA: Yes, because Mr Chaskalson
 11 spoke about amongst the people who died no person had such
 12 injuries. So it means he survived, he did not die because
 13 he was not amongst the dead.
 14 MR SEMENYA SC: It's a version you only
 15 fell upon for the first time yesterday.
 16 MR MTSHAMBA: From the word go I never
 17 said a person who was shot in the hand or in the arm died.
 18 MR SEMENYA SC: Yes, no I know. I know.
 19 I know. I'm talking about him escaping.
 20 CHAIRPERSON: I thought Mr Mpofu
 21 explained that the word used really means he got away with
 22 his life as opposed to got away physically from the place.
 23 I think that's the distinction.
 24 MR SEMENYA SC: No, I'm using it in the
 25 correct context of the word. Survived.

<p style="text-align: right;">Page 35373</p> <p>1 CHAIRPERSON: I want to take the tea 2 adjournment soon, so when an appropriate stage for it comes 3 please let me know. 4 MR SEMENYA SC: It is convenient, Chair. 5 CHAIRPERSON: We take the tea 6 adjournment. 7 [COMMISSION ADJOURNS COMMISSION RESUMES] 8 [15:16] CHAIRPERSON: The Commission resumes. 9 Please tell the witness that he's still under oath. 10 SHADRACK ZANDISILE MTSHAMBA: [s.u.o. 11 through interpreter] 12 MR GOIRANA: Yes, still under oath. 13 CHAIRPERSON: Mr Semenya. 14 CROSS-EXAMINATION BY MR SEMENYA SC (CONTD.): 15 Mr Mtshamba, we were exploring the possibility of the 16 striker who was saying you must surrender, that he may have 17 survived, remember? 18 MR MTSHAMBA: Yes, Sir. 19 MR SEMENYA SC: Now Mr Mpfu and his 20 team, they represent all the injured and arrested. You 21 accept that? 22 MR MTSHAMBA: I know that. 23 MR SEMENYA SC: And diligent as I know 24 him to be he would have obtained a statement of somebody 25 who was urging everybody to raise their hands while they're</p>	<p style="text-align: right;">Page 35375</p> <p>1 the hand. That's his answer. Whether it's a good answer 2 is another matter, but that's his answer. 3 MR SEMENYA SC: No Chair, the point I'm 4 making is such a person would have been one of Mr Mpfu's 5 clients because he's representing all those who were 6 injured and all those who were arrested. 7 MR MPOFU: Chairperson, I'm sorry, again 8 I don't want to interrupt my learned friend – 9 CHAIRPERSON: [Microphone off, inaudible] 10 MR MPOFU: But I will, yes. Again it's a 11 false premise, Chairperson. Obviously we represent all 12 those injured people who came forward. If someone for 13 whatever reason was injured but did not want to pursue the 14 matter I wouldn't know about it. There might be a hundred 15 people out there who got injured and decided I don't want 16 to get involved in this whole thing. 17 MR SEMENYA SC: You know, Chair – 18 MR MPOFU: Like you said – 19 MR SEMENYA SC: I used it conjunctively 20 to say both injured and arrested, so I don't know if there 21 is any arrested person somewhere floating with injuries 22 that Mr Mpfu is not representing. 23 CHAIRPERSON: [Microphone off, inaudible] 24 MR MPOFU: Fair enough, okay. 25 CHAIRPERSON: [Microphone off, inaudible]</p>
<p style="text-align: right;">Page 35374</p> <p>1 getting shot at. You can accept that to be correct, right? 2 MR MTSHAMBA: Yes, Sir. 3 MR SEMENYA SC: And he would have surely 4 made sure that that individual comes and testifies 5 firsthand. 6 MR MTSHAMBA: That is so. 7 MR SEMENYA SC: So that we can conclude 8 with relative safety that the only reason Mr Mpfu is not 9 bringing a statement of that kind or an individual of that 10 nature is because there is no such person who has been 11 arrested and injured, correct? 12 MR MTSHAMBA: I said to Mr Semenya I saw 13 that it happened and if such evidence is necessary, since 14 the lawyers can go to the mortuary, get details of people 15 who died, what injuries they have, it is also possible to 16 go to the hospitals, search the hospital records, you'll 17 find someone with such injuries who did not die. 18 MR SEMENYA SC: No, I think the point is 19 lost on you. 20 CHAIRPERSON: The point he's making is 21 not lacking in credibility. They don't have to call 22 someone. If there was somebody who didn't die but was 23 injured and admitted to hospital and the hospital records, 24 I take it we've got hospital records of all the people who 25 were injured, there may well be somebody who's injured in</p>	<p style="text-align: right;">Page 35376</p> <p>1 represent all the arrested people. 2 MR MPOFU: Yes, and those who were 3 arrested and injured. 4 CHAIRPERSON: Yes, that's right. So 5 there's no question that someone who was injured lying on 6 the spot there, arrested by the police, is not one of your 7 clients. 8 MR MPOFU: Yes, no that's fair enough. 9 CHAIRPERSON: You've got full house as 10 far as they're concerned. 11 MR MPOFU: No, that's – ja, I just want 12 to say as far as people who were injured in the – 13 CHAIRPERSON: No, alright. 14 MR MPOFU: - they might be or might not 15 be, but Mr Semenya is right. 16 CHAIRPERSON: Mr Semenya is right, yes. 17 MR MPOFU: He is. 18 CHAIRPERSON: Let's leave him to carry 19 on. 20 MR SEMENYA SC: I'm saying if there was 21 such an individual that you describe, surely Mr Mpfu would 22 have given that individual to us. The only reason he 23 didn't is because there was, there is no such a person. 24 MR MTSHAMBA: Mr Semenya, I assure you 25 there is such a person.</p>

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1 MR SEMENYA SC: Let's go on. We have a
2 visual where the strikers were throwing stones at the
3 police and it is at the kraal. Did you observe them
4 throwing stones at the police before they got to the kraal?
5 MR MTSHAMBA: No.
6 MR SEMENYA SC: So when you mention in
7 your statement that they were throwing stones it must have
8 been at the kraal, correct?
9 MR MTSHAMBA: Not before.
10 MR SEMENYA SC: Yes, well you say it in
11 your statement. You are referring to the stage where those
12 stones are thrown at the police at the kraal.
13 MR MTSHAMBA: I did not say before the
14 shooting.
15 MR SEMENYA SC: Okay, I'm going to try
16 the last time. Reference to stone throwing by the strikers
17 in your statement relates to an event that happened at the
18 kraal.
19 MR MTSHAMBA: Near the kraal.
20 MR SEMENYA SC: And you want us to
21 believe this is an observation you make while you're
22 smoking on koppie 2.
23 MR MTSHAMBA: That is so.
24 MR SEMENYA SC: And this is despite the
25 water cannon, it's despite the teargas, despite the stun

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1 grenades, and despite the dust that is flowing from the
2 commotion there?
3 MR MTSHAMBA: Yes, I saw it.
4 MR SEMENYA SC: Okay, now when you tell
5 us Mr Noki is a leader you mean he was leading a whole
6 group of people, including you?
7 CHAIRPERSON: We've now got something on
8 the screen, a video clip. Has it got an exhibit number?
9 If so, I think you should tell us what it is.
10 MR SEMENYA SC: Chair, this –
11 CHAIRPERSON: No, it's got an exhibit
12 number. Just tell us and tell us at what –
13 MR SEMENYA SC: This is at the kraal –
14 CHAIRPERSON: Is this a photograph or
15 part of the video clip?
16 MR SEMENYA SC: It's part of the video
17 clip –
18 CHAIRPERSON: Alright, then just tell us
19 what the video clip is and you must tell us at what point
20 this particular picture that we now, image we now see
21 appears so that later on when the record is looked at by
22 others they can follow what's going on. I suppose when we
23 look at it later as well.
24 MR SEMENYA SC: Chair, we'll find the
25 description of –

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1 CHAIRPERSON: It doesn't look as if this
2 witness is going to finish by the end of today, so you've
3 gotten really till Monday to give us the information.
4 Anyway, carry on.
5 MR SEMENYA SC: Is this a depiction of
6 what you refer to in your statement?
7 MR MTSHAMBA: Mr Chair, what we see here
8 is not clear to me whether these people we see here were in
9 the front group or the group at the back.
10 MR SEMENYA SC: That's alright. Let's
11 proceed. I just asked you whether you were one of those
12 people who were under the leadership of Mr Noki.
13 CHAIRPERSON: The picture we've seen
14 shows two Nyalas and between them one can see a number of
15 strikers, one of whom at least appears to be throwing
16 something, judging by the position of his arm, in the
17 direction of the Nyala on the right-hand side of the
18 photograph. There are other strikers behind in what looks
19 like the kraal as well, but we'll get more details when
20 we're told precisely what this witness [inaudible, speaking
21 simultaneously with interpreter]. The striker in the front
22 of the group appears to have a green top. Whether it's a
23 blanket or not I don't know.
24 MR SEMENYA SC: Thank you, Chair.
25 MR MPOFU: No, Chairperson, I just wanted

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1 to contest a part of that description. From that picture
2 one cannot see the direction that the stone is allegedly
3 being thrown in the direction of any Nyala. It could have
4 been a person. You can actually see them looking away from
5 there, including the person next to him.
6 CHAIRPERSON: He's either throwing it at
7 the Nyala on the right-hand of the picture or he's throwing
8 it at a person who is on the other side of the Nyala. Or
9 perhaps he's just throwing in the open air on the other
10 side of the Nyala.
11 MR MPOFU: Yes, that's also possible,
12 Chairperson.
13 MR SEMENYA SC: You were one of those
14 people who were followers to Mr Noki?
15 MR MTSHAMBA: I do not understand what
16 you mean by that. Can you explain?
17 MR SEMENYA SC: And your confusion is
18 raised by what in my question?
19 MR MTSHAMBA: Can you please explain the
20 question? What do you exactly mean by this point?
21 MR SEMENYA SC: You were one of those
22 strikers who were followers to Noki when you describe him
23 as a leader?
24 MR MTSHAMBA: My first day on the
25 mountain, I arrived there and there were people who I was

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1 told were chosen to represent the workers. Mr Noki was one
 2 of them. When I also joined the people on the mountain I
 3 would get a report, which we would receive from the people,
 4 those group of people that was chosen. So I don't
 5 understand exactly when you say I'm one of the followers of
 6 Mr Noki.

7 MR SEMENYA SC: We're wasting time. Was
 8 Mr Noki a leader?

9 MR MTSHAMBA: He was the person chosen to
 10 represent the workers.

11 MR SEMENYA SC: Meaning yes?

12 MR MTSHAMBA: I'd agree if you put it
 13 that way.

14 MR SEMENYA SC: And you were one of the
 15 followers?

16 MR MTSHAMBA: I went to the mountain to
 17 listen to what was being said. I was not going there to be
 18 a follower.

19 MR SEMENYA SC: And you mean that
 20 seriously?

21 MR MTSHAMBA: Yes.

22 MR SEMENYA SC: So when we read paragraph
 23 19 of your statement and I read halfway through that
 24 paragraph, "I followed other people moving in the same
 25 direction with the aim of escaping into Nkaneng. Most of

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1 the people who were on koppie 2 managed to escape via the
 2 path to Nkaneng." So say you, and I emphasise, "But those
 3 of us who were on koppie 1 took longer and walked behind
 4 the leaders, including Mr Noki. We were all intending to
 5 escape into Nkaneng, like the others." The Commission was
 6 told that at a certain point the late Mr Noki would have
 7 told their group "We have done nothing wrong. We are not
 8 going to run. We're just going home." Were you part of
 9 those he was addressing?

10 MR MTSHAMBA: Firstly when you say that
 11 was mentioned in the Commission it's possible I was not
 12 here and yes, when you say I was one of the people who were
 13 told by Mr Noki we should walk, there's nothing wrong that
 14 we've done, yes I was one of those people there.

15 MR SEMENYA SC: That you must just walk
 16 towards home?

17 MR MTSHAMBA: Yes.

18 MR SEMENYA SC: And you don't say to him
 19 no, but I live in Karee, which is the other direction; I
 20 don't live in Nkaneng?

21 CHAIRPERSON: [Microphone off, inaudible]
 22 MR SEMENYA SC: Marikana.
 23 MR MTSHAMBA: He was not directly
 24 addressing me.
 25 MR SEMENYA SC: So he was not talking to

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1 you?

2 MR MTSHAMBA: Talking to me directly.

3 MR SEMENYA SC: So he was not addressing
 4 you? He was addressing those who live in Nkaneng?

5 MR MTSHAMBA: Mr Noki did not say we
 6 should go to Nkaneng or to Marikana or anywhere else. I
 7 simply chose to go to Nkaneng because it was near.

8 MR SEMENYA SC: No, but in your own
 9 statement you say "We were all intending to escape into
 10 Nkaneng, like the others." That's why you followed Mr
 11 Noki.

12 MR MTSHAMBA: Mr Semenya, if you look at
 13 the papers –

14 MR GOIRANA: The witness points to the
 15 other documents he has in front of him, there appears to be
 16 photos.

17 MR MTSHAMBA: - there are people who went
 18 in the direction of Marikana and there are people who went
 19 in the direction of Nkaneng. One chose wherever they,
 20 whatever direction they wanted to follow. If I said all of
 21 us, like it appears in the statement that I said us, all of
 22 us, well I was referring to the majority of the people
 23 which direction they took.

24 MR SEMENYA SC: Those who were under the
 25 leadership of Mr Noki?

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1 MR MTSHAMBA: Which are those?

2 MR SEMENYA SC: The ones you were with
 3 while Mr Noki was addressing you.

4 [15:35] MR MTSHAMBA: Mr Noki address everybody
 5 there including the people who went to Marikana side,
 6 Nkaneng side or whatever other direction.

7 MR SEMENYA SC: Okay.

8 CHAIRPERSON: Exhibit MMMMF, sorry
 9 exhibit MMMM7. Will you look at that? That's the picture
 10 on which you indicated the direction in which people moved.
 11 Can we have that up please? Now can you tell me, can you
 12 show me in which direction Karee is?

13 MR MPOFU: Mr Interpreter, the witness
 14 has just given an answer which was not interpreted.

15 MR GOIRANA: Yes the witness started
 16 saying opposite.

17 MR MPOFU: In the opposite direction.

18 MR GOIRANA: Opposite direction. That
 19 direction the witness points to the screen in front of him.
 20 He says opposite that direction.

21 MR MTSHAMBA: This direction is towards
 22 Nkaneng and that direction that is towards Marikana.

23 CHAIRPERSON: What you've shown us is the
 24 bottom right-hand corner is towards Nkaneng, the top left-
 25 hand corner is to Marikana, I asked you the direction to

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1 Karee.

2 MR MTSHAMBA: It's that direction, the

3 direction that I'm pointing now.

4 CHAIRPERSON: The same direction as

5 Marikana, the top left-hand corner.

6 MR MTSHAMBA: Yes.

7 CHAIRPERSON: Now as one can see from the

8 picture there are some people going in that direction.

9 MR MTSHAMBA: That is what I was saying.

10 CHAIRPERSON: Then why didn't you go in

11 that direction, that's where you live isn't it?

12 MR MTSHAMBA: I went to the direction of

13 the place nearer.

14 MR SEMENYA SC: And nearest because?

15 MR MTSHAMBA: The place near the mountain

16 from the mountain.

17 MR SEMENYA SC: Ja what was so difficult

18 in going to the place where you live which is further?

19 MR MTSHAMBA: The reason why people moved

20 in the direction of Nkaneng it's when the Nyalas started

21 deploying the wire. We realised that the police were

22 trying to enclose us there on the mountain because in the

23 direction of Marikana there were also vans going or

24 stopping in that area. I then thought of going to Nkaneng

25 because it was nearer.

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1 MR SEMENYA SC: So there was nothing

2 stopping you from going to your home except for one fact,

3 it was far.

4 MR MTSHAMBA: That is so.

5 MR SEMENYA SC: You could easily have

6 gone home without any reason, I mean without difficulty, am

7 I right?

8 MR MTSHAMBA: Mr Chair, if you are facing

9 a situation you do not think about all these things that Mr

10 Semenya is putting to me.

11 MR SEMENYA SC: And I understood your

12 answer to say when people say they will finish the police

13 you find it as a comic statement.

14 MR MTSHAMBA: Yes, Sir.

15 CHAIRPERSON: What's the joke?

16 MR MTSHAMBA: There are no people with

17 such weapons who can be able to kill the police who were

18 armed with so many firearms, sharp ammunition and there

19 were so many of them.

20 MR SEMENYA SC: Like it happened on

21 Monday. They killed police with the same weapons.

22 MR MTSHAMBA: Well I heard people say so,

23 I was not there.

24 MR SEMENYA SC: It did not trouble you

25 that you were unarmed, happily able to go home, but

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1 actually elected to be with armed people going to Nkaneng.

2 MR MTSHAMBA: And these people, Mr Chair,

3 all along, I was not, but I managed. We could walk past

4 the police, I did earlier on go to Nkaneng and I came back

5 unarmed and there was nothing saying I should be armed at

6 this stage.

7 MR SEMENYA SC: Let me quickly deal with

8 paragraph 27 of your statement. This is the gentleman who

9 was saying let us surrender. It is him who was shot in his

10 hands or arms, am I right?

11 MR MTSHAMBA: Yes.

12 MR SEMENYA SC: It is him who kneels down

13 and he tried to stand up.

14 MR MTSHAMBA: Yes.

15 MR SEMENYA SC: It is him still with his

16 hands up.

17 MR MTSHAMBA: Yes.

18 MR SEMENYA SC: It is him who was shot in

19 the stomach and he fell down.

20 MR MTSHAMBA: Yes, Sir.

21 MR SEMENYA SC: It is him who was trying

22 to stand up was shot at again and he fell down.

23 MR MTSHAMBA: That is true.

24 MR SEMENYA SC: It is him who tried to

25 crawl back could not do so.

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1 MR MTSHAMBA: Yes, that is true.

2 MR SEMENYA SC: So why did you tell Mr

3 Chaskalson that it's possibly another person?

4 MR MTSHAMBA: Which other person?

5 MR SEMENYA SC: Exactly my point. Why do

6 you say so?

7 MR MTSHAMBA: Mr Chaskalson said there

8 were two bodies at the place where we had raised our hands,

9 people who died there and I said to Mr Chaskalson it's

10 possible that this person was shot on the hand or arm,

11 stomach and on the upper leg is not amongst those two

12 people who died there.

13 MR SEMENYA SC: We can believe Mr X when

14 he testifies about two bulls not sharing one kraal. It was

15 actually uttered.

16 MR MTSHAMBA: What does that have to do

17 with me?

18 MR SEMENYA SC: It was actually uttered,

19 you can believe him when he tells us that, right?

20 MR GQIRANA: You can?

21 MR SEMENYA SC: We can believe him.

22 MR MTSHAMBA: When he said what?

23 MR SEMENYA SC: When he says he heard

24 what you say you heard in the same group of people being

25 addressed about two bulls not sharing one kraal.

<p style="text-align: right;">Page 35389</p> <p>1 MR MTSHAMBA: Mr Chair, I don't want to 2 comment on things that I did not say. What does Mr X 3 version have to do with me? 4 MR SEMENYA SC: And that the group's 5 intention was to go and attack the police. 6 MR MTSHAMBA: You people can believe in 7 what Mr X says, it's got nothing to do with me. 8 MR SEMENYA SC: Okay and your version 9 that your IPID statement does not have certain things in it 10 is explained by the fear, that you were apprehensive you 11 would be assaulted. 12 MR MTSHAMBA: Yes, that is so. 13 MR SEMENYA SC: Your fear for torture 14 would have been triggered by you implicating the police in 15 some criminal conduct right? 16 MR MTSHAMBA: If you say so, I haven't 17 said that yet. 18 MR SEMENYA SC: So if I read it in your 19 statement I'll be mistaken. In your evidence, transcript. 20 MR MTSHAMBA: When I said what according 21 to my statement? 22 MR SEMENYA SC: I'll argue those points, 23 Chair, I must stop here. 24 CHAIRPERSON: Thank you, Mr Semenya. Mr 25 Bham, obviously you're not going to finish your cross-</p>	<p style="text-align: right;">Page 35391</p> <p>1 office on the 2nd July again, on two occasions. Were you 2 part of those groups of people who had marched to Mr De 3 Costa? 4 MR MTSHAMBA: No, I was not there. 5 MR BHAM SC: The RDOs from Karee returned 6 to Mr De Costa's office on the 23rd of July, were you part 7 of that group – 8 MR MTSHAMBA: No, I was not there. Also 9 these things came to my attention later. 10 MR BHAM SC: When did it come to your 11 attention? 12 MR MTSHAMBA: Just shortly before I went 13 on leave. 14 MR BHAM SC: Sorry shortly before? 15 MR MTSHAMBA: Before I went on leave. 16 MR BHAM SC: And you went on leave at the 17 end of July. 18 MR MTSHAMBA: Yes. 19 MR BHAM SC: How did it come to your 20 attention? 21 MR MTSHAMBA: I heard about these things 22 from my colleagues who worked with me in the mine. 23 MR BHAM SC: Can you tell us precisely 24 how you heard about it and from whom you heard about it? 25 MR MTSHAMBA: There is a colleague of</p>
<p style="text-align: right;">Page 35390</p> <p>1 examination today, but I'd like you to make a start. So 2 we've got the extra time available for the next witness on 3 Monday. 4 CROSS-EXAMINATION BY MR BHAM SC: Yes, Mr 5 Chairman. Mr Mtshamba, when did you go on leave? 6 MR MTSHAMBA: I'm not sure about the 7 date, but it was some time in July. The end of July. 8 MR BHAM SC: The end of July. 9 MR MTSHAMBA: Yes. 10 MR BHAM SC: You were one of the Karee 11 RDOs were you? 12 MR MTSHAMBA: Yes. 13 MR BHAM SC: And how long did you work at 14 Karee? 15 MR MTSHAMBA: I started in June 2011. 16 MR BHAM SC: Were you part of the group 17 of RDOs who at the end of June 2012 had marched to Mr De 18 Costa's office? 19 MR MTSHAMBA: I was not there on the day, 20 I worked until late. I only heard about that. 21 MR BHAM SC: Did you know what those RDOs 22 had marched to Mr De Costa for? 23 MR MTSHAMBA: I heard later. 24 MR BHAM SC: The RDOs marched to Mr De 25 Costa's office, the Karee RDOs marched to Mr De Costa's</p>	<p style="text-align: right;">Page 35392</p> <p>1 mine whose name I have forgotten, he is an RDO. He was 2 present or amongst the group of people who went there the 3 last time. He told me that the RDO's salary or wages at 4 Anglo and the other mines on that side was more than ours. 5 And that they also had gone to Mr De Costa's to complain 6 about the RDOs wages. 7 MR BHAM SC: And did he tell you that 8 they went to complain about the RDOs wages because RDOs at 9 other mines were getting more than RDOs at Lonmin? 10 MR MTSHAMBA: That is so, yes. 11 MR BHAM SC: Did he tell what the RDOs at 12 the other mines were getting paid? 13 MR MTSHAMBA: He did not give me the 14 exact amount, but he said they were getting more than us. 15 MR BHAM SC: And at that point in time 16 when he told you that RDOs at other mines were getting more 17 than RDOs at Lonmin would you have been satisfied if Lonmin 18 to you as an RDO what RDOs were paid at other mines? 19 MR MTSHAMBA: I would have been very 20 happy. 21 MR BHAM SC: Where did this figure of 22 12 500 come from? Where did you first hear about this 23 figure? 24 MR MTSHAMBA: I heard about that while I 25 was on leave.</p>

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1 MR BHAM SC: I'm going to come back to
 2 this issue and how you got to hear about it and where it
 3 came from, but I just want to ask you one thing as a matter
 4 of interest. When you went onto the koppie that was on the
 5 15th and when you were on the koppie on the 16th of August
 6 were you still under the impression that the issue or the
 7 problem in relation to Lonmin was that there they were
 8 paying you as RDOs less than the other mines were paying
 9 their RDOs?
 10 MR MTSHAMBA: I arrived on the 13th, got
 11 an explanation about things that were happening, I was told
 12 that Mr De Costa agreed to give R750 to the RDOs at Karee.
 13 Now RDOs from Western also wanted an increase. Now all the
 14 RDOs came together, decided to come together and ask or
 15 demand an increase from Lonmin as a whole.
 16 MR BHAM SC: If I understand what you're
 17 saying and I just want to understand this very carefully,
 18 at the end of July if Lonmin had said to you they are
 19 paying you a salary of an RDO, which the other mines are
 20 paying to their RDOs, you would have been very happy if I
 21 hear your words correctly?
 22 [15:55] MR MTSHAMBA: Yes, I said so.
 23 MR BHAM SC: And when you came back on
 24 the 13th of July you were, sorry 13th of August my
 25 apologies, on the 13th of August what was explained to you

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1 go onto a different theme. I don't want to start off with
 2 the first question. I want to develop something.
 3 CHAIRPERSON: Well we'll adjourn until
 4 Monday morning 9:30.
 5 MR BHAM SC: Thank you.
 6 [COMMISSION ADJOURNED]
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1 was that the reason for the discontent and therefore the
 2 strike was that the increase, the RDO allowance increased
 3 which Mr Da Costa had communicated was limited to RDO's at
 4 Karee and all of the other RDOs at Lonmin also wanted the
 5 same increase?
 6 MR MTSHAMBA: That is so.
 7 MR BHAM SC: And you thought that because
 8 only you as an RDO at Karee or the group of RDOs at Karee
 9 were getting what Mr Da Costa had offered but that the
 10 other Lonmin RDOs were not getting that the strike was
 11 therefore justified?
 12 MR MTSHAMBA: Mr Chair, you should
 13 remember that I'm not the one who took a decision about
 14 embarking on a strike. I was coming from leave when I got
 15 there the strike was on.
 16 MR BHAM SC: I'm going to ask that
 17 question one more time. What was explained to you when you
 18 came on the 13th, when you joined the strike was that people
 19 who were on strike were unhappy because what Mr Da Costa
 20 offered was only offered to the Karee RDOs and all of the
 21 other Lonmin RDOs wanted the same offer made to them.
 22 MR MTSHAMBA: Yes, that's what I said.
 23 MR BHAM SC: Thank you very much.
 24 MR MTSHAMBA: That was explained to me.
 25 MR BHAM SC: Mr Commissioner, I want to

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