

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 292

16 SEPTEMBER 2014

PAGES 38127 TO 38368



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64 10th Avenue, Highlands North, Johannesburg
P O Box 721, Highlands North, 2037
Tel: 011-440-3647 Fax: 011-440-9119 Cell: 083 273-5335
E-mail: realtime@mweb.co.za
Web Address: <http://www.realtimesa.co.za>



Page 38127

1 [PROCEEDINGS ON 16 SEPTEMBER 2014]
 2 [08:33] CHAIRPERSON: The Commission resumes.
 3 Good morning, Mr Mokoena, you're still under oath. Mr
 4 Mpofo, have you got any more questions for the witness?
 5 MR MPOFU SC: One or two, Chairperson.
 6 CHAIRPERSON: Before you ask your one or
 7 two questions, I will stop you after the second, I am
 8 informed by Mr Bham that the witness did the homework we
 9 asked him to do. He couldn't print it last night because
 10 there's something wrong with his printer but arrangements
 11 are being made at the moment to have them printed, about 15
 12 or 16 copies. So we'll deal with that when they're
 13 available.
 14 MR MPOFU SC: Thanks, Chair.
 15 CHAIRPERSON: Perhaps at the end of your
 16 cross-examination if they're ready by then, but he has done
 17 what I asked him to do.
 18 MR MPOFU SC: Yes, well, I would prefer
 19 to see it before I finish, Chairperson, but we'll see how
 20 it goes.
 21 CHAIRPERSON: How it goes.
 22 MR MPOFU SC: Yes, thank you Chair.
 23 MR BHAM SC: Chairperson sorry, and I'm
 24 not taking any objection to my learned friend Mr Mpofo, he
 25 may wonder why I'm speaking before he says it, I just want

Page 38128

1 to place something on record on the instructions of my
 2 client flowing from a couple of statements that were made
 3 yesterday. This witness was cross-examined on his absence
 4 when members of the deceased's families had made their
 5 presentations, with the suggestion that there was a
 6 disinterest on the part of Lonmin in that regard. On the
 7 first of the two days, on one of the two days that
 8 originally were set aside for the family presentations and
 9 specifically because the families were making their
 10 presentations, an executive vice-president of external
 11 affairs and communications, Ms Lerato Molebatsi, was
 12 present. You will know that she hasn't been a Lonmin
 13 witness but given her seniority she was asked to be present
 14 specifically because presentations were being made on
 15 behalf of the families. Ms Molebatsi was also present on
 16 Friday, the Friday that's just passed, as was Mr Peter
 17 McGilligan who is the head of legal. Ms Molebatsi's
 18 presence was specifically here to ensure senior
 19 representation on the part of Lonmin management at those
 20 presentations.
 21 CHAIRPERSON: Thank you, Mr Bham. I
 22 understand, you told me before we started that you're also
 23 going to make, to produce a document in relation to, I
 24 think it's the bursary fund that Lonmin established but
 25 perhaps at a suitable stage, perhaps when Mr Mpofo has

Page 38129

1 finished or even when one of the other cross-examiners has
 2 finished, you can then present that as well and maybe the
 3 witness will want to say something about it as well, I
 4 don't know.
 5 MR BHAM SC: It will be ready. If I
 6 might just say, yesterday I was handed a document and I
 7 thought it required just a bit more detail which I
 8 suggested to my client we worked on. I'm waiting for its
 9 arrival with that detail today and as soon as it comes
 10 we'll make it available.
 11 CHAIRPERSON: Yes. Thank you, Mr Bham.
 12 Yes, Mr Mpofo?
 13 BARNARD MOKOENA: (s.u.o.)
 14 CROSS-EXAMINATION BY MR MPOFU SC (CONTD.):
 15 Thank you very much, Chairperson. Good morning, Mr
 16 Mokoena.
 17 MR MOKOENA: Good morning, sir.
 18 MR MPOFU SC: Yes. Yes, I'd like us to
 19 just round off the issue that you and I were dealing with
 20 yesterday, very quickly. I think because I've just got a
 21 feeling that maybe we're not understanding each other.
 22 What I was saying to you is that at Lonmin there is no such
 23 thing as an RDO bargaining forum, you understand that?
 24 MR MOKOENA: That is correct.
 25 MR MPOFU SC: Ja. Before, before the

Page 38130

1 events of August 2016 there was no such thing called an RDO
 2 bargaining forum.
 3 MR MOKOENA: No, there wasn't.
 4 MR MPOFU SC: There is no such thing as
 5 an RDO bargaining forum even now.
 6 MR MOKOENA: That is correct.
 7 MR MPOFU SC: Okay, so whatever it is
 8 that Mr Mathunjwa wanted to be involved in was, in its
 9 nature, transient. It was not something that was going to
 10 be there permanently, you'll accept that? If that you
 11 accept that what he was saying is that he would negotiate
 12 for the people on the mountain, for the RDOs, then it could
 13 have only been about that crisis. Do you understand that?
 14 MR MOKOENA: Yes.
 15 MR MPOFU SC: Yes.
 16 CHAIRPERSON: Well, let's see how the
 17 witness responds to the proposition.
 18 MR MPOFU SC: Yes.
 19 CHAIRPERSON: What do you say to the
 20 proposition that Mr Mpofo has put to you?
 21 MR MOKOENA: I agree that there was no
 22 such forum for RDOs to bargain and that we do not have such
 23 forum as we speak today. The only forum we had was a
 24 bargaining forum for wages, no other forum outside the
 25 known bargaining forum in a workplace.

Page 38131

1 MR MPOFU SC: Yes. Alright, and
 2 therefore if then you and I agree on this, then you would
 3 agree that your fear that if you had acceded to the request
 4 of Mr Mathunjwa it would suddenly kind of through the back
 5 door get him back not some permanent bargaining
 6 arrangement, was unfounded because it was a logical
 7 impossibility. Even if you had allowed him to speak for
 8 the RDOs at the mountain, it could never have pushed him
 9 into any structure because there was no such structure. In
 10 other words, that fear was just ill-founded and illogical.
 11 Do you understand that?
 12 MR MOKOENA: No, I disagree with that. I
 13 disagree with the assumption upon which you base the
 14 question because when you talk about Mr Mathunjwa you're
 15 talking about a seasoned unionist who knows wages are
 16 negotiated within bargaining structures. So it's not
 17 possible that Mr Mathunjwa would have suggested a small
 18 nyana forum outside what is traditionally known to bargain
 19 wages. So I would not have thought of any other thing
 20 except the bargaining forum which Mr Mathunjwa, in his
 21 experience as a unionist, would have known that you cannot
 22 create a parallel small forum outside bargaining
 23 structures.
 24 MR MPOFU SC: No, but then it means your
 25 executives did not report to you on exactly what was

Page 38132

1 discussed between them and Mr Mathunjwa. Do you accept
 2 that, because that's exactly what Mr Mathunjwa had asked
 3 for, to talk, as I showed you yesterday, on behalf of the
 4 people who were on the mountain, those RDOs. So he never
 5 said he wanted to be in any permanent arrangement.
 6 CHAIRPERSON: How do you respond to that
 7 one?
 8 MR MOKOENA: Chair, if you could refer me
 9 to exactly what you believe I was not - so that I can go
 10 through it, where exactly was I not informed properly by
 11 executives?
 12 MR MPOFU SC: Yes. Okay, Mr Kwadi says
 13 at page 134, "Okay Joseph, I think it is clear to me what
 14 you are saying. You are basically saying that you'll go to
 15 the mountain on condition that you get some kind of
 16 guarantee that the company will negotiate with AMCU on the
 17 demands of the people that are on the mountain." I'm
 18 reading from about line 17, 18. Can you see that?
 19 MR MOKOENA: Yes, I can see that.
 20 MR MPOFU SC: Ja, that is what he was
 21 saying. So can it be more clearer than that?
 22 MR MOKOENA: Chair, I don't know how you
 23 want to interpret this.
 24 MR MPOFU SC: I don't want to interpret
 25 it. It says -

Page 38133

1 MR MOKOENA: Yes.
 2 MR MPOFU SC: - the demands of the people
 3 on the mountain.
 4 MR BHAM SC: Mr Chairman, may I just
 5 raise an issue so that we don't forget the evidence. We
 6 now know from witnesses who have testified that those
 7 present on the mountain making the demands were not limited
 8 to RDOs. In fact Mr Nzuzza, when asked about which category
 9 of workers the demands were being advanced on behalf of
 10 said all workers.
 11 MR MPOFU SC: Ja.
 12 MR BHAM SC: So when we deal with the
 13 RDOs, when we deal with those present on the mountain now,
 14 we shouldn't forget testimony coming from somebody who was
 15 in - the phrase was used lightly but for want of a better
 16 term, a second-in-command of the people who were on the
 17 mountain.
 18 CHAIRPERSON: Mr Mpofo, before you answer
 19 I must tell you that my recollection is, and if I'm wrong I
 20 hope you'll correct me, my recollection of the evidence is
 21 originally there was a demand for 12 500 to be paid to the
 22 rock drill operators only and subsequently, and I think
 23 it's correct by the 16th of August, the demand had broadened
 24 as it were -
 25 MR MPOFU SC: Ja.

Page 38134

1 CHAIRPERSON: And it wasn't only the RDOs
 2 but all those involved on the mountain were claiming
 3 12 500.
 4 MR MPOFU SC: Yes, whatever.
 5 CHAIRPERSON: If my recollection is
 6 correct, that really is the basis of Mr Bham's objection.
 7 MR MPOFU SC: Yes, no, I understand that,
 8 Chairperson. Okay -
 9 MR BHAM SC: I'm sorry to interrupt -
 10 Chair, I just want to say it wasn't just by the 16th. Mr
 11 Nzuzza joined the strike by the 11th. Mr Magidiwana was part
 12 of the strike at the outset.
 13 CHAIRPERSON: Yes, that's correct. Of
 14 course the decision that the witness is being cross-
 15 examined about I think was made originally on the 10th but
 16 of course persisted up through until the 16th. So your
 17 point is that already at an earlier stage that was a demand
 18 not limited to RDOs.
 19 MR BHAM SC: No, what I'm raising is in
 20 the context of cross-examination which goes to a
 21 conversation and a perception which post-dated the 11th and
 22 by the 11th you know, certainly from Mr Magidiwana and Mr
 23 Nzuzza, that those present on the mountain were not limited
 24 to RDOs. This happened after that.
 25 CHAIRPERSON: Mr Mpofo, how do you

Page 38135

1 respond to the point?

2 MR MPOFU SC: Chairperson, I don't –

3 whatever you call them, there was no such things as call

4 them the mountain bargaining forum either, correct?

5 Whoever was on the mountain.

6 MR MOKOENA: No.

7 MR MPOFU SC: Ja. Okay, and Mr Kwadi, Mr

8 Kwadi further made it very clear that even, even in

9 relation to the people on the mountain the issue was

10 narrow. So you also didn't have a one issue bargaining

11 forum as well, correct?

12 MR MOKOENA: I have confirmed that the

13 only bargaining forum we had was the collective bargaining

14 forum –

15 MR MPOFU SC: Yes, so the answer is yes.

16 MR MOKOENA: Yes.

17 MR MPOFU SC: Yes, alright. If you go to

18 138 Mr Kwadi says again, in case there's any other

19 confusion which there shouldn't be, he says there just to

20 clarify himself about, around paragraph 18, "The issue of

21 the people that are on the mountain, there is only one

22 demand and they have confirmed it, it is 12 500, that is

23 it. There was no other demand or grievance that they have

24 raised. One and one only, okay. Now the company is that"

25 and so on. So again it made it clear that what was being

Page 38136

1 talked about was the issue of the people on the mountain

2 and one demand and one demand only, R12 500. So it was a

3 one issue, once-off kind of forum that Mr Mathunjwa wanted

4 to participate it. Do you understand that?

5 MR MOKOENA: I disagree that it was a

6 once-off forum. I have no idea where that concept comes

7 from.

8 MR MPOFU SC: So do you think that - you

9 don't think it was one issue even though Mr Kwadi says one

10 issue and one issue only repeatedly, you think he was

11 wrong?

12 MR MOKOENA: I agree with when you say it

13 was one issue, 12 500. I disagree with you when you say it

14 was a once-off forum.

15 MR MPOFU SC: So if the issue was R12 500

16 and let's say then you discussed it and decided to give

17 them R12 500 or whatever, how could that issue then ever

18 resuscitate ever in life?

19 MR MOKOENA: Chair, what I'm trying to

20 explain is my understanding and the understanding of my

21 managers and their experience is a forum for wage

22 negotiations is the one that we have always used for

23 collective bargaining at Lonmin. There is no other once-

24 off forum that we have known about or the one that was

25 suggested. If it was suggested, if this was Mr Mathunjwa's

Page 38137

1 understanding, I'm arguing that I would have expected Mr

2 Mathunjwa to have understood out of his experience that

3 there is no such a thing as a once-off wage negotiation

4 forum outside what unions and employers in this country

5 know as a bargaining forum. So my understanding of what he

6 was saying could only have been a reference to what I have

7 known, to what he has known by way of practice in this

8 country, not a once-off that I do not know –

9 MR MPOFU SC: Was the strike eventually

10 resolved in a once-off, once, type of a kind forum which

11 involved churches and all sorts of people?

12 MR MOKOENA: I said that post this

13 tragedy –

14 MR MPOFU SC: Yes?

15 MR MOKOENA: - we brought in signatories

16 to the bargaining forum who allowed us to reopen and that

17 allowed us to involve other parties. That's what happened.

18 MR MPOFU SC: Yes.

19 MR MOKOENA: I would not have done that

20 unilaterally alone.

21 MR MPOFU SC: That's fine but –

22 CHAIRPERSON: Before you carry on,

23 there's this point I'd like to –

24 MR MPOFU SC: Sorry, Chairperson.

25 CHAIRPERSON: - like to put to the

Page 38138

1 witness or perhaps the two of you together. You've said

2 what Mr Mathunjwa wanted. Of course what's also important

3 is the understanding of the Lonmin management. They may

4 have not understood Mr Mathunjwa correctly.

5 MR MPOFU SC: That's why I'm putting Mr

6 Kwadi –

7 CHAIRPERSON: No, I know. What Mr Kwadi

8 says is, he's not a Scotsman he's just Mr Kwadi, what Mr

9 Kwadi says in line 23 on this page is that, "Now, the

10 company position now is that they cannot pay 12 500 for

11 each and every employee in Lonmin" –

12 MR MOKOENA: Sure.

13 CHAIRPERSON: - "current mandate." Now

14 that, this is just a prima facie point I'm putting to you

15 but maybe you and the witness can help me.

16 MR MPOFU SC: Thank you.

17 CHAIRPERSON: That looks as if Mr Kwadi

18 thought that what was envisaged would be a demand which

19 would lead to the payment of that amount for each and every

20 employee at Lonmin, in other words, not just those who

21 happen to be on the mountain. I don't know if that's a

22 good point or a bad point but I'm just bringing it up to

23 get some light on it.

24 MR MPOFU SC: Ja. Thank you,

25 Chairperson. In any event, I don't want to waste more time

Page 38139

1 on this, in any event whatever the common understanding
 2 was, Mr Kwadi seemed to think that it was not a problem and
 3 he said he was going to come to you to get a mandate. You
 4 remember that?
 5 MR MOKOENA: Yes.
 6 MR MPOFU SC: And he actually said to Mr
 7 Kwadi the last, on page 141 he says, when they say they're
 8 going to come to you and so on he says, Mr Kwadi says, "You
 9 give me a few minutes. I will see if I can get you the
 10 answer that is required." Those few minutes meant he was
 11 coming to you to give the mandate, correct?
 12 MR MOKOENA: Yes.
 13 MR MPOFU SC: Which you refused.
 14 MR MOKOENA: Yes.
 15 MR MPOFU SC: Ja. And, well, I'm going
 16 to argue that that refusal, that refusal of – or just
 17 before we do that, when you did have the special forum that
 18 was convened later, AMCU was indeed invited to be part of
 19 it, correct?
 20 MR MOKOENA: Yes.
 21 MR MPOFU SC: Ja. So I'm going to say
 22 that your initial refusal to bring AMCU in or to have this
 23 kind of special forum, which you subsequently did and the
 24 sky did not fall, also was a lost opportunity of or rather
 25 another bad decision that you made which might have

Page 38140

1 prevented the tragedy. That's what I'm going to argue.
 2 CHAIRPERSON: What's your comment to
 3 that, Mr Mokoena?
 4 MR MOKOENA: Well, I have argued to the
 5 contrary and I said that I needed the consent of the other
 6 signatories and this is what happened afterwards.
 7 Secondly, that I think it was obvious to everybody that the
 8 relationship between AMCU and NUM during those days did not
 9 suggest to me that the two parties would have wanted to sit
 10 around the table. I presented that to the Commission
 11 before.
 12 MR MPOFU SC: Ja.
 13 MR MOKOENA: So I, the conditions created
 14 after the tragedy of the 16th, the situation had changed, I
 15 had consented with the other signatories, they came on
 16 board and that's how the matter was resolved. What I'm
 17 emphasising, Chair, is I needed to get their consent, they
 18 were willing, they came to the table and our experience at
 19 the Rustenburg Civic Centre was not an easy ride to arrive
 20 at that solution.
 21 MR MPOFU SC: Yes, Mr Mokoena, I don't
 22 think we understand each other. What I'm saying to you and
 23 what I said to you yesterday is that leadership is about
 24 foreseeing situations and preventing catastrophes. It's no
 25 use being wise after the fact. All I'm saying to you is

Page 38141

1 that had you taken the decision that you took subsequently
 2 to involve AMCU and others who had offered themselves,
 3 before the tragedy, that might have prevented the tragedy.
 4 That's all, it should be a simple thing of either you agree
 5 with that or you don't.
 6 MR MOKOENA: No, I disagree –
 7 MR MPOFU SC: It's fine, fine.
 8 MR MOKOENA: You're proposing that the
 9 success of this depended on AMCU on board, that's what I'm
 10 interpreting and Chair, I also want to say that leadership
 11 is also about respect for framework and governance. So
 12 although I accept that, yes, leadership needs to be an
 13 extraordinary thing but at that time leadership also was
 14 expected to respect frameworks –
 15 MR MPOFU SC: Technicalities.
 16 MR MOKOENA: - that were in place, yes.
 17 MR MPOFU SC: The technicalities, ja,
 18 okay.
 19 CHAIRPERSON: Sorry, can I just put a
 20 question because I think it's really an elaboration of Mr
 21 Mpfu's point.
 22 [08:52] I would just like to get your reaction to it. I
 23 think this is what Mr Mpfu is suggesting but not putting
 24 it clearly as perhaps is necessary for you to understand
 25 the point. If you had said when you received this request

Page 38142

1 via Mr Kwadi from Mr Mathunjwa, if you'd said we can't do
 2 that without engaging the other parties to the wage
 3 negotiation framework, I'm not saying no to you but I've
 4 firstly got to speak to them, and you'd explained that to
 5 Mathunjwa who as you say is a seasoned unionist, and you
 6 then contacted him and said look, we've got a crisis here -
 7 and the other unions too I take it who were in the wage
 8 negotiation forum – we've got a crisis here; this is what's
 9 been put to us, what is your reaction, do you agree. Now I
 10 know you say that you think they'd have, by implication you
 11 say you think they would have said no, but the point really
 12 is perhaps should you not at least have tried it to see
 13 whether you couldn't persuade the people who ultimately
 14 agreed to take part in the forum that was held in the
 15 Rustenburg Civic Centre, shouldn't you have tried to do
 16 that before the shootings on the 16th? And if you had done
 17 that, is it not possible the result might be different? I
 18 think that's Mr Mpfu's point, but if I'm misunderstanding
 19 him he will correct me.
 20 MR MPOFU SC: That's correct,
 21 Chairperson.
 22 CHAIRPERSON: So how do you react to
 23 that? You understand it is his point, but viewed from a
 24 slightly different angle.
 25 MR MOKOENA: Ja, two things, Chair; it

Page 38143

1 sounds like Joseph's reference to technicalities is exactly
 2 about us explaining to him what we would, at that time
 3 should happen. So this reference to technicalities was us
 4 explaining to him that actually we have binding contracts,
 5 we need the consent of other unions, we cannot reopen
 6 negotiations without their consent, particularly as this is
 7 an unprotected strike. So actually this reference to
 8 technicalities is about us explaining to Mr Mathunjwa.
 9 Secondly, Chair, the Lonmin EXCO had already made
 10 it clear that the 12 500 was an affordable issue, whether
 11 the strike was protected or unprotected. So that mandate
 12 was not, was very clear that the 12 500 was essentially not
 13 affordable, particularly, Chair, that three months down the
 14 line Lonmin went to the market to raise US\$800 million for
 15 funding. So whether the strike was protected or
 16 unprotected, clarity was 12 500 was actually not
 17 affordable. So there was no reason for me to give a
 18 different outcome when that mandate had been made very
 19 clear.
 20 MR MPOFU SC: But that didn't stop you
 21 from talking to them after the tragedy, and even though you
 22 didn't give them the 12 500 they went back to work. Isn't
 23 that really what happened?
 24 MR MOKOENA: Yes, they went back to work,
 25 yes.

Page 38144

1 MR MPOFU SC: Thank you. Alright, now
 2 you see the point I'm going to argue, in fairness to you,
 3 is that if anyone placed in your – I'm going to argue that
 4 you were guilty of poor decision making, negligence and
 5 dereliction of your duties as a leader, and the point I
 6 simply want to make just to round off this whole
 7 discussion, is that anybody in your position faced with a
 8 situation where 10 people have died would have said I will
 9 embrace the devil himself if he is going to resolve this
 10 situation. That's the issue, but you, instead of saying I
 11 will embrace the devil himself to resolve the situation and
 12 stop the killings, you're worried about all these nice
 13 things you're talking about, precedents, technicalities,
 14 this and that, and all I'm saying is that those things
 15 could never, never have been more important than saving
 16 lives. Do you understand that? Do you even understand
 17 what I'm saying?
 18 MR MOKOENA: I understand you with
 19 clarity and I disagree with the –
 20 MR MPOFU SC: With the proposition, okay.
 21 MR MOKOENA: - your proposition, yes.
 22 MR MPOFU SC: Alright. You knew, it was
 23 clear to you because of what had happened on the 15th, that
 24 the workers, you knew that the workers rejected NUM in
 25 front of your eyes, or at least of what happened with

Page 38145

1 Zokwana and Mathunjwa. You knew that they had rejected NUM
 2 and they had accepted AMCU. Just by their reaction it was
 3 clear on the 15th that – I'm cutting a long story short –
 4 that they were rejecting NUM and they were accepting AMCU.
 5 MR MOKOENA: Again let me refer you to
 6 naked facts, that at the time AMCU had about 4 000 members
 7 at Lonmin in a population of 22 000. So statistically if
 8 you say to me 4 000 rejected NUM out of 22 000, it's still
 9 for me not convincing.
 10 MR MPOFU SC: Mr Mokoena, please man,
 11 forget about statistics –
 12 MR BHAM SC: Sorry, Mr Chairman –
 13 MR MPOFU SC: I'm saying to you did you
 14 know or did you not know that on the Wednesday evening when
 15 Mr Zokwana came there the reaction –
 16 CHAIRPERSON: Mr Mpofo, sorry –
 17 MR MPOFU SC: Can I just finish?
 18 CHAIRPERSON: Mr Bham wants to raise an
 19 objection –
 20 MR MPOFU SC: Well, can I finish my –
 21 CHAIRPERSON: No, I think –
 22 MR BHAM SC: [Microphone off, inaudible]
 23 CHAIRPERSON: Okay, let him – as soon as
 24 you've finished the proposition Mr Bham will speak.
 25 MR MPOFU SC: Mr Mokoena, I'm not asking

Page 38146

1 you about statistics, okay. I'm saying did you know or did
 2 you not know that on the Wednesday evening the reaction
 3 broadly speaking to Mr Zokwana was one of rejection and to
 4 Mr Mathunjwa was one of acceptance? Did you?
 5 MR MOKOENA: I accept that Mr Zokwana,
 6 yes, was rejected –
 7 MR MPOFU SC: Thank you.
 8 MR MOKOENA: - by 3 000 plus people at
 9 the koppie.
 10 MR MPOFU SC: Yes.
 11 MR MOKOENA: Now what I'm saying is there
 12 was another 19, 18 000 who were not at the koppie who were
 13 NUM members, who did not reject Mr Zokwana. So my decision
 14 making would not have been strictly limited to this is what
 15 happened at the koppie and therefore that's the rest of the
 16 organisation. I was sensitive that there were many other
 17 workers who were still NUM members, who were still the
 18 majority, and I could not have ignored that fact.
 19 MR MPOFU SC: Mr Mokoena, please –
 20 MR BHAM SC: Sorry –
 21 MR MPOFU SC: - do me a favour; answer
 22 the question.
 23 CHAIRPERSON: No, sorry –
 24 MR BHAM SC: May I now make my point?
 25 CHAIRPERSON: Mr Mpofo, Mr Bham indicated

Page 38147

1 he wanted to object –

2 MR MPOFU SC: [Microphone off,

3 inaudible] –

4 CHAIRPERSON: I think you must give him

5 an opportunity.

6 MR MPOFU SC: Okay.

7 CHAIRPERSON: Yes, Mr Bham.

8 MR BHAM SC: I didn't want to interrupt

9 Mr Mpofo previously. I just want to make this point and

10 again I think it's important that as we're going along the

11 evidence before this Commission is not overlooked. As I

12 understand the evidence from the strikers in relation to

13 what they sought at that point in time, they wanted no

14 union involvement. To that extent it seems to me that a

15 proposition that those on the koppie had accepted AMCU is

16 an incorrect proposition, having regard to the evidence

17 we've heard from those who were on the koppie.

18 MR MPOFU SC: Chairperson, I'm afraid

19 this is an almighty waste of my time. I'm asking a simple

20 question; did you know that in terms of the reception that

21 the two leaders received Mr Mathunjwa received a better

22 reception than Mr Zokwana?

23 CHAIRPERSON: Mr Mpofo, Mr Mpofo, please

24 do me a favour; we've got an objection raised. You can't

25 just brush it aside –

Page 38148

1 MR MPOFU SC: I've rephrased the

2 question.

3 CHAIRPERSON: Yes, sorry. Rephrase the

4 question.

5 MR MPOFU SC: I have.

6 CHAIRPERSON: I think I know where you're

7 going. Repeat the question again so that we can be

8 satisfied that the question successfully avoids the

9 objection. Rephrase the question. I know you wanted –

10 MR MPOFU SC: But I've just, that's

11 exactly what I've just done.

12 CHAIRPERSON: Be kind to me and repeat it

13 for me.

14 MR MPOFU SC: Mr Mokoena –

15 MR BHAM SC: Mr Chairman, I just –

16 MR MPOFU SC: Do you know that –

17 MR BHAM SC: I just want to raise

18 something –

19 MR MPOFU SC: Oh, come on.

20 MR BHAM SC: - because –

21 MR MPOFU SC: Really, man.

22 MR BHAM SC: It's suggested what I've

23 done, and I'm raising a legitimate issue based on evidence

24 before you. To categorise it as a waste of time is just

25 unfair and improper.

Page 38149

1 CHAIRPERSON: Yes, Mr Mpofo, I think you

2 must restrain yourself from making comments like that. But

3 Mr Bham, what he's doing –

4 MR MPOFU SC: Well, I was saying –

5 CHAIRPERSON: - what he's doing is he's

6 in effect acknowledging that your objection is well taken

7 because he's rephrasing the question. I want to see, he

8 did rephrase it; I didn't quite catch it – my fault, I

9 accept – but I want to make sure the new question indeed

10 successfully avoids your objection.

11 MR MPOFU SC: No, it's fine, I'll move to

12 something else.

13 CHAIRPERSON: No, no, Mr Mpofo, I think

14 you were making, if I may say so, what sounded to me like a

15 point –

16 MR MPOFU SC: Ja, Chairperson, I can't

17 spend 10 minutes on one question –

18 CHAIRPERSON: - a point which has some

19 validity –

20 MR MPOFU SC: - when I only have –

21 CHAIRPERSON: The point that Mr Mpofo is

22 making to you is whether or not AMCU enjoyed majority

23 support at Lonmin versus NUM, isn't really the point of his

24 question. The point of his question is that even if the

25 majority people on the mountain didn't support AMCU, what

Page 38150

1 was clear was that the people on the mountain were prepared

2 to listen to Mr Mathunjwa, but they weren't prepared to

3 listen to Mr Zokwana. I take it you've got to accept that

4 is correct.

5 MR MOKOENA: I have said that already I

6 accept it, Chair.

7 MR MPOFU SC: Thank you. Alright, and

8 therefore a reasonable leader in your position would have

9 simply asked himself the question, given that Mathunjwa got

10 this reception, does that place him in a position where he

11 can assist us in resolving the crisis. Would you agree?

12 Whether all these technicalities, 19 000, this and the

13 other, a reasonable leader in your position would have said

14 given the reception that he received, which is good and

15 better than – is he capable of helping us to solve the

16 carnage of death and the crisis that is going on. Would

17 you agree with that?

18 MR MOKOENA: I agree, ja.

19 MR MPOFU SC: Thank you, and you didn't

20 do that. Would you agree? Or rather you rejected his

21 offer of assistance.

22 MR MOKOENA: As I said, I did not stop Mr

23 Mathunjwa on doing anything.

24 MR MPOFU SC: Anyway, another window of

25 opportunity which presented itself again, which I've

Page 38151

1 previously called God-given kind of literally, was the
 2 arrival of Bishop Seoka who also went there and you knew at
 3 least by the time you spoke to him that he had been to the
 4 koppie, correct?
 5 MR MOKOENA: Yes.
 6 MR MPOFU SC: And you knew that he was
 7 not harmed when he went to the koppie, correct? Because
 8 you were talking to him.
 9 MR MOKOENA: Yes.
 10 MR MPOFU SC: Yes. Now I'm going to
 11 argue again – again I'm cutting a long story short – that
 12 here you are with a religious leader who has been to the
 13 mountain, who was not harmed there, who comes back and
 14 offers you another God-given opportunity, and you spurned
 15 that one too. I'm also going to argue that a reasonable
 16 person in your position should have grabbed at that
 17 opportunity and you failed to do so and to that extent you
 18 were negligent.
 19 MR MOKOENA: I disagree with that.
 20 MR MPOFU SC: Okay.
 21 CHAIRPERSON: Would you like to motivate
 22 your disagreement?
 23 MR MOKOENA: Yes, I, the short time - I
 24 met the Bishop outside Middelkraal, outside the JOC and he
 25 had phoned earlier looking for me and when I met the Bishop

Page 38152

1 we were standing and he spoke to me that he had been to the
 2 koppie and I briefly explained to him the situation and
 3 that "Bishop, we've just come out of a meeting where the
 4 police had publicly said the area is declared a police
 5 operation and, Your Lordship, may I take you to the
 6 Provincial Commissioner so that you can speak to her and
 7 get a go-ahead from her and she can explain to you what the
 8 situation is." And at that time I thought I was doing the
 9 right thing to say, "Bishop, we have all been told it's a
 10 police operation, so let me introduce you to the Provincial
 11 Commissioner who then can explain to you the situation."
 12 That's what I did and for me I thought that was the best
 13 thing to do. In my conversation with the Bishop I also
 14 emphasised to the Bishop the kind of complexity we were
 15 involved, as I said, "Bishop, this is an unprotected strike
 16 and this is how we understand it to be," and then I
 17 proceeded to introduce the Bishop to the commissioner.
 18 MR MPOFU SC: Yes, well the Bishop's
 19 version is that you were arrogant and you said you were not
 20 going to speak to those criminals.
 21 MR MOKOENA: I'm sorry, I did not use
 22 those words when speaking to the Bishop. It's not correct.
 23 MR MPOFU SC: But you used those words in
 24 relation to the strikers many other times, correct? That
 25 they were criminals. So why should we believe you did not

Page 38153

1 do that then?
 2 MR MOKOENA: Chair, I at no point
 3 referred to the strikers as criminals. I refer to the
 4 incidents of killings that those were acts of criminal
 5 behaviour. At no stage did I say strikers are criminals,
 6 and the fact that I mentioned that before does not actually
 7 say that I said the same thing to the Bishop. So it is
 8 incorrect. I did not use those words when talking to the
 9 Bishop.
 10 MR MPOFU SC: Right.
 11 MR MOKOENA: Sir, Chair, there is also in
 12 my statement where there's reference that the Bishop made a
 13 proposal about madodas. That is also incorrect and the
 14 issue of madoda was introduced the following week when the
 15 Bishop came to see me. At that stage there was absolutely
 16 no mention of madoda coming to see me, so –
 17 MR MPOFU SC: Ja well, that's even under
 18 – that's another failure on your part, Mr Mokoena. If you
 19 were the leader that you should by you – forget about the
 20 Bishop – should have said, 'Bishop, I'm scared of going to
 21 the mountain but if you can bring me a delegation of
 22 madodas,' or whatever you call it, 'and we'll go to LPD,
 23 then we will deal with the issue.' That's what a
 24 reasonable leader in your position should have done.
 25 MR MOKOENA: I have explained the reason

Page 38154

1 before that we had already spoken to the workers, their
 2 delegates from Mr Da Costa and the message would have been
 3 exactly the same. So I'm trying to correct the perception
 4 created that certain statements were said by the Bishop and
 5 I want to confirm that those statements were incorrect.
 6 That's all I'm trying to do.
 7 MR MPOFU SC: And also – well, now that
 8 you mention Da Costa, do you agree that the Da Costa
 9 engagement, negotiation, whatever you call it, was an
 10 engagement with the workers outside the structures?
 11 MR MOKOENA: We have presented before the
 12 Commission that yes, the workers were at liberty to
 13 approach line at any time about issues at Lonmin and that
 14 we do encourage that, and that has never been perceived as
 15 wage negotiations.
 16 MR MPOFU SC: Do you agree that the
 17 discussions with Mr Da Costa about wages was an engagement
 18 with the workers outside the structures?
 19 MR MOKOENA: Yes.
 20 MR MPOFU SC: Yes.
 21 MR MOKOENA: That's what I've just
 22 explained.
 23 MR MPOFU SC: Now if there could be
 24 deviation on this rigidity of yours about not talking about
 25 wages outside the structures in relation to Mr Da Costa,

Page 38155

1 why could you, who's even a higher manager than Mr Da
2 Costa, have the same flexibility and be prepared to talk
3 outside the structure?
4 MR MOKOENA: Let me at once correct the
5 perception, Chair, that workers at any given point have the
6 right to approach their line and the fact that they knocked
7 at Mr Da Costa's and said we demand to be paid 12 500, that
8 does not automatically make it a wage negotiation outside
9 the structures, and the reason why Mr Da Costa escalated
10 this matter is because he saw it was a substantive matter
11 that should have been negotiated within the structures. So
12 workers do knock at our doors all the time. That knock
13 alone is not equal to wage negotiations.
14 MR MPOFU SC: No, Mr Da Costa – let's put
15 it this way, at the lowest - Mr Da Costa entertained the
16 wage demands of the workers outside the structures. Is
17 that a correct statement?
18 MR MOKOENA: Chair, whether it's
19 entertained, engaged, communicated, all I'm saying is when
20 workers speak to line, whether you want to call it
21 entertainment or engagement –
22 MR MPOFU SC: Can you please listen to
23 the question?
24 MR MOKOENA: I am –
25 MR MPOFU SC: Did Mr Da Costa – yes or no

Page 38156

1 – entertain the workers –
2 MR MOKOENA: Yes.
3 MR MPOFU SC: - outside the structures?
4 MR MOKOENA: Yes.
5 CHAIRPERSON: No –
6 MR MPOFU SC: Thank you.
7 CHAIRPERSON: Mr Mpofo and Mr Mokoena,
8 it's very difficult for us to follow when there are
9 interruptions. I'm not blaming anyone in particular. It's
10 very difficult for the transcribers as well. So Mr Mpofo,
11 I'm inclined to think you started it. I think you did it
12 because you thought he was answering the wrong question,
13 but –
14 MR MPOFU SC: Yes.
15 CHAIRPERSON: Anyway –
16 MR MPOFU SC: I'm sorry, Chairperson.
17 CHAIRPERSON: Let's please both of you
18 try not to interrupt each other and I must also try not to
19 interrupt both of you.
20 MR MPOFU SC: Thank you.
21 CHAIRPERSON: So if the three of us do
22 our best we shouldn't have a problem. Carry on.
23 MR MPOFU SC: Thank you, Chairperson. Mr
24 Mokoena, please, I'm begging you, listen to the question.
25 If the question is yes or no just give us an answer. If it

Page 38157

1 needs further elaboration we'll give you an opportunity.
2 Did Mr Da Costa entertain the wage demands of the workers
3 outside the structures?
4 CHAIRPERSON: I think he's already said
5 yes to that.
6 MR MOKOENA: Chair, I think it would be
7 helpful if I create context for our decisions for the
8 Commission. Now –
9 CHAIRPERSON: By all means give context
10 to the decision, but what Mr Mpofo wants to know, I think
11 you already answered it frankly –
12 MR MOKOENA: Yes, Chair.
13 CHAIRPERSON: - that Mr Da Costa did
14 receive a wage demand, or a wage increase demand outside
15 the structures. I think you've conceded that –
16 MR MOKOENA: Yes.
17 CHAIRPERSON: You won't be able to deny
18 it anyway. So that we can accept as a given. You now want
19 to give us the context which you say is relevant for the
20 subsequent questions you think Mr Mpofo may ask you.
21 MR MPOFU SC: Alright. Well, I'll leave
22 that for argument. The point I'm going to, in fairness to
23 you, is that if it was good enough for Mr Da Costa to
24 entertain – entertain, not necessarily to meet it or
25 whatever – to entertain a wage demand outside the

Page 38158

1 structures, then it should have been good enough for you
2 and it would have averted the tragedy. That's what I'm
3 going to argue. I'm sure you disagree, correct?
4 MR MOKOENA: Yes.
5 MR MPOFU SC: Ja, alright. Now you
6 accept that also even your adjustment of salaries did not
7 match the Impala and Anglo salaries?
8 MR MOKOENA: Yes.
9 MR MPOFU SC: Thank you.
10 MR MOKOENA: And there's context to that.
11 MR MPOFU SC: No, I'm not interested.
12 And then –
13 MR BHAM SC: I don't know how you can –
14 CHAIRPERSON: No, no, Mr Mpofo, he's
15 entitled to give the context. What's the context?
16 [09:12] MR MOKOENA: The context is our employees
17 would have received in October their annual increase which
18 would then have put them above Impala and almost equal to
19 Anglo. So that adjustment alone, yes, would have moved
20 them a little bit but there was still an annual increase
21 due in October which would have made them competitive
22 compared to Impala and Anglo.
23 MR MPOFU SC: Well, I'm sure there's an
24 annual increase at Impala as well but anyway, both on the,
25 in relation to Mr Xolani Gwala and in relation to General

Page 38159

1 Mpembe again you made decisions which were remiss of a
2 person in your position in the sense that in respect of
3 both those gentlemen you refused to go and address the
4 workers. You accept that?

5 MR MOKOENA: I have submitted before the
6 Commission that after the deaths on the koppie I was, as
7 Barnard, Chair, I was afraid to go to the koppie and as
8 such I felt it would have been irresponsible of me to
9 suggest somebody else to go to the koppie.

10 MR MPOFU SC: So why did you suggest that
11 Mr Zokwana and Mr Mathunjwa should go?

12 MR MOKOENA: It was their choice.

13 MR MPOFU SC: You never, you didn't
14 support the fact that they should go there in those two
15 meetings, both in the radio interview and the Mpembe
16 meeting?

17 MR MOKOENA: I supported the initiative –

18 MR MPOFU SC: So you wanted them to go
19 and get killed if you were so, or whatever it is that you
20 were scared of.

21 MR MOKOENA: No.

22 MR MPOFU SC: Alright. Now you accepted
23 the assurances of General Mpembe that whoever had gone
24 there, whether it was Mr Zokwana – or let me put it this
25 way, you surely did not expect that there would be

Page 38160

1 hostilities directed towards you which would be worse than
2 those directed at Mr Zokwana.

3 MR MOKOENA: I did expect that there
4 would be actually more hostility directed at me.

5 MR MPOFU SC: But knowing full well that
6 all the workers want, all they wanted was for someone from
7 Lonmin management to come there. That's all they wanted,
8 you conceded that yesterday. How could they have been
9 hostile when all that they wanted was being achieved?

10 MR MOKOENA: Chair, it's because I have
11 never had to address 3 000 people on a mountain with
12 weapons and when I have had just an experience of somebody
13 close to my office killed at that very venue and I –

14 MR MPOFU SC: Yes, but you –

15 MR MOKOENA: That's my honest feeling –

16 MR MPOFU SC: Ja.

17 MR MOKOENA: - at that time.

18 MR MPOFU SC: That's fine, but you
19 accepted the assurances given by General Mpembe that the
20 people who were going to go with, a heavy police
21 contingency were going to be safeguarded. You thought that
22 only applied to Mr Mathunjwa and Mr Zokwana and that
23 wouldn't apply to you?

24 MR MOKOENA: No.

25 MR MPOFU SC: Ja. And also you didn't

Page 38161

1 think before the incident of Mr Twala, why did you not go
2 in the negotiation team of Mr McIntosh which was in an
3 armoured vehicle?

4 MR MOKOENA: Who is Mr McIntosh?

5 MR MPOFU SC: The police negotiation team
6 that went there. You knew, you were part of the – you knew
7 all the police plans.

8 CHAIRPERSON: I don't think he was, I
9 think he was at Melrose Arch at that stage but the evidence
10 is that the police decided to try to solve the problem by
11 negotiation to persuade the strikers to lay down their arms
12 and so forth and they got an experienced police negotiator,
13 Lieutenant-Colonel McIntosh, to come. He came on the
14 Tuesday the 14th and he tried to establish this kind of
15 relationship with the strikers. He called five men forward
16 and talks to them. This started on the Tuesday afternoon,
17 continued again on the Wednesday and I think he was also
18 there on the Thursday. And that's what Mr Mpofo is talking
19 about. Lieutenant-Colonel McIntosh was in a Nyala, an
20 armoured vehicle, from the Tuesday from the time he
21 arrived. I take it you were still at Melrose Arch?

22 MR MOKOENA: No, no, no, Chair, I was all
23 the time in Marikana. Actually I work from Marikana, I am
24 not based in Melrose but I was not aware of the –

25 CHAIRPERSON: I was under a

Page 38162

1 misapprehension, so you were there but you weren't aware –

2 MR MOKOENA: No.

3 CHAIRPERSON: - of Lieutenant-Colonel
4 McIntosh's involvement?

5 MR MOKOENA: No.

6 CHAIRPERSON: I see.

7 MR MPOFU SC: And you never, well, were
8 you aware that there was heavy police presence in and
9 around the koppie, if you were in the area, correct?

10 MR MOKOENA: Yes.

11 MR MPOFU SC: Ja. I'm saying again,
12 let's not shift the responsibility to the police, let's
13 shift it back to you. Why did you not say, well, if the
14 police can be stationed around there and they are, you
15 know, journalists are milling around there and nothing is
16 happening to them, I can go as long as there is police
17 protection?

18 MR MOKOENA: I've given my answer for not
19 going to the koppie.

20 MR MPOFU SC: You were scared, even if
21 there were police, there was police protection.

22 MR MOKOENA: And I also believed that it
23 looks like the workers would have welcomed anybody who
24 would have carried good news for them, you know. Mr
25 Zokwana was booed, as it's known. Mr Mokoena would have

<p style="text-align: right;">Page 38163</p> <p>1 arrived at the koppie and said to 3 000 people carrying 2 pangas and dangerous weapons, sorry, there is no 12 500. 3 Now – 4 MR MPOFU SC: Ja, as – I'm sorry. 5 MR MOKOENA: Let me finish. What would 6 have been the reaction? Already that message had been 7 given to them and from June, July into August. So I did 8 not see my going to the koppie at that time – in actual 9 fact it would have made the situation worse. 10 MR MPOFU SC: And yet you, when Mr 11 Mathunjwa who did exactly that, he went in there, he did 12 not offer them R12 500 and when he came back to you not 13 having brought the people back, you felt, as you call it, 14 betrayed by him when he did that exact thing of going to 15 speak to them without offering 12 500. Is that your 16 evidence? 17 MR MOKOENA: I referred the Commission to 18 the letter he sent me, particularly page 2. Now I don't 19 know at what stage Mr Mathunjwa stopped experiencing the 20 strikers as third force, that was a reference to his 21 correspondence, that he initially said "Barnard, don't 22 engage, don't talk to them, there's a third force." 23 MR MPOFU SC: What has that got to do 24 with my question? I'm saying to you did you or did you 25 not, when Mr Mathunjwa failed to resolve the issue was your</p>	<p style="text-align: right;">Page 38165</p> <p>1 is that you, I'm going to show that you told or you were 2 deceptive, deliberately so, in your dealing with this 3 situation and told many, many untruths deliberately. You 4 said, I think you've already conceded that in the statement 5 you made to Xolani Gwala that there were no engagements 6 with the workers was untrue, correct? 7 MR MOKOENA: Which statement? 8 MR MPOFU SC: The one you made to Mr 9 Xolani Gwala which said there was no engagement with the 10 workers, that was untrue, that was false. 11 MR MOKOENA: Can you please kindly refer 12 me to – 13 MR MPOFU SC: Okay, go to page 49. 14 CHAIRPERSON: It's exhibit OO3 which is 15 reproduced in your bundle from pages 42 to 77 and Mr Mpofo 16 says please look at page 49, is it? 17 MR MPOFU SC: 49 yes, thank you, Chair. 18 CHAIRPERSON: I think you should give the 19 line number. 20 MR MPOFU SC: Ja, let's go to about 20, 21 1, 2, 3, start from 24. 22 CHAIRPERSON: It's the line beginning 23 where you say, "No, no, no" – 24 MR MPOFU SC: No, no, no. 25 CHAIRPERSON: "He's twisting the truth at</p>
<p style="text-align: right;">Page 38164</p> <p>1 evidence not that you felt betrayed? 2 MR MOKOENA: Yes, I'm explaining why I 3 felt betrayed. 4 MR MPOFU SC: Okay. 5 CHAIRPERSON: Sorry, tell us why you felt 6 betrayed? Tell us why you felt betrayed? 7 MR MOKOENA: Chair, I felt that letter 8 from Mr Mathunjwa was a genuine position that I actually 9 shared with him, that this is an unprotected strike, do not 10 engage, don't set a precedent and he suggested that there's 11 a third force doing these things. So my expectation was 12 actually for him to rebuke and say this is unprotected, 13 there's a third force behind these workers, please go back 14 to work. That was my expectation coming out of that 15 letter, so when he came back to me and his other members 16 asking, carrying the 12 000 demand from the koppie, I asked 17 myself the question: but Mr Mathunjwa, I would have 18 expected you to actually almost read that letter to the 19 workers. So where is the third force now? 20 CHAIRPERSON: I understand why, your 21 feelings that you had been betrayed then. 22 MR MOKOENA: Yes. 23 CHAIRPERSON: I think you've explained 24 that now. Mr Mpofo, sorry to have interrupted. 25 MR MPOFU SC: I don't – the other issue</p>	<p style="text-align: right;">Page 38166</p> <p>1 the expense of 10 lives. There are no engagements" – 2 MR MPOFU SC: Yes. 3 CHAIRPERSON: "We've not engaged these 4 groups of people. It's still our position" – 5 MR MPOFU SC: "There are no" – 6 CHAIRPERSON: That's the passage Mr Mpofo 7 is referring to. 8 MR MPOFU SC: Yes. Ja, it says "There 9 were no engagements" and then if you read, I'll paraphrase 10 from there, from 49 to 51 effectively what you are saying, 11 two things, there were no engagements and the adjustments 12 were not as a result of any engagements but they were so- 13 called market allowances. Both of those statements were 14 untrue. I said to you, you acknowledged that yesterday. 15 MR MOKOENA: Please repeat the statement? 16 MR MPOFU SC: The statement that there 17 were no engagements with the workers in relation to the Da 18 Costa incident was not true. 19 MR MOKOENA: Well, there were 20 engagements. 21 MR MPOFU SC: Yes, there were 22 engagements, yes. So the statement that there were no 23 engagements was untrue. 24 MR MOKOENA: Well, what was this, what 25 was I responding to here because I think it's important</p>

Page 38167

1 that we don't just take a sentence out of context.

2 MR MPOFU SC: Mr Mathunjwa, I'm telling

3 you Mr Mathunjwa was saying that one of the causes of this

4 is because you engaged with the workers and Mr Gwala was

5 finding out from you whether that was so and you said that

6 was not so.

7 MR MOKOENA: Yes.

8 MR MPOFU SC: Which was false.

9 MR MOKOENA: Yes, because Mr Mathunjwa's

10 argument was that we had actually opened, well, engaged by

11 way of wages, wage negotiations with the workers. That's

12 what I understood Mr Mathunjwa's argument to have been.

13 MR MPOFU SC: Ja –

14 MR MOKOENA: And secondly, we said we

15 communicated the market allowance, that is a fact that we

16 did, so I don't understand.

17 MR MPOFU SC: What is it you don't – go

18 to page 51. Mr Xolani Gwala asked you directly, from line

19 9, "So in other words did you engage? You, you did come

20 to, they did come to you, they raised their concerns and

21 you offered them 700." "No, no." Is that –

22 MR MOKOENA: Yes, because the context of

23 the argument was that, in that interview, was that we had

24 opened wage negotiations and I was trying to explain that

25 no, we have not opened wage negotiations, we have made a

Page 38168

1 market allowance.

2 MR MPOFU SC: Okay, thank you. And you

3 also, you knew that the strike was not caused by union

4 rivalry, correct?

5 MR MOKOENA: I have explained to the

6 Commission my experience from 2012.

7 MR MPOFU SC: Did you know that the

8 strike of August 2016 was not caused by union rivalry, yes

9 or no?

10 MR MOKOENA: Yes.

11 MR MPOFU SC: 2012, sorry.

12 MR MOKOENA: Yes.

13 MR MPOFU SC: Yes, you knew that?

14 MR MOKOENA: Yes.

15 MR MPOFU SC: And yet in your communiqués

16 that you issued you suggested that the strike was caused by

17 union rivalry, deliberately misleading the public, correct?

18 MR MOKOENA: Chair, if you allow me, that

19 my experience of the beginning of the relationship between

20 AMCU and NUM went back to 2010. I've also explained that

21 how AMCU was born at Karee, at Lonmin, was out of a

22 situation where workers who were NUM had been fired because

23 of a conflict in NUM and that the beginning of AMCU at

24 Karee and the leadership that had been fired by NUM would

25 have continued to carry the sentiment of not liking NUM at

Page 38169

1 Karee. Now me, yes –

2 MR MPOFU SC: Mr Mokoena –

3 MR MOKOENA: Let me finish first, Mr

4 Mpofo.

5 MR MPOFU SC: You're not answering my

6 question, that's my problem.

7 CHAIRPERSON: Mr Mpofo, well, you can't

8 censor his answers.

9 MR MPOFU SC: No, but Chairperson -

10 CHAIRPERSON: He's giving you an answer –

11 MR MPOFU SC: - Chairperson, but if he's

12 going off at a complete tangent, must we leave him here for

13 the next two weeks to go off at the tangent?

14 CHAIRPERSON: I didn't see it as a

15 tangent he's going on. Finish your answer, try to keep it

16 short.

17 MR MOKOENA: Yes. So since 2010 and that

18 event, we have had numerous issues at Karee that, for me,

19 showed there was some conflict going on and I actually

20 understood it would have been a natural conflict where

21 leadership that used to belong to one union start another

22 union and they would therefore want to promote the new

23 union.

24 MR MPOFU SC: Forget that history. I'm

25 saying to you would this be correct, if someone said to you

Page 38170

1 on the 14th of August Lonmin announces, with regret, serious

2 and ongoing outbreak of violence at its West Marikana

3 mine –

4 MR MOKOENA: Sorry, where are you reading

5 from?

6 MR MPOFU SC: Don't worry about that. If

7 someone said that –

8 CHAIRPERSON: No, he's entitled to know –

9 MR MPOFU SC: No, Chairperson, please –

10 CHAIRPERSON: I'm sorry, I'm sorry, if

11 you're putting things to him that you say he said then –

12 MR MPOFU SC: I never said that. I never

13 said he said anything. I've just said if someone, if

14 anybody said the following, would it be correct, that seven

15 Lonmin workers and two policemen have been killed in a

16 dispute between two rival unions, would that be a correct

17 statement of what happened?

18 MR MOKOENA: I've asked where he's

19 reading from, Chair, and I think I'm entitled –

20 MR MPOFU SC: No, Mr Mokoena, please –

21 CHAIRPERSON: It's a hypothetical –

22 MR MPOFU SC: No, don't waste my time –

23 CHAIRPERSON: Mr Mpofo, Mr Mpofo, I'm

24 here to make sure that time isn't wasted. I'm sure I don't

25 do it very well but I'm here to do it. Mr Mokoena, it's a

Page 38171

1 hypothetical question. He's not quoting anybody. He's
 2 saying if someone were to say that, that's the basis of the
 3 question.
 4 MR MOKOENA: If somebody were to say that
 5 to me, Mr Mpofo, with the knowledge and the background and
 6 the history that I knew, I would have believed that.
 7 MR MPOFU SC: You would have agreed that
 8 seven people were killed in a dispute between rival unions?
 9 That was the dispute.
 10 MR MOKOENA: Ja, with the context that
 11 I've explained to you, I would have actually said it's
 12 possible.
 13 MR MPOFU SC: And –
 14 MR MOKOENA: And not only that, Mr Mpofo,
 15 the people, employees who were killed were killed going to
 16 work and it's a very important thing. Why would anybody be
 17 killed to work if those who are on the koppie are saying
 18 we're not going to work? So it would have been people
 19 killed who want to go to work, in other words those who are
 20 not supporting the strike.
 21 MR MPOFU SC: So what's that got to do
 22 with union rivalry?
 23 MR MOKOENA: Let me finish, let me
 24 finish. Now we know that NUM wanted people to go to work,
 25 so NUM members would have actually wanted to go to work.

Page 38172

1 MR MPOFU SC: And seven people, seven
 2 people fall under what you are talking about now?
 3 MR MOKOENA: Let me rephrase my argument,
 4 Chair.
 5 CHAIRPERSON: Sorry –
 6 MR MOKOENA: People, employees –
 7 CHAIRPERSON: Carry on?
 8 MR MOKOENA: Employees who were killed
 9 going to work would have been employees who wanted to go to
 10 work and not be associated with the strike. Two, NUM had
 11 made a call for their workers not to take part in the
 12 strike and to go to work. Now the fact that NUM would have
 13 made that statement and said our members are not on strike,
 14 we want them to go to work, protect them, and they got
 15 killed, that statement in that context which is a fact,
 16 would actually have made sense to me.
 17 CHAIRPERSON: What you're saying is, if I
 18 understood you correctly, that there was a basis for saying
 19 there was inter-union rivalry at the root of the problem,
 20 that's right?
 21 MR MOKOENA: Yes.
 22 CHAIRPERSON: Well, Mr Mpofo, that's what
 23 he says. If you don't agree with that you can argue at the
 24 end, that's an answer –
 25 MR MPOFU SC: Ja.

Page 38173

1 CHAIRPERSON: I see from Mr Wesley you've
 2 got five minutes left.
 3 MR MPOFU SC: Well, Chairperson, ja,
 4 honestly. That's fine. Now Mr Mokoena, you said you
 5 admired the big guns that the police were bringing to
 6 Lonmin, is that correct?
 7 MR MOKOENA: Where is that?
 8 MR MPOFU SC: Where you said you liked
 9 the ones, the big ones, the one that are snipers – in the
 10 transcript JJJ192. You must remember that piece if you did
 11 your homework.
 12 CHAIRPERSON: Sorry, where is this page?
 13 MR MPOFU SC: JJJ192, the one where –
 14 CHAIRPERSON: JJJ192.
 15 MR MPOFU SC: - the Chairperson said you
 16 must look for places where you might have made mistakes.
 17 You don't know this, Mr Mokoena?
 18 MR MOKOENA: Ja, 192 is –
 19 MR MPOFU SC: You don't know what I'm
 20 talking about.
 21 CHAIRPERSON: It's pages 20, it's pages
 22 20 to 41 of your bundle. That's the transcript of the
 23 meeting you had on the Wednesday afternoon, sorry the
 24 Tuesday afternoon. You and some of your colleagues with
 25 the provincial commissioner.

Page 38174

1 [09:32] And it is exhibit JJJ192 if this is the one -
 2 which is the revised one. What page of this transcript are
 3 you referring the witness to?
 4 MR MPOFU SC: I don't know the specific
 5 page, Chairperson.
 6 CHAIRPERSON: Kwadi says something at the
 7 top at page 37, but you're busy with this witness.
 8 MR MPOFU SC: Ja page 37. "But I must
 9 tell you the ones that impress me the is this fancy one,
 10 they are the snipers or what." at the bottom. "Which
 11 ones?" "The military, the specialised." "Oh the special
 12 task force. Ja I know, I like those ones."
 13 CHAIRPERSON: I think you're quoting from
 14 another copy, I think the earlier version.
 15 MR MPOFU SC: Page 36, the one we've all
 16 been using, Chairperson. Page 36 of the bundle.
 17 CHAIRPERSON: What's in the bundle is the
 18 revised one you see, the correct one. Where is it there?
 19 MR MPOFU SC: Page 36, three six.
 20 CHAIRPERSON: It is there. You see at
 21 the foot of page 37, 36 rather where you say "I must tell
 22 you the ones that impress is this fancy ones these are
 23 snipers or what" that's the passage that counsel is
 24 referring to.
 25 MR MOKOENA: Yes I found it, Chair.

Page 38175

1 MR MPOFU SC: Oh you found it. You had
2 forgotten this one, this part?
3 MR MOKOENA: No I just wanted to know
4 where it's located in my bundle.
5 MR MPOFU SC: Where it is.
6 MR MOKOENA: Yes.
7 MR MPOFU SC: Okay so what is your answer
8 now? You like the big ones, the snipers.
9 MR MOKOENA: Well the Commissioner said
10 which ones and I said the military, the ones who were
11 dressed in camouflage and she said oh the special task
12 force.
13 MR MPOFU SC: Anyway, Mr Mokoena –
14 MR MOKOENA: I don't find a place where I
15 said I like the big guns, Chair.
16 MR MPOFU SC: If they impress you it
17 means you don't like them.
18 MR MOKOENA: Yes but I'm asking, I don't
19 find anywhere where there's a talk about I like the big
20 guns, that is incorrect.
21 MR MPOFU SC: Mr Mokoena, let me ask you,
22 when the signs were clear from your discussion with – I'm
23 going to argue that the signs were clear that there was
24 going to be a carnage and a lot of bloodshed. And I'm
25 going to refer you to the following extract from your

Page 38176

1 discussion.
2 MR MOKOENA: Chair, I have asked Mr Dali
3 to refer me to where he claims I made a statement about big
4 guns.
5 MR MPOFU SC: Mr Mokoena, you're not
6 going to ask me anything okay.
7 CHAIRPERSON: I think he's entitled to
8 ask if you're putting something to him and he doesn't agree
9 he made it, but he's given you the answer. The statement
10 "I like those ones was made by Mr Kwadi" so he correct
11 himself and said the passage that he was referring to was
12 the one at the foot of page 37 where you said you were
13 impressed –
14 MR MPOFU SC: He knows that he's just
15 deflecting here as usual.
16 CHAIRPERSON: Sorry?
17 MR MPOFU SC: Mr Mokoena, at page 26 the
18 Provincial Commissioner said to you "Tomorrow when we go
19 there for the second time, and then if they did not
20 surrender then it's blood." Do you remember that?
21 MR MOKOENA: Yes, I remember that.
22 MR MPOFU SC: Then it's blood. You know
23 blood means bloodshed.
24 MR MOKOENA: Yes.
25 MR MPOFU SC: Ja so you knew that. And

Page 38177

1 then later down she said "You know these things, you know
2 from the Tatana incident and all that." Tatana incident
3 also refers to killing people, correct?
4 MR MOKOENA: Yes I recall that.
5 MR MPOFU SC: You recall that ja. And
6 then later she also talks about the emotions are high and
7 there might be a situation where 20 people will be dead.
8 That's another sign that we're talking about, possible
9 bloodshed. Correct?
10 CHAIRPERSON: At the top of page 27 she
11 said "I don't want a situation where 20 people will be dead
12 –
13 MR MPOFU SC: Yes.
14 CHAIRPERSON: Okay, this is your last
15 point, Mr Mpofo, round it up and put it to the witness and
16 let's get the answer.
17 MR MPOFU SC: No, Chairperson, I'll argue
18 that point. Mr Mokoena, the other issue that I'm going to
19 argue which I want to put to you is that, in particular
20 that you and Mr Ramaphosa were in very serious and
21 responsible leadership positions which where you could have
22 made a difference. And you were both members of the
23 Transformation Committee and that particularly as black
24 people in this country you failed, you are a disgrace to
25 black people because you betrayed your position to

Page 38178

1 transform the company and infuse new culture.
2 CHAIRPERSON: Mr Mokoena, what's your
3 answer to that?
4 MR MPOFU SC: What do you say to that?
5 MR MOKOENA: I disagree, to his
6 statement, Chair –
7 CHAIRPERSON: To what statement?
8 MR MOKOENA: I said he's made a statement
9 and I disagree with it.
10 MR MPOFU SC: Ja, no okay.
11 CHAIRPERSON: Yes, Mr Mpofo, that's the
12 end of your cross-examination.
13 MR MPOFU SC: Chairperson, if I can just
14 put one proposition, Chairperson.
15 CHAIRPERSON: No, no, no your time is up.
16 If you wanted to put a proposition you should have put it
17 earlier. Your time is up, we're moving onto then next
18 cross-examiner who is from the Human Rights Commission.
19 MR BHAM SC: Before we do so, Mr Chair,
20 can I hand up the document that you've been waiting for?
21 This is from Mr Mokoena. Might I just say this? Although
22 it was printed by my learned junior the document is
23 verbatim what was prepared by Mr Mokoena. In other words –
24 CHAIRPERSON: I suppose we'd better make
25 it an exhibit. What's the next exhibit, Ms Pillay?

<p style="text-align: right;">Page 38179</p> <p>1 MR BHAM SC: Put it at then end of the 2 bundle that we're in at the moment. May I make a 3 suggestion? 4 CHAIRPERSON: Yes, that sounds a sensible 5 suggestion, yes let's do that. 6 MR BHAM SC: That it is numbered from 428 7 onwards. We'll just – 8 CHAIRPERSON: How many pages? 9 MR BHAM SC: It's five pages. What I'll 10 do is I'll just number three copies. 11 CHAIRPERSON: Yes 428 to 432, number – 12 MS PILLAY: Chair, I think it would be 13 more practical to make it a separate exhibit because – 14 CHAIRPERSON: So what will that be then? 15 MS PILLAY: It will be WWWW2. 16 MR BHAM SC: Okay that's fine. 17 CHAIRPERSON: What do we call the 18 document? 19 MR BHAM SC: It's a document prepared by 20 Mr Mokoena with the title Lessons learnt from the tragic 21 events of August 2012. 22 CHAIRPERSON: Lessons learnt? 23 MR BHAM SC: From the tragic events of 24 August 2012. 25 CHAIRPERSON: Yes I see, thank you. It</p>	<p style="text-align: right;">Page 38181</p> <p>1 questions for Lonmin, either Mokoena or Seedat. 2 CHAIRPERSON: Perhaps more time could be 3 available to be used with Mr Seedat when he comes. So you 4 don't want to cross-examine at all? 5 MS LE ROUX: Well, Chair, we do wish to 6 cross-examine, but we understand the Commission has ruled 7 that there won't be phase 2 questioning of – 8 CHAIRPERSON: Let me phrase the question 9 more precisely. You don't want to cross-examine this 10 witness on phase 1. 11 MS LE ROUX: Correct, Chair. 12 CHAIRPERSON: All right. Okay, well in 13 that event you've got no cross-examination. The next 14 cross-examination is from the Legal Resources Centre. 15 MR NGCUKAITOBI SC: Mr Chairman, again if 16 I – perhaps Mr Chaskalson should take the lead here. 17 MR CHASKALSON SC: The Legal Resources 18 Centre yesterday indicated that they would rather use their 19 30 minutes with Mr Seedat on the same excuse for – 20 CHAIRPERSON: Okay you also won't be 21 cross-examining this witness on phase 1. That's correct. 22 MR NGCUKAITOBI: On the basis, Mr Chair, 23 that we would have 30 minutes for Mr Seedat. 24 CHAIRPERSON: Yes, of course. Yes all 25 right, thank you. So the evidence leaders are next. Mr</p>
<p style="text-align: right;">Page 38180</p> <p>1 will be so marked, VVVV2. Did you also prepare a document 2 on the things you wished – or your comments on the 3 transcript of the discussion you had – 4 MR MOKOENA: Yes, Chair, the last page on 5 that document – 6 CHAIRPERSON: It's all in there. 7 MR MOKOENA: Yes. 8 CHAIRPERSON: I see, thank you. Ms Le 9 Roux, I think you're next. 10 MS LE ROUX: Yes Chair, although I must 11 just record that this does raise some confusion because we 12 were advised that phase 2 issues would not be canvassed 13 with Mr Mokoena, they would be for Mr Seedat and then we 14 understand there's been a ruling denying cross-examination 15 on phase 2. 16 CHAIRPERSON: You're entitled to – 17 MS LE ROUX: So as we understood the 18 position we were not going to be able to put phase 2, I'm 19 happy to put phase 2 to Mr – 20 CHAIRPERSON: No I don't want you to. 21 MS LE ROUX: The erstwhile phase 2 – 22 CHAIRPERSON: I don't want you to. I 23 understood you wanted to cross-examine on – do you not want 24 to cross-examine on phase 1 at all – 25 MS LE ROUX: No Chair, it's phase 2</p>	<p style="text-align: right;">Page 38182</p> <p>1 Chaskalson have you got question for the witness? 2 CROSS-EXAMINATION BY MR CHASKALSON SC: 3 Yes, yes I have just a few questions for Mr Mokoena. Mr 4 Mokoena, most of the issues that I wanted traverse with you 5 have already been dealt with by counsel, I don't want to 6 repeat anything. I just want to ask you a few questions 7 about the flow from your meeting with the Provincial 8 Commissioner on the Tuesday afternoon which is JJJ192. And 9 there will be a small bundle of extra exhibits that will be 10 handed up. 11 CHAIRPERSON: Do you know how long this 12 will take because I see it's now – 13 MR CHASKALSON SC: 15 minutes, 14 Chairperson. 15 CHAIRPERSON: All right, okay. We'll 16 then take the first comfort break after that. 17 MR CHASKALSON SC: Mr Mokoena, I'd like 18 to take you first to page 2 of this transcript of your 19 meeting where you are quoted. 20 CHAIRPERSON: I'm sorry, Mr Chaskalson, I 21 take it this document you've handed us should also be given 22 an exhibit number. VVVV3? 23 MR CHASKALSON SC: W, WWWW3. 24 CHAIRPERSON: Oh I beg your pardon. 25 WWWW3, is it?</p>

<p style="text-align: right;">Page 38183</p> <p>1 MR CHASKALSON SC: Ja. Chair, there are 2 three different documents, maybe if we could give them 3 different exhibit numbers, there are actually four and 4 make the email WWWW3, the table of cell phone calls WWWW4, 5 the document paginated number 304 WWWW5, media release 6 issued by Lonmin on 16 August and WWWW6 will be the 7 document which starts with paginated 305 and runs to 306 8 that will be media statement by Lonmin, violence at Lonmin 9 operations, 16 August.</p> <p>10 CHAIRPERSON: Also 16 August.</p> <p>11 MR CHASKALSON SC: Yes.</p> <p>12 CHAIRPERSON: So it's a media release and 13 a media statement both dated 16 August issued by Lonmin.</p> <p>14 MR CHASKALSON SC: That's correct, Chair.</p> <p>15 And Mr Mokoena, I'd just like to read what you said at your 16 meeting with the Provincial Commissioner from the foot of 17 page 2. You say "And our plan going forward is we are not 18 forcing workers to come to work for now because we cannot 19 really guarantee, because we do not know, you know are 20 these people still or not. Tomorrow we want to issue an 21 ultimatum because we have a court interdict that we've 22 actually issued." SAPS Commissioner says "Issued." "We 23 want to give everybody the benefit of the doubt today and 24 your course is to settle and do things. We do not want to 25 say come to work while the situation is very tense." Now</p>	<p style="text-align: right;">Page 38185</p> <p>1 MR MOKOENA: Exactly.</p> <p>2 MR CHASKALSON SC: And for that purpose 3 you needed to know when the police were going to take 4 action to resolve the situation.</p> <p>5 MR MOKOENA: Exactly.</p> <p>6 MR CHASKALSON SC: Now presumably that 7 remained Lonmin's position well throughout the week.</p> <p>8 MR MOKOENA: Yes, I think it was the 9 expectation of Lonmin management.</p> <p>10 MR CHASKALSON SC: So you weren't going 11 to issue your ultimatum until you knew that the police had 12 acted as it were, or were going to act.</p> <p>13 MR MOKOENA: Yes, that was my 14 understanding.</p> <p>15 MR CHASKALSON SC: Can I then take you to 16 WWWW3, the email? It was sent to you by Mark Munroe at 17 6:29am on the Thursday and it says "Gents today is the day 18 we need to drive. Return to work by tomorrow 7:00am or 19 face dismissal." So you got an email from Mark Munroe at 20 6:29am on Thursday the 16th saying our ultimatum goes out 21 today. And that email is also reflected in the two media 22 releases WWWW5 and WWWW6 which Lonmin on the Thursday and 23 you'll see on W5 the last two sentences "Lonmin has issued 24 several notices to the RDOs and exhausted all possible 25 avenues to encourage them to return to work. Consequently</p>
<p style="text-align: right;">Page 38184</p> <p>1 am I right that from your perspective your concern was that 2 you needed to co-ordinate or Lonmin needed to co-ordinate 3 its actions with SAPS because out of fairness to the 4 workers who you were going to demand to come back to work 5 you couldn't give them an ultimatum to return to work until 6 SAPS had made the place safe by arresting the strike 7 leadership? Was that your position on the day?</p> <p>8 MR MOKOENA: No my position, no it 9 wasn't, Chair.</p> <p>10 MR CHASKALSON SC: Well what did you mean 11 then by this statement?</p> <p>12 MR MOKOENA: I meant that I was concerned 13 about safety of people coming to work and that at that time 14 it would only have been proper to expect workers to come to 15 work if the situation was safe.</p> <p>16 MR CHASKALSON SC: Well I don't 17 understand there to be a major difference between what I've 18 put to you and what you've answered. You wanted to co- 19 ordinate what you were doing with what the police was doing 20 so that you wouldn't issue an ultimatum until the police 21 had made it safe.</p> <p>22 MR MOKOENA: Yes.</p> <p>23 MR CHASKALSON SC: Because it wouldn't be 24 fair to people to demand that they return to work when it 25 wasn't safe for them to return to work.</p>	<p style="text-align: right;">Page 38186</p> <p>1 Lonmin has issued a final ultimatum to the striking workers 2 to return to work by their next shift on Friday the 17th or 3 they could face dismissal." That's what the first media 4 release says and the second makes a similar point in the 5 third paragraph on the first page of WWWW6. "Striking rock 6 drill operators remain armed and away from work. This is 7 illegal under the Labour Relations Act consequently and in 8 keeping with the court order granted to Lonmin on the 11th 9 August 2012 the illegal strikers have today, Thursday 16 10 August, been issued with a final ultimatum to return to 11 work by their next shift on Friday the 17th or face 12 dismissal." Now how did you know at 6:29am that it would 13 be safe for work, to return to work on the 17th, 6:29am on 14 the 16th of August that it would be safe for the workers to 15 return on the 17th?</p> <p>16 MR MOKOENA: This email comes from Mark 17 Munroe who was my peer, head of mining and I have no 18 recollection of how I responded to his email or if indeed I 19 did respond to that. So it's him who's saying today is the 20 day we need to drive, return to work by tomorrow 7:00am or 21 face dismissal, so I'm not in a position to say what Mark 22 had mind, Chair.</p> <p>23 MR CHASKALSON SC: But, Mr Mokoena, on 24 Tuesday your attitude was we have to co-ordinate with SAPS 25 because we can't ask people to come back to work until we</p>

Page 38187

1 know that SAPS is going to act.
 2 MR MOKOENA: That is correct.
 3 MR CHASKALSON SC: And you said that you
 4 understood that to be Lonmin's attitude through the week.
 5 MR MOKOENA: Yes, and in actual fact the
 6 context of us - we deliberated on issuing the ultimatum and
 7 Chair, there was hope that the ultimatum would actually
 8 attract workers back to work because since we issued the
 9 court interdict notice on the Friday nothing had happened.
 10 And I recall a strong feeling at EXCO that an ultimatum
 11 would actually help workers come back to work. I think
 12 that was the context in which an agreement - we came to an
 13 agreement. There was hope that the ultimatum may bring
 14 workers back to work for fear of being dismissed, yes.
 15 CHAIRPERSON: If the security problem
 16 wasn't solved then there's another fear, the fear would be
 17 that if they did come back, some of them, in answer to the
 18 ultimatum they might have been killed. So surely it would
 19 only have been responsible to have issued the ultimatum, in
 20 the light of the policy that you'd already discussed with
 21 Mr Chaskalson, conceding to be the case on the Tuesday.
 22 Surely it would only have been responsible to have issued
 23 that ultimatum if you had known that the security problem
 24 would be over by Friday. What do you say to that?
 25 MR MOKOENA: I agree with that, Chair, as

Page 38188

1 I said the sentiment was the ultimatum may come across as
 2 we're going to be fired, let's go back to work. That was
 3 the spirit in which this ultimatum was issued.
 4 MR CHASKALSON SC: But my interest is in
 5 something else and it's the point that the Chair has just
 6 put to you. You as Lonmin knew it wouldn't be fair to ask
 7 workers to come back to work unless you knew it was going
 8 to be safe for them. How did you know at 06:30 in the
 9 morning, on Thursday, that by the next day it was going to
 10 be safe for workers to return to work?
 11 [09:52] MR MOKOENA: Chair, I have absolutely no
 12 context of this one line from Mark. I'm trying to say -
 13 MR CHASKALSON SC: Well, let me - I know
 14 that's what you said, but let me put another concern that I
 15 have in this regard to you. WWW4 is a list of cell phone
 16 calls between General Mbombo and yourself over the period
 17 14 to 16 August and what we see there is that at 15 August
 18 at quarter past 8, or 20:16:26, General Mbombo took a call
 19 from you that lasted for 30 seconds. She was at a meeting
 20 of the National Management Forum at that stage, which was
 21 possibly already over and she was possibly going to move
 22 into what the SAPS call an extraordinary session after that
 23 meeting. She took a call from you for 30 seconds. The
 24 SAPS version is at the extraordinary session that took
 25 place shortly after she took that call a decision was taken

Page 38189

1 that SAPS were going to move in the next day. Did she not
 2 convey that to you in the 30 seconds that you spoke at
 3 quarter past 8?
 4 MR MOKOENA: Absolutely, Chair, I have
 5 had no conversation with General Mbombo on what they were
 6 going to do the next day and all this. I did not discuss
 7 any - or she did not tell me anything about what was going
 8 to happen.
 9 CHAIRPERSON: You phoned her?
 10 MR MOKOENA: No, the MTC means I phoned
 11 her.
 12 CHAIRPERSON: Yes, as I said, you phoned
 13 her.
 14 MR MOKOENA: Yes.
 15 CHAIRPERSON: Why? What for?
 16 MR MOKOENA: I have no idea, Chair. We,
 17 I've had several -
 18 MR CHASKALSON SC: Well, I can possibly
 19 assist you in that regard, Mr Mokoena. She tried to phone
 20 you three times between quarter to 2 and 12 minutes past 2,
 21 earlier in the day. Those MOCs that all last five seconds,
 22 six seconds, three seconds, look to me like three attempts
 23 by her to call you, which didn't succeed, which reached
 24 your voicemail. So I suspect that when you phoned back at
 25 20:16 you were possibly trying to get back to some missed

Page 38190

1 calls.
 2 MR MOKOENA: That's very possible, Chair.
 3 MR CHASKALSON SC: Well, you say she
 4 didn't say any of that, she didn't tell you what SAPS were
 5 going to do?
 6 MR MOKOENA: No. Not a single police
 7 official ever told me or described or presented or
 8 explained any of their plans except generic information
 9 about reinforcement. I was not privy to any of the
 10 details.
 11 MR CHASKALSON SC: And you don't know how
 12 anyone in Lonmin would have known by 6:30AM that it was
 13 going to be safe for workers to return the following day?
 14 MR MOKOENA: I don't know how Mark would
 15 have arrived at that decision.
 16 MR CHASKALSON SC: You see, what does
 17 strike me as strange about it, Mr Mokoena, is we've looked
 18 at General Mbombo's full cell phone records and what we can
 19 tell you is that between 8PM on Wednesday the 15th and
 20 6:15AM on Thursday the 16th she had a number of calls to
 21 senior police officers, but the only other people to whom
 22 she spoke were yourself and Mr Sinclair, only other people
 23 to whom she spoke.
 24 MR MOKOENA: I do not deny that. As I
 25 said, I'm not aware of any conversation I had on the

Page 38191

1 telephone with her that she would have presented to me,
2 explained to me about their plans. I –
3 CHAIRPERSON: She did tell you what their
4 plans were on the Tuesday? Is that right?
5 MR MOKOENA: Not at all, Chair.
6 CHAIRPERSON: According to the transcript
7 she told you they're going to have to act tomorrow. She
8 also told you they had a plan to encircle the strikers.
9 That's at the beginning of the transcript. I think she
10 actually said it in your hearing –
11 MR MOKOENA: Yes.
12 CHAIRPERSON: - over the telephone to the
13 National Commissioner. So certainly you were privy on the
14 Tuesday to what their plans were and that the Provincial
15 Commissioner was proposing to act on the Wednesday morning.
16 Is that correct?
17 MR MOKOENA: Ja, the police –
18 CHAIRPERSON: That's correct, is it?
19 MR MOKOENA: It is correct, Chair, that
20 the police reinforcement, the encircling, that was generic
21 information that we received as feedback at EXCO through
22 Mark Munro who security Sinclair was reporting to. So I
23 had that type of information about reinforcement,
24 encircling, from EXCO, yes –
25 CHAIRPERSON: But we also know that

Page 38192

1 Lonmin knew the details of that plan because Ms Ncube sent
2 an email to Mr Ramaphosa setting out what the plan was
3 going to be. She used the expression "corralling," they
4 were going to corral – was she on EXCO?
5 MR MOKOENA: Yes, she was.
6 CHAIRPERSON: She knew and she conveyed
7 that to Mr Ramaphosa. So we know what EXCO knew already on
8 the Tuesday.
9 MR MOKOENA: Ja.
10 CHAIRPERSON: They knew the details of
11 the plan that was on the table that was going to be
12 implemented, or presumably it was envisaged might be
13 implemented at that stage, and then you knew from what you
14 heard the Provincial Commissioner say to the National
15 Commissioner in your presence on the Tuesday afternoon that
16 her intention was to go in the next morning.
17 MR MOKOENA: Yes, and Chair, but the
18 Provincial Commissioner at the press conference was asked
19 by media what the detail of the plan was and I was present
20 in that meeting and she did not divulge it. So it is
21 correct that I knew generic information like other EXCO
22 members, reinforcement, that they were going to encircle,
23 but as to the detail of what's going to happen on the day
24 and all that, I didn't know. Even to date I have had no
25 access to those plans.

Page 38193

1 MR CHASKALSON SC: But of course from
2 Lonmin's perspective you didn't need to know what the
3 details were to know that it would be safe. All you needed
4 to know is that the police were going to move in.
5 MR MOKOENA: Yes, she actually confirmed
6 that they were going to move in and they were going to
7 disarm the workers at the koppie.
8 MR CHASKALSON SC: Yes, that was at 9
9 o'clock.
10 MR MOKOENA: Yes.
11 MR CHASKALSON SC: But Mr Munroe sends an
12 email that suggests he knew it at 6:30.
13 MR MOKOENA: Chair, that's why I said I
14 have – Mark may have had other information, I didn't.
15 CHAIRPERSON: I understood you to suggest
16 that Mr Munroe might have heard that from Mr Sinclair –
17 MR MOKOENA: Yes.
18 CHAIRPERSON: - who reported to him.
19 MR MOKOENA: Yes.
20 CHAIRPERSON: And so we know also, I
21 think Mr Sinclair was in contact with various police
22 officers.
23 MR MOKOENA: Yes.
24 CHAIRPERSON: So it's an inference that
25 you ask us to make, I take it –

Page 38194

1 MR MOKOENA: Yes.
2 CHAIRPERSON: - that Mr Munroe probably
3 got that information from Mr Sinclair, who got it from the
4 police. You say you didn't get it yourself.
5 MR MOKOENA: Yes, that's correct, Chair.
6 MR CHASKALSON SC: And the cell phone
7 records show that the Provincial Commissioner called Mr
8 Sinclair after the end of the extraordinary session of the
9 National Management Forum. I can get the exact time; it's
10 round about 11 o'clock at night. For the record I will get
11 the exact time. One last issue flowing from this; on the
12 Tuesday the Provincial Commissioner also wanted Lonmin to
13 coordinate its activities with SAPS. It wasn't just that
14 SAPS wanted to – that Lonmin wanted to coordinate its
15 activities with SAPS, SAPS also wanted that. Can I take
16 you to page 6 of that transcript? This comes, you may
17 recall she was talking about "possibly moving in this
18 evening, but possibly not and waiting until tomorrow," and
19 then she says, "Getting 480 members tomorrow when we go
20 there for a second time now that we were there today, they
21 did not surrender, then it is blood. So I want us to be in
22 a position to say whilst you're saying you will call them
23 or you allow us to give – but tomorrow they must be told
24 that the company expects them to be at work." So she
25 wanted your ultimatum to be issued in a manner that was

<p style="text-align: right;">Page 38195</p> <p>1 coordinated with the SAPS action. You recall that from the 2 meeting?</p> <p>3 MR MOKOENA: Yes, I recall that.</p> <p>4 MR CHASKALSON SC: And in fact through 5 that meeting she was urging you to take a hard line with 6 the striking workers, was she not?</p> <p>7 MR MOKOENA: My experience both General 8 Mbombo, Chair, and Mpmembe, throughout were asking us to do 9 our job, which was an IR job. They insistently said, 10 "Barnard, you must do your IR job and sort out this 11 matter." So they were persistent and were very clear that 12 we needed to do our part and my communication with her and 13 General Mpmembe was we will try to do our best, but also you 14 do your part as police. So yes, it is correct.</p> <p>15 MR CHASKALSON SC: But there may have 16 been a difference in the attitude between General Mbombo 17 and General Mpmembe. I can't speak for General Mpmembe at 18 this stage because I think that his attitude was possibly a 19 bit more nuanced, but General Mbombo didn't just want you 20 to do your job, she wanted you to do your job in a 21 particular way. She wanted you to take a hard line on the 22 strikers. Would you agree with that?</p> <p>23 MR MOKOENA: I didn't experience that, 24 Chair. I thought she was asking me to do my job as a 25 company in terms of employees and unions.</p>	<p style="text-align: right;">Page 38197</p> <p>1 Page 8, "You see, I want us to, you remember last night 2 Abey and I raised this thing that where dealing with Impala 3 we had lots of allegations and rumours and some of these 4 allegations they were pointing to the management, that the 5 management is colluding with AMCU," and so on and so forth. 6 Over the page, "of ourselves not being comfortable in terms 7 of understanding whether the Impala Mine management really 8 is colluding with the mine" – or I think she means the 9 union there, meaning AMCU – "but also remember from a 10 political point of view there was even this feeling that, 11 you know, the mining sector wants to replace NUM, you know, 12 with a new face" –</p> <p>13 MR MOKOENA: Sorry, I think the paging is 14 different from my – let me find it quickly –</p> <p>15 CHAIRPERSON: The passage –</p> <p>16 MR CHASKALSON SC: Oh, sorry, it's page 17 8, 8 and 9. I beg your pardon.</p> <p>18 CHAIRPERSON: The passages that have been 19 read to you are pages 28 and 29 of your bundle. Look at 20 page 28 of your bundle. This is the second proofread 21 version. It's page 9 of the second proofread version and 22 round about three-quarters of the way down the page, page 23 28 of your bundle, the Provincial Commissioner starts, 24 "Mmmm, you see I want us to, you remember last night Abey," 25 and then that's the passage Mr Chaskalson put to you and it</p>
<p style="text-align: right;">Page 38196</p> <p>1 MR CHASKALSON SC: Well, first she asked 2 for the company to give an ultimatum to be coordinated with 3 the police action. We've just seen that passage.</p> <p>4 MR MOKOENA: Yes, and in that 5 conversation, Chair, you will notice that I said I don't 6 want to do anything that could compromise the work of the 7 police and the police on the other hand should not do 8 anything to compromise our work in terms of IR, and I think 9 that was the context of our conversation in terms of 10 coordination that I don't want to do anything general 11 that's stupid, that tomorrow you know you will blame 12 management, and also whatever you do just make sure that it 13 doesn't upset our IR relations. That was the context of my 14 conversation with General Mbombo.</p> <p>15 MR CHASKALSON SC: Yes, but the General I 16 want to put to you didn't want you to talk to the strikers, 17 didn't want you to give leeway to the strikers. Would you 18 accept that?</p> <p>19 MR MOKOENA: I'm not sure I picked that 20 up, Chair.</p> <p>21 MR CHASKALSON SC: Well, let's go to page 22 8. You may remember this passage because she put to you 23 this rather strange proposition which apparently was also 24 entertained by the Minister of Mining, that management were 25 actually using this sort of situation to get rid of NUM.</p>	<p style="text-align: right;">Page 38198</p> <p>1 goes over the page. Is that correct, Mr Chaskalson?</p> <p>2 MR CHASKALSON SC: That is correct. Mr 3 Mokoena, have you got the passage in the transcript? It's 4 the original page 8 of the transcript. I understand it's 5 page 28 of your paginated bundle. Page 27 of your 6 paginated bundle, and you see SAPS Commissioner –</p> <p>7 MR MOKOENA: Okay, I've got it.</p> <p>8 MR CHASKALSON SC: I beg your pardon, 9 it's my fault. I'm working off the wrong document. I'll 10 just work on Ms Pillay's screen. Paginate 28, "Mm, you 11 see, I want us, you remember last night, Abey, I raised 12 this thing that when we were dealing with Impala we heard a 13 lot of allegations and rumours and some of these 14 allegations, they were pointing to the management, that the 15 management is colluding with AMCU and so on." Then over 16 the page, "At some point ourselves, we were asking 17 ourselves questions to say but these rumours that we're 18 getting, these issues that are being said, they might find 19 truth somehow because we're looking at how the management 20 was moving forward in terms of taking action, in terms of, 21 you know, because we believe is that what, whether there is 22 this unrest now" – no, no, now I've cut off my –</p> <p>23 CHAIRPERSON: It's in the middle of the 24 page, he talks about whether the Impala mine management 25 really is colluding with this mine, I take it, it should be</p>

Page 38199

1 with this union, and then he goes on about mining sector
 2 wants to replace NUM.
 3 MR CHASKALSON SC: Yes.
 4 CHAIRPERSON: So that's the passage –
 5 MR CHASKALSON SC: Thank you, Chair. "So
 6 at the end of the day when we're dealing with these issues
 7 we ended up ourselves not being comfortable in terms of the
 8 understanding whether the Impala Mine management really is
 9 colluding with this mine, but also remember from a
 10 political point of view there was even these feelings that,
 11 you know, the mining sector wants to replace NUM, you know,
 12 with a new face, and maybe that's why these things are
 13 erupting. So I want us, so I think, Abey, so I think
 14 yesterday, Abey you will recall, you'll recall when this
 15 discussion with the National Commissioner came she also
 16 from the discussion she raised with you, you know, some of
 17 these questions that she raised. You remember I raised
 18 them in the morning in our meeting and she also felt that,
 19 you know, it's difficult to separate management from giving
 20 these people a leeway and if management gave these people
 21 this type of a leeway how do we separate them now from an
 22 allegation that can come and say but they are supporting
 23 you? That is my interest, because yourselves here as
 24 management, you will clear yourselves from this," and you
 25 say, "Perception," in other words the perception of giving

Page 38200

1 leeway to people who are hostile to NUM, and over the page
 2 30, "Perception, you know, ja. You will clear yourselves
 3 by ensuring that you defuse, you give out information
 4 that's related to this thing and we're able to actually act
 5 on that information."
 6 So from the Provincial Commissioner's side, I
 7 want to put to you, she didn't want you to give leeway to
 8 the strikers. She wanted you to take a hard line against
 9 them. Would you accept that?
 10 MR MOKOENA: Yes.
 11 MR CHASKALSON SC: Now General Mpembe may
 12 have had a different attitude. His attitude is not
 13 altogether clear from the transcripts of the meetings that
 14 we have with him, but what I want to ask you, did General
 15 Mbombo at any stage after the 14th ever indicate to you that
 16 SAPS had now changed their mind and now they were happy for
 17 you to give some leeway to the strikers and they would
 18 actually like you to negotiate with the strikers, General
 19 Mbombo?
 20 MR MOKOENA: Not to my recollection,
 21 Chair.
 22 MR CHASKALSON SC: Did anyone else from
 23 SAPS on the 16th tell Lonmin that they now wanted Lonmin to
 24 negotiate with the strikers?
 25 MR MOKOENA: Not that I know of.

Page 38201

1 MR CHASKALSON SC: If we go back to WWWW4
 2 we'll see that on the 16th between 10:39 and 10:47 you had
 3 four calls with General Mbombo and they lasted a total of
 4 more than five minutes, between 10:39 and 10:47. At any
 5 stage during those calls did she try to persuade you that
 6 Lonmin should go to the koppie to speak to the miners?
 7 MR MOKOENA: The only call that I
 8 remember clearly was at some stage the, and Mr Mathunjwa
 9 refers to that, called me looking for Mr Mathunjwa and when
 10 I handed my phone to Mr Mathunjwa. It was in the morning,
 11 one of these calls would have been that call where she
 12 called me that she was waiting for Mr Mathunjwa to go to
 13 the koppie and I handed the phone to Mr Mathunjwa. That's
 14 the only call that I really remember because I had to give
 15 Mr Mathunjwa the phone and I think he has accounted for
 16 that in his statement.
 17 MR CHASKALSON SC: Well, that would have
 18 been one of the calls.
 19 MR MOKOENA: Yes.
 20 MR CHASKALSON SC: Of course there were
 21 three others.
 22 MR MOKOENA: Yes, so –
 23 MR CHASKALSON SC: Do you recall her ever
 24 trying, ever saying to you during those calls SAPS needs
 25 you, or you being Lonmin, to negotiate with the strikers,

Page 38202

1 you must go to the koppie and tell them you will negotiate?
 2 MR MOKOENA: No, Chair.
 3 MR CHASKALSON SC: Thank you, Mr Mokoena,
 4 those are all my questions.
 5 CHAIRPERSON: Thank you. We will take
 6 the first adjournment now, 15 minutes.
 7 [COMMISSION ADJOURNS COMMISSION RESUMES]
 8 [10:32] CHAIRPERSON: The Commission resumes.
 9 You're still under oath, Mr Mokoena. I understand that the
 10 last cross-examiner of Mr Mokoena is going to be Mr
 11 Ramphele who has been given five minutes.
 12 MR CHASKALSON SC: Sorry, Chair, the
 13 evidence leaders were asked by NUM to ask some questions on
 14 NUM's behalf. I ought to have –
 15 CHAIRPERSON: How do you need for – how
 16 long can we give him, Mr Wesley? How long can we give Mr
 17 Chaskalson?
 18 MR CHASKALSON SC: Five minutes, I'm
 19 told. Ms Pillay will put those questions.
 20 CHAIRPERSON: Five minutes for Ms Pillay
 21 and then five minutes for Mr Ramphele and then there'll be
 22 re-examination by Mr Bham and that will be the end of Mr
 23 Mokoena's evidence. Yes, Ms Pillay do you want to go first
 24 or should we let Mr Ramphele go first?
 25 MS PILLAY: Chair, I have no preference.

Page 38203

1 CHAIRPERSON: Let's ask Mr Ramphele. Mr
 2 Ramphele? Okay, Ms Pillay, Mr Ramphele would prefer for
 3 you to go ahead first.
 4 BARNARD MOKOENA: (s.u.o.)
 5 CROSS-EXAMINATION BY MS PILLAY: Thank
 6 you, Chair. Mr Mokoena, could I ask you to refer to XXX3?
 7 MR MOKOENA: Sorry, what is the page
 8 because mine are not referenced that way?
 9 MS PILLAY: I'm not sure what it is in
 10 your bundle but maybe if we can ask the technician to put
 11 up exhibit XXX3. It's a memorandum from – if we can go
 12 down to 448 of this bundle and you'll see this document is
 13 a memorandum from Mr Da Costa to Lonmin EXCO and it's dated
 14 the 27th of June 2012, do you see that?
 15 MR MOKOENA: Yes.
 16 MS PILLAY: Now you will know, Mr
 17 Mokoena, that this memorandum relates to the issue of the
 18 special allowance to the rock drill operator which Mr
 19 Mokoena, sorry, Mr Da Costa was dealing with at the time.
 20 MR MOKOENA: Exactly.
 21 MS PILLAY: Now can I ask you to go down
 22 to the next page of this document where we look
 23 specifically at the proposal that Mr Da Costa is making to
 24 EXCO and you'll see it's stated, the following is stated,
 25 "Proposal. Feedback will be given to the two

Page 38204

1 representatives who met with the vice-president as follows"
 2 and you'll see in those four bullet points beneath that
 3 heading, Mr Mokoena, that Mr Da Costa is summarising what
 4 you have described in your evidence as the default
 5 position.
 6 MR MOKOENA: Exactly.
 7 MS PILLAY: Namely that Lonmin has well-
 8 established processes for negotiation, that should the
 9 company agree to a separate wage increase for RDOs in this
 10 way it would set a precedent for other employees and that
 11 the revised wage amount that has been requested is too
 12 high. And lastly, that management is prepared to undertake
 13 the revision of the drilling bonus system within the next
 14 six months, do you see that?
 15 MR MOKOENA: Yes, I do.
 16 MS PILLAY: More or less, that amounts to
 17 what you've described as the default position which is what
 18 we see, which is the approach taken by Lonmin subsequently.
 19 MR MOKOENA: Exactly.
 20 MS PILLAY: Now importantly, Mr Mokoena,
 21 if I could ask you to look at the line just directly below
 22 these four bullet points and it's stated that this feedback
 23 will be given on the 2nd of July 2012, do you see that?
 24 MR MOKOENA: Yes.
 25 MS PILLAY: And then this is the part

Page 38205

1 that NUM has asked me to specifically put to you, the
 2 following appears, "The feedback outlined above" – in other
 3 words the default position that you have described – "is
 4 not likely to resolve the matter and more work will be
 5 required over the next few weeks." Do you see that?
 6 MR MOKOENA: Yes.
 7 MS PILLAY: "In this regard the following
 8 is proposed" and the first bullet point, "to engage both
 9 the NUM and AMCU at national level to inform them of this
 10 development and to solicit their opinion on the matter."
 11 Do you see that?
 12 MR MOKOENA: Yes.
 13 MS PILLAY: So in other words what we see
 14 in this memorandum is Mr Da Costa, the vice – saying to
 15 EXCO that the default position is unlikely to resolve the
 16 matter and that what he is suggesting is, firstly, that NUM
 17 and AMCU be engaged at national level in order to discuss
 18 the way forward. Do you see that?
 19 MR MOKOENA: Yes, I see that.
 20 MS PILLAY: Now the question, Mr Mokoena,
 21 now we know from the evidence that has been placed before
 22 this Commission that Lonmin did in fact not engage either
 23 NUM or AMCU at national level to discuss the RDO demand,
 24 isn't that correct?
 25 MR MOKOENA: That is correct.

Page 38206

1 MS PILLAY: The question is why wasn't
 2 that done, specifically in circumstances where Mr Da Costa
 3 pointed out to EXCO that the default position was unlikely
 4 to resolve the situation?
 5 MR MOKOENA: Yes. My understanding is
 6 there were some engagements with both AMCU and NUM at the
 7 operations level. Yes, I'm not aware of any engagement at
 8 the national level, so there was engagement feedback given
 9 to both AMCU and NUM at the operations level about the RDO
 10 allowance.
 11 MS PILLAY: And you're unable to explain
 12 why Mr Da Costa's suggestion that the matter be taken up at
 13 national level with both the NUM and AMCU, you're unable to
 14 say why that wasn't followed through.
 15 MR MOKOENA: Ja, I don't have any reason
 16 why that has happened and it's probably that our first
 17 major contact with unions on substantive issues is with the
 18 local leadership, the chairpersons of the branches and all
 19 that and I'm aware that there were those engagements at the
 20 operations.
 21 MS PILLAY: Now the second part of that
 22 question, Mr Mokoena, is why this wasn't taken up with NUM
 23 and AMCU at national level, given the fact that the RDO
 24 allowance would amount to an effective increase in the
 25 salaries of the RDOs.

<p style="text-align: right;">Page 38207</p> <p>1 MR MOKOENA: Our understanding of that 2 allowance, that allowance was the management prerogative, 3 like other many bonuses that we grant to employees, has 4 always been the discretion of management to do those. So 5 that could have been the reason why there was no need to 6 escalate the issue of allowance to national office of 7 National Union of Mineworkers and AMCU. 8 MS PILLAY: Thank you, Chair, those are 9 the questions. 10 CHAIRPERSON: The memorandum that Mr Da 11 Costa prepared, which is exhibit XXX3, did that come before 12 the EXCO meeting in July? 13 MR MOKOENA: Chair, I do not recall the 14 exact date of the EXCO meeting in July, Chair. 15 CHAIRPERSON: Well, you see it says the 16 feedback would be given on 2 July, so we know that this 17 memorandum was prepared before that. There was a July EXCO 18 meeting, was there not? 19 MR MOKOENA: The June, the EXCO is 20 normally towards the end of the month, so EXCO would have 21 deliberated at the end of June and this memorandum would 22 have been a follow-up coming out of EXCO to be – so it would 23 have been issued in between the two EXCO meetings. 24 CHAIRPERSON: So there was an EXCO 25 meeting towards the end of July?</p>	<p style="text-align: right;">Page 38209</p> <p>1 MR MOKOENA: Yes. 2 CHAIRPERSON: Am I right? 3 MR MOKOENA: Yes, Chair. 4 CHAIRPERSON: That's correct. And it may 5 be minuted, it may not be. I'll ask your legal 6 representatives to see, to take instructions. If there's 7 any document from which the reasons appear, could that 8 please be made available to the Commission, alright? You 9 nod your head, Mr Bham. You're nodding again, it doesn't 10 come on the record. 11 MR BHAM SC: Yes. Thank you, Chair. 12 CHAIRPERSON: Do we know what the date of 13 this memorandum is? It's an exhibit, I know, but what's it 14 dated at the – 15 MS PILLAY: Chair, it's the 27th of June 16 2012. 17 CHAIRPERSON: 27th of June. And do we 18 know when the EXCO meeting was held in June? So it was – I 19 think Mr Mokoena is clear it was after the EXCO meeting, is 20 that right? 21 MS PILLAY: The memo is dated the 26th of 22 June and the EXCO started on the 27th of June. 23 CHAIRPERSON: So it would either have 24 been considered then in the meeting at the end of June or 25 end of July but anyway, whenever it was considered, if a</p>
<p style="text-align: right;">Page 38208</p> <p>1 MR MOKOENA: Yes. 2 CHAIRPERSON: And this memo, did that 3 come before it, before the meeting? 4 MR MOKOENA: Yes. 5 CHAIRPERSON: And do we know from the 6 minutes of the meeting whether, why the proposal that he 7 made in the first bullet point was not accepted? 8 MR MOKOENA: I do not, Chair, at the 9 moment have access to the minutes of that meeting in July, 10 whether this was deliberated. It's also customary that a 11 lot of EXCO discussions are circulated and are not 12 necessarily discussed in one sitting and it could have 13 happened on a Monday because we have monthly EXCO and we 14 also have weekly EXCO calls every Monday. So it's possible 15 that probably it was discussed in one of the Monday 16 meetings, not necessary the monthly EXCO meeting. 17 CHAIRPERSON: Anyway, would I be correct 18 in saying that we can say in our report that this proposal 19 of Mr Da Costa's in the first bullet point was not accepted 20 by EXCO, certainly not prior to the 16th of August or even 21 the 10th of August 2012? 22 MR MOKOENA: Yes, Chair. 23 CHAIRPERSON: And the reason for not 24 accepting the proposal may be – you can't give it to us 25 although you took part in the discussion.</p>	<p style="text-align: right;">Page 38210</p> <p>1 document exists which indicates why this proposal wasn't 2 accepted then that's what we want but anyway you obviously 3 can't help us but I've asked your legal representatives who 4 have undertaken to give it to us if there is such a 5 document. Thank you. Then Mr Ramphele – are those your 6 questions, Ms Pillay? 7 MS PILLAY: Those are my questions. 8 CHAIRPERSON: Mr Ramphele, were you going 9 to deal with that matter or another one? 10 MR RAMPHELE: Well, Chair, how many 11 minutes did you give me? 12 CHAIRPERSON: Five. 13 MR RAMPHELE: Are you saying Mr Langa is 14 just worth five minutes? 15 CHAIRPERSON: The clock is already 16 running on your time, don't waste it. 17 MR RAMPHELE: Okay, let me use my five. 18 CROSS-EXAMINATION BY MR RAMPHELE: Mr 19 Mokoena, I represent Mr Langa, Mabebe and Mabelane and I 20 just want to remind you of what you said in relation to the 21 death of Mr Twala at the koppie. Do you remember that you 22 said as soon as you heard that Mr Twala had been killed 23 from Constance you took a decision that it would be 24 irresponsible to send anyone to the koppie? 25 MR MOKOENA: Yes, I recall that.</p>

Page 38211

1 MR RAMPHELE: And you agree with me that
2 as vice-president, human capital, that was the right
3 decision to take in view of the known dangers at the
4 koppie?
5 MR MOKOENA: Yes, I agree.
6 MR RAMPHELE: You remember that, and I'm
7 going to refer you to exhibit VVVV, the bundle of Mr
8 Jamieson, can we get that on the screen please? VVVV page
9 3. Ja, let's go to, you see paragraph 4 of this media
10 release? It reads, "The illegal march was accompanied by
11 incidents of intimidation and violent action against
12 employees who wanted to report for duty. Four employees
13 trying to report for work were injured on Friday 10th, two
14 of whom have been hospitalised after receiving gunshot
15 wounds, allegedly by rival supporters. A further two
16 employees were hospitalised on Saturday 11th, also as a
17 result of gunshots wounds." So it was known, will you
18 agree with me that it was known to Lonmin that there was
19 danger for those employees who were to report for work?
20 MR MOKOENA: That is correct.
21 MR RAMPHELE: It is also correct that in
22 your recruitment you recruit a large number of people
23 coming from very distant places and they have to find
24 accommodation in neighbouring villages, is that correct?
25 MR MOKOENA: That is correct.

Page 38212

1 MR RAMPHELE: And that if these people
2 were going to be going to work and if you'd just look at
3 this paragraph, if they were going to be going to work they
4 would face the same violent action by those who did not
5 want them to go to work.
6 MR MOKOENA: That is true.
7 MR RAMPHELE: And that it was a known
8 danger that Mr Langa, on his way to work, would in all
9 probability if he were to meet the strikers, would be faced
10 with the same fate of these people that were injured on the
11 10th.
12 MR MOKOENA: That is correct.
13 MR RAMPHELE: And therefore you would
14 agree with me that not informing Mr Langa that he should
15 not come to work because of the circumstances, was
16 something that one can call irresponsible.
17 MR MOKOENA: That could be the case,
18 Chair. If I may say, one of the options that actually we
19 considered was to close the mine and we deliberated
20 extensively and looked at what that could mean for
21 employees who then we would have to pay because they'd had
22 absolutely nothing to do with the strike. So it was a
23 matter that was discussed extensively, let's close the
24 mine. The question then was, if we close the mine the
25 workers who are not on strike have to be paid because

Page 38213

1 they're not on strike and we realised then it was going to
2 be very difficult to determine who was actually on strike
3 and who was not on strike if we were to pay people after
4 closing the mine. Further, we also looked at the issue
5 that if we close the mine, continue paying people who are
6 not striking, the likelihood would have been, why would
7 anybody therefore go back to work if they are paid because
8 there is an unprotected strike? So it was a complex issue.
9 Chair, I want to admit, however, it was a consideration on
10 our part actually to close the mine as a tool to avoid
11 further damage –
12 MR RAMPHELE: I appreciate that and I
13 appreciate your, the complexity you were in, so that we're
14 dealing with a person that has to face the strikers going
15 to work from a village alone, as in the case of Mr Langa,
16 and whilst you were surmising whether you should close or
17 not this person has to be put in a situation where he's
18 going to be facing violent action, probably gunshots,
19 probably death as it happened.
20 MR MOKOENA: Yes, I said I agree with you
21 and that's why I was trying to put context to my answers.
22 MR RAMPHELE: Yes. Thank you. I think
23 my five minutes are up, Chair, so thanks.
24 CHAIRPERSON: Thank you. Re-examination,
25 Mr Bham?

Page 38214

1 RE-EXAMINATION BY MR BHAM SC: Thank you.
2 Mr Mokoena, the bundle in front of you, may I ask you to
3 turn to page 49 please? In the middle of the page, you
4 will be familiar with this, some time was spent in your
5 cross-examination on your statement. "It is amazing how
6 Joseph could lie before the South African public with 10
7 people dead." He is insinuating he knew, he is
8 insinuating. Now you know this was in the discussion on
9 radio before Mr Xolani Gwala.
10 MR MOKOENA: Yes.
11 MR BHAM SC: I want to draw your
12 attention to two passages in the record and ask you whether
13 you wish to comment on your statement in light of those two
14 passages. The first is at page 18. Now you know you were
15 taken to exhibit OO2 which was the AMCU press statement.
16 Page 18 would appear to be the newspaper report, reporting
17 on that press statement.
18 MR MOKOENA: Yes, Chair.
19 MR BHAM SC: If you go to that press
20 statement, the fifth paragraph of that press statement
21 which commences with the following, "AMCU stated that while
22 3 000 RDOs were marching to hand over a memorandum of
23 demands to Lonmin management, some of its members alleged
24 that people dressed in NUM T-shirts and emerging from NUM
25 offices had opened fire, killing one worker and killing

Page 38215

1 others on Friday." It then goes on to say, "This then
2 sparked the violence over the weekend that led to the death
3 of eight more people, including two policemen and injuring
4 many more." Now that statement, as I understand it, Mr
5 Mathunjwa in his evidence had already indicated was
6 incorrect and retracted that statement. So that was one of
7 the press reports. May I then ask you to go back to page
8 49 and that came prior to the statement you made at page
9 49. At line, starting at – you'll see at the top of the
10 page there's Mr Mathunjwa, then Xolani, then Mr Mathunjwa
11 again, do you see that?
12 MR MOKOENA: Yes.
13 MR BHAM SC: And at that point he says,
14 this is before you made your statement, he says, "We did
15 ask in terms of what is really happening, they are saying
16 as part of this they went to management and say yes, they
17 did hear that there will be some workers who are bringing
18 sort of a memorandum to, I mean to them. Please invite us
19 into these processes but the management, what they did,
20 they neglected all the structures of the union and engaged
21 those employees outside the structures of the union." Now
22 in light of what I've just referred to you, both in respect
23 of the press articles and this stating preceding what you
24 had to say.
25 [10:52] Do you wish to comment on what you've stated in

Page 38216

1 the middle of that page.
2 MR MOKOENA: Particularly that line
3 number 10, Chair, I have presented before this Commission
4 that it was false to conclude that Lonmin management had
5 engaged workers outside structures, and I've explained the
6 practice at Lonmin. So, and particularly that I was
7 dealing with matured union leadership that understood the
8 nature of wage negotiations compared to workers knocking at
9 a door and asking for an increase. The fact that Mike Da
10 Costa spoke to the workers never occurred to me that he was
11 opening wage negotiations. So I've always insisted on this
12 misunderstanding and for Mr Mathunjwa to make statements
13 when he knew actually the rules of wage negotiations, the
14 processes, the triggers, the whole thing, and suggested
15 that we had engaged workers outside structures, for me has
16 always been a problem that I did never, never understood
17 why that was the case.
18 MR BHAM SC: Thank you. May I ask you to
19 turn to page 51, please? It's in the same radio
20 discussion, on line 9 Xolani says, the passages preceding
21 this have already been read to you and then line 9 Xolani
22 says, "So in other words they did engage you, they did come
23 to you, they raised their concerns and you offered them
24 R700?" You then say, "You start off by saying no, no, but
25 you don't stop there. You say no, no, those market

Page 38217

1 allowances are a prerogative of management, they are done
2 throughout the year to different categories. It was not a
3 demand. They never demanded to get a market allowance."
4 Having regard to the full response you gave, would you care
5 to elaborate upon that against the background of the
6 question which Xolani had put to you?
7 MR MOKOENA: Yes. The essence of this
8 statement, I was trying to explain to Mr Xolani that
9 throughout the year –
10 CHAIRPERSON: He's actually Mr Gwala, but
11 Xolani is his first name, I think. I'm not on first-name
12 terms with him. Let's call him Mr Gwala.
13 MR MOKOENA: Mr Gwala, thank you, Chair.
14 I was trying to explain to him that we, it is not an
15 irregular practice that during the course of the year
16 management would adjust different types of allowances for
17 different types of employees for market reasons. It could
18 be rock drill operators, it could be winches, it could be
19 all sorts of other job categories, and that has never been
20 a matter of wage negotiations, it has always been a
21 management prerogative, and I was trying to clarify that
22 practice that if management did that, whether an allowance
23 or a bonus scheme, that was never an essence of collective
24 bargaining with unions. It's a management decision to say
25 you've fallen behind for this reason, we're then going to

Page 38218

1 give you X-amount of money. That was the essence of my
2 statement that it was not a matter of wage negotiations.
3 MR BHAM SC: Thank you. Mr Chair, I have
4 no further questions. Might I just say though that when I
5 referred to Xolani I meant no disrespect to Mr Gwala. I
6 was reading verbatim the transcript.
7 CHAIRPERSON: No, no, I accepted that is
8 the case. I'm sure Mr Gwala won't mind. Mr Mokoena,
9 you're excused. Thank you for coming and giving your
10 evidence.
11 MR MOKOENA: Thank you, Chair.
12 [NO FURTHER QUESTIONS – WITNESS EXCUSED]
13 CHAIRPERSON: I understand you wish to
14 make an announcement about another matter, Mr Bham, but
15 before you do that perhaps we can introduce another note at
16 this point. Mr Mpofo, you did indicate to me you also
17 wanted to make an announcement and extend some kind of
18 invitation. Is that correct?
19 MR MPOFU SC: Yes, thank you,
20 Chairperson. Keeping up with my promise of last week when
21 you, all of you congratulated me, I had promised some cake,
22 which has now been upgraded to a finger lunch in the
23 breakaway room at lunchtime. So everyone is invited,
24 Chairperson.
25 CHAIRPERSON: Thank you. Thank you very

Page 38219

1 much indeed. I presume there may be some remarks made
 2 there as well, but we have to keep an eye on the time for
 3 the lunch today I'm afraid.

4 MR MPOFU SC: Yes, thank you.

5 CHAIRPERSON: But still –

6 MR MPOFU SC: I think Mr Wesley will be
 7 there too.

8 CHAIRPERSON: Yes, he's in charge of that
 9 aspect of it. Thank you very much. Right, thank you, Mr
 10 Mpofu. Mr Bham.

11 MR BHAM SC: Thank you, Mr Chair, fellow
 12 Commissioners. I handed to you at the break a document
 13 which is a Lonmin document relating to what has been
 14 provided, or the support given by Lonmin on behalf of the
 15 families, or to the families of the deceased. Perhaps you
 16 wish to give that an exhibit number. Mr Chair, what I
 17 intend to do is spend no more than a few minutes just
 18 highlighting the key aspects of that.

19 CHAIRPERSON: Yes, you gave me a document
 20 headed "Support for the families of the deceased: Lonmin, a
 21 summary of statutory and non-statutory payments."

22 MR BHAM SC: Yes, that's –

23 CHAIRPERSON: And I think we can mark it
 24 XXXX1. I don't know if there are any other quadruple X
 25 exhibits, but we'll mark it that.

Page 38220

1 MR BHAM SC: May I just preface what I'm
 2 going to go through by saying that this document was
 3 prepared as a result of the testimony given by the families
 4 of the deceased, or the presentations made by them. It is
 5 being therefore handed up to the Commission in the form of
 6 a presentation and I'm just going to highlight certain key
 7 aspects of it.

8 The first point that Lonmin makes in the
 9 presentation is that in the aftermath of the Marikana
 10 disaster the company Lonmin recognised that although there
 11 were policies, it talks of insurance policies and the like,
 12 in place that paid out to beneficiaries in the event of
 13 death, in this particular instance the company recognised
 14 it as an extraordinary event and for that reason had taken
 15 a resolution to provide direct assistance to the families.

16 It then gave consideration to the nature of that
 17 direct assistance and it states the following. "Given the
 18 extraordinary nature of the events at Marikana, Lonmin
 19 resolved that the best and most enduring contribution it
 20 could make would be to provide its deceased employees'
 21 dependent children with an education. Consequently it
 22 established a memorial trust fund to fund their school and
 23 tertiary education. In addition Lonmin also facilitated
 24 various payments to the families from statutory sources,"
 25 and a summary of those payments is set out in the document.

Page 38221

1 There are three sources of non-statutory, namely
 2 voluntary payments which have been made to families. The
 3 first is from the memorial trust fund and there are full
 4 details of every person to whom such payments have been
 5 made in an annexure to the document. The payments made to
 6 date amount to R2 691 506.

7 In addition to that there was an ad hoc education
 8 payment, and I'll explain that shortly, in an amount of
 9 just over R143 000, and then there were payments made
 10 through TEBA for welfare support which Lonmin describes as
 11 additional contributions to deceased's wives and children
 12 between November 2012 and July 2014 and that was in an
 13 amount of R2 477 317. Those then were the non-statutory
 14 payments.

15 There were also statutory payments that have been
 16 made, facilitated through Lonmin, by the Masakhane
 17 Provident Fund to the families, and again details of the
 18 beneficiaries to whom those payments have been made are
 19 fully set out in an annexure to this document. Those
 20 payments total R9 929 547.

21 In relation to the memorial trust fund
 22 principally directed towards meeting educational needs,
 23 that fund provides costs for education assistance, full
 24 education assistance, extramural activities, boarding fees,
 25 local school fees where children are not boarding, tertiary

Page 38222

1 education, and the cost of accommodation, prescribed books,
 2 stationary, transport and food at a tertiary institution.

3 During July 2013 Mr Ben Magara and members of his
 4 management team visited families of the deceased employees
 5 in the Eastern Cape, Lesotho and elsewhere. At that point
 6 in time a decision was made to ensure that these children
 7 had access to the best possible education to meet their
 8 needs and facilities and not necessarily just the education
 9 facilities available in their home area. Consequently
 10 you'll see in the schedule that in certain instances
 11 there's private school tuition fees being paid as well.

12 In July 2014 Lonmin representatives embarked on a
 13 school visit audit to check that the beneficiaries of the
 14 trust fund were at the education institutions as stated in
 15 the trust fund. At the same time Lonmin undertook a needs
 16 analysis at schools in Kokstad, KwaZulu-Natal, the Free
 17 State, Eastern Cape, Swaziland and Lesotho in order to
 18 establish if the children had what they needed. During
 19 those visits it was established that the children needed
 20 additional toiletries, books and stationary, whilst some
 21 also needed uniforms. Lonmin immediately provided these
 22 items, as well as laptops, scanners and printers for those
 23 attending at tertiary institutions. The costs of these ad
 24 hoc education related expenses was just over R143 000.

25 In addition to those benefits paid for purposes

Page 38223

1 of education there were certain non-education related
 2 payments. This included payments made for family support
 3 between November 2012 and July 2014 where a total of
 4 R2 477 317 was paid towards support for the deceased's
 5 wives and children. This included the cost of families'
 6 transport, accommodation, burial preparations, meals and
 7 funeral services. Those payments were made via TEBA and
 8 details of payments made to TEBA for those purposes are set
 9 out in a schedule to the document.

10 What you'll then find are certain schedules, a
 11 schedule which sets out the Masakhane Provident Fund
 12 payment with details of the amounts paid, when those
 13 payments were made and the beneficiary to whom the payment
 14 was made, and that's the amount of just over R9 million.
 15 Details of the payments made via TEBA for funeral cover and
 16 payroll is set out in a second schedule to the document.

17 Finally there's full details of trust student
 18 payments made, in other words every student beneficiary on
 19 behalf of whom educational payments have been made is set
 20 out in a schedule in detail, which identifies the student,
 21 the family they come from, as well as the amount paid on
 22 behalf of the student and the institution to whom the
 23 amount is paid, and the last schedule then deals with non-
 24 statutory payments, welfare support for families, and these
 25 were payments made to TEBA for onward facilitation to the

Page 38224

1 families. Thank you, Mr Chairman.

2 CHAIRPERSON: Thank you, Mr Bham. I
 3 understand that the payments to which you've referred were
 4 all made to the families of deceased persons who were
 5 actually in the employ of Lonmin. That's correct, isn't
 6 it?

7 MR BHAM SC: That is absolutely correct.

8 CHAIRPERSON: I also understand from Mr
 9 Ntsebeza that he wishes to submit an interrogatory to
 10 Lonmin on behalf of the families of three persons who,
 11 deceased persons who were not employed by Lonmin, to get
 12 Lonmin's response. So you'll get the interrogatory shortly
 13 and once we have the reply I take it Mr Ntsebeza will deal
 14 with it in his argument. But your document you've given
 15 us, the exhibit, deals fully I take it with the families of
 16 those deceased persons who were in the employ of Lonmin on
 17 the 16th of August.

18 MR BHAM SC: It deals with those
 19 families, the nature of the payments made, the purpose for
 20 which it's been made, the beneficiary towards whom it's
 21 been made and the details of the institutions to whom it's
 22 been made.

23 CHAIRPERSON: Yes, thank you, Mr Bham.
 24 [Microphone off, inaudible], did you want to say something
 25 at this stage or later? Later. So I think we can now move

Page 38225

1 on to Mr Seedat. You recall Mr Seedat. Mr Wesley is going
 2 to give us the details of the parties who are going to
 3 cross-examine Mr Seedat and the times that have been
 4 allocated.

5 MR WESLEY: Yes, thank you, Chair. I do
 6 understand that in chief though there are some matters that
 7 must still be dealt with for approximately 10 minutes.
 8 Chair, then for cross-examination the sequence and the
 9 allocated times will be as follows; evidence leaders, 180
 10 minutes, followed by AMCU, 30 minutes, followed by the
 11 Legal Resources Centre, 25 minutes, and finally the Human
 12 Rights Commission, 25 minutes.

13 CHAIRPERSON: Yes, thank you. And you'll
 14 keep the time, keep a close watch on that. Mr Seedat, you
 15 remember when you were here last time you swore to give the
 16 evidence truthfully and fully and so forth. I remind you,
 17 you're still under your oath.

18 MAHOMED ISMAIL SEEDAT: [s.u.o.]

19 CHAIRPERSON: Yes, thank you. You may be
 20 seated. Mr Burger, I understand there are a couple of
 21 matters you want to deal with briefly by way of concluding
 22 the examination-in-chief of the witness.

23 EXAMINATION BY MR BURGER SC (CONTD.):
 24 Indeed, Chair, three small issues. I start the first one
 25 by referring to volume 4 of exhibit SSSS2, those are the

Page 38226

1 five volume exhibit. Mr Seedat, as part of the financial
 2 statements of Lonmin during the relevant period 2008 to
 3 2012 there was also inserted what was called a
 4 sustainability report.

5 MR SEEDAT: That's right.

6 MR BURGER SC: And I don't have time to
 7 refer to all those sustainability reports. They are all in
 8 volume 4, but can I just highlight two of them; the 2010
 9 report appears at page 1404 and I refer to that because
 10 this is in the year that the new mining charter is
 11 published and this is your report to shareholders on inter
 12 alia the subject of housing, and at page 1404 in the window
 13 you find a report-back on housing and I will ask you to
 14 read just the paragraph below the window starting with
 15 "Regrettably" into the record.

16 MR SEEDAT: Sure, excuse my voice. I've
 17 got a bit of a sore throat. "Regrettably there have been
 18 several challenges that have required us to adjust the
 19 5 500 houses target. These challenges include sufficient
 20 and appropriate land not being available in the vicinity of
 21 the workplace, insufficient water and electricity supply,
 22 and financial constraints resulting in delay to meeting our
 23 committed targets."

24 MR BURGER SC: And then the second year I
 25 want to highlight is 2012 and I want you to explain to the

Page 38227

1 Commission why it was experienced that housing, separate-
2 standing housing was not well received by the workers, but
3 can we look at the report which you'll find at page 1424.

4 This is part of the sustainability report for the 2012
5 annual statements of Lonmin and there is a long section, we
6 simply don't have the time to read it, but you will know
7 this page and perhaps particularly with reference to what
8 is in the first column will you just remain us why the
9 housing did not appear to be a success with the employees?

10 MR SEEDAT: It lists, well various bullet
11 points there. It was the rising cost of housing and
12 availability of finance amidst increased economic
13 constraints, lack of sufficient available land on Lonmin's
14 lease area, shortage of water and electricity which is
15 worsened by the spread of unplanned informal settlements,
16 and consequent increase in pressures on services as some
17 employees choose to sublet their purchased or rented homes
18 to tenants. And this is the important bullet point, a lack
19 of interest in homeownership despite government requirement
20 that ownership among employees be increased. Many
21 employees still opt to stay in hostels or rental as they
22 are considered to be more affordable and employees from
23 distant labour sending areas often do not want to invest in
24 property at Marikana when they already have a home and
25 community based elsewhere. Then of course there's issues

Page 38229

1 occupants. The remaining 800 odd homes.
2 [11:11] To the best of my knowledge the amounts owed on
3 those homes are relatively small, one to R5 000 I think is
4 the number that remains in my mind for the majority of them
5 and we even explored possibilities of using money from the
6 pension fund, getting a loan against the pension fund to
7 enable the occupants to take ownership of those houses
8 because those houses in early 2000 were worth R62 000.
9 Today they're probably worth R200 000 to R300 000, but
10 there has been a reluctance for that to happen and we can
11 ascribe that to several reasons. One is that ratio of 240-
12 odd taking occupation versus the remainder not taking
13 occupation seems to correspond with a survey we did which
14 said that the vast majority of the employees do not want to
15 own homes, around 85% if I remember correctly, they want to
16 rent accommodation – probably because they have a home back
17 from where they come in the communities they come from and
18 they don't want to be burdened with a second home. That
19 was the one reason.

20 The second reason is that once the employee took
21 ownership of that house, he would be responsible for
22 maintenance, he would be responsible for the provision of
23 electricity, for payment of that and water and other rates
24 that normally go with ownership of a home and there seemed
25 to have been a reluctance to take responsibility for those

Page 38228

1 around schooling and other community facilities as well as
2 the community has grown.

3 MR BURGER SC: And what was Lonmin's
4 experience with that housing development that had been done
5 in the late 90s?

6 MR SEEDAT: Yes, as has been mentioned
7 previously the Marikana Housing Development Company was set
8 up in cooperation as a section 21 company with the local
9 authorities. If memory serves me correctly around 1 200
10 homes were built and the basis of how those houses were
11 sold is that a person takes occupation, the price is fixed
12 on the day of occupation, which is around R62 000, if
13 memory serves me correctly, and the rental, which is around
14 R500 a month, would all accumulate towards paying for that
15 house. So there was no interest charged, there was no
16 rebasing of the price for the house and the additional
17 requirements were that the occupant would pay for the use
18 of electricity and water services. That scheme was
19 introduced I think from late '99 onwards, so you know, it's
20 what, some 14 years since the scheme was introduced and one
21 would think that after 10 years, that's paying R6 000 a
22 year rental, the house would have been paid for and the
23 occupants would willingly take ownership of those
24 properties. Sadly in these 14 years I think only about
25 240-odd homes have actually been transferred to the

Page 38230

1 charges. And that seems to correspond to the survey we did
2 in late 2007 where one of the things the people who were
3 surveyed said is that if we buy a house, all we expect to
4 do is pay for the cost, the purchase price of the house,
5 instalments to pay for it. We don't want to pay for
6 electricity, we don't want to pay for water, we don't want
7 to pay for rates. So the actual practice seems to
8 correspond to what we've actually seen with these MHDC
9 homes. Incidentally, the money that has accumulated in
10 this MHDC was about R25 million a few years ago. The
11 intention was and the MHDC is a company that has its own
12 board of directors, including union membership and Lonmin
13 management, and the intention was to take that money and
14 roll it over to build more homes in a progressive way and I
15 think that intention still exists but I'm not sure how
16 successful they've been at actually implementing it.

17 MR BURGER SC: Thank you. Another
18 subject, in a report Dr Forrest raises a query about what I
19 may call inter-group payments, payments by Lonmin to an
20 entity called Lonmin Management Services and a second
21 entity called Western Metals Sales Limited. Now subsequent
22 to that there's been a set of facts agreed with the
23 evidence leaders, between the evidence leaders and Lonmin
24 and that will be placed before the Commission but perhaps
25 just a thumbnail sketch explaining to the Commission the

<p style="text-align: right;">Page 38231</p> <p>1 role of Lonmin Management Services and the background to 2 the fee they receive from Western Platinum for that service 3 being rendered? 4 MR SEEDAT: Clearly these arrangements 5 have been there for a long term, long before I got there, 6 but to the best of the research I've done, what I've been 7 able to establish is that historically Lonmin, and that's 8 WPL, Western Platinum and then Eastern Platinum Limited 9 primarily, its assets were in two countries. One was in 10 the old South Africa and the other one was the old 11 Bophuthatswana, two different legal jurisdictions as well 12 and it's not uncommon in the industry and the previous 13 companies I was involved with had similar arrangements, is 14 that to try to optimally use your management, you create a 15 single management team to manage these businesses that 16 exist across many geographical boundaries and country 17 boundaries. So Lonmin I think did the same thing here, 18 they established Lonmin Management Services which provided 19 services both to WPL and EPL and the kind of services it 20 provided was everything to do with the shareholding and 21 listing which was company secretarial, legal, treasury, 22 finance, exploration work and then later on when Western 23 Metal Sales was rolled out in, was closed out in 2007 if 24 memory serves me correctly, even the marketing of its metal 25 was done through this LMS. And LMS, the people it employed</p>	<p style="text-align: right;">Page 38233</p> <p>1 Well, there's logistical risks. You could lose product in 2 transfer, the price could significantly drop from the day 3 you pass the metal on to the marketing company to the day 4 it sells it. The counter-party risk in terms of the 5 customers and payment are risks that are taken on by this 6 marketing company and the costs of bearing these risks 7 translate into a charge that the marketing company charges 8 for the metal itself and I've seen these charges range 9 from, in Lonmin's case while it had this arrangement, 10 around 2% to cases where it could be as high as 7, 8%, 11 depending on the risk. All of these arrangements are 12 subject to scrutiny by our auditors, subject to scrutiny by 13 SARS both – I'm talking about the marketing arrangement as 14 well as the LMS entity and throughout the period there have 15 not been any concerns raised by SARS with these 16 arrangements. 17 MR BURGER SC: To your knowledge did LMS 18 ever suffer a loss in any financial year? 19 MR SEEDAT: Oh yes. Because the fee that 20 LMS gets paid is subject to the turnover of WPL, which is 21 effectively related to the price of the platinum and 22 platinum group metals that are produced, in a year like 23 2009, so I'm talking October 2008 to September 2009 where 24 the price literally dropped from over \$2 000 a fine ounce 25 for platinum to around \$800 a fine ounce, it meant in that</p>
<p style="text-align: right;">Page 38232</p> <p>1 for these services, the sales, as I say sales, marketing, 2 legal, treasury, company secretarial, finance, all of 3 these, the people and the resources that were used by LMS 4 had to be paid for by LMS. 5 MR BURGER SC: Who employed the CEO, for 6 example? 7 MR SEEDAT: The CEO would have been part 8 of LMS. I'm subject to correction, he may be part of 9 Lonmin PLC but outside WPL and EPL. The buildings that it 10 rented to house these people would also have to be paid for 11 by LMS and in order to enable it to do that, it charged a 12 fee back to WPL based on turnover. That, as I said, is 13 what I'm familiar with, that has been done in other mining 14 companies that work across many different geographies and 15 boundaries. Western Metal Sales, again it's not an unusual 16 arrangement to have a marketing company which is generally 17 located in a jurisdiction where the tax regime is much more 18 favourable. As I said, many of the mining companies that 19 I've worked with and I'm familiar with, have this 20 arrangement, they still have it till today. And what 21 happens is that the moment the metal, in this case the 22 platinum and platinum group metals are produced, as soon as 23 they leave the boundary of the refinery in our case, it 24 becomes owned by this marketing company and all risks then 25 pass on to this marketing company and what kind of risks?</p>	<p style="text-align: right;">Page 38234</p> <p>1 year Lonmin, LMS recovered significantly less because of 2 the depressed platinum price in that year, recovered 3 significantly less and therefore could not cover the costs 4 of the services and the resources that it was obliged to 5 provide in terms of those agreements. 6 MR BURGER SC: Thank you. Then finally, 7 at the last occasion there was a debate about housing in 8 the context of containers and you had a view on that. 9 Chair, I was handed this morning a little bundle which this 10 witness prepared. I only have four copies and I should 11 have done it in re-examination but that would take away the 12 ability of my learned colleagues to ask questions on it. 13 May I hand this up and ask the witness to speak for a 14 minute to it and undertake to hand up copies after lunch so 15 that everybody knows what we're talking about. I have 16 copies for you and your two Commissioners and for the 17 witness but those are the only four copies I have at 18 present. 19 MR SEEDAT: Yes, Chair – 20 CHAIRPERSON: Ms Pillay will tell me what 21 exhibit – 22 MR BURGER SC: That will be SSSS4 or 5, I 23 think. 24 MS PILLAY: Chair, if I can just indicate 25 we have already pre-marked the exhibits to be introduced by</p>

Page 38235

1 the evidence leaders. There are two volumes of them.

2 CHAIRPERSON: Alright.

3 MS PILLAY: They will be SSSS4 and SSSS5.

4 CHAIRPERSON: Yes.

5 MS PILLAY: So this document will be

6 SSSS6.

7 CHAIRPERSON: SSSS6, thank you. How do

8 we, we just call it –

9 MR BURGER SC: “Housing:

10 Containerisation” or something like that, Chair. I’m in

11 your hands.

12 CHAIRPERSON: “Housing: Containerisation”

13 and that will be SSSS6, thank you.

14 MR BURGER SC: Mr Seedat, you have in

15 front of you a little document which you prepared. I

16 believe we have two minutes, will you just explain to us

17 what you tried –

18 MR SEEDAT: Sure.

19 MR BURGER SC: - to explain in that?

20 MR SEEDAT: Sure. Chairman, when we did

21 the survey in 2007 employees were quite adamant about what

22 they wanted. They wanted a single unit on a piece of land.

23 It had to be made of bricks and mortar and they were not

24 prepared to pay for other services as I mentioned earlier,

25 once they've paid for, started paying for the house. So

Page 38236

1 this was a major challenge and I want to qualify what I’m

2 discussing here, is it needs leadership from labour,

3 government, business, local authorities, if we’re going to

4 find a solution that works for everyone, an affordable

5 solution. And after my presentation on Thursday when I

6 went back home I got onto the internet and just decided to

7 do a search and the first document you see there is a real

8 live example, as I said, as you’re driving up the M1 north

9 if you look to your left there is this student

10 accommodation that has been built right here in

11 Johannesburg and it’s containers and in fact these

12 containers have been stacked many, many levels high.

13 There’s pictures of the interiors of these units, et

14 cetera, so – and around the world, there’s examples in

15 France that I picked up, there’s examples in other parts of

16 the world as well where a similar exercise has been done

17 and apparently very successfully and I just wanted to share

18 this as being a real example where good leadership is

19 applied, there’s a meeting of the minds, I think that’s

20 extremely important. Solutions can be found that would be

21 ultimately infinitely better than what we currently have

22 with those informal townships but not necessarily the

23 ideal, but certainly something that can work very well. And

24 just to expand a little bit, in terms of rented

25 accommodation, as you - where in our current hostels we’ve

Page 38237

1 reduced the density massively but we still have the water

2 resources, we have the waste water treatment, et cetera,

3 all in those hostels. A solution like this where you could

4 stack up these containers and properly convert it into

5 acceptable accommodation units could possibly mean that we

6 could have employees back in the hostel location enjoying

7 single room accommodation in a much better condition than

8 they currently enjoy, with all of the other benefits that

9 go with it. Thank you.

10 MR BURGER SC: Thank you, Chair, that’s

11 the evidence in chief.

12 CHAIRPERSON: Yes, thank you, Mr Burger.

13 The first cross-examiner is going to be Mr Chaskalson but

14 perhaps it’s convenient for us to take the second break now

15 and we’ll then have an unbroken session of cross-

16 examination until lunch time.

17 MR CHASKALSON SC: Thank you, Chair, that

18 would enable me to organise my papers.

19 CHAIRPERSON: Quarter of an hour.

20 [COMMISSION ADJOURNS COMMISSION RESUMES]

21 [11:57] CHAIRPERSON: The Commission resumes.

22 You’re still under oath, Mr Seedat. Mr Chaskalson.

23 CROSS-EXAMINATION by MR CHASKALSON SC (CONT.):

24 Thank you, Mr Chair. There will be two cross-examination

25 bundles of exhibits and I just want to check that Mr Seedat

Page 38238

1 has got either two files that say volume 1 and volume 2 or

2 SSSS4 and SSSS5.

3 MR SEEDAT: I have the files that say

4 volume 1 and volume 2.

5 MR CHASKALSON SC: Can I ask you, Mr

6 Seedat and the Commissioners to mark volume 1 SSSS4 and

7 volume 2 SSSS5? And just briefly to explain the division

8 of the two volumes, SSSS4 is a series of Lonmin PLCs annual

9 reports from I think 2007 to 2012. SSSS5 most of the

10 documents in SSSS5 are annual financial statements of

11 Western Platinum Limited from 2008 through to 2012 and

12 there are sundry collection of individual documents that I

13 will be referring to in due course. And if we can start,

14 Mr Seedat, with just clarifying a number of – what I’d like

15 to suggest are errors and possibly controversial errors in

16 your evidence in chief. I don’t want to spend too much time

17 on it, I just want to put to you what I – a number of cases

18 where I say that you’ve got certain details wrong and see

19 if we can just clarify those. The first is the cost of

20 accommodation in informal settlements at the moment. Now

21 that you spoke of in your evidence in chief at page 37760

22 and you suggested that the going rate at the moment is 500

23 a month rental for a single person and a person living in a

24 married shack R800 a month. You recall that.

25 MR SEEDAT: That’s right and I’ve

Page 38239

1 subsequently seen a document, I've spoken historically,
 2 it's 800 and 1 200.
 3 MR CHASKALSON SC: 800 and 1 200, great.
 4 Just for the reference that document for the record will be
 5 SSSS5 at page 374. So the going rate for informal
 6 settlement rentals is R800 and R1 200. The next detail
 7 relates to proclamation, full proclamation Marikana
 8 Extension 2. I think that's what you were referring to in
 9 your testimony at page 37743 when you said at lines 12 to
 10 15 "We couldn't progress until proclamation of the
 11 remainder of the township was done" and if I recall
 12 correctly and Barnard will be better able to speak on it, I
 13 recall that was only done around 2012. In fact the correct
 14 date is 10 February, sorry not 2012, 2010 was your
 15 testimony. The correct date was 10 February 2009 and the
 16 local government notice – local authority notice 28 of
 17 February 2009. Now the third is a much more substantial
 18 issue and for that I need to start with your table of
 19 dividends at page 2004 of SSSS2 which was your primary
 20 evidence in chief bundle. If I can just ask you to have
 21 that table at hand and it is an issue on which I'm going to
 22 have to address – it's quite a complicated issue so I'd
 23 like that table to be up on the screen so that everyone
 24 else can see it as well. Before I get to what I'm going to
 25 suggest are quite serious errors in that table, I need to

Page 38240

1 clarify some issues around the Lonmin corporate structure
 2 and also the SLP obligations. The first point that I want
 3 to clarify is that Lonmin PLC is really the holding company
 4 of the two South African operating subsidiaries. It holds
 5 82% of Western Platinum Limited and Eastern Platinum
 6 Limited. Lonmin PLC is the English company, Western
 7 Platinum Limited and Eastern Platinum Limited are the South
 8 African operating companies.
 9 MR SEEDAT: That's correct.
 10 MR CHASKALSON SC: Now in your evidence
 11 in relation to those sales commission payments you
 12 mentioned Lonmin Management Services and I got the sense
 13 from your evidence that you were suggesting, well it may
 14 have been misunderstood, that Lonmin Management Services
 15 are actually a separate entity from Lonmin PLC. It's the
 16 same entity.
 17 MR SEEDAT: Well Lonmin PLC owns Lonmin
 18 Management Services.
 19 MR CHASKALSON SC: No I think you'll find
 20 it's actually the same entity. Lonmin Management Services
 21 is the South African branch company of Lonmin PLC. It's
 22 Lonmin PLC and it's South African guys.
 23 MR SEEDAT: That's right.
 24 MR CHASKALSON SC: You couldn't do a
 25 transaction between LMS and Lonmin PLC, they are the same

Page 38241

1 entity.
 2 MR SEEDAT: South African - to Lonmin
 3 PLC, correct.
 4 CHAIRPERSON: Is it registered as a
 5 foreign company in terms of the Companies Act?
 6 MR CHASKALSON SC: It is registered as a
 7 South African company, as an external company.
 8 CHAIRPERSON: As a foreign company –
 9 MR CHASKALSON SC: Yes, so it's Lonmin
 10 PLC's guise in South Africa, registered presence in South
 11 Africa.
 12 CHAIRPERSON: Not a separate legal
 13 persona in other words.
 14 MR SEEDAT: Well it's a separate legal
 15 persona in South Africa representing Lonmin PLC.
 16 CHAIRPERSON: Yes so it's not a separate
 17 legal persona from Lonmin PLC.
 18 MR SEEDAT: Well I'm not sure if that is
 19 correct because it has separate set of directors and it
 20 operates separately from the Lonmin PLC UK listed company.
 21 I think we can check that –
 22 MR CHASKALSON SC: Maybe we could clarify
 23 that, I thought that we'd sorted that out between us and
 24 Lonmin, but we'll hold that. If it becomes relevant it
 25 will become relevant later. But then there are some other

Page 38242

1 issues that I need to clarify with you. The first is that
 2 the BE interest that is held by Incwala, that's not a
 3 direct interest in Lonmin PLC, that's an 18% interest in
 4 Eastern Platinum Limited and Western Platinum Limited.
 5 MR SEEDAT: That's right, it's an
 6 interest in the South African Subsidiaries of Lonmin PLC.
 7 MR CHASKALSON SC: Indeed, so Incwala is
 8 not a shareholder of Lonmin PLC.
 9 MR SEEDAT: Not of PLC but WPL and EPL,
 10 yes.
 11 MR CHASKALSON SC: Yes. It's also got a
 12 26% interest in a different South African subsidiary,
 13 that's Akanani (Pty) Limited.
 14 MR SEEDAT: That's right.
 15 MR CHASKALSON SC: And Akanani has, I'm
 16 not sure whether it's a mining right or a prospecting right
 17 over certain assets in Limpopo, but it's not operational at
 18 this stage.
 19 MR SEEDAT: No that's right. It
 20 currently has a prospecting right which I think has been
 21 extended and they are busy looking at feasibility studies
 22 on how you can convert that into a mine.
 23 MR CHASKALSON SC: Okay, and the mining
 24 rights that are held in Marikana are not held by Lonmin
 25 PLC, they're held by WPL and EPL.

Page 38243

1 MR SEEDAT: That's right.
 2 MR CHASKALSON SC: And the SLP
 3 obligations that we're concerned with today, those are
 4 obligations of WPL AND EPL, they're not obligations of
 5 Lonmin PLC.
 6 MR SEEDAT: That's right.
 7 MR CHASKALSON SC: If we can then go back
 8 to your table with that corporate structure in mind and if
 9 we – there's a generic problem in the table, but I'm going
 10 to illustrate it with respect to 2007 and 2008. So can we
 11 shift the table to the left? But we still need that
 12 opening column, we need to straddle 2007 and 8 on the far
 13 right-hand side and we need to be able to read the
 14 descriptive column which tells us what the rows mean. So
 15 the 2007 and 2008 columns are dividend columns and the
 16 first row says, Dividend Paid To Shareholders and you would
 17 suggest this is the total dividend paid to Lonmin
 18 shareholders at all levels.
 19 MR SEEDAT: Yes it includes the dividends
 20 paid to the South African Incwala in this case.
 21 MR CHASKALSON SC: Well that's the
 22 mistake, it doesn't. You see so what you get, so you
 23 deduct in the second row dividends paid to Incwala to say
 24 that what Lonmin shareholders get is 121 million in 2008
 25 and 150 million in 2007. That's how the table works is it

Page 38244

1 not? You've got total, subtract Incwala, this is what's
 2 left for Lonmin shareholders. Now that's wrong and I would
 3 like to show you why, I'll show you what's wrong with
 4 reference to the 2008 annual report. Now that's in SSSS4
 5 at 196. So, if we could now go to SSS4 page 196 which sets
 6 out what dividends were paid and how. 196 and if we can
 7 just go up a little bit. What you have is two years
 8 compared, 1 October 2007 is the upper box, 1 October 2008,
 9 sorry it's 2006 is the lower box, my comparison should have
 10 been 2006, 2007, not 2007, 2008. No, no it's the 2008
 11 financial year is the top box, 2007 as at 30 September 2007
 12 is the bottom box. And if you look at these dividends
 13 under Retained Income for 2008 financial year you deduct
 14 186 million dividends which will be dividends paid to
 15 Lonmin PLC shareholders. There's a separate of 65 million,
 16 we're talking dollars not rand that are paid to minority
 17 interests. Those are the dividends that have been paid out
 18 to Incwala at WPL and EPL level before the money goes into
 19 the Lonmin PLC and the total is 251 million. So the 186
 20 million has to be added to the Incwala figure of 65 million
 21 to get the total of 251. And you'll see the same
 22 underneath in respect of the 2008 year. \$171 million paid
 23 to Lonmin shareholders, 41 million has been paid to Incwala
 24 at operating company level, the total is 212. What you've
 25 is subtracted rather than added.

Page 38245

1 MR SEEDAT: It appears so. I got these
 2 numbers from the finance people and I didn't go back and
 3 check the financial statements. So I need to speak to the
 4 financial people.
 5 MR CHASKALSON SC: Can I suggest that you
 6 speak to your finance people and clarify that what I'm
 7 putting to you is correct and you produce a revised version
 8 of the table. But I'm going to suggest that there are some
 9 other rows that need to be put into the table because the
 10 source of the confusion, if I can see it, is that the
 11 Incwala dividends are paid by WPL and EPL, not by Lonmin
 12 PLC.
 13 MR SEEDAT: That's right.
 14 MR CHASKALSON SC: And Incwala has this
 15 18% interest in WPL and EPL, Lonmin has an 82% interest in
 16 WPL and EPL. So for every R18 that get paid in dividends
 17 to Incwala by WPL and EPL R82 get paid to Lonmin in
 18 dividends by WPL and EPL. And we've looked at the
 19 financial statements of WPL, we can't find a single year
 20 where WPL paid dividends to Incwala for its 18% share
 21 without paying a corresponding dividend to Lonmin for its
 22 82% share. Let me illustrate that to you with reference to
 23 the WPL 2009 financials. That's SSSS5 page 84. These are
 24 dividends paid by WPL and the column Dividends Paid, I'm
 25 marking with the pointer now, it's just below the row that

Page 38246

1 has note 15 attached to it and you'll see that in the 2008
 2 financial year WPL paid out dividends of just over R2.5
 3 billion. Sorry, do you have the page?
 4 MR SEEDAT: I follow that, ja.
 5 MR CHASKALSON SC: The 2009 financial
 6 year, now the 2009 financial year was the first financial
 7 after the financial crisis took in, it started on 1 October
 8 2009 which was after the crisis. Sorry 1 October 2008.
 9 MR SEEDAT: Ja.
 10 MR CHASKALSON SC: The crisis was
 11 September 2008. WPL paid out in that year in excess of a
 12 billion rand, okay. Now we know from –
 13 CHAIRPERSON: You nod your head, the
 14 answer's yes.
 15 MR SEEDAT: Yes, yes.
 16 MR CHASKALSON SC: Now if we go to – well
 17 let me put it to you that 18% of those dividends would have
 18 been paid to Incwala, the other 82%, roughly R800 million
 19 would have been paid to Lonmin PLC. Would you accept that?
 20 MR SEEDAT: Yes.
 21 MR CHASKALSON SC: And we can see that
 22 more or less confirmed that the schedules to the agreed
 23 statement of fact in volume, sorry in SSSS5 at page 235.
 24 So if we can go there which tells us then that 2009
 25 financial year total dividends were paid to Incwala in the

<p style="text-align: right;">Page 38247</p> <p>1 amount of 205 million. Now that would have been the total 2 from both Eastern and Western. We know that the total 3 dividend paid out by Western alone for 2009 was 1 billion. 4 So there's at least another 800 million that would have to 5 have gone to Lonmin PLC from the WPL dividend. Do you 6 accept that?</p> <p>7 MR SEEDAT: Yes I do, yes.</p> <p>8 CHAIRPERSON: I think we can work on the 9 basis that unless you say you don't agree we can assume you 10 agree. That will probably shorten things.</p> <p>11 MR SEEDAT: Okay, Chair.</p> <p>12 MR CHASKALSON SC: Now on that note, with 13 that background and – well your finance people are going to 14 redo the table which is at page 2004 SSSS2. What I'd like 15 your finance people to do is not just to correct the 16 subtraction and the addition, but also in each year where 17 dividends are paid to Incwala, where you have a row 18 describing dividends paid to Incwala put in a corresponding 19 row which will show us what dividends were paid to Lonmin 20 PLC from the operating companies.</p> <p>21 MR SEEDAT: Okay.</p> <p>22 MR CHASKALSON SC: I now want to take you 23 to a document that you were led to in evidence in chief 24 that concerns the section 93 order that was issued to 25 Western Platinum and Eastern Platinum and that is in your</p>	<p style="text-align: right;">Page 38249</p> <p>1 MR CHASKALSON SC: But what's important 2 is because the license holders at WPL and EPL the 93 order 3 had been directed to WPL and EPL and the reply comes from 4 WPL and EPL.</p> <p>5 MR SEEDAT: That's correct.</p> <p>6 [12:17] MR CHASKALSON SC: I want to take you to 7 a statement that we see at page 1571 where you're 8 discussing steps that you've taken and you say under the 9 third bullet point, "Cash preservation structures have been 10 implemented and no dividend was paid to shareholders at the 11 end of the 2008 financial year." Now this is a document 12 that's issued by WPL and EPL. That's not correct.</p> <p>13 MR SEEDAT: Well –</p> <p>14 MR CHASKALSON SC: Let me put my concern. 15 At the end, in the 2008 financial year WPL alone paid 16 dividends of a billion rand, more than a billion rand. 17 What's your response to that?</p> <p>18 MR SEEDAT: Well, I think to answer your 19 question that 4.1 is headed at corporate level and I think 20 in Lonmin's view the corporate refers to Lonmin PLC because 21 the CEO and the chairman are at PLC level, so I would argue 22 that all of this points on responding, or talking about 23 what has been done at a corporate level, which is a Lonmin 24 PLC level.</p> <p>25 MR CHASKALSON SC: But it comes in the</p>
<p style="text-align: right;">Page 38248</p> <p>1 bundle SSSS2 1558 is where it starts.</p> <p>2 MR SEEDAT: Sorry, you've got to give me 3 the file number, unfortunately –</p> <p>4 MR CHASKALSON SC: Sorry, oh, I'm going 5 to assistance for that. It is –</p> <p>6 CHAIRPERSON: The bundle as I understand 7 it –</p> <p>8 MR CHASKALSON SC: Yes, but it was broken 9 up into volumes and I have mine all in one electronic file.</p> <p>10 CHAIRPERSON: Volume 4 I think it was.</p> <p>11 MR CHASKALSON SC: Try volume 4.</p> <p>12 CHAIRPERSON: It is volume 4, page 1558. 13 That's what the screen says and I think that's what is 14 correct.</p> <p>15 MR CHASKALSON SC: Chair, will you give 16 me a list of the page numbers of each volume?</p> <p>17 MR SEEDAT: Yes, I have it.</p> <p>18 MR CHASKALSON SC: Now the first point 19 I'd like to draw your attention to is what the document is. 20 It says Notification To The Minerals And Mining Development 21 Board In Terms Of Section 52. The Mineral And Petroleum 22 Resources Act By Western Platinum Limited And Eastern 23 Platinum Limited and it is your answer to the section 93 24 directive. Is that not correct?</p> <p>25 MR SEEDAT: That's correct.</p>	<p style="text-align: right;">Page 38250</p> <p>1 context of a response where you've explained that you 2 haven't built houses because inter alia the financial 3 crisis had left you without the cash reserves to do so. 4 Now the obligation to build houses was WPL and EPL's and 5 you have the statement that says no dividends had been 6 paid.</p> <p>7 MR SEEDAT: I think it's very difficult 8 to talk of WPL and EPL without considering aspect of the 9 PLC structure and the reason why I say that is one of the 10 benefits of having located in the UK is the access to 11 capital markets, it is banks, etcetera, debt, at much more 12 favourable rates. So generally Lonmin would negotiate 13 loans at PLC level against its balance sheet and that's why 14 the dividends have to flow from WPL and EPL back into PLC 15 so it has substance behind it, and similarly when one 16 considers what Lonmin can do, you can't just, although the 17 structures are WPL/EPL legally, you have to include the PLC 18 structure because that is an inherent component of how 19 Lonmin finances itself.</p> <p>20 MR CHASKALSON SC: Well, you say Lonmin 21 negotiated these loans, but is it not Lonmin policy that 22 whoever's negotiated the loans, they are very quickly 23 transferred down to operational level?</p> <p>24 MR SEEDAT: Well, the funds are generally 25 kept at PLC level and loaned to the operation that requires</p>

Page 38251

1 it. Not all of these funds are automatically transferred
2 down to the subsidiaries.

3 MR CHASKALSON SC: There is another
4 subsidiary that we haven't spoken about, which is Western
5 Mining (Pty) Limited. Who carries the loan finance in
6 respect of Western Mining Limited?

7 MR SEEDAT: Well, Western Mining came to
8 an end I think in 2007 and I'm not, I wouldn't be able to
9 tell you who carries the financing for that, but I would
10 guess up to 2007 the sole shareholder of Western Mining
11 would have been Western Metal Sales, so are you talking of
12 Western Metal Sales?

13 MR SEEDAT: No, no, not Western – sorry,
14 Messina Mining (Pty) Limited. Messina Mining (Pty)
15 Limited. I'm sorry.

16 MR SEEDAT: Well, if I remember correctly
17 Messina was bought as a subsidiary of WPL.

18 MR CHASKALSON SC: It wasn't bought as a
19 subsidiary of WPL, it was bought by Lonmin PLC and quickly
20 converted into a subsidiary of WPL.

21 MR SEEDAT: Well, it's part of the assets
22 of WPL and any financing paid for, for that, if the initial
23 sale – and the sale may have happened at the PLC level for
24 good reason because it all depends on what the most
25 effective structure that would give effect to the sale in

Page 38252

1 the most efficient way, so I don't have the details of
2 that. It was done prior to me getting there, but I would
3 guess at the time when we were considering this purchase it
4 made sense to do it at the PLC level to get all of the
5 paperwork completed and the approvals in place. Once that
6 was done it then became prudent to transfer that asset into
7 WPL.

8 MR CHASKALSON SC: And Messina Mining has
9 been dormant for some time, has it not?

10 MR SEEDAT: It was operating until we had
11 the financial crisis in around 2008 and because it was not
12 economic operations were put on care and maintenance and to
13 date I think they're still on care and maintenance.

14 MR CHASKALSON SC: And all of that
15 finance costs sits on the WPL balance sheet.

16 MR SEEDAT: Well, I guess when the asset
17 was transferred to WPL there would have to be a
18 corresponding entry into the WPL books, yes.

19 MR CHASKALSON SC: And if you go back on
20 the WPL balance sheet you'll see each year there's a
21 massive impairment of that loan on the WPL balance sheet.

22 MR CHASKALSON SC: Well, I'm not sure if
23 it's an impairment. It's an indication of that loan is
24 still outstanding.

25 MR CHASKALSON SC: No, no, impairment as

Page 38253

1 well.

2 MR SEEDAT: Okay.

3 MR CHASKALSON SC: That was a bit of a
4 digression. But let's, I don't accept your proposition
5 that in response to a directive to WPL to explain why it
6 isn't building houses it's an answer to say well, our
7 holding company hasn't paid dividends. We'll get to that
8 in more detail later, but let's take your statement at face
9 value –

10 MR BURGER SC: Chair, may I just – and I
11 may be wrong here, my learned friend as I understand it is
12 working on the premise that the section 93 inquiry is met
13 by the document starting at page 1558 of volume 4. That's
14 not correct. The response to the section 93 inquiry is at
15 page 1548. That's the document dated 31st August of that
16 year and that was in fact the evidence-in-chief.

17 MR CHASKALSON SC: If that's an error I
18 will stop this. Well, I have one last comment that stands
19 independent of that inquiry. I mean I must apologise for
20 that, but the 1558 document is nonetheless a document
21 issued by Western and Eastern. My last point in relation
22 to that bullet point is you say no dividend was paid to
23 shareholders at the end of the 2008 financial year. It
24 seems to me that even in relation to Lonmin PLC that's at
25 best a half-truth because there'd been massive interim

Page 38254

1 dividends paid during the financial year in 2008. Do you
2 accept that?

3 MR SEEDAT: Interim dividends may be
4 paid. I'm trying to just –

5 MR CHASKALSON SC: Well, if you go back
6 to your –

7 MR SEEDAT: Yes –

8 MR CHASKALSON SC: If you go back to your
9 table you'll see that in fact the total amount of dividends
10 paid in that financial year was \$186 million. That's about
11 a billion rand.

12 MR SEEDAT: Well, if you read the bullet
13 point, generally when these kind of comments are made you
14 talk of an interim dividend and a dividend at the end of
15 the financial year and this refers to the shareholders at
16 the end of the 2008 financial year. The interim dividend
17 wasn't referred to here.

18 MR CHASKALSON SC: That's right, but it
19 does beg the question of the fact that close a billion rand
20 was paid out during that financial year, before the end of
21 the financial year.

22 MR SEEDAT: Well, when you, in the course
23 of the financial year when you've got the platinum price
24 exceeding \$2 000 a fine ounce, when there are no signs that
25 there's going to be a meltdown, you are fairly confident

Page 38255

1 that you're going to, you can pay a dividend and still have
 2 enough cash available for other things. When the
 3 beginning, absolute the very beginning of the new financial
 4 year when you're still preparing the financial statements
 5 which are finalised around November, December of the
 6 following year, financial year, you're then confronted with
 7 a platinum price of \$800, you immediately have to go into
 8 cash conservation, irrespective of how good the previous
 9 financial year was, and that's why the decision was made
 10 then not to pay dividends going forward, to pass on the
 11 dividend, as they call it.

12 MR CHASKALSON SC: Let me then move to
 13 another topic, which is these sales commission payments
 14 that you mentioned in your evidence-in-chief earlier today,
 15 and the commission is a 2% commission and we're talking
 16 about fairly substantial amounts of money. If one goes to
 17 SSSS4, page 235, there is a schedule of what these payments
 18 were. Can we go to SSSS4, 235?

19 MR SEEDAT: File 1?

20 MR CHASKALSON SC: SSSS – sorry, SSSS5,
 21 234, 235. Try 234. Yes – no, 236? Sorry, go back up.
 22 I've got my reference wrong. It's going to be – further
 23 up, that's 234.

24 CHAIRPERSON: [Microphone off,
 25 inaudible]. Do you want 232?

Page 38256

1 MR CHASKALSON SC: Can we just reduce the
 2 page to a, so that it's all visible? So down to 233 –
 3 sorry, 234. 235. Uh-uh, there's a page missing from this
 4 document in the one that's been printed, that's been
 5 distributed. I'll arrange for that page to be incorporated
 6 into the distributed document, but will you agree with me,
 7 and it's my arithmetic that the aggregate amount of these
 8 2% commission payments from 2008 to 2012 was R1.2 billion,
 9 1 231 662 719 in sales commission?

10 MR SEEDAT: I haven't done the
 11 calculation, so I'm not aware of the number, but let's
 12 assume your number is correct for the purpose –

13 MR CHASKALSON SC: I put it to you my
 14 number is correct. We can address that in the lunch break.
 15 You said that these payments are really essentially for the
 16 risk that is carried by either Lonmin management services
 17 or Western Metal Sales Limited in the past in relation to
 18 the sale of Lonmin platinum.

19 MR SEEDAT: Well, primarily the risk, but
 20 there are also other costs. You have a marketing manager,
 21 you have sales people, so it's all the fixed costs plus the
 22 costs related to –

23 MR CHASKALSON SC: Well, let's separate
 24 those. What do you think the total cost of the Lonmin
 25 marketing section – I don't know – division, or it isn't a

Page 38257

1 division, department, what would that be?

2 MR SEEDAT: Again I have to go on my
 3 memory, but the fixed costs are probably in the region,
 4 there's, you've also got – just to clarify, you've got
 5 other costs in there as well which is for example there is
 6 a platinum marketing organisation that is supported not
 7 only by Lonmin but by the other major platinum suppliers to
 8 try to get the jewellery market to take increased
 9 consumption, so that's including that. I'm speaking
 10 subject to correction because I haven't been involved in
 11 running the business for the better part of four, five
 12 years, but my guess is that could be up to \$50 million a
 13 year, including all of those costs.

14 MR CHASKALSON SC: \$50 million a year?

15 MR SEEDAT: Because the marketing of the
 16 jewellery council alone, if I remember correctly, and again
 17 I'm speaking subject to correction, was around 15 to \$20
 18 million a year.

19 MR CHASKALSON SC: Maybe Lonmin could
 20 give us a little breakdown of that. I mean it's not fair
 21 to ask you to do it on your feet now. But the rest of
 22 these amounts which have been running on, sort of an
 23 average at around R200 million a year for the 2008 to 2012
 24 financial years you say is in respect of risk transfer?

25 MR SEEDAT: Well, the moment the metal –

Page 38258

1 what I said is the moment the metal leaves the property,
 2 which is in our case is the refinery in Boksburg, it is
 3 taken ownership by this entity and all the issues related
 4 with getting that metal from there to the customer are the
 5 responsibilities of this entity, and that includes the
 6 risks associated with that. It's the financial risks,
 7 logistical risks, payment risks, are all then accepted by
 8 this entity.

9 MR CHASKALSON SC: Look, I have been
 10 given a copy of the agency agreement to inspect. The risk
 11 transfer that you're talking about would have to be
 12 pursuant to that agreement, would it not? There's no other
 13 agreement that you're aware of that governs risk?

14 MR SEEDAT: Not that I'm aware of, no.
 15 Well, it's not only risk, it's a whole transfer of
 16 ownership and all the issues that go with the transfer of
 17 ownership and the sale and delivery to the ultimate
 18 customer.

19 MR CHASKALSON SC: And you say a transfer
 20 of ownership is regulated by that agreement?

21 MR SEEDAT: Well, the transfer of the
 22 ownership of the metal from Lonmin to the customer, all the
 23 issues related to making that transfer happen. It's
 24 arranging the logistics, it's insurance to cover any issues
 25 with the loss of those, of the PGM. It's to do with

<p style="text-align: right;">Page 38259</p> <p>1 insuring that you get paid and there are, there's issues of 2 currency that you may have to hedge. All of these things, 3 it's a value chain from the point that it leaves the 4 Brakpan Refinery to the point where it gets to the customer 5 that this organisation is responsible for providing. 6 MR CHASKALSON SC: But ownership doesn't 7 ever pass to this organisation? 8 MR SEEDAT: I don't recall what the 9 agreement says. I don't, it's an agency, so I don't think 10 it does – 11 MR CHASKALSON SC: Well, maybe I would 12 ask the Lonmin legal team to let me have another look at 13 that agreement because these details were not immediately 14 apparent to me on inspecting the agreement. I'm not saying 15 you're wrong. But I have a much more fundamental problem 16 with these transactions, and that's what I'd like to get to 17 now, and if we can start with what we say Lonmin says the 18 true state of affairs is, which is SSSS5, page 229. So 19 this is the statement of agreed facts and the true state of 20 affairs according to Lonmin is in paragraph 2, if we can 21 just scroll down, and we start off at 2.1, "Western Metal 22 Sales Limited is a company registered in Bermuda and a 23 wholly owned subsidiary of Lonmin PLC. Prior to 1 April 24 2007 all of the products of Western Platinum Limited were 25 marketed by Western Metal Sales Limited in terms of an</p>	<p style="text-align: right;">Page 38261</p> <p>1 reasonable course of action to remove the cause of that 2 unfairness." 3 On 5 July 2012 Western Platinum Limited, Western 4 Metal Sales Limited, and Lonmin signed an agreement 5 described as the third supplemental agreement, which we'll 6 call the transition agreement, to regulate the transition 7 from a previous arrangement in terms of which Western Metal 8 Sales had done the marketing, to what we're told is the 9 current where Lonmin does it. 10 Now in terms of the transition agreement in 11 respect of the period 1 April 2007 to 30 September 2007 the 12 2% marketing commission was payable by Western Platinum to 13 Western Metals, that's the Bermuda company, but a fee of 14 50% of that commission was payable to Lonmin by Western 15 Platinum. So half went to Bermuda, half went to head 16 office. 17 In respect of the period 1 October to 30 18 September half of the 2% was payable – sorry, let me go 19 back to that early interim. The full amount goes to 20 Bermuda. Bermuda in turn pays half of it over to head 21 office. 1 October to 30 September half of the 2%, that's 22 1%, is payable directly to Western Metals, payable directly 23 to Bermuda. The other half is payable directly by Western 24 Platinum to head office. 25 CHAIRPERSON: That's October 2007 to</p>
<p style="text-align: right;">Page 38260</p> <p>1 agreement which provided for Western Metal Sales Limited to 2 be paid a 2% commission on the turnover of Western Platinum 3 Limited. 4 This arrangement was changed by Lonmin and now 5 the products of Western Platinum Limited are marketed by 6 Lonmin Management Services," that's Lonmin PLC, "in terms 7 of an agency agreement concluded by Lonmin PLC, Western 8 Platinum Limited, EPL, and several other operating 9 subsidiaries who are also governed by that agreement, but 10 we don't need to concern ourselves with them. 11 "The agency agreement was signed on 12 June 2012, 12 but has a commencement date of 1 October 2008 and governs 13 the relationship between the parties with effect from 1 14 October 2008. In terms of the agency agreement LMS," 15 that's Lonmin PLC, "is the exclusive agent of WPL in 16 relation to the sale of WPL products" - and that would also 17 mean all of the sale of EPL products because all of the EPL 18 concentrate goes first to WPL - "the treatment or purchase 19 of third party products by WPL, and the treatment by third 20 party refiners of any WPL products. WPL pays LMS a monthly 21 commission of 2% on turnover for services provided by LMS 22 under the agency agreement. 23 The agency agreement contains a fairness clause 24 which obliges the parties in cases of unfairness caused by 25 prevailing circumstances to attempt to agree on a</p>	<p style="text-align: right;">Page 38262</p> <p>1 September 2008. 2 MR CHASKALSON SC: That's the second half 3 of the, that's the 2008 financial year. With effect from 4 the start of the 2009 financial year, that's September 5 2008, the 2% marketing commission was payable by Western 6 Platinum, that's our local subsidiary, to head office. 7 CHAIRPERSON: That must surely be 8 October, surely. 9 MR SEEDAT: Yes. 10 MR CHASKALSON SC: It is October. 11 CHAIRPERSON: 2.9.2 deals with the 2008 12 year – 13 MR CHASKALSON SC: That's an error, it's 14 October. Now consistent with the terms of the transition 15 agreement the audited financials of the Bermuda company, 16 Western Metal Sales – and these I've seen and this I can 17 confirm is correct – reflect the following. The full 18 commission paid by Western was reflected in the turnover of 19 WMSL, the Bermuda company, for the 2006 financial year and 20 the 50% fee payable to head office was reflected in the 21 Bermuda financial statements under administration 22 expenditure. So the full amount went in, half of it went 23 out. 24 In the next financial year, the 2007/8 financial 25 year, only half of it went in and that's reflected in the</p>

<p style="text-align: right;">Page 38263</p> <p>1 Western Metals Sales financials, the Bermuda financials, 2 and in the financials of the Bermuda company following 3 2007/8 no payments are reflected and the company 4 effectively has no turnover at all. 5 [12:36] Now, before I get to my difficulties I need to 6 ask a couple of questions. First of all, why was it 7 decided in 2007 to stop making these marketing commission 8 payments to Bermuda and to start making them to head 9 office? 10 MR SEEDAT: I'm not sure exactly why but 11 I can give you what I think would be the reasons. A 12 structure like this is normally set up to be optimal from a 13 tax perspective and obviously if it's no longer optimal or 14 economic and the cost of running the structure far exceeds 15 the benefits, then it would be decided to abandon that 16 structure and go for something that makes more sense and I 17 suspect that's the logic that was applied at the time but I 18 can't give you the exact reasons. 19 MR CHASKALSON SC: So are you suggesting 20 that there would have been a favourable tax regime in 21 Bermuda up to 2007 but that might well have changed in 22 around 2007? 23 MR SEEDAT: I'm not exactly - 24 MR CHASKALSON SC: That's what you 25 suspect. Do you have any idea why this new arrangement was</p>	<p style="text-align: right;">Page 38265</p> <p>1 correctly, in July just prior to the board meeting which is 2 around the 26th of July the chief executive and the CFO went 3 to bond customers in the US to really test the waters. So 4 it wasn't a formal process that had actually been embarked 5 on because they came back from that and at the board 6 meeting reported that it didn't make sense to pursue a bond 7 issue for various reasons, one of them was the projected 8 cash flow going forward of Lonmin and I think around August 9 or September then the idea of issuing a bond was abandoned 10 and it was decided to go and do a rights issue. So I'm 11 going by memory but if I recall correctly, by July we were 12 not ready in any way or form to actually issue documents 13 for a bond issue. It was really to test the waters. 14 MR BURGER SC: Chair, if I may be of 15 assistance, I have an instruction from the chief legal 16 adviser to Lonmin to say the reason for the lateness of 17 that agreement was that Incwala for very many years refused 18 to agree to the new structure and it was only by the middle 19 of 2012 that that agreement could be obtained and that the 20 agreement could be concluded. 21 MR CHASKALSON SC: Did Incwala have a 22 veto over the new structure? 23 MR SEEDAT: I'm going to defer to my 24 legal colleague on that. 25 MR CHASKALSON SC: Because that may help</p>
<p style="text-align: right;">Page 38264</p> <p>1 only reduced to a written agreement on 12 June 2012? 2 MR SEEDAT: I have no idea. 3 MR CHASKALSON SC: Do you think it might 4 have had something to do with the fact that Lonmin was 5 trying to issue a bond around that time and would be 6 subject to due diligence investigations? 7 MR SEEDAT: Well, I was on the Lonmin 8 board at that time. I don't recall this coming up as an 9 issue, so I don't know. 10 MR CHASKALSON SC: Well, let me put my 11 problems to you. 12 CHAIRPERSON: You were busy trying to 13 raise a massive bond. Would that have brought in its 14 train, due diligence investigation? 15 MR SEEDAT: It would, yes. 16 CHAIRPERSON: And the due diligence 17 investigators would have come across the relationship with 18 Western Metals and various matters that are reflected in 19 the paragraphs we've just looked at. I take it one can 20 accept it as a certainty. 21 MR SEEDAT: Chairman, I'm not absolutely 22 sure if that is correct because remember in June/July the 23 company was still going to test the waters for a bond 24 issue. It hadn't formally gone out and said, we want to 25 issue a bond, who's interested? But Chair, if I recall</p>	<p style="text-align: right;">Page 38266</p> <p>1 to explain or partially to explain another difficulty that 2 I have, my primary difficulty, which is that what you 3 describe is at odds with what we see in the Western 4 Platinum financial statements, so let me take you to them. 5 Let's start with the 2008 financial statements. 6 MR SEEDAT: Which page are you? 7 MR CHASKALSON SC: SSSS5 page 70. 8 MR SEEDAT: Could I just follow the 9 previous question you asked about Incwala having veto? 10 Because Incwala is a 26% shareholder, I think on some 11 material matters, this probably would be considered a 12 material matter, you needed a 75%, minimum of 75% majority 13 to approve this. So I suspect this is one of the matters 14 that have been considered to be material. 15 MR CHASKALSON SC: Well, let's look at 16 the 2008 financials that we've been given. In terms of the 17 facts that we've been or what we've been told of the facts, 18 by 2008 half of the sales commission should have been going 19 to Western Metals, the other half to Lonmin PLC, but if we 20 go to the WPL financials at page 70 of SSSS5 – can we 21 scroll down to 30, to 29, related parties, scroll down just 22 a little bit further? Stop, stop, stop. Related party 23 balances, investments transactions. The management fee is 24 reflected as going to Lonmin Management Services but the 25 sales commission in its full amount is reflected as still</p>

<p style="text-align: right;">Page 38267</p> <p>1 going to Bermuda. It should have been 50% to Bermuda, 50%</p> <p>2 to head office. These are audited financial statements</p> <p>3 which were prepared for the special purpose of submission</p> <p>4 to SARS, as I understand it.</p> <p>5 MR SEEDAT: That's right, yes.</p> <p>6 MR CHASKALSON SC: So can you explain why</p> <p>7 they inaccurately reflect this transaction?</p> <p>8 MR SEEDAT: This is for the period up to</p> <p>9 the end of 30th of September 2008.</p> <p>10 MR CHASKALSON SC: That's correct.</p> <p>11 MR SEEDAT: Ja. Can we go back to the</p> <p>12 document with the statement of facts? I just want to</p> <p>13 refresh my memory there.</p> <p>14 MR CHASKALSON SC: Certainly, we can go</p> <p>15 back to that document, it's at page 229, same volume and if</p> <p>16 we can scroll down to 2.9.2 which deals with the 2008</p> <p>17 financial year. So half of that 2% commission should have</p> <p>18 been payable to Bermuda, the other half to head office.</p> <p>19 What the financials show is that all of it was paid to</p> <p>20 Bermuda.</p> <p>21 MR SEEDAT: Yes, that's how the</p> <p>22 financials show it.</p> <p>23 MR CHASKALSON SC: Can you explain why</p> <p>24 the financials show it inaccurately?</p> <p>25 MR SEEDAT: Well, the number is clearly</p>	<p style="text-align: right;">Page 38269</p> <p>1 because now we – [microphone off, inaudible.]</p> <p>2 MR CHASKALSON SC: Let me, my reference</p> <p>3 is wrong. Let me get the correct reference.</p> <p>4 CHAIRPERSON: Yes, that's 2007. You want</p> <p>5 2012, as I understand.</p> <p>6 MR CHASKALSON SC: No. Our problem is I</p> <p>7 think we're in the wrong file, we should be in SSS5.</p> <p>8 MR CHASKALSON SC: 221. Can we scroll</p> <p>9 down? Sales commission paid to Western Metals Sales</p> <p>10 Limited. By this stage there should have been nothing paid</p> <p>11 to Western Metals Sales. \$23 million, no sales commission</p> <p>12 reflected as having been paid to head office.</p> <p>13 MR SEEDAT: Well, I think it's an error</p> <p>14 in the sense that there isn't another line item that says</p> <p>15 sales commission paid to LMS, so it's probably referring to</p> <p>16 the sales commission paid to LMS but referred to as Western</p> <p>17 Metals Sales.</p> <p>18 MR CHASKALSON SC: Sorry, where's that</p> <p>19 other line item?</p> <p>20 MR SEEDAT: No, there isn't another line</p> <p>21 item so I'm saying that it was a sales commission that was</p> <p>22 paid to LMS but incorrectly reflected as being paid to</p> <p>23 Western Metals Sales.</p> <p>24 MR CHASKALSON SC: So that's an error in</p> <p>25 the 2012 accounts?</p>
<p style="text-align: right;">Page 38268</p> <p>1 correct. The entity to which it was sent is reflected</p> <p>2 incorrectly. Perhaps it was an error, I don't know but it</p> <p>3 doesn't change the financials in terms of the movement of</p> <p>4 funds.</p> <p>5 MR BURGER SC: Chair, with respect, this</p> <p>6 may not be correct. If the agreement between the parties</p> <p>7 is that the agency agreement was only concluded in June,</p> <p>8 albeit with effect from four years earlier, as at 2008</p> <p>9 financial year this is not an error. This in fact shows</p> <p>10 the position then. The retroactive effect is only</p> <p>11 introduced, according to this set of facts, on the 12th of</p> <p>12 June 2012. There may have to be a restatement of the</p> <p>13 financials.</p> <p>14 MR CHASKALSON SC: Well, maybe we can</p> <p>15 address Mr Burger's suggestion by looking at the 2012</p> <p>16 financials. They're at page 221 of this document, because</p> <p>17 the 2012 financials cover the period after June 2012. Can</p> <p>18 we scroll down?</p> <p>19 CHAIRPERSON: What are we looking to?</p> <p>20 We've got the right page, have we?</p> <p>21 MR CHASKALSON SC: Scroll one further.</p> <p>22 Sorry, scroll up, scroll up. What we're looking for is</p> <p>23 page, paginated page 30 of the original document. Scroll</p> <p>24 up?</p> <p>25 CHAIRPERSON: We're going the wrong way</p>	<p style="text-align: right;">Page 38270</p> <p>1 MR SEEDAT: I would guess, yes.</p> <p>2 MR CHASKALSON SC: Now we've tried to</p> <p>3 track these sales commissions through into the Lonmin</p> <p>4 accounts themselves because if the amounts were in fact</p> <p>5 paid to Lonmin, they would ultimately have ended up in the</p> <p>6 Lonmin accounts. We haven't been able to do so, partly</p> <p>7 because the group accounts give you very limited</p> <p>8 information about the company accounts and this would have</p> <p>9 been a payment into the company from another group company,</p> <p>10 but I would welcome it if Lonmin could provide us with an</p> <p>11 accounting trail which shows that these payments actually</p> <p>12 did end up in Lonmin PLC because from what we have looked</p> <p>13 at we can't see any evidence of that. I'm not saying it</p> <p>14 doesn't exist but we would like to see it.</p> <p>15 MR SEEDAT: I guess the flow would be</p> <p>16 from WPL, EPL into LMS and then from LMS into Lonmin PLC.</p> <p>17 So we've got to look for them in LMS now –</p> <p>18 MR CHASKALSON SC: Yes, that's what we</p> <p>19 want to see.</p> <p>20 MR SEEDAT: Okay, we'll try to –</p> <p>21 MR BURGER SC: Chair, I wonder whether I</p> <p>22 can suggest that my learned friend prepares, at the end of</p> <p>23 the questioning, a list of those queries which we must</p> <p>24 address. I have great difficulty following this. I got a</p> <p>25 copy of these financials on my Blackberry this morning.</p>

Page 38271

1 I'm never good on a Blackberry but with financials I'm
2 particularly poor, so I'm trying to keep up with the debate
3 and we would certainly assist if there's a structured
4 request, we have an opportunity to consider what this is
5 all about and then respond to it.
6 CHAIRPERSON: I take it you'll comply
7 with that request?
8 MR CHASKALSON SC: We will, Chair. I now
9 want to move away from the financials to deal with housing
10 and we'll get back to some issues in relation to the
11 financials and how they affect housing.
12 CHAIRPERSON: Sorry, before you do that
13 can I ask a question? These are sales commissions. Mr
14 Jamieson told us that 85% of platinum produced by Western
15 Platinum and Eastern Platinum is sold to two customers, is
16 that right?
17 MR SEEDAT: That's right. Lonmin has two
18 major customers.
19 CHAIRPERSON: Who are they?
20 MR SEEDAT: Mitsubishi Corporation and
21 BASF.
22 CHAIRPERSON: Sorry?
23 MR SEEDAT: Mitsubishi Corporation –
24 CHAIRPERSON: Yes?
25 MR SEEDAT: And BASF, a German company.

Page 38272

1 CHAIRPERSON: BASF?
2 MR SEEDAT: Yes.
3 CHAIRPERSON: I see. Now are these
4 permanent, more or less longstanding customers?
5 MR SEEDAT: These are longstanding
6 customers but the contracts are regularly reviewed. They
7 may have a two year term or a three year term. At the end
8 of that term the conditions are reviewed and depending on
9 market conditions, sometimes we have, you know, because you
10 have a long term contract you pay a discount or you give
11 the customer a discount, that discount is renegotiated.
12 The customer may be also charging you other fees for doing
13 other things with the metal, those kinds of contractual
14 conditions are regularly reviewed when these contracts come
15 up for renewal.
16 CHAIRPERSON: I see. And so the
17 marketing that's done was originally done by Western Metals
18 Sales, 85% of it was done to these two customers.
19 MR SEEDAT: Yes. Chairman, I'm not even
20 sure if it was done in the time of Western Metals Sales or
21 even prior to that. Lonmin as a company has been going for
22 many, many years. I don't know how long Western Metals
23 Sales has existed so I'm not sure if it was done during
24 Western Metals Sales' time or before that, I can't tell
25 you.

Page 38273

1 MR CHASKALSON SC: We've been told that
2 Impala does all of its marketing in house. Are you in a
3 position to confirm to dispute that?
4 MR SEEDAT: I'm not aware of how they do
5 their marketing.
6 MR CHASKALSON SC: If they did, of
7 course, then there wouldn't be a transfer out of the
8 operational entity into another entity in respect of
9 marketing services.
10 MR SEEDAT: If they don't have a separate
11 business entity in Impala that does it, yes. So having
12 said that, I think Anglo Platinum has a separate business
13 entity that markets its platinum.
14 CHAIRPERSON: Our terms of reference
15 don't cover Anglo Platinum's activities.
16 MR CHASKALSON SC: Let's move to consider
17 housing issues more directly. You'll accept, I assume,
18 that living conditions in Nkaneng and the other informal
19 settlements around Marikana are truly appalling?
20 MR SEEDAT: Yes.
21 MR CHASKALSON SC: And I take it you've
22 read Dr Forrest's interim report?
23 MR SEEDAT: I have not read the whole
24 report but the section on housing, section 5 I think it is,
25 I have read.

Page 38274

1 MR CHASKALSON SC: And did you read
2 chapter 2 that deals with living conditions?
3 MR SEEDAT: I may have. I just skimmed
4 through the documents, I may have gone through those
5 sections. I've got a copy of the report here so if you
6 refer me to it I can –
7 MR CHASKALSON SC: No, I have –
8 CHAIRPERSON: Sorry, can I – you did tell
9 us you've been to Nkaneng.
10 MR SEEDAT: Yes.
11 CHAIRPERSON: And you told us you weren't
12 proud of what you saw.
13 MR SEEDAT: Yes.
14 CHAIRPERSON: So whatever Dr Forrest says
15 about the conditions, you've got some of your own personal
16 knowledge about how appalling the conditions are. You've
17 agreed that the adjective "appalling" is appropriate.
18 MR SEEDAT: Yes. Chairman, I could go
19 even further than that. Within Lonmin we did commission a
20 survey, a typical, a day in the – a typical day in the life
21 of a Lonmin employee, and we covered employees coming from
22 these different settlements and we fully understand how
23 difficult the conditions are under which they live.
24 CHAIRPERSON: Tell me, were you with the
25 company when Mr Mills was the CEO?

Page 38275

1 MR SEEDAT: I joined in September 2007
 2 and he departed in around September 2008.
 3 CHAIRPERSON: I seem to remember having
 4 read somewhere that he actually spent a night in, I don't
 5 know if it was Nkaneng but in one of the informal
 6 settlements.
 7 MR SEEDAT: He spent a night at the
 8 hostel.
 9 CHAIRPERSON: Oh, only at the hostel?
 10 MR SEEDAT: In one of the hostels, yes.
 11 CHAIRPERSON: I see.
 12 MR CHASKALSON SC: Now presumably Lonmin
 13 has known since long before the shootings that a
 14 substantial proportion of its workforce is living in those
 15 conditions.
 16 MR SEEDAT: Yes, we've done many surveys
 17 and we fully understand the demographics of how our
 18 employees live.
 19 MR CHASKALSON SC: Now at SSSS5 at page
 20 366 you'll see a press statement that Lonmin issued on the
 21 24th of August 2016.
 22 CHAIRPERSON: 2016, that can't be right.
 23 MR CHASKALSON SC: Sorry, 2012. 16th of
 24 August.
 25 CHAIRPERSON: 2012.

Page 38276

1 MR CHASKALSON SC: 2012 was the massacre,
 2 this was on the 24th of August and it's a press statement
 3 called "Lonmin seeks sustainable peace at Marikana." If we
 4 go over the page at 367 there's a little heading called
 5 "Housing" and there Lonmin say the following, "We estimate
 6 that approximately 50% of people living in a 15 kilometre
 7 radius of our operations are housed in informal dwellings
 8 with little or no access to basic services and suspect that
 9 this will include a significant number of our employees who
 10 choose not to spend their housing allowance on
 11 accommodation provided by the company but to live
 12 elsewhere." This was a paragraph which, I put to you, was
 13 doubly disingenuous. First, Lonmin did not suspect that a
 14 significant number of its employees were living in informal
 15 dwellings with little or no access to basic services, it
 16 manifestly knew that this was a fact. Would you agree with
 17 that?
 18 MR SEEDAT: Yes, we were aware that a
 19 significant number lived outside – yes.
 20 MR CHASKALSON SC: But you knew it as a
 21 fact.
 22 MR SEEDAT: He says "we estimate" so –
 23 MR CHASKALSON SC: No, no, that's not
 24 what it says. It says, "We estimate that approximately 50%
 25 of people," that's the general population, "living in a 15

Page 38277

1 kilometre radius of our operations are housed in informal
 2 dwellings with little or no access to basic services and
 3 suspect that this will include a significant number of our
 4 employees." You didn't suspect anything, you knew that a
 5 significant number of employees were living in those
 6 conditions.
 7 MR BURGER SC: My learned friend is not
 8 reading the sentence correctly and what he put is, with
 9 respect, textually unsound.
 10 MR CHASKALSON SC: Maybe Mr Burger can
 11 explain why it's textually unsound.
 12 MR BURGER SC: No, as I understand it,
 13 the suspicion is that housing allowance is not spent on
 14 housing but it is used for other purposes. I think that's
 15 the suspicion.
 16 MR CHASKALSON SC: No, no, the suspicion
 17 is clearly that the 50% include a significant number of the
 18 employees.
 19 CHAIRPERSON: The key word is "include"
 20 so that the suspicion relates to the inclusion of a
 21 significant number of employees in those persons who are
 22 housed in informal dwelling with little or no access to
 23 basic services. I think that's the correct position.
 24 [12:56] MR CHASKALSON SC: But there is a second
 25 element of disingenuity about it which addresses Mr

Page 38278

1 Burger's concern, which is that the employees in question
 2 didn't choose to live in these squalid conditions as
 3 opposed to spending their housing allowance on
 4 accommodation provided by the company? There was no
 5 accommodation provided to them by the company. Do you
 6 accept that?
 7 MR SEEDAT: Well if I may. The surveys
 8 we'd done and we talked previously of the going rate for
 9 single room accommodation and family accommodation R800 and
 10 R1 200 respectively. Employees were receiving at that time
 11 I guess to the order of R1 850, after tax they had R1 500.
 12 So I think this statement is also alluding to the fact that
 13 employees are not prepared to spend the full housing
 14 allowance on accommodation which could be provided by the
 15 company or someone else.
 16 MR CHASKALSON SC: What was your waiting
 17 list for housing for employees who chose not to live in the
 18 informal settlement but would like to live in company
 19 provided accommodation?
 20 MR SEEDAT: Well the waiting list in 2006
 21 was around 5000.
 22 MR CHASKALSON SC: And 2012 when this
 23 statement was issued?
 24 MR SEEDAT: Well I don't have a number,
 25 but I do know that 85% of the employees at that time

Page 38279

1 preferred rental accommodation.
 2 CHAIRPERSON: No, no the statement goes
 3 further you see. The statement says they chose not to
 4 spend their housing allowance on accommodation provided by
 5 the company. Now if I'd been an employee of the company as
 6 a rock drill operator, I might have been at Mooi Nooi if
 7 I'd been higher up in the company, if I'd been an employee
 8 as a rock drill operator and someone spoke and said look
 9 here would you like a housing allowance or would you like a
 10 living out allowance. Would you like a living out
 11 allowance or would you like accommodation provided by the
 12 company. I would say well what accommodation have you got
 13 for me. And as far as I understand, from the evidence
 14 we've heard so far, you wouldn't have had any accommodation
 15 for me. You'd converted the larger hostels which reduced
 16 your housing stock quite dramatically, you hadn't built
 17 houses, we heard that, so if I'd said no, no I would
 18 actually like to spend my housing allowance on
 19 accommodation provided by the company please take me there
 20 and show me what you've got. You wouldn't have been able
 21 to show me anything would you?
 22 MR SEEDAT: True.
 23 CHAIRPERSON: Right, thank you. Mr
 24 Chaskalson, is this an appropriate stage for us to take the
 25 lunch adjournment?

Page 38280

1 MR CHASKALSON SC: I think it is, Chair.
 2 CHAIRPERSON: All right, we'll take the
 3 lunch adjournment. We've got to be back, I'm afraid, at
 4 half past one which is going to mean that those of us who
 5 are going to enjoy the hospitality of the new silk will
 6 have to be fairly quick about it. We now adjourn until
 7 half past one.
 8 [COMMISSION ADJOURNS COMMISSION RESUMES]
 9 [13:56] CHAIRPERSON: The Commission resumes.
 10 You're still under oath, Mr Seedat.
 11 MAHOMED ISMAIL SEEDAT: [s.u.o.]
 12 CHAIRPERSON: Before the cross-
 13 examination continues there are two things I want to say.
 14 The first is that as a result of this splendid lunch that
 15 we had we're running half an hour behind. I've spoken to
 16 Mr Chaskalson to see whether that means we have to squeeze
 17 out the others who are due to cross-examine. He thinks
 18 not. We may have to do some reduction of times, but that
 19 we can look at, at teatime to see whether we can handle
 20 that. That's the first thing.
 21 The second thing is we have finally received, I
 22 don't know how many months after we originally asked for it
 23 and it was promised, we finally received from the police
 24 the lessons the police say they've learned from this
 25 exercise and I want to thank Mr Pretorius for all the

Page 38281

1 efforts he's made in order to get that document for us. We
 2 now have it and we will have to give it an exhibit number.
 3 Presumably it will be YYYY. We'll just call it "Police
 4 lessons," I think.
 5 Yes, when I, of course I was forgetting a very
 6 important thing. The counsel who is also very much
 7 involved in this is Mr Semanya and actually I think we owe,
 8 it's necessary for me to thank them both for the efforts
 9 they made to get this document for us, which I think should
 10 assist us. So it's YYYY, "Police lessons." Mr Chaskalson.
 11 CROSS-EXAMINATION BY MR CHASKALSON SC (CONTD.):
 12 Thank you, Chair. Mr Seedat, would it be correct that from
 13 the time that Lonmin started its hostel conversion process,
 14 first of all it was aware that there was an existing
 15 critical shortage of accommodation? Would you – let's take
 16 them one by one.
 17 MR SEEDAT: Well, when they submitted the
 18 SLP they had a waiting list of I think 5 000 people who
 19 wanted housing.
 20 MR CHASKALSON SC: Ja, and also at the
 21 same time Lonmin knew that the hostel conversion problem
 22 was going to aggravate this problem?
 23 MR SEEDAT: It was anticipated, if you
 24 read the SLP it clearly anticipates that the
 25 desensification of the hostel means that's people who have

Page 38282

1 to live elsewhere, but when the SLP had been submitted in
 2 2006 it said it's still addressing how they're going to do
 3 that in conjunction with the banks.
 4 MR CHASKALSON SC: Well, let's go to
 5 those SLPs, because what I want to put to you is that you
 6 can't separate the hostel conversion obligation for the
 7 house construction obligation. If you read the SLPs
 8 they're clearly two sides of the same coin. Let's go –
 9 MR SEEDAT: Could I add just a little
 10 more to that and in fact you are right and with the wisdom
 11 of hindsight even the anticipation to build 5 000 houses
 12 was probably not the right thing to estimate because you
 13 have to provide a lot more than 5 000 homes because as
 14 people left the hostels that waiting list should have grown
 15 even bigger and bigger. As we see currently it's circa
 16 around 15 000 people.
 17 MR CHASKALSON SC: Well Mr Seedat, I want
 18 to put to you that the true situation is slightly
 19 different, that the SLP expressly anticipated that people
 20 leaving the hostels would be a problem and that's why
 21 houses had to be built for them. I'll take you to the
 22 passages.
 23 MR SEEDAT: Sure.
 24 MR CHASKALSON SC: Let's go to SSSS2,
 25 pages 79 to 80.

Page 38283

1 MR SEEDAT: Sorry, I've got SSSS4 and S5.
 2 MR CHASKALSON SC: S2 is your bundle,
 3 volume 1.
 4 MR SEEDAT: Volume 1.
 5 MR CHASKALSON SC: And if we could have
 6 SSSS2, pages 79 to 80 up. We don't have a video operator.
 7 I'll continue in the absence of one. At the bottom – oh,
 8 I'm sorry, Craig. And you'll see that 79 deals with hostel
 9 accommodation, then there's a paragraph A dealing with the
 10 Karee accommodation complex, and then the second-last
 11 paragraph, "To cater for those employees who will no longer
 12 be accommodated in hostels in the 2006/7 and 2007/8
 13 financial years owing to the conversion of 11 hostel units,
 14 houses to be built at Marikana Extension 2 will be
 15 available for purchase or rental. In addition, houses will
 16 be built on the existing hostel stand which does not need
 17 to go through the township establishment, to provide for
 18 further accommodation." So the hostel conversion is going
 19 to push people out into the housing market. The SLP shows
 20 where they're going to be accommodated and that's –
 21 CHAIRPERSON: That provides that the
 22 houses will be built to be available for purchase or
 23 rental. So it wasn't –
 24 MR CHASKALSON SC: I am going to get
 25 there, Chair.

Page 38284

1 CHAIRPERSON: Are you going to get there?
 2 MR CHASKALSON SC: And then in the next
 3 paragraph, "To cater for those employees who'll no longer
 4 be accommodated in hostels in subsequent financial years
 5 08/9, 9/10, 10/11, owing to the conversion of a further 15
 6 hostel units, houses and flats will be built in an area to
 7 the east of the present hostel which will effectively be an
 8 extension of Marikana Extension 3. This area is however
 9 still to be approved for township establishment purposes.
 10 Provision will be made for sport, recreation and retail
 11 facilities."
 12 Then if we go through each one of these hostel
 13 conversion promises, page 80 you deal with the Wonderkop
 14 conversion. You'll see exactly the same. Hostels will be
 15 converted, there will be people who we'll now need to
 16 accommodate because of it. This is how we're going to
 17 house them, we're going to build houses. 81, Eastern Plats
 18 conversion, same thing. To cater for those employees
 19 who'll no longer be accommodated in the hostels in 2006/7
 20 houses to be built at Marikana Extension 2 will be
 21 available for purchase or rental by employees.
 22 So at the time of the submission of the SLPs
 23 Lonmin realised that its house building programme was a
 24 necessary counterpart to its hostel conversion programme.
 25 Do you accept that?

Page 38285

1 MR SEEDAT: Yes.
 2 MR CHASKALSON SC: Now the hostel
 3 conversion programme as we understand it is finally going
 4 to be completed at the end of this year, 2014.
 5 MR SEEDAT: That's correct.
 6 MR CHASKALSON SC: That's three years
 7 behind schedule. Better late than never. Now we know that
 8 the converted hostels produced some units where the hostels
 9 used to be and there were three show houses that you told
 10 us about in your evidence-in-chief. Now apart from those,
 11 how many houses has Lonmin built for its workers in the
 12 last 10 years?
 13 MR SEEDAT: If you talk the last 10
 14 years, I'm not exactly sure when the MSDC houses were
 15 built, but if you exclude those and the houses that were
 16 there, some other houses built at the same time as MSDC
 17 houses, I would say from about 2006 onwards, besides the
 18 three, no other houses.
 19 MR CHASKALSON SC: So no other houses?
 20 None at all?
 21 MR SEEDAT: Since 2006, yes.
 22 MR CHASKALSON SC: It's actually since
 23 2005, Mr Seedat. The record of Lonmin in relation to house
 24 construction is – I can give the references, it's SSSS2,
 25 page 1057, you built 1 149 houses, in volume 3, 1 149 in

Page 38286

1 1999 and 2000. That's almost, that's 14 years ago, 14, 15
 2 years ago, and if you were to go to SSSS5, page 244, you'll
 3 see that the last time Lonmin built houses was in 2004
 4 because there it describes 369 houses next to Karee Mine
 5 and 218 at Wonderkop that were built between 2000 and 2004,
 6 bringing the total number of houses that we have built to
 7 1 798. So in the last decade Lonmin has built three show
 8 houses but nothing more beyond the hostel conversion, which
 9 has aggravated the housing shortage.
 10 MR SEEDAT: That's right.
 11 MR CHASKALSON SC: Now if I understood
 12 your evidence-in-chief your position is this is not a
 13 breach of the commitments you made in your social labour
 14 plan because there was no commitment to spend Lonmin money
 15 on housing, only some sort of vague commitment to assist in
 16 the market-driven private interaction between employees,
 17 banks, and builders. Is that correct?
 18 MR SEEDAT: Well, the SLP as it is
 19 written, and I'm on that page right now, Lonmin Platinum
 20 adheres to facilitate the building of these houses through
 21 entering into partnerships with banking institutions and in
 22 this regard has commenced discussions with Rand Merchant
 23 Bank who are likely to provide the necessary funding, and
 24 you see reference to banking facilities in other places in
 25 the SLP as well.

<p style="text-align: right;">Page 38287</p> <p>1 MR CHASKALSON SC: Well, let me take you 2 to some of them. Let's go to page 79 of SSSS2 where you 3 deal, we start with the hostel conversion process because 4 we know that Lonmin put its own money into the hostels. Is 5 that correct? 6 MR SEEDAT: Yes, correct. 7 MR CHASKALSON SC: And if we look at page 8 79 we see language which says this, "Process going forward; 9 the number of hostel blocks that will be converted during 10 the period from 2006 to 2011 and the capital budget 11 required to give effect to such conversion is as follows." 12 Then there are numbers and there's a capital budget, 145.9 13 million. Now that's Lonmin's own money, isn't it? 14 MR SEEDAT: No, Sir, if you talk of the 15 capital budget it doesn't mean it's Lonmin's money. It's a 16 budget for a project. 17 MR CHASKALSON SC: Yes, but how did this 18 happen? Who borrowed the money for the hostel conversion 19 process? 20 MR SEEDAT: No, the point I'm making is 21 this budget was prepared on, in terms of the cost of doing 22 the conversions. Clearly at some point Lonmin decided that 23 financial institutions are not coming to the party and then 24 put its own money into these projects. 25 MR CHASKALSON SC: Well, if that's so,</p>	<p style="text-align: right;">Page 38289</p> <p>1 process. 2 MR SEEDAT: Yes, ja. 3 MR CHASKALSON SC: We go to page 77, up 4 two pages, and we see that – 5 CHAIRPERSON: I'm sorry, but it will also 6 retain the converted hostels. So the money it spent in the 7 conversion it will recover part of it through rental. Some 8 of it won't be recovered, but it will have in its place an 9 asset, namely the converted hostels. Isn't that right? 10 MR SEEDAT: That's right, Chairman, the 11 assets would remain with Lonmin, yes. 12 MR CHASKALSON SC: And then if we look at 13 the corresponding table for housing, the format's 14 identical. The wording is identical. You've got a capital 15 budget and then underneath it says, just as it said on page 16 79 for hostels, "A more detailed breakdown of the number of 17 houses to be built, for example on a six-monthly basis, is 18 not yet available. This breakdown will only be available 19 once the relevant banking institution has been approached 20 to provide the necessary funding. WPL and the banking 21 institution will agree on a more detailed breakdown at that 22 stage." If we go back to 79, down to 79, you'll see 23 exactly that same sentence is there, a more detailed – now 24 we're talking about hostel conversion. "A more detailed 25 breakdown of the number of houses to be built, for example</p>
<p style="text-align: right;">Page 38288</p> <p>1 did Lonmin not borrow the money from a financial 2 institution itself for the hostel conversion process? 3 MR SEEDAT: You can't say that Lonmin or 4 WPL or EPL went to a bank and said give me this money to 5 convert these hostels. They would have used funds 6 available to them, which would include retail earnings and 7 which would include any facilities they already had with 8 banking institutions both locally and abroad. 9 MR CHASKALSON SC: And if Lonmin was to 10 use its facilities that it could access to convert the 11 hostels, it would recoup that. It wasn't going to sell any 12 of these converted hostel units to anybody, was it? It was 13 going to recoup it through rentals to people. 14 MR SEEDAT: Yes, but if you look at the 15 rentals that are currently being paid for these units, 16 which I, the document I think mentions R250 if I remember 17 correctly, and you do the sums you'll find that that rental 18 comes nowhere near to reimbursing the costs. 19 MR CHASKALSON SC: No, no, whatever it's 20 going to recoup, it's going to get from rental. I'm not 21 suggesting it's going to recoup the full amount. It's 22 actually – 23 MR SEEDAT: That will – 24 MR CHASKALSON SC: It actually has sunk a 25 fair amount of its own money into this hostel conversion</p>	<p style="text-align: right;">Page 38290</p> <p>1 on a six-monthly basis, is not yet available. This 2 breakdown will only be available once the relevant banking 3 institution has been approved to provide the necessary 4 funding. WPL and the banking institution will agree on a 5 more detailed breakdown at that stage." 6 CHAIRPERSON: In each case the key phrase 7 is "the capital budget required to give effect to such 8 conversion," the capital budget required to give effect to 9 the hostel conversion is set out and the capital budget 10 required to give effect to the house construction programme 11 is set out, and then as Mr Chaskalson points out, "the 12 relevant banking institution has got to be approved," 13 approached, to be approved, has been – it should be 14 approached I think – "to provide the necessary funding," 15 and then not the necessary funding to outsiders, surely it 16 must be to WPL because the next paragraph, the next 17 sentence says, "WPL and the banking institution will agree 18 on a more detailed breakdown." Isn't that right? 19 MR SEEDAT: Well, Chairman, I think for 20 the hostels that's correct because the hostels were an 21 asset owned by Lonmin and if you're going to go to, you 22 want to raise funds against that asset you have to be the 23 owner because you've got to make the commitment. So I 24 think that statement is absolutely valid when it comes to 25 the hostels, but for the housing I would argue that it's</p>

<p style="text-align: right;">Page 38291</p> <p>1 not as simple as that because the intention was that 2 somebody's going to buy these houses, some are going to be 3 rented out. We could identify who's going to be the 4 developer, the owner of the rented accommodation. So I 5 would argue that as far as the housing units were concerned 6 it wasn't as simple as is the case with the hostel units. 7 CHAIRPERSON: Why was the phrase "the 8 capital budget required to give effect thereto," that's to 9 the building of the houses, why was that phrase used? 10 MR SEEDAT: Well, the – 11 CHAIRPERSON: If it wasn't going to be 12 Lonmin's money, it wasn't going to be any amount that 13 Lonmin has had to borrow or anything of that, or use from 14 its retained funds, then why would it talk about a capital 15 budget required? 16 MR SEEDAT: Well, Chairman, whenever you 17 talk of capital projects that's a common speak you use. 18 Irrespective of who's going to fund it, the project capital 19 required for this project is the following. Now the 20 capital budget for this project is the following. It's 21 common speak when you're looking at capital projects to use 22 that kind of terminology. 23 MR CHASKALSON SC: Can I ask a follow-up 24 question? There are a range of tenure options that have 25 been contemplated in this SLP. If you go to page 77 again</p>	<p style="text-align: right;">Page 38293</p> <p>1 MR CHASKALSON SC: So there's no mention 2 of a developer anywhere in these SLPs, but you think that a 3 developer was going to sort of come into the picture? 4 MR SEEDAT: Yes, because we approached 5 similar banks again in 2011 and it had to be with somebody 6 assisting from a developing perspective. 7 MR CHASKALSON SC: Yes, but that's after 8 you'd repudiated the obligations in the SLP. I'm talking 9 about what those original obligations were. 10 MR SEEDAT: Well, you know, why would you 11 involve a banking institution and you talk of these 12 alternatives? What other way could you anticipate this 13 being done? 14 MR CHASKALSON SC: If Lonmin takes the 15 loan. 16 CHAIRPERSON: Mr Seedat, can I ask you a 17 question about that? You go to the department and you say 18 look here, we'd like you to convert our old order mining 19 rights to new order mining rights and what we will do in 20 order to make sure that we get the new order mining rights 21 is we will agree to an SLP. One of the things you agree to 22 do is to convert the hostels and see to it that there's 23 housing. Now could it ever have been envisaged by anybody 24 that you could say well, all we have to do as far as the 25 housing is concerned is try to see if there are houses, get</p>
<p style="text-align: right;">Page 38292</p> <p>1 under housing, top of the page, "Lonmin Platinum intends to 2 facilitate the building of these houses through entering 3 into partnerships with banking institutions and in this 4 regard has commenced discussions with Rand Merchant Bank, 5 who are likely to provide the necessary funding. Employees 6 will have the choice of a number of tenure options, i.e. 7 rental, instalment sale, rent-to-buy or full mortgage 8 bonds, and will therefore be able to select the option most 9 suited to their financial circumstances." So the employee 10 who comes to you and says I'd like to go rental, or better 11 still, I'd like to go rent-to-buy, how is this process 12 going to take place if all that Lonmin is doing is 13 mediating a relationship between that employee and Rand 14 Merchant Bank? 15 MR SEEDAT: Well, I wasn't there when 16 this was drawn, but I'll give you my view, because we tried 17 to do something similar again in 2010/2011. Banks do 18 provide different ways of financing these kinds of options 19 and the intention was Lonmin would at arm's length be the 20 facilitator of the agreement between the bank and its 21 developing arm, developer arm, and the particular 22 individual, whether it's someone who's buying or a 23 developer who says I'll take X number of units and I'll 24 rent them out. So that's the kind of arrangement I 25 anticipated was envisioned when this was written.</p>	<p style="text-align: right;">Page 38294</p> <p>1 banks involved, get developers involved, facilitate it, and 2 if they don't provide the houses or the banks walk away 3 from it, well tough, it's very unfortunate, we did our 4 best, we went through the motions of facilitating, it 5 didn't work out, there aren't the houses, the people are 6 having to live in shacks in appalling conditions in an 7 informal settlement, but that's very sad, but nevertheless, 8 this was all we had to do in order to get the new order 9 mining rights. Does that sound like a proposition that 10 makes sense? 11 MR SEEDAT: Well, Chairman, let's go back 12 to what was happening in 2006 and 2007. These were the 13 heady days of the commodities boom. Mining companies, the 14 prices were rising, platinum price in this case for example 15 was hovering around \$2 000 a fine ounce. Not only 16 platinum, iron ore prices had almost doubled. It was just 17 before, or two years before the crash that happened in 18 2008, but during this period the banks had significant 19 confidence in the ability of mining companies to generate 20 cash. So as I say, I wasn't there and there's a bit of 21 speculation of what is intended in this, when this was 22 written, but I would anticipate Lonmin with its strong 23 balance sheet at the time had a relationship with someone 24 like Rand Merchant Bank and said we want to put up these 25 houses, these are the things we're trying to do, and RMB</p>

Page 38295

1 would you help finance this and come up with a financing
2 model. In turn Lonmin will ensure that whether there is
3 rental or the bond repayments are done through the books.
4 [14:16] So that the bank is guaranteed every month that
5 the employee will pay for his rent or will pay for his bond
6 and in that way create certainty. So I'm guessing but I
7 guess over that period there was a fair amount of
8 confidence around that finances could be raised, this
9 project will happen. I mean I'll share a similar example
10 with you. This is the time when Lonmin bought Akanani for
11 what in today's money terms is probably around R5 billion,
12 Lonmin bought in June 2006, bought Messina Platinum for, I
13 think it's 150-odd million dollars so let's say R1.5
14 billion, in January 2007 it invested over \$400 million in
15 Akanani so – and banks were prepared to come on board with
16 financing, etcetera. So the climate then was very
17 different to the climate we are, since then.

18 CHAIRPERSON: No, but that argument
19 actually goes against you, I would have thought. I'm just
20 putting it to get your views. You see it indicates a
21 confidence on the part of the mining company to say we can
22 take on these obligations, everything's fine, the mineral
23 market is booming, the banks are happy, falling over
24 themselves to give us money, we're quite happy to undertake
25 these obligations because of this climate of confidence and

Page 38296

1 boom and so forth. So that argument I would have thought
2 prima facie, unless there's something I'm overlooking, in
3 fact supports what Mr Chaskalson is putting to you, that
4 Lonmin was quite happy to assume these obligations and they
5 were real obligations, not just going through the motions
6 trying to facilitate obligations, quite happy to assume
7 them. They got substantial assets in return for assuming
8 these obligations and now they're trying to say, no, we've
9 got the rights but we're walking away as far as the
10 obligation is concerned because they weren't real
11 obligations, they were just facilitation obligations. Does
12 that make commercial sense to you?

13 MR SEEDAT: Well, Chairman, I mean if you
14 follow that logic through, these SLPs were written in 2006.
15 They were finalised in April 2007. The survey of employees
16 I think was done around November 2007. So clearly Lonmin
17 had started the process, even after the new order mining
18 rights were granted and let's kick this process off. What
19 we don't know and I can't find any institutional memory to
20 tell me that, is what happened with RMB? Why did those
21 negotiations suddenly stop? You know, it's like things
22 were going wonderfully and suddenly come 2007, late 2007,
23 2008, in fact even late 2007 Lonmin was investing in these
24 surveys of the employees and then come sometime in 2008 –
25 perhaps I'm answering my own question, I'll get there now –

Page 38297

1 everything stops. So even taking your argument, at some
2 point RMB said –

3 CHAIRPERSON: I haven't got an argument,
4 I'm just putting a prima facie view to you so we get the
5 benefit of your inputs.

6 MR SEEDAT: Taking that possible position
7 into account, at some point RMB, even if Lonmin that was
8 the institution who was going to take the loans from RMB,
9 at some point RMB pulled the plug, my words. Now I can
10 only assume that Lonmin was going through this exercise,
11 doing the survey of the employees, getting the relevant
12 information, distilling that into what kind of houses are
13 going to be built, where they were going to be built and
14 around, if I remember correctly, August 2007 I think an e-
15 mail, a memo was sent to the EXCO. I've just got to get my
16 notes to confirm the timeline but a note was sent to the
17 EXCO that we're going to start building. If I may just
18 check this? Sorry, August 2008 – no, ja, November 2007 the
19 needs analysis started. By August 2008 a presentation to
20 build 100 starter homes was given to the unions, so I guess
21 between November 2007 and August 2008 all of this work was
22 being done to distil the information, come up with a plan,
23 present it to the unions, get their feedback and then start
24 with the building and then this is August 2008. And then
25 in October 2008 the stock market crashed, so perhaps your

Page 38298

1 scenario, the scenario that you have coloured that by
2 October 2008 the markets crashed and the banks closed
3 doors. So either way we ended with a situation where the
4 banks were not prepared to give financing.

5 MR CHASKALSON SC: I'll get to a lot of
6 what you've been putting in response to the Chair in due
7 course but the real question is, what was the obligation?
8 You say you weren't there when these plans were written so
9 you're not sure what they had in mind but you were
10 certainly there when the closeout report was filed and when
11 Lonmin accounted on the plans.

12 MR SEEDAT: What was the year for the
13 closeout report?

14 MR CHASKALSON SC: 2013.

15 MR SEEDAT: No, I'd left Lonmin as an
16 executive at the end of 2010. So I would not –

17 MR CHASKALSON SC: Sorry, Western
18 Platinum, you were a director of Western Platinum when
19 Western Platinum –

20 MR SEEDAT: Yes.

21 MR CHASKALSON SC: It's not Lonmin's
22 plan, it's Western Platinum's plan.

23 MR SEEDAT: I understand that. I was a
24 director, a non-executive director so I wouldn't get
25 involved in the technical, the details of the closeout

Page 38299

1 report. That would not be submitted to the board, to the
2 WPL board for ratification.
3 MR CHASKALSON SC: Well, then we can't
4 rely on your personal knowledge which is unfortunate
5 because Lonmin chose you to be the person to speak to these
6 phase 2 issues and we'll just have to look at what Western
7 Platinum put in their closeout report themselves and we'll
8 – to reflect how they understood the obligation. And that
9 is in volume 3, page 1059 is where we'll start. So that's
10 SSSS2, 1059 for the overhead. 1059, not 1095, ja 1059.
11 Stop. Housing and living conditions, paragraph 3.2. Let's
12 look at the last sentence of that first paragraph. "As
13 such, the original commitments set out in financial year
14 2006 were to convert 114 hostel blocks to family single
15 units and to build 5 500 houses by 2011 at an estimated
16 cost of 810 million." Now the 810 is the 145 million for
17 hostel conversions, 665 for house construction, that
18 original capital budget. No distinction between the two
19 and the commitment as understood is to build 5 500 house at
20 an estimated cost of what would be 665 million. But you
21 say you want us to read into the report that the commitment
22 did not extend to Lonmin's assumption of that cost in any
23 way, is that correct?
24 MR SEEDAT: Ja, well, I'm going on face
25 value of what the SLP says and the SLP says clearly that

Page 38300

1 it's talking to the banking institutions to provide
2 financing. So I'm going on that assumption. But you don't
3 have any personal knowledge in this regard that can add to
4 what we see here?
5 MR SEEDAT: No.
6 MR CHASKALSON SC: Well, let's go to some
7 other passages –
8 CHAIRPERSON: Sorry, before you carry on,
9 the SLP doesn't say to whom the financial institution has
10 to provide the finance.
11 MR SEEDAT: Yes, that's a matter of
12 interpretation.
13 CHAIRPERSON: Am I right? Am I right?
14 MR SEEDAT: Yes.
15 MR CHASKALSON SC: Well, let's go to 1057
16 which ought really to put this beyond doubt. Can we go to
17 1057? There's a table 25 there, can you flip it? Now
18 unfortunately in black and white we can't see what we can
19 see in colour, so I'll have to tell you what we can see in
20 colour is next to that block that says "financial
21 commitment achieved financial year '07 to financial year
22 '11" is in bold and capitals, "NO."
23 CHAIRPERSON: We can just see the no, we
24 can just see the no in the middle if you look very
25 carefully.

Page 38301

1 MR CHASKALSON SC: Now you say you don't
2 think there was any financial commitment. So what wasn't
3 achieved?
4 MR SEEDAT: I don't know. I didn't write
5 this report, so I'm not sure what is intended by saying
6 financial commitment achieved.
7 MR CHASKALSON SC: Maybe I can help you
8 because if we go to the right, SLP commitment says 665
9 million. Now that was the capital budget for the houses
10 but are you saying that this wasn't a Lonmin commitment?
11 MR SEEDAT: Well, as I said you know, we
12 can, I can only go by what I've read in the SLP and the SLP
13 talks about discussing this or getting financing from the
14 financial institutions, so that creates a doubt in my mind
15 whether Lonmin intended putting these houses on its books
16 and balancing it with a loan from the banks or it was
17 intended, because employees were going to buy these houses,
18 that it is intended that –
19 MR CHASKALSON SC: I don't want to
20 interrupt you, Mr Seedat, but let's maybe look at
21 everything and then you can reconsider your position
22 possibly. Next to SLP commitment 665 million is actual
23 spend financial year '07 to financial year '11, 138
24 million. Would that have been a spend from someone other
25 than Lonmin?

Page 38302

1 MR SEEDAT: No, that's R138 million worth
2 of spend on the hostel conversions.
3 MR CHASKALSON SC: No, it shouldn't be
4 accounted for here because this housing and hostels are
5 accounted for separately, there's a separate table that
6 deals with the spend on the hostel conversion. Are you
7 aware of anybody else who spent money on housing for Lonmin
8 workers during financial year '07 to financial year 11?
9 MR SEEDAT: Well, then I'm a little
10 confused because if it did not build any houses, where was
11 the R138 million spent?
12 MR CHASKALSON SC: That's one of the
13 questions I'm going to ask you in due course but let's go
14 through it again. Financial year, next column says, "Per
15 cent financial spend achieved against SLP target."
16 CHAIRPERSON: [Microphone off, inaudible]
17 – it's not on the screen.
18 MR CHASKALSON SC: It is, bottom left-
19 hand corner.
20 COMMISSIONER HEMRAJ: In the block.
21 CHAIRPERSON: Oh, in the block? I see.
22 MR CHASKALSON SC: And it says 21% and
23 you'll find that 138 million is 21% of 665 million. Sorry,
24 665 million. And then it says, there's another separate
25 column which says actual spend financial years '12 and '13,

Page 38303

1 172 million, giving a total spend of 310 million. Now do
 2 you know anything about the financial, the alleged spend of
 3 172 million in 2010, how that's, you know where that comes
 4 from?
 5 MR SEEDAT: The only money Lonmin spent
 6 on –
 7 MR CHASKALSON SC: I'm so sorry, it
 8 wasn't 2010, it was 2012 and 2013.
 9 MR SEEDAT: The only money Lonmin spent
 10 on housing or accommodation was, aside from the three
 11 houses that we've already, cost about 620-odd thousand
 12 rand, the remaining funds were all spent on converting the
 13 hostels. So I can only assume that the money that you're
 14 talking about, the 138 plus the 172, relates to the
 15 conversion of the hostels.
 16 MR CHASKALSON SC: You see this project,
 17 the accounting is under project number 4 if you go back –
 18 sorry, project number 6, housing provision. No, you may
 19 well be right, in fact –
 20 MR SEEDAT: That was –
 21 MR CHASKALSON SC: Project number 6 and
 22 project number 4.
 23 MR SEEDAT: Yes.
 24 MR CHASKALSON SC: It's housing provision
 25 and hostel blocks. So there's a little bit of a sleight of

Page 38304

1 hand here, isn't there, because the budget for both of
 2 those projects wasn't 665 million, it was actually 810
 3 million. And what we're doing is we're taking the budget
 4 for houses on which Lonmin has spent nothing and allocating
 5 a spend on the budget for hostels on which Lonmin has spent
 6 138 million and saying you spent 21% of your target
 7 spending for houses. Is that what's happening here?
 8 MR SEEDAT: As I say, I wasn't involved
 9 in putting this document – but it appears to be – I would
 10 argue that it would have been an honest mistake rather than
 11 a deliberate intent.
 12 MR CHASKALSON SC: But whether it was an
 13 honest mistake or not, what seems to be implicit in this
 14 document is an acceptance that there was a commitment on
 15 Lonmin's part, a financial commitment in the SLP to spend
 16 665 million.
 17 MR SEEDAT: Well, whoever authored this
 18 document probably had that as an interpretation.
 19 CHAIRPERSON: If that's wrong then the
 20 percentage goes down, doesn't it?
 21 MR CHASKALSON SC: The percentage
 22 actually goes down to nought if Mr Seedat's analysis of
 23 what's happening here is correct. On the housing project
 24 Lonmin spent 0%.
 25 CHAIRPERSON: There were of course some

Page 38305

1 reports where it gave a target and then gave achievement
 2 and the target was nought and the achievement was nought
 3 and therefore there was 100% achievement. Is this the sort
 4 of territory we're in at the moment?
 5 MR CHASKALSON SC: No, because here the
 6 target is not nought, the target is 665 million, or the
 7 commitment rather than the target.
 8 MR SEEDAT: Chairman if you – I think
 9 there was one report that I read where it said that the
 10 target was three, you built three and therefore you gave
 11 yourself 100%. Those three houses were built but did not
 12 take into cognizance the 5 500 homes. So I think
 13 that's what you're referring –
 14 MR CHASKALSON SC: We will get to that in
 15 due course if we have the time, Mr Seedat, but you say this
 16 table may be an honest mistake.
 17 MR SEEDAT: It's – it's the first time I
 18 saw it, is preparing for this Commission. As I say, I
 19 wasn't there and gone through the details when this report
 20 was produced, so I'm making an assumption, that I would be
 21 very surprised if somebody did this because the numbers we
 22 talk about are very much in the public domain in more than
 23 one document, so I –
 24 CHAIRPERSON: I think the answer is you
 25 think it's an honest mistake, it's not likely to be a

Page 38306

1 dishonest mistake, isn't that so?
 2 MR SEEDAT: Ja.
 3 MR CHASKALSON SC: Now presumably a
 4 closeout report to the DMR on a social labour plan is quite
 5 an important document for Lonmin. It has implications for
 6 your relations with the regulator, may even have
 7 implications for your licence. Would you accept that?
 8 MR SEEDAT: Potentially, yes.
 9 MR CHASKALSON SC: What process would be
 10 followed in Lonmin before a document like this is sent out?
 11 MR SEEDAT: Well, firstly, the numbers
 12 that are produced in the annual financial, annual report of
 13 Lonmin, there's many of those matrix that are actually
 14 audited by the auditors. Now I can't recall if these were
 15 one of them but the auditors would say you made a
 16 commitment of X, you claim you did Y, yes we're happy, you
 17 can say that or no, you're not happy that you can say that.
 18 So that's one item of, one check that's in place. If you
 19 take this kind of a report, my guess is what would happen
 20 is the report would be produced, it would be signed off by
 21 the relevant head that would look after this, in this case
 22 it would be the head of, I think, human capital. It would
 23 be presented to the DMR and it would – the DMR generally
 24 has a workshop. I don't know in this case if workshops
 25 were held but the details would be work-shopped with the

<p style="text-align: right;">Page 38307</p> <p>1 DMR and then they would go away and then give us their 2 feedback. So I assume in the workshop these issues, if 3 there were any issues, would then be clarified. 4 MR CHASKALSON SC: But within Lonmin 5 would this document stop with the head of human res-, human 6 capital? 7 MR SEEDAT: Generally, yes. 8 MR CHASKALSON SC: So no-one higher than 9 – and that's Mr Mokoena? 10 MR SEEDAT: Well – 11 MR CHASKALSON SC: Or was Mr Mokoena. 12 MR SEEDAT: Depending which is, you had 13 Mr Mokoena or Mr Kgotle, whoever was – 14 MR CHASKALSON SC: Yes. 15 MR SEEDAT: - at the time. 16 MR CHASKALSON SC: Because it's a strange 17 mistake this one because it isn't just that it's been 18 overlooked in one place, if it is a mistake. You'll see 19 exactly the same figures in two other places in the 20 document, pages 1006 where there's an executive summary 21 table and you'll see exactly those same figures. If we can 22 scroll left? Project 4 housing commitment, housing project 23 and bear in mind that the housing project, project 4 was 24 not hostel conversion, that was project 6. Target 665 25 million, actual spend 138 million, then there are some</p>	<p style="text-align: right;">Page 38309</p> <p>1 Lonmin's final accounting to the DMR. 2 [14:36] And for present purposes – well I don't want to 3 take issue with your suggestion that it's an honest 4 mistake. It may be an honest mistake, it's an extremely 5 negligent mistake. It's been missed on eight separate 6 occasions. But what's interesting about these figures and 7 what I want to put to you is that what these figures 8 reflect is a very clear understanding by the parties who 9 accounted to the DMR that they understood that 665 million 10 to be a commitment on Lonmin's part, not a sort of strange 11 arrangement in terms of which Lonmin may link up its 12 workers with private banks. What's your response to that? 13 MR SEEDAT: Well let me respond to the 14 first one. You refer to all of these tables with the same 15 numbers replicated and I'm aware that Lonmin puts together 16 a database which is a made up of Excel or other similar 17 spreadsheets and if you're going to enter the number once 18 and you refer to the cell on other tables, so if you get it 19 wrong once it's not improbable that the same number will be 20 replicated incorrectly in all the eight tables. So again 21 it was probably entered the first time incorrectly – 22 MR CHASKALSON SC: Can I engage with that 23 explanation? That explains why it appears in eight 24 different tables, it doesn't explain why the person who was 25 signing off on the document when they had a hard copy or</p>
<p style="text-align: right;">Page 38308</p> <p>1 strange figures called, that say "Budget" which was I think 2 reflecting to what was budgeted for financial years '12 and 3 '13 and actual figure which is the sum of the 2012/13 4 budget and the actual spend and then combined target says 5 665 million and combined actual 138 million. So this 6 notion of 138 million against 665 million is in that table. 7 It's also again in page 1044. If we go to 1044 there's 8 another table where you see the same numbers, so it's not 9 something that would have been missed by one oversight, it 10 would have to have been missed by three oversights. If we 11 can stop, so if you see project 4 housing provision WPL/EPL 12 combined 665 million was the total budget, the actual was 13 138, the per cent SLP target was 21% and then you have 14 these same figures that roll over into 2013. 15 MR SEEDAT: If the – 16 MR CHASKALSON SC: Before you respond let 17 me give you the full set of sequences in Lonmin documents 18 where we see this table because there are another six, 19 sorry, five – because there's an executive summary that was 20 prepared as a separate document, an executive summary of 21 the closeout report. I'll just give you the references, 22 you can take it on trust from me that these figures are 23 there. Table 1 page 1147, table 2 page 1151, table 3 page 24 1156, table 12 page 1167, table 13 page 1168. So there are 25 in all eight separate references to these numbers in</p>	<p style="text-align: right;">Page 38310</p> <p>1 even when they were looking electronically at the 2 spreadsheet didn't pick up on one of the eight tables that 3 this information is wrong. 4 MR SEEDAT: Ja that you can ask the 5 person who reviewed it. The second question, sorry what 6 was the second question around the objection? 7 MR CHASKALSON SC: That when the table 8 speaks of a commitment of 665 million and - sorry and a 9 financial commitment is not achieved and a percent 10 financial spend against actual target, what that all 11 reflects is that whoever put together this document on 12 behalf of Lonmin recognised that the 665 million was a 13 commitment from Lonmin, not from maybe a bank if Lonmin 14 could persuade a bank to lend 665 million in 5 500 15 individual transactions to 5 500 individual workers. 16 MR SEEDAT: Let's go back to the - when 17 this SLP was put together, this was in – 18 MR CHASKALSON SC: No, Mr Seedat, my 19 question is what this reflects about the person who signed 20 off on this document and what they understood about the 21 commitment, not what the original document can be, how the 22 original document can or cannot be – 23 MR SEEDAT: I think you're going to have 24 to ask the person who put this document together. I'll 25 give you my personal experience. It was quite some time</p>

<p style="text-align: right;">Page 38311</p> <p>1 after I joined Lonmin that I realised that the commitment 2 was made on the basis of getting finance from banking 3 institutions. Everybody accepted that we had to build 4 those houses for employees. In fact not even 5500, we had 5 to build sufficient accommodation for all of the employees 6 who were displaced and who were living in the informal 7 settlements. That commitment we all felt. The 5 500 8 commitment was interpreted in that light. It's only when 9 you read the SLP carefully that you understood the logic 10 around that. In 2006, in 2007 Lonmin was in a pretty good 11 financial position. The commodity prices were booming, 12 Lonmin was making money, one must then ask the question why 13 would you want to go to the banks if you had the cash to do 14 it. So there's a lot of questions, I don't have the 15 answers to these questions, but those are the questions 16 that – there is some ambiguity because the SLP document is 17 not absolutely clear what the intent was. And the history 18 and in terms of how that conclusion was arrived at when the 19 SLP document was put together those people are not around. 20 MR CHASKALSON SC: That's unfortunate for 21 our Commission, but if we can move on. In your evidence in 22 chief you were led by Mr Burger on the suggestion in Dr 23 Forest's report that what had happened is that Lonmin had 24 unilaterally repudiated its obligations in the SLP. And 25 there was some suggestion that this was a matter in respect</p>	<p style="text-align: right;">Page 38313</p> <p>1 talking about commitments that were made, the ability to 2 meet them has now been compromised. "As a result, where 3 applicable, the targets were revised in line with the 4 organisation's ability to deliver on the commitments made. 5 Lonmin, however, remains committed to working with all 6 stakeholders to realise our promises which will contribute 7 to the continued empowerment and transformation of our 8 business. The progress achieved against the revised 9 targets for calendar year 2009 is displayed in the table 10 below." You may recall that the original target for 2009 11 was 1200 houses after 2000 had already been built, the new 12 target is 3 off a base of zero. So although Lonmin has 13 achieved, if we go down to that bottom – sorry no come back 14 up, the third column from the bottom Housing 5 year target 15 5500. The new annual target is now put at 3, the actual is 16 3, the variance is nil and 100%. Then if we go to 685 we 17 get the crux of it. Sorry 684, paragraph 15.5. Review Of 18 Commitments made in Respect of Housing and Hostel 19 Conversion. First bullet point Financial problems. Second 20 bullet point. Restructuring of the company and the 21 returned profitability took precedence over the building of 22 houses and upgrading of hostel units. So a choice was 23 made. We'll put our resources in there, it will take 24 precedence over building of houses. Fourth bullet point is 25 very significant. Future building of houses will be</p>
<p style="text-align: right;">Page 38312</p> <p>1 of which Lonmin was entitled to take umbrage. Can we go to 2 the source of Dr Forest's allegation against Lonmin and 3 that is the SLP report for 2009 where the repudiation takes 4 place? It's SSSS2 page 646. 5 MR SEEDAT: Which file, that would be 6 file – 7 MR CHASKALSON SC: Volume 2. 8 MR SEEDAT: Your volume 2, Sir. 9 MR CHASKALSON SC: Sorry not my volume 2, 10 your bundles. My volume 2 of your bundles. 11 MR SEEDAT: Okay. 12 MR CHASKALSON SC: We start with what the 13 original commitment was which is set out at 646. 646, 14 we're shooting past and there at table 4 Housing and Hostel 15 Conversion Key Commitments For Marikana and we've housing 16 and hostel conversion dealt with separately. I'm just 17 interested in housing for present purposes. Key Commitment 18 build 5 500 houses by 2011, build those houses by 2011 and 19 then it's broken up into years and we see the annual 20 commitment. 700 2007, 1300 2008, 1200 2009 and so on to 21 get the accumulative total of 5500. Turn the page to 647. 22 And we can reduce the width of this document on screen. 23 "The recent decline in the world market price of platinum 24 has severely impacted on the company's ability in 2008/9 to 25 meet many of the commitments made in 2006." So we're</p>	<p style="text-align: right;">Page 38314</p> <p>1 dependent on the prospective owners obtaining pre-approved 2 home loans and when there are at least 50 applicants with 3 approved home loans building of houses will continue. 4 Sorry commence, commence. Yes, continue suggested that 5 suggested that it had already started which of course it 6 hadn't. Now, Mr Seedat, do you think anyone in Lonmin 7 honestly believed that they would be able to ensure that 8 5500 houses, sorry 5497 houses would be built in 2010 and 9 2011 on the basis or an arrangement where housing 10 construction would proceed in tranches dependent on the 11 arrival of groups of 50 plus applicants who'd managed to 12 secure their own pre-approved home loans? Did anyone think 13 that was going to happen? 14 MR SEEDAT: No and I've got to put that 15 in context. In late 2008 we put up these show houses as 16 you pointed out. We had people come through and I think 17 potentially about 4000 came to these houses and what they 18 told us was markedly different to what they told us in 19 2007. In 2007 85% of respondents said they wanted to live 20 in the Marikana area and they wanted to own their houses, a 21 significant percentage. Lonmin since that day proceeded on 22 that assumption that people wanted to buy their own houses, 23 the vast majority. I must also remind you that in October 24 2008 the stock market crash happened. So now we're talking 25 and this is the report of the 2009 financial year, so we</p>

Page 38315

1 were operating in the year from October 2008 to September
 2 2009 when it was a case of do we keep the operations alive,
 3 survive or does Lonmin shut shop. Now in that context, I'm
 4 sure you'll agree with me, that the priority would be save
 5 as many jobs as you can. Keep the company as profitable as
 6 you can so we can survive this tough condition. As a
 7 result we had to make some tough decisions, we had to
 8 retrench over 3000 people, we had to close shafts. We had
 9 to go and ask shareholders for money, the second rights
 10 issues was done in that period, in 2009. So the focus was
 11 let's get Lonmin in a situation where it can survive. Yes
 12 and in that context when we did the survey 85% of employees
 13 said uh-uh, ugh we don't want to own a house, we just want
 14 to rent a unit. And we were very concerned and having
 15 looked at experiences of other mining companies that built
 16 a quota of houses for sale to their employees, we were very
 17 concerned that we would put up houses, people would not
 18 afford to be able to buy them and Lonmin would be left with
 19 having to finance those houses. So the logic changed to
 20 well if there are people who are interested in us building
 21 houses for them to own we will build those. But I agree
 22 with you that it was not likely that we were ever going to
 23 be able to build 5 500 homes.

24 CHAIRPERSON: But you'd withdrawn the
 25 rental hadn't you? Originally it was you can buy or you

Page 38317

1 done to the board at sometime that showed that within the
 2 current hostel complex putting in more hostel units so that
 3 we can put more people in the same infrastructure. As I
 4 recall one of the board members saying this looks too much
 5 like a ghetto, we have to find a better solution. The
 6 reason why I say that is I want to confirm to the
 7 Commission that we were looking at rental in parallel to
 8 owning. But as far as owing is concerned we were too
 9 concerned about the risks and therefore we had to make it
 10 arms length. The other reason is in 2009 our financial
 11 situation was pretty dire. There was no ways Lonmin could
 12 add any other financial liabilities to its books without
 13 the risk of it violating its covenance to the banks and
 14 that's why we did the right thing.

15 MR CHASKALSON SC: Mr Seedat, there are
 16 two separate questions. The first is whether you were
 17 repudiating your original obligations. The second is
 18 whether you had an explanation which might be accepted for
 19 doing that. But will you accept that in respect of that
 20 original commitment to build 5500 houses what happened in
 21 9000 was a decision by Lonmin that would have the result
 22 that that obligation was never going to fulfilled.

23 MR SEMENYA SC: I disagree with you in
 24 the sense that the obligation to properly house our
 25 employees has always been there. The commitment to try to

Page 38316

1 can rent. Now you've withdrawn the rental option, all that
 2 you had left was the buying opportunity and you knew by
 3 that time that most of the people didn't want to buy, they
 4 preferred to rent. Isn't that so? So it's a little bit
 5 misleading to say well we've got this wonderful scheme
 6 whereby if we can find 50 people who have got approved
 7 home loans which means they had to get them independently
 8 apparently and then we'll start building the 50 houses.
 9 It's a little bit unrealistic isn't it?

10 MR SEEDAT: Well, Sir, it's not. If I
 11 recall correctly the average cost of building a house
 12 during this time was around R200 000. Knowing what
 13 employees are prepared to pay to rent 800, 1200, there was
 14 no likelihood of those houses ever being rented out and the
 15 cost of building those houses being recovered through
 16 rental. So we had taken the view that we had to find a
 17 different solution for rental stock for the majority of the
 18 employees who wanted effectively a single room unit to stay
 19 in. Therefore we were only going to build those houses at
 20 R200 a throw so that people that were committed to buying
 21 and carrying the risk of buying that unit. And that's why
 22 we said we'll wait for 50 and then we'll build. But it did
 23 not mean that we had excluded the idea of building rental
 24 stock. We were still exploring that and I don't think the
 25 documents are in here, but I recall a presentation being

Page 38318

1 find a solution has always been there. The challenge to
 2 find a viable solution has been the biggest problem. So we
 3 tried different options -

4 MR CHASKALSON SC: My question was put in
 5 the wrong terms, sorry, Chair.

6 CHAIRPERSON: Give him a chance to finish
 7 his answer.

8 MR SEEDAT: Oh I'm sorry. The obligation
 9 was always accepted and we racked our brains trying to
 10 find solutions to this problem. So we decided to break it
 11 up into two. Those who can afford to and would like houses
 12 built for them we'll do one thing for them. Those that
 13 cannot afford and want rental accommodation we have to an
 14 alternative solution and up to that point in time we had
 15 not found an alternative solution.

16 MR CHASKALSON SC: But to get back to my
 17 first question. Let's separate two different issues. The
 18 one is were you repudiating an obligation in that original
 19 2006 SLP?

20 MR SEEDAT: No.

21 MR CHASKALSON SC: An obligation to build
 22 5500 houses by 2011, are you suggesting that Lonmin still
 23 thought it was going to build 5500 by 2011?

24 MR SEEDAT: No clearly we would not have
 25 been able to build them by 2011, but we were committed to

<p style="text-align: right;">Page 38319</p> <p>1 finding a solution to the housing problem.</p> <p>2 MR CHASKALSON SC: But that's a broader</p> <p>3 moral obligation that is separate from the very specific</p> <p>4 commitment in that 2006 report. You will accept that by</p> <p>5 that 2009 report it was clear that Lonmin was not going to</p> <p>6 deliver on the commitment it made in 2006 in relation to</p> <p>7 5500 houses –</p> <p>8 MR SEEDAT: If you put it as narrowly as</p> <p>9 that, yes.</p> <p>10 MR CHASKALSON SC: We'll get to issues of</p> <p>11 reasonableness in due course, but before I get there what I</p> <p>12 want to put to you is that reasonableness, affordability,</p> <p>13 financial position all of that is ultimately missing the</p> <p>14 point because that commitment that you made in 2006 was a</p> <p>15 binding, legal obligation. Because 25.2F of the Mineral</p> <p>16 and Petroleum Resources Development Act says the holder of</p> <p>17 a mining right must comply with the requirements of the</p> <p>18 prescribed social and labour plan. That's a legal</p> <p>19 obligation. It's not something that you can choose to, you</p> <p>20 know, respect, vary, unilaterally depart from at your</p> <p>21 leisure. When did you become a director of WPL?</p> <p>22 MR SEEDAT: Around 2008, but can I</p> <p>23 respond to the things you've just said? If Lonmin had gone</p> <p>24 under, closed shop in 2008 would you have expected Lonmin</p> <p>25 to still meet its obligations to build 5500 homes?</p>	<p style="text-align: right;">Page 38321</p> <p>1 single report. Now it's no good saying that you've said to</p> <p>2 the Department we're not complying. The question that</p> <p>3 you're being asked is whether you ever in terms applied for</p> <p>4 a written amendment, a written agreement by the Department</p> <p>5 to an amendment to the SLP so that those obligations would</p> <p>6 no longer be binding on you so that you would be free to</p> <p>7 vary them, free to do other things. In other words to use</p> <p>8 your language, the language of Lonmin, you talk about a</p> <p>9 review of the housing program, did you ever in terms apply</p> <p>10 to the Department and say please we want to review our</p> <p>11 housing program, we've got difficulties which are set out</p> <p>12 in annexure, would you kindly give us written agreement in</p> <p>13 terms of the relevant sections of the act, to such</p> <p>14 variations. Did you ever do that?</p> <p>15 MR SEEDAT: Not formally, but in</p> <p>16 workshops we did. We informed them of the situation and –</p> <p>17 CHAIRPERSON: No, no I understand that's</p> <p>18 why I used the word formally. I can understand that you</p> <p>19 told them that there were problems and reply you got a</p> <p>20 direction at one stage, under section 93, but we won't go</p> <p>21 into there now. My question is did you ever ask in terms</p> <p>22 for a variation, a written variation approving of the</p> <p>23 amendment of your obligations? And your answer I think is</p> <p>24 no.</p> <p>25 MR SEEDAT: I don't think so.</p>
<p style="text-align: right;">Page 38320</p> <p>1 MR CHASKALSON SC: No, no but there is a</p> <p>2 lawful way of doing things and there is a way of taking the</p> <p>3 law into one's own hands.</p> <p>4 MR SEMENYA SC: Could I respond –</p> <p>5 MR CHASKALSON SC: Let me put this to</p> <p>6 you. Has Lonmin, at any stage, applied to the Department</p> <p>7 of Mineral Resources as its entitled to, for an amendment</p> <p>8 of its 2006 Social and Labour plans?</p> <p>9 MR SEEDAT: Lonmin continuously and you</p> <p>10 see the reports that we included had continuously engaged</p> <p>11 with the DMR.</p> <p>12 MR CHASKALSON SC: I think a yes or a no</p> <p>13 would suffice to that question.</p> <p>14 MR SEEDAT: It's not as simple as that.</p> <p>15 Every year Lonmin engaged, when the DMR came to do</p> <p>16 inspections and updated them on the situation. If it is a</p> <p>17 challenge to achieve a particular objective, you're going</p> <p>18 to try a different approach. The DMR was kept continuously</p> <p>19 informed as we tried to find a solution to this problem.</p> <p>20 CHAIRPERSON: Mr Seedat, first the front</p> <p>21 page of your annual reports about compliance under the SLP,</p> <p>22 a statement is made in every single one of those reports</p> <p>23 that the obligations in SLP are binding on Lonmin unless</p> <p>24 there's a variation or amendment agreed to by the</p> <p>25 Departments in writing. That's on the front page of every</p>	<p style="text-align: right;">Page 38322</p> <p>1 MR CHASKALSON SC: Well let's shift to</p> <p>2 the second issue which is whether you did is reasonable as</p> <p>3 opposed to just unlawful. Your basic arguments about</p> <p>4 affordability, that argument really begs the question about</p> <p>5 why you failed to build any houses.</p> <p>6 [14:55] Or to make financial provision for your house</p> <p>7 construction programme. In 2006/7 and 2007/8, the first</p> <p>8 two years of your SLP when the boom was at its peak and</p> <p>9 when you were paying out amounts in annual dividends that</p> <p>10 were, that could have financed the whole capital budget if</p> <p>11 you'd taken, asked your shareholders to take 20% discount</p> <p>12 on the dividends they got in those two financial years, the</p> <p>13 entire capital budget would have been covered by 20% of the</p> <p>14 dividends you paid out in 2006 and 2007/8. Have you got</p> <p>15 any explanation for that?</p> <p>16 MR SEEDAT: Well, I can only respond</p> <p>17 based on my experience with other mining companies that I</p> <p>18 was involved with in applications to have the conversions</p> <p>19 done. In one case in spite of we thinking that we'd met</p> <p>20 all the requirements for conversion, it took over five</p> <p>21 years for the conversion to happen. So if you're not sure</p> <p>22 whether your commitments are being accepted, it's very</p> <p>23 difficult to go to the board and say, put a budget in. The</p> <p>24 board is going to say, well, where's the commitment? Well,</p> <p>25 it hasn't been approved yet. So my experience, if I was in</p>

<p style="text-align: right;">Page 38323</p> <p>1 my Lonmin, is in 2006 I could not put that in the budget 2 because you were still discussing and negotiating your SLP 3 commitments with the DMR. The new order mining rights were 4 approved in April 2007. The financial year starts in 5 October 2000 and – in October every year. So I would 6 assume between April, and I know that the budgets are 7 prepared around June, July, from April through to the end 8 of that year 2007, September 2007, the budgets would be 9 prepared to start building in the following year, 2007/2008 10 and if you look at what happened is they started the 11 workshops to the employees, they had the focus group 12 interviews, out of that in August 2007 a memo was sent to 13 the EXCO saying we have talked to the unions, this is where 14 we've got, we are now prepared to start building 100 show 15 houses, that was in August 2007 and then in October 2000 - 16 just after that we had all of the other problems. I'm just 17 going to get my –</p> <p>18 CHAIRPERSON: No, hang on, before we get 19 there. Once you got your new order rights you didn't at 20 that stage, the market was still booming, platinum was 21 still 200, was still \$2 000, you didn't then as prudent 22 housekeepers put money aside. Remember you told us on 23 Thursday, you quoted someone who said that in mining you 24 must always, a sensible company in good years always puts 25 money aside for the bad years that are coming so you can</p>	<p style="text-align: right;">Page 38325</p> <p>1 said we've got our approval, let's budget for it at the 2 start of the new financial year, we'll start with this 3 process and start building homes.</p> <p>4 MR CHASKALSON SC: But you've left out 5 one very crucial date and payment which is in the course of 6 the 2007/8 financial year Lonmin pays out R2.089 billion in 7 dividends to its shareholders. So that's not to acquire an 8 asset, it's not to finance a loan, it's money that is bled 9 straight out of the company to shareholders at a time when 10 you know now that you've got the rights and that you are 11 going to have a commitment of 665 million to service.</p> <p>12 MR SEEDAT: That was a decision made by 13 the board. I'm sure they looked at the financial position 14 of the company at the time and the commitment, before it 15 paid those dividends, so we need to go and look at exactly 16 whether the financial position was considered at the time 17 and that was still the peak of the commodities cycle which 18 crashed in August, October – sorry, October 2008, yes.</p> <p>19 MR CHASKALSON SC: No, no, the 20 Chairperson referred to one of your statements in evidence 21 in chief and it made a deep impression on me, so I actually 22 wrote it down. You said, you quoted someone who said, 23 "Mining is a whole lot of winters with one or two very good 24 summers in between, especially if you're a single trick 25 pony."</p>
<p style="text-align: right;">Page 38324</p> <p>1 comply with your obligations then. Once you got your new 2 order rights in 2007, wasn't the sensible thing then to say 3 right, now we've got them, these commitments are there, 4 it's a good year, we've got super profits, let's put some 5 money away so that we can deal with the situation when it 6 comes because for all we know the price of platinum may 7 fall next year in September and we may then have 8 difficulties? Wasn't that the appropriate thing to do?</p> <p>9 MR SEEDAT: Sir, I wasn't there at the 10 time but I'll give you my view. As I mentioned earlier, in 11 June 2006 Lonmin had invested R1.5 billion in buying 12 Messina Platinum. In January 2007 it spent a further R4.5 13 billion buying Akanani and in April the DMR gives its 14 approval to the conversion of the old order to the new 15 order. Normally what would happen then is that as you're 16 preparing the budget for the next year, you would make a 17 provision for these commitments and that commitment would 18 then start in on the 1st of October of that year, which is 19 what it appears to have happened because in November 2007 20 the housing needs analysis, these interviews with the focus 21 groups all started taking place and in about August 2008, I 22 assume after distilling all of this information, et cetera, 23 a presentation was done to the EXCO to start building these 24 100 starter homes based on feedback from the unions. So 25 rightly or wrongly, Lonmin was following a process that</p>	<p style="text-align: right;">Page 38326</p> <p>1 MR SEEDAT: Ja –</p> <p>2 MR CHASKALSON SC: You had two of the 3 hottest summers on record for Lonmin in 2006/7 and 2007/8. 4 Dividends of 1.45 billion in 2006/7, 2.089 billion in 5 2007/8. Are you suggesting that it was reasonable for the 6 board at the time not to realise that with one or two 7 super-good summers, winter might be around the corner, 8 winter was going to be around the corner?</p> <p>9 MR SEEDAT: Well, as I mentioned, from 10 around 2001 the commodities was in a massive super-cycle so 11 you were almost experiencing a very hot summer every year 12 and based on market analysis – and I'm speculating here, so 13 it's not, I wasn't there – based on market analysis at the 14 time and forecasting, they probably thought that this 15 wonderful summer is going to persist for many, many more 16 years and on that basis decided to pay this dividend, 17 little knowing that a year later there would be this 18 massive crash. Nobody predicted this crash.</p> <p>19 CHAIRPERSON: The longer the period of 20 good summers lasted, the cycle of good summers lasted, 21 surely the more likely it was that the next year could be 22 the beginning of a bad cycle. I mean I can understand in 23 2001 thinking it'll last till 2003 but it had gone on for 24 quite a long time. Wasn't it a rather rash assumption that 25 the good weather would continue for a few more years?</p>

Page 38327

1 MR SEEDAT: Well, sir, all the mining
2 houses were of the same view that this wonderful super-
3 cycle was going to continue. China was growing at the rate
4 of 8, 9% per annum and you're talking of a population in
5 excess of a billion rand and 250 million people urbanising
6 every year. So all the signs indicated that this cycle was
7 going to continue for a much longer period and it's not
8 only Lonmin, it was most of the other mining houses were in
9 the same position. Very few, if any, predicted that this
10 was going to come to an end. Everybody thought there'd be
11 a soft landing after a good few years and it will be
12 predictable, that it will come to a soft landing, but
13 nobody predicted that it would happen as suddenly as it.

14 CHAIRPERSON: On that note perhaps we can
15 take the tea adjournment. I think, Mr Chaskalson, it would
16 be helpful if you or Mr Wesley could talk to the cross-
17 examiners who are waiting with their cross-examination
18 prepared to see what can be done in regard to adjusting the
19 programme. 15 minutes.

20 [COMMISSION ADJOURNS COMMISSION RESUMES]
21 [15:17] CHAIRPERSON: The Commission resumes.
22 You're still under oath, Mr Seedat.

23 MAHOMED ISMAIL SEEDAT: [s.u.o.]
24 CHAIRPERSON: Mr Chaskalson.
25 MR CHASKALSON SC: Chair, before I start

Page 38328

1 my cross-examination, it's clear that I'm not going to be
2 able to finish in the time available today. AMCU needs to
3 cross-examine on a phase 1 issue, which is a narrow cross-
4 examination. Other parties who wanted to cross-examine on
5 the phase 2 issues are not, may well not have time today.
6 The evidence leaders were contemplating a more general
7 interrogatory process so that parties could put outstanding
8 questions to counter-parties, and I would suggest that for
9 the, if parties get squeezed out today, that, well I would
10 ask for a ruling that they be entitled to put those
11 questions on an interrogatory basis.

12 CHAIRPERSON: I take it no one objects to
13 that, so I should make the ruling that has been requested.

14 MR BURGER SC: No, Chair, I certainly
15 haven't thought that through because I'll be at the
16 receiving end of those questions. Does that include
17 interrogatories we can put to Dr Forest? I've never met
18 the lady. I've never had the opportunity of posing one
19 question to her.

20 CHAIRPERSON: Surely it must.
21 MR BURGER SC: And Sir, if –
22 CHAIRPERSON: Yes, of course it must. I
23 mean obviously the way it's got to work is if parties wish
24 to put interrogatories they have to submit them through the
25 evidence leaders to me. If parties are asking questions

Page 38329

1 that I think are unrealistic, go too far, I will disallow
2 them, but obviously I'm sure the parties will be
3 responsible and I can assure you that any question which I
4 think is a legitimate question to ask and which parties are
5 not just entitled to an answer, it's really to question
6 whether the answer, the question will elicit an answer
7 which will help the Commissioners to deal as fully and
8 comprehensively with the terms of reference, I will allow.

9 MR BURGER SC: I'm just posing that we
10 are going to go into a period of working very hard in order
11 to write an argument, to present an argument to you. If we
12 get reams and reams of questions which are likely to come
13 I'm going to be embarrassed by that and I'm not sure what
14 happens if there's dissatisfaction with my answer now. Is
15 there now an interlocutory application argued, or how do we
16 go about this whole new process?

17 CHAIRPERSON: No, look, remember this is
18 a Commission. We want answers that will help us to write
19 our report. If you get buckets full of interrogatories and
20 it's obviously unreasonable and unfair and unrealistic to
21 expect you to answer them, then I won't expect you to
22 answer them. That's the first point.

23 The second point is if I allow the interrogatory
24 and you choose to give – when I say "you" it's unfair to
25 put it that way - the party to whom the interrogatory is

Page 38330

1 addressed chooses to put up an evasive or an unhelpful or
2 incomplete answer, then inferences may be drawn against
3 that party. But further than that I can't go at this
4 stage.

5 MR BURGER SC: And Sir, I take it the
6 only parties who may pose this new interrogatory to a phase
7 2 Lonmin witness are those parties who had the right to
8 pose questions in cross-examination?

9 CHAIRPERSON: Yes, only those parties to
10 whom I gave, allocated time to ask questions, only those
11 parties, because it's a substitute for the cross-
12 examination time which they would have had, which
13 unfortunately they – you know, Mr Ntsebeza, I've sat here
14 for two years and people have been doing this and I can't
15 stop. Counsel are not, and people aren't supposed to walk
16 between a cross-examining counsel or a counsel addressing
17 the Chair and the Chair, or a counsel asking questions of a
18 witness. You'll never get a chance to do it again, but
19 please, don't do it again.

20 MR NTSEBEZA SC: Chair, I apologise. I
21 only realised when I was going past him that you were
22 actually talking to him –
23 CHAIRPERSON: Your apology is accepted.
24 MR NTSEBEZA SC: I'm sorry, Mr Chairman.
25 CHAIRPERSON: Anyway, let's not waste

Page 38331

1 time on that kind of thing. I answered your questions now,
 2 Mr Burger?
 3 MR BURGER SC: Yes, thank you, Chair.
 4 CHAIRPERSON: And you heard my ruling.
 5 Mr Chaskalson.
 6 CROSS-EXAMINATION BY MR CHASKALSON SC (CONTD.):
 7 Mr Seedat, I want to interrogate this argument of
 8 affordability that Lonmin has put up, and would you agree
 9 that outside of issues of legal obligation, questions of
 10 affordability are ultimately questions of choice?
 11 MR SEEDAT: Yes.
 12 MR CHASKALSON SC: You have a limited
 13 amount, a limited resource, you choose how you want to
 14 spend it.
 15 MR SEEDAT: Yes.
 16 MR CHASKALSON SC: You can't accommodate
 17 everything, you have to make some sacrifices, and you were
 18 led in your evidence-in-chief on dividends that were paid
 19 to Incwala and you suggested that this happened because
 20 Incwala needed the dividends to repay loans and Lonmin was
 21 worried about losing its licence if it lost its BEE
 22 partner.
 23 MR SEEDAT: That's right.
 24 MR CHASKALSON SC: Now by the same logic
 25 am I correct in assuming that if Lonmin thought that the

Page 38332

1 DMR was going to withdraw the WPL licence for failing to
 2 build the 5 500 houses committed to in the SLP, Lonmin
 3 would have made sure that funds were made available for the
 4 house construction programme, if you thought it was a
 5 material risk to your licence?
 6 MR SEEDAT: Well, we would have applied
 7 our minds and decided how best to respond. It may be that,
 8 you know, we suggest an alternative. It may be that we try
 9 to find other means of financing, which to be honest
 10 between 2008 and to date would have been extremely
 11 difficult to find other methods of financing. So we would
 12 have looked at other, different ways of how we would
 13 respond to that kind of a challenge if it came up.
 14 MR CHASKALSON SC: You see, what concerns
 15 me about that answer is that it seems that Lonmin sort of
 16 treats the houses not as a real obligation, just as a soft
 17 obligation, because let's just step back a bit to matters
 18 that we traversed earlier this morning. The licence is
 19 with WPL. The SLP obligation is with WPL. It's WPL –
 20 MR SEEDAT: Ja.
 21 MR CHASKALSON SC: - who has committed to
 22 the 5 500 houses, WPL/EPL. If we go back to that extract
 23 from the WPL financials that I showed you on SSSS5, page
 24 84, can we go there? The 2009 financials. And if we can
 25 just scroll down to dividends paid – no, I can't believe

Page 38333

1 I'm doing this again. Dividends paid, this is – can we
 2 just have the whole page on screen so that we can see the
 3 columns and the row titles? These are the 2009 financials.
 4 If we go down to dividends paid, 2009 financials which have
 5 the 2008 and 2009 figures, scroll down a little. Dividends
 6 paid, so in that 2009 financial year Western Platinum paid
 7 out more than a billion in dividends. Now this was in the
 8 middle of the financial crisis, or just after the financial
 9 crisis took effect. Now if the house construction
 10 programme was recognised as a hard obligation you wouldn't
 11 pay out dividends and then say we can't afford to build
 12 houses. Would you accept that?
 13 MR SEEDAT: No. Let me explain. These
 14 are WPL statements, alright.
 15 MR CHASKALSON SC: Yes.
 16 MR SEEDAT: Lonmin PLC has no other
 17 source of income except from its South African
 18 subsidiaries. Lonmin PLC would have loans on its books.
 19 These loans would have to be serviced, as I mentioned
 20 earlier, otherwise you're in violation of your covenants.
 21 In 2009 according to the numbers I have here Lonmin PLC did
 22 not pay any dividends to its shareholders. These dividends
 23 flowed from WPL to Lonmin PLC I would suspect to be able to
 24 service loans and other obligations it has at PLC level.
 25 MR CHASKALSON SC: No, no, I appreciate

Page 38334

1 that, but let's assume – which probably is the case, which
 2 we know is the case, but WPL has loan obligations to
 3 private financial institutions, WPL, okay, not Lonmin.
 4 Would you ever have contemplated not discharging those
 5 obligations in financial year 2009 but still paying a
 6 billion dividends out to Lonmin PLC?
 7 MR SEEDAT: No, the dividends that are
 8 paid from WPL to Lonmin PLC is after local financial
 9 commitments are met. I know where you're going with this
 10 point and let me explore it further. A bank will foreclose
 11 on you and your business comes to a dead standstill. That
 12 risk is something that you have to weigh against, okay, you
 13 have not built these houses, you are putting an integrated
 14 strategy together, you are talking to the DMR, you are
 15 committed to build these houses but not necessarily by
 16 2011, which of the lesser - evils is a bad word, but which
 17 of these options do you follow, survivability of the
 18 business or building houses and going into violation of
 19 your covenants?
 20 MR CHASKALSON SC: So you would choose to
 21 violate your legal obligation under the MPRDA if you
 22 thought it was a commercially sensible decision?
 23 MR SEEDAT: If you had to choose between
 24 the survivability of the business and meeting – this is not
 25 a health, safety and environmental obligation where you're

Page 38335

1 putting people's health at risk. Yes, there are health
 2 issues, I will not deny it, but when you're faced with that
 3 kind of a choice whether your business is going to survive
 4 or you put up houses for people that will not have a
 5 business to work in, clearly you make the choice to keep
 6 your business surviving.

7 CHAIRPERSON: Are you seriously
 8 suggesting that compliance with your housing obligations
 9 would have necessarily brought, forced Lonmin into
 10 liquidation?

11 MR SEEDAT: Well Sir, I clearly remember
 12 discussions with the CFO when we suggested taking further
 13 loans or somehow creating a liability, financial liability
 14 to build the houses, his response was we cannot afford to
 15 violate our covenants, the banks will foreclose on us. So
 16 these were discussions we had. We were talking of, as I
 17 say different ways of trying to find financing, and Sir, I
 18 mean I mentioned this last week, when you have a shaft
 19 which is 80% complete where you've sunk 8 to R9 billion and
 20 you've still got to sink a few more hundred million rand to
 21 finish it so you can generate cash by operating it and
 22 employ up to 10 000 people more, you can't even finish
 23 that. In fact the choice we made is we will put, not put
 24 money in that shaft but we'll continue at least with the
 25 hostels, that is post 2009, because we want to meet that

Page 38336

1 obligation and we can. So Lonmin had to make some tough
 2 choices.

3 MR CHASKALSON SC: There was another
 4 touch choice in extreme circumstances that Lonmin could
 5 always have made. It could have taken some of its non-
 6 productive assets, albeit very valuable ones, like Akanani
 7 for which it had spent R5 billion, sold them at a loss. It
 8 could have done that.

9 MR SEEDAT: Theoretically it could have
 10 sold the whole business, but does that make good sense?

11 MR CHASKALSON SC: Well, so you chose to
 12 break a legal obligation because you didn't want to take
 13 for instance a big loss on the Akanani purchase.

14 MR SEEDAT: Well, it's, when you're
 15 talking of the kind of funding you're talking about and to
 16 make those kind of decisions you probably have to go to
 17 your shareholders and say we're going to go and lose X
 18 amount of money by selling this early so that we can meet
 19 our housing obligation commitment made in the SLP. I'm not
 20 sure how easily shareholders, I would suspect a transaction
 21 of that size would have had to have shareholder approval
 22 and I'm not sure how the shareholders would have voted.

23 CHAIRPERSON: But what about passing the
 24 dividend, or reducing the dividend? You did pay dividends,
 25 didn't you?

Page 38337

1 MR SEEDAT: In 2009 we didn't pay any
 2 dividends except the dividends locally to –

3 CHAIRPERSON: Yes, I know those, you paid
 4 dividends, and the next year, 2010?

5 MR SEEDAT: 2010 we paid a dividend of
 6 \$30 million.

7 CHAIRPERSON: And that's translated into
 8 rands?

9 MR SEEDAT: About R300 million.

10 CHAIRPERSON: And how much would the
 11 houses have cost?

12 MR SEEDAT: Well –

13 CHAIRPERSON: Not all of them, just the
 14 ones you could have built that year.

15 MR SEEDAT: It's the 5 – well, it depends
 16 how many you think you can build in a year, Sir. So let's
 17 say if you build a hundred houses, average cost of
 18 R250 000 –

19 CHAIRPERSON: Do the sum for me.

20 MR SEEDAT: Well, I need a calculator.
 21 25 million.

22 CHAIRPERSON: Ja, if you'd done that and
 23 you'd reduced the dividend payments by that amount you
 24 could have done it, surely?

25 MR SEEDAT: Well Sir, as I say –

Page 38338

1 CHAIRPERSON: The answer is yes or no,
 2 isn't it?

3 MR SEEDAT: You could financially have
 4 built it, yes, and in fact –

5 CHAIRPERSON: And you could have reduced
 6 the dividend and still paid a dividend.

7 MR SEEDAT: Probably a lower dividend,
 8 yes.

9 CHAIRPERSON: Yes, a lower dividend,
 10 obviously a lower dividend. It still would have been a
 11 dividend. What would the dividend have been? What was the
 12 total amount of the dividend you paid? I think you said
 13 300 million.

14 MR SEEDAT: \$30 million, whatever the
 15 exchange rate was at the time –

16 CHAIRPERSON: It's R300 million.

17 MR SEEDAT: Ja.

18 CHAIRPERSON: Ja, okay, and the houses
 19 would have cost you, how much did you say?

20 MR SEEDAT: 100 houses circa R25 million.

21 CHAIRPERSON: So you could have paid a
 22 total dividend in rand terms of 275 million.

23 MR SEEDAT: Possible.

24 CHAIRPERSON: You could have done that.

25 MR SEEDAT: Possible.

Page 38339

1 CHAIRPERSON: The company wouldn't have
2 gone into liquidation if you'd done that, would it?
3 MR SEEDAT: No, if the dividends – well,
4 depending how the shareholders would have reacted to a
5 lower dividend as well, we need to take –
6 CHAIRPERSON: Well, the shareholders
7 couldn't have put the company into liquidation because –
8 MR SEEDAT: No.
9 CHAIRPERSON: - the dividend wasn't as
10 high as they wished, could they?
11 MR SEEDAT: They wouldn't, but they will
12 vote with their feet, sell their shares, share price would
13 drop –
14 CHAIRPERSON: Ja well, some of them could
15 have sold their shares, but so? The company would still
16 have existed.
17 MR SEEDAT: Yes.
18 CHAIRPERSON: Even though the shares were
19 in different hands. Isn't that so?
20 MR SEEDAT: Ja, at a lower value.
21 CHAIRPERSON: Ja, I know, but - I
22 understand that. Anyway, I think the point has been made.
23 MR CHASKALSON SC: While we're talking
24 about lower value of shares, we analysed the Lonmin share
25 price on the London Stock Exchange because we wanted not to

Page 38340

1 look at the effect of changes in the value of the rand,
2 before and after the 2012 strike and before and after the
3 2014 strike, and the products of our analysis are on page
4 378 of SSSS5. You'd been shown a copy of the document.
5 What they show is that in each of these two strikes the
6 share price dropped by 20%, more than 20% over the course
7 of the strike. You accept that?
8 MR SEEDAT: Around there, yes, yes.
9 MR CHASKALSON SC: Ja, so labour unrest
10 is obviously also very damaging to the share price.
11 MR SEEDAT: Yes.
12 CHAIRPERSON: I'm sorry, Mr Chaskalson,
13 it sounds as if you're moving on to a slightly different
14 point. Can I say to you, we've been having a discussion
15 here at our table and we've come to the conclusion that the
16 answer to the problem that we debated earlier is for us to
17 on Monday the 29th to have a session from quarter to 2 until
18 4 o'clock. That will accommodate those to whom we've
19 allocated time for the purposes of cross-examination,
20 that's AMCU, the LRC – AMCU 30 minutes I think, LRC 25, and
21 the Human Rights Commission 25. Those are the allocations
22 we made and if we sit on the Monday afternoon the 29th from
23 quarter to 2 we will be able to honour those allocations.
24 So I mention that to you now because it may have a bearing
25 on your cross-examination and you'll also perhaps have time

Page 38341

1 to mop up on Monday the 29th, and also Mr Burger will have a
2 chance to ask a few questions in re-examination if he
3 considers it –
4 MR BURGER SC: I'm not available on the
5 29th.
6 CHAIRPERSON: Well, I'm sorry but
7 perhaps –
8 MR BURGER SC: I'm sure Mr Bham or
9 somebody from my team will be here, Chair.
10 CHAIRPERSON: Thank you. I was hoping
11 you'd say that and am pleased my hopes were realised.
12 Thank you. Yes, so Mr Chaskalson, I'm sorry to interrupt
13 you but I think that's important information you should
14 have.
15 MR CHASKALSON SC: Thank you, Chair, that
16 does change the way that I will go forward.
17 CHAIRPERSON: As I say, that will obviate
18 the need for the interrogatories from those parties who
19 were intending to cross-examine on phase 2. The general
20 point about interrogatories with respect to phase 1 still
21 stands, subject to the points I've made about
22 reasonableness and so forth.
23 MR CHASKALSON SC: The affordability
24 argument also begs the question of what consequences you
25 suffer if you don't provide decent living conditions for

Page 38342

1 your workers and in that regard I've just referred to that
2 20% loss of share value in the course of the strike. You
3 mentioned in your evidence-in-chief that at full capacity
4 the Marikana Mines generate R50 million a day.
5 MR SEEDAT: In turnover, yes.
6 MR CHASKALSON SC: In turnover, turnover.
7 MR SEEDAT: Turnover, determined,
8 dependent on platinum price and exchange rate, etcetera,
9 but ja, plus-minus.
10 MR CHASKALSON SC: Now during a strike
11 you don't have any of that turnover.
12 MR SEEDAT: Well, it depends because if
13 you have work in process, you have stockpiles of ore, you
14 have work in process in the concentrators and throughout
15 the value chain and what we did in 2012 to avoid us
16 violating our covenants is literally drained the entire
17 system of every ounce of platinum so that we could have
18 enough cash to meet our obligations. So that when we
19 started it took another two months, I think it was, before
20 you filled this pipeline all the way through to the
21 finished product again.
22 [15:37] MR CHASKALSON SC: During a strike you'll
23 have, you'll make some savings on, for instance, labour
24 costs, on consumption expenses which –
25 MR SEEDAT: On variable costs.

<p style="text-align: right;">Page 38343</p> <p>1 MR CHASKALSON SC: On variable costs.</p> <p>2 Now there's a JP Morgan report in your bundle which</p> <p>3 suggests that, as a rule of thumb in the platinum industry,</p> <p>4 70% of cost is fixed.</p> <p>5 MR SEEDAT: Yes, that's about right.</p> <p>6 MR CHASKALSON SC: So in terms of lost</p> <p>7 turnover, what would you estimate the cost of the strike, a</p> <p>8 prolonged strike?</p> <p>9 MR SEEDAT: Well, as I say, around –</p> <p>10 CHAIRPERSON: Turnover?</p> <p>11 MR CHASKALSON SC: Sorry, sorry, sorry,</p> <p>12 lost income.</p> <p>13 CHAIRPERSON: - lost profit, don't you?</p> <p>14 MR CHASKALSON SC: Well, lost income.</p> <p>15 CHAIRPERSON: Ja.</p> <p>16 MR SEEDAT: Profit or income? Income</p> <p>17 after all expenses?</p> <p>18 MR CHASKALSON SC: Ja, well, let me put</p> <p>19 it this way, turnover less variable cost, what would that</p> <p>20 give us?</p> <p>21 MR SEEDAT: Less fixed costs and variable</p> <p>22 costs?</p> <p>23 MR CHASKALSON SC: Yes, but fixed costs</p> <p>24 you're going to incur whether it's, whether it's there or</p> <p>25 not.</p>	<p style="text-align: right;">Page 38345</p> <p>1 incur that cost.</p> <p>2 MR SEEDAT: Yes? So out of the 50 you</p> <p>3 take out 70, that's 35 and then you've got your variable</p> <p>4 costs.</p> <p>5 MR CHASKALSON SC: No, well, presumably</p> <p>6 there's some profit into your daily operation as well but</p> <p>7 50 million is the turnover you generate from daily</p> <p>8 production at full steam.</p> <p>9 MR SEEDAT: Yes.</p> <p>10 MR CHASKALSON SC: 70% of your cost, of</p> <p>11 your daily cost is fixed. You've got to carry on paying</p> <p>12 that in a strike.</p> <p>13 MR SEEDAT: So the 35 million off the 50</p> <p>14 million, you take off 35 million to pay those fixed costs.</p> <p>15 CHAIRPERSON: [Microphone off, inaudible]</p> <p>16 MR CHASKALSON SC: Yes, but you're not</p> <p>17 getting the 50 million because your production isn't</p> <p>18 happening.</p> <p>19 MR SEEDAT: I'm finding it difficult to</p> <p>20 understand your question.</p> <p>21 MR CHASKALSON SC: Sorry, maybe I'm being</p> <p>22 a bit obtuse here. You lose 50 million in output during a</p> <p>23 strike.</p> <p>24 MR SEEDAT: Yes. And you've still got</p> <p>25 your fixed costs.</p>
<p style="text-align: right;">Page 38344</p> <p>1 MR SEEDAT: Well, but if you produce</p> <p>2 you're covering the fixed costs so –</p> <p>3 MR CHASKALSON SC: You lose your 50</p> <p>4 million output.</p> <p>5 MR SEEDAT: Ja.</p> <p>6 MR CHASKALSON SC: You save the variable</p> <p>7 cost. What's your net position?</p> <p>8 MR SEEDAT: Again it depends on platinum</p> <p>9 price, depends on exchange rates –</p> <p>10 CHAIRPERSON: We're assuming more or less</p> <p>11 what the platinum price is and what the exchange rates are</p> <p>12 because we're starting with a figure of 50 million, aren't</p> <p>13 we?</p> <p>14 MR SEEDAT: Yes, well –</p> <p>15 CHAIRPERSON: 50 million makes</p> <p>16 assumptions about exchange rates and –</p> <p>17 MR SEEDAT: That's right.</p> <p>18 CHAIRPERSON: - and platinum price. So</p> <p>19 sticking with those assumptions, what's the answer to the</p> <p>20 question?</p> <p>21 MR SEEDAT: I am subject to correction</p> <p>22 but I give a gross net figure of between 5 and R10 million</p> <p>23 a day, subject to correction, I need –</p> <p>24 MR CHASKALSON SC: Sorry, but hang on a</p> <p>25 minute. 70% of the cost is fixed. You've still got to</p>	<p style="text-align: right;">Page 38346</p> <p>1 MR CHASKALSON SC: You've still got your</p> <p>2 fixed costs.</p> <p>3 MR SEEDAT: Yes.</p> <p>4 MR CHASKALSON SC: So what, so you've got</p> <p>5 approximately 35 million fixed costs that you still have to</p> <p>6 pay, so it's really the fixed cost that is the principle</p> <p>7 cost to you during a strike.</p> <p>8 MR SEEDAT: That's correct.</p> <p>9 MR CHASKALSON SC: The variable cost</p> <p>10 you've saved, the output you've lost.</p> <p>11 MR SEEDAT: Yes.</p> <p>12 MR CHASKALSON SC: And that's about 35</p> <p>13 million.</p> <p>14 MR SEEDAT: The fixed cost.</p> <p>15 MR CHASKALSON SC: Rough.</p> <p>16 MR SEEDAT: Yes.</p> <p>17 CHAIRPERSON: But then you also have to</p> <p>18 factor in that the platinum is still in the ground, so</p> <p>19 though you've lost theoretically 35 on a daily income loss</p> <p>20 basis, you'll be able to get most of it, some of it back</p> <p>21 because that platinum that you would otherwise have taken</p> <p>22 out is still in the ground. So when you start ramping up</p> <p>23 or whatever you do once the strike over, then the loss that</p> <p>24 you've made, the 35 is in fact mitigated by the fact that</p> <p>25 you've now got this extra platinum, as it were, to extract</p>

Page 38347

1 and to sell, isn't that so?

2 MR SEEDAT: No, sir. That's not correct

3 because the 35 million is a sunk cost. The day you don't

4 produce, you incur those costs, it's sunk. Tomorrow you

5 produce, the 35 million on that day has to be covered by

6 the ore that you produce tomorrow.

7 CHAIRPERSON: Yes, but theoretically

8 there's more ore, there's ore left. Either the mine will

9 last for longer or you can ramp up your production and

10 perhaps take out more than 50 million on a day because at

11 the moment I believe you're ramping up, is that right?

12 MR SEEDAT: At the moment -

13 CHAIRPERSON: After the strike?

14 MR SEEDAT: - strike, we are ramping up,

15 yes.

16 CHAIRPERSON: And which means, amongst

17 other things, that you can work on Saturdays. I read a

18 report in the newspaper the other day, I don't know if

19 that's Lonmin but some of the other companies are actually

20 working on Saturdays, which they don't normally do or

21 certainly not to the same extent. Is that right?

22 MR SEEDAT: That's right but you can only

23 ramp up to a certain point because you only have a certain

24 number of production faces that you can produce from.

25 CHAIRPERSON: No, no, I understand. All

Page 38348

1 I'm saying to you is that 35 figure theoretically has got

2 to be reduced to factor in the fact that there's extra

3 platinum you can take out and you can ramp up. It's not an

4 exact science -

5 MR SEEDAT: Ja.

6 CHAIRPERSON: But notionally there must

7 be some kind of return you get on your 35 that you've spent

8 when you, because the platinum is still in the ground.

9 MR SEEDAT: Sir, it's minimal because

10 yes, you have the time value of the money, you've got the

11 platinum in the ground, you're going to mine it at a future

12 date and the time value of that money you can bring back

13 but the R35 million for ventilation, other fixed costs, is

14 sunk. You'll only recover a small fraction of that at some

15 future date.

16 MR CHASKALSON SC: I mean let's not

17 nitpick about precise amounts but if you can save yourself

18 20 lost working days on a strike, you are covering what was

19 that capital budget, are you not?

20 MR SEEDAT: 20 lost working days and

21 you've got to look at the net profit or the recovery -

22 MR CHASKALSON SC: You've got a sunk cost

23 of roughly 35 million a day that you lose.

24 MR SEEDAT: Ja, ja.

25 MR CHASKALSON SC: 20 of those gets you

Page 38349

1 to 700 million. Maybe I'm being too glib with equations

2 but the point that I'm making is that the strike costs you

3 a great deal of money.

4 MR SEEDAT: Absolutely, it costs a great

5 deal of money.

6 MR CHASKALSON SC: And when you assess

7 the cost of not providing housing do you not accept that

8 you also need to assess the potential social costs and

9 labour unrest costs of that choice?

10 MR SEEDAT: Well, if one assumes that the

11 strike was purely based on housing, but it wasn't, but if

12 there was a strike purely on housing, absolutely. I mean

13 every time we have a strike and we look at the potential

14 settlements we have to reach, we evaluate that against how

15 long the strike is going to last, how much money we're

16 going to lose, et cetera, et cetera. So those equations

17 are continuously done in the organisation.

18 MR CHASKALSON SC: Well, you see I don't

19 think it's just an issue of whether the strike was about

20 housing. This one wasn't, it was about a wage demand.

21 It's a broader issue and I want to put to you that the

22 Lonmin board recognised that in the wake of the Marikana

23 tragedy and if I can take you to the letter that your

24 chairperson wrote at the first AGM after Marikana, it's

25 SSSS5 page 275. 375 sorry, 375 not 275, it was my error.

Page 38350

1 CHAIRPERSON: It's now been tilted for

2 us, those of us who can't read sideways, thank you.

3 MR CHASKALSON SC: And in that second

4 paragraph what Mr Phillimore says, "In August last year a

5 breakdown of trust and an atmosphere of fear and

6 intimidation led to the murder of eight of our employees

7 and two police officers. The ensuing confrontation left

8 another 34 people dead and brought untold grief to mining

9 families, to Lonmin, the community around us and to all

10 South Africans. Our tragedy was part of the prevailing

11 unrest through the entire sector which highlighted issues

12 of trust between government, unions, employees,

13 communities, mining companies and society at large. Re-

14 establishing that trust is vital to ensuring sustainable

15 value creation for all or stakeholders, including our

16 shareholders, and will require a fundamental change over

17 time in the way that we do things." So Lonmin understood

18 the Marikana tragedy as being linked to a breakdown of

19 trust, inter alia between itself and its employees. Do you

20 accept that?

21 MR SEEDAT: Yes.

22 MR CHASKALSON SC: And it recognised that

23 if it was going to be able to create sustainable value for

24 its shareholders, it would first have to re-establish that

25 relationship of trust with its employees.

<p style="text-align: right;">Page 38351</p> <p>1 MR SEEDAT: Yes.</p> <p>2 MR CHASKALSON SC: And that theme runs</p> <p>3 very strongly through that 2012 annual report which was</p> <p>4 delivered with this address. If we go to SSSS2 –</p> <p>5 CHAIRPERSON: Before we go to SSSS2, what</p> <p>6 about this page, this paragraph at the foot of the page on</p> <p>7 the screen? The paragraph after the one that's just been</p> <p>8 read is, "The industry as a whole is at a crossroads." It</p> <p>9 goes on to say, "It's imperative to play our part in</p> <p>10 enhancing working relations, committing to a process of</p> <p>11 fundamental change. We are determined to improve our</p> <p>12 operating model to facilitate the creation of shared value</p> <p>13 for all our stakeholders." And then the next paragraph</p> <p>14 says, "One of the key challenges our company and the</p> <p>15 industry as a whole faces is to assist the government in</p> <p>16 the creation of decent and affordable accommodation for our</p> <p>17 employees. They are our most important asset." That's</p> <p>18 right, isn't it?</p> <p>19 MR SEEDAT: Yes.</p> <p>20 MR CHASKALSON SC: And that's all linked</p> <p>21 to this relationship of trust that the board recognises is</p> <p>22 going to be absolutely crucial to re-establish. It's the</p> <p>23 theme in the entire annual report. If we can go to SSSS2</p> <p>24 page 1455, it's your bundle, it's volume 4. 1455.</p> <p>25 CHAIRPERSON: Volume 3 in the top of the</p>	<p style="text-align: right;">Page 38353</p> <p>1 under the heading of "Building a safe and sustainable</p> <p>2 business" because it recognises that without the</p> <p>3 relationship of trust the business is not sustainable.</p> <p>4 MR SEEDAT: Absolutely.</p> <p>5 MR CHASKALSON SC: And I want to – it</p> <p>6 seems to me that this is the first strategic initiative</p> <p>7 that the board announces in the wake of the Marikana</p> <p>8 tragedy because it sees the tragedy as being bound up with</p> <p>9 the breakdown of the relationship of trust. First priority</p> <p>10 is, rebuild trust and under this heading what it says is,</p> <p>11 "One of the key obligations we have assumed under our</p> <p>12 social and labour plan is improving our employees' living</p> <p>13 conditions. To that end we have focused on constructing</p> <p>14 houses, converting former single sex accommodation."</p> <p>15 Presumably it makes that statement under this heading</p> <p>16 because the board realises that you're unlikely to be able</p> <p>17 to build a proper relationship of trust with your workers</p> <p>18 as long as they're forced to live in squalid conditions on</p> <p>19 your doorstep.</p> <p>20 MR SEEDAT: Yes.</p> <p>21 MR CHASKALSON SC: And conversely, you're</p> <p>22 much more likely to build up a relationship of trust with</p> <p>23 them if you provide them with decent accommodation.</p> <p>24 MR SEEDAT: Yes.</p> <p>25 MR CHASKALSON SC: And the last reference</p>
<p style="text-align: right;">Page 38352</p> <p>1 – now volume 4, okay. What page?</p> <p>2 MR CHASKALSON SC: 1455.</p> <p>3 CHAIRPERSON: We're nearly there. Not</p> <p>4 there yet, not there yet.</p> <p>5 MR CHASKALSON SC: And if we can just</p> <p>6 scroll down so that we can – no, sorry, up – up so we can</p> <p>7 see the top of the page. This is where the board announces</p> <p>8 what it calls its six primary strategic initiatives or</p> <p>9 elements here. The first one is building a safe and</p> <p>10 sustainable business and the first paragraph there talks</p> <p>11 about safety. Second particular, "Alongside our legal and</p> <p>12 regulatory obligations we believe that it's necessary to</p> <p>13 earn our social licence to operate from the people and</p> <p>14 communities who host our operations through creating</p> <p>15 economic value by contributing to addressing their needs</p> <p>16 and challenges. We have engaged with and invested heavily</p> <p>17 in our local communities over many years and one of the key</p> <p>18 obligations we've assumed under our social and labour plan</p> <p>19 is improving our employees' living conditions. To that end</p> <p>20 we focused on constructing houses, converting former single</p> <p>21 sex hostels accommodation into bachelor and family housing</p> <p>22 units." Now when Lonmin refers to a social licence to</p> <p>23 operate it means, does it not, a relationship of trust with</p> <p>24 its employees and its local community? It's broadly the</p> <p>25 same thing and it deals with this social licence to operate</p>	<p style="text-align: right;">Page 38354</p> <p>1 in this annual report to which I'd refer you to in this</p> <p>2 regard is unfortunately a passage which wasn't in your</p> <p>3 bundle because your bundle just had extracts, so we'll have</p> <p>4 to get out of this document and go to SSSS4, page 696 which</p> <p>5 is page 13 of the same annual report. So it's SSSS4 page</p> <p>6 696. I must apologise, I've lost my reference again.</p> <p>7 CHAIRPERSON: It's in this document, Mr</p> <p>8 Chaskalson –</p> <p>9 MR CHASKALSON SC: It's going to be page</p> <p>10 698.</p> <p>11 CHAIRPERSON: Alright, we've got 696 on</p> <p>12 the screen –</p> <p>13 MR CHASKALSON SC: Building a sustainable</p> <p>14 business. Social licence to operate. If we, the passages</p> <p>15 that we've heard already and then if we go down, down the</p> <p>16 column, "The challenge, however, is in providing" – it's</p> <p>17 the last paragraph on the page that we can see – "The</p> <p>18 challenge, however, is in facilitating the provision of</p> <p>19 mass affordable employee accommodation, particularly for</p> <p>20 our migrant workforce. The events at Marikana have</p> <p>21 highlighted the critical shortage of affordable housing as</p> <p>22 a major challenge for Lonmin and the South African nation</p> <p>23 more broadly." Now, Lonmin had known about this critical</p> <p>24 housing shortage in Marikana for years, had it not?</p> <p>25 MR SEEDAT: Yes.</p>

<p style="text-align: right;">Page 38355</p> <p>1 MR CHASKALSON SC: And it had also known 2 about the squalid conditions in Nkaneng for years. 3 MR SEEDAT: Yes. 4 MR CHASKALSON SC: So when the annual 5 report said that the vents at Marikana highlighted these 6 issues, it's presumably because the board saw a link 7 between the critical shortage of affordable housing and 8 those events. 9 MR SEEDAT: The board and the executive. 10 MR CHASKALSON SC: The board and the 11 executive, yes. 12 MR SEEDAT: Yes. 13 MR CHASKALSON SC: And I know that you 14 have difficulty dealing with your shareholders who just 15 want money but under all of these headings of sustainable 16 business, I want to put to you that what Lonmin is 17 recognising and what Lonmin really ought to be doing is 18 attending to those housing conditions so that the business 19 can be sustainable and so in the long run shareholders will 20 get value out of the business. Would you accept that? 21 MR SEEDAT: Yes, but I would add that 22 Lonmin has been and continues to look for a solution that 23 will work for all parties. So it's not a lack of 24 willingness to do something, it's not being able to find an 25 optimal solution that suits all parties.</p>	<p style="text-align: right;">Page 38357</p> <p>1 MR SEEDAT: That sounds about right, yes. 2 MR CHASKALSON SC: It also says that 92% 3 of the workforce takes that housing allowance, 26 068 4 employees. 5 MR SEEDAT: That's probably right, yes. 6 MR CHASKALSON SC: The reference, I don't 7 need you to go there but for the record the reference is 8 SSSS5, page 244. Now if one does the arithmetic, 26 068 9 times 1 950 a month times 12 months year, that gives you 10 609 991 200 that Lonmin is spending on this housing 11 allowance on an annual basis. 12 MR SEEDAT: Yes. 13 MR CHASKALSON SC: In 2013. Now you're 14 spending 609 million per year on housing allowances and it 15 seems to us that the bulk of this money is being spent on 16 subsidising slum lords who are charging your workers for 17 squalid conditions in Nkaneng. Would you accept that? 18 MR SEEDAT: Yes. 19 MR CHASKALSON SC: Now don't you think it 20 would be a much more productive use of that money to 21 allocate it towards, in a more focused way towards 22 providing the workers with decent living conditions? 23 MR SEEDAT: If we could, yes. The 24 housing allowance is a condition of employment. If an 25 employee chooses to take the housing allowance you cannot</p>
<p style="text-align: right;">Page 38356</p> <p>1 CHAIRPERSON: Well, they focused on 2 housing according to what we saw earlier, and they produced 3 three houses as a result of the focus. 4 MR SEEDAT: We didn't build houses, sir, 5 but we did put a lot of effort into trying to find a 6 solution to building the houses. 7 CHAIRPERSON: That was the focus, was it? 8 MR SEEDAT: Finding a solution. 9 CHAIRPERSON: That was the focus. 10 MR SEEDAT: Yes. 11 CHAIRPERSON: Oh, I see. The greater 12 Lonmin community which is in capital letters here at the 13 foot of the page, the left-hand column, what is meant by 14 that, the greater Lonmin community, capital letters all the 15 way? 16 MR SEEDAT: The greater Lonmin community 17 is considered the community that lives around, I think it's 18 within a 15 kilometre radius of the operation. 19 CHAIRPERSON: Thank you. 20 MR CHASKALSON SC: Just to tie up a few 21 loose ends, the living allowance as it presently – or 22 actually I don't know under the current wage agreements but 23 in 2013 the social development report reflects the fact 24 that the living out allowance, the housing allowance is 25 1 950 per month.</p>	<p style="text-align: right;">Page 38358</p> <p>1 say you can't have it – 2 CHAIRPERSON: We went through that 3 before. This choice is a non-existent choice. If I'm a 4 rock drill operator and you say to me, you've got a choice, 5 you can either have a housing allowance or you can go into 6 one of our houses, I'd say thank you very much, I'd like to 7 go to one of your houses, would you take me there? Sorry, 8 we haven't got the house. So are you only telling me I can 9 only take the housing allowance? It must be yes, we 10 discussed that before. 11 MR SEEDAT: Yes. 12 CHAIRPERSON: That's not a cock that'll 13 fight, surely. 14 MR SEEDAT: Well, no, the argument I'm 15 making is that it's a condition of employment that an 16 employee does get a housing allowance. I thought the 17 question from the evidence leader was that, take the 18 housing allowance away and in place provide a housing unit. 19 Now I don't think that can be done unless it's negotiated 20 between the employer and the employee or an employee 21 representative. That's the point I was going to make, 22 23 [15:57] understand that, but the point I've put to you, 24 the choices is an illusionary one. Mr Chaskalson, I would 25 like to stop now. If we carry on as I suggested on Monday</p>

Page 38359

1 afternoon the 29th you can then finish your cross-
 2 examination. There are a couple of bits of housekeeping I
 3 have to attend to, so if you don't mind I'll do that now.
 4 There was some controversy about the ruling which
 5 I gave, or announced at the close of the evidence of Mr De
 6 Rover. On reflection I think it was not really a ruling,
 7 it was more a direction, but nothing turns on that
 8 misnomer. The thrust of what I said was really contained
 9 in paragraph 3 of what I'm going to read in a moment, but I
 10 want to clarify the ruling, or the direction as follows
 11 because of the dispute that arose as to the import of the
 12 direction, and I do so under six numbered paragraphs.
 13 The first is that the SAPS has a duty to justify
 14 all of the shootings by SAPS members which caused injury or
 15 death.
 16 The second is SAPS may discharge the duty upon it
 17 by calling witnesses to give oral evidence, by submitting
 18 written statements of witnesses, and by relying on the
 19 other evidence which is before the Commission.
 20 The third – this was really the nub of the
 21 direction I gave before – no adverse inference may be drawn
 22 from the fact that the SAPS has not called every SAPS
 23 member who fired such a shot as a witness to give oral
 24 evidence.
 25 4, Earlier this year the SAPS presented the

Page 38360

1 evidence leaders with a lengthy list of witnesses,
 2 including a number of SAPS members who had fired shots at
 3 scene 1 or scene 2, whom the SAPS wanted to call to give
 4 evidence to the Commission. Because of the time
 5 constraints the evidence leaders did not agree to the SAPS
 6 calling all of the witnesses on its list and agreed only to
 7 the SAPS calling those SAPS members who have now given
 8 evidence. The absence of oral evidence from other
 9 shottists is the consequence of this view expressed by the
 10 evidence leaders.
 11 Any party – this is the fifth paragraph – any
 12 party who intends to rely upon a written statement in
 13 relation to justifiability of the shooting or the lack
 14 thereof is by the 23rd of September 2014 to give notice to
 15 all of the parties, either identifying where that statement
 16 may be found in the materials which have already been made
 17 available, or providing a copy of that statement.
 18 The sixth and last paragraph is as follows. The
 19 Commission will evaluate all of the evidence before it in
 20 considering whether shooting by members of the SAPS was
 21 justified. That is the clarification and amplification of
 22 the direction that was given.
 23 Mr Budlender, I understand you have certain
 24 housekeeping comments to make at this stage before we
 25 adjourn until Monday.

Page 38361

1 MR BUDLENDER SC: Thank you, Chair, yes,
 2 just one matter. It relates to the question of
 3 interrogatories which you raised a bit earlier. We propose
 4 and we ask you to rule, Chair – or well, can I take a step
 5 back. We don't yet know when the argument will be, but we
 6 all need to bring the evidentiary phase to a conclusion as
 7 rapidly as possible and so we propose and we ask that you
 8 rule that any interrogatories must be submitted to the
 9 party affected and to the evidence leaders on your behalf
 10 by not later than Tuesday of next week, Tuesday the 23rd of
 11 September, after which you will be able to rule which
 12 interrogatories need to be answered and there be an
 13 adequate opportunity for answers to be provided.
 14 CHAIRPERSON: Yes, of course I say that
 15 anyone who feels that the interrogatory should not be
 16 answered in its entirety should indicate that to me, then I
 17 can give a ruling. I don't think it's necessary for me to
 18 troll through the interrogatories looking for those that
 19 shouldn't be allowed. I will deal with objections that are
 20 raised.
 21 MR BUDLENDER SC: That's all I wish to
 22 say, Chair, but Mr Burger –
 23 CHAIRPERSON: [Microphone off, inaudible]
 24 statements are dealt with in the – didn't I say the
 25 statements had to be filed by the 23rd, the same Tuesday.

Page 38362

1 Mr Burger?
 2 MR NGCUKAITOBI: I just wanted to –
 3 CHAIRPERSON: Sorry, Mr –
 4 MR NGCUKAITOBI: - ask some clarity, Mr
 5 Chairman, in relation to the interrogatories. As you would
 6 know we had intended to ask some questions to Mr Mokoena.
 7 We gave up the time so that we could get more time for Mr
 8 Seedat.
 9 CHAIRPERSON: You're going to get that
 10 time on Monday the 29th.
 11 MR NGCUKAITOBI: Yes, I understand that,
 12 but I'm asking –
 13 CHAIRPERSON: We're going to adjourn
 14 until Monday the 29th.
 15 MR NGCUKAITOBI: Yes, I'm asking about Mr
 16 Mokoena, whether or not the interrogatories extend to him.
 17 CHAIRPERSON: No, that's not the
 18 intention. The intention is the interrogatories should
 19 take the place of – oh, I see. No, you gave up the time to
 20 ask him questions. I'm sorry, that time is gone. I don't
 21 think I should extend extra facilities. I can understand
 22 questions that have arisen in other matters, in relation to
 23 other matters, but where you were going to deal with
 24 something in cross-examination and you gave up the time in
 25 order to get time to cross-examine this witness, which you

Page 38363

1 are going to get, then there's no scope for interrogatories
2 for Mr Mokoena.

3 MR MPOFU SC: Chairperson –
4 CHAIRPERSON: Yes, sorry –
5 MR MPOFU SC: Sorry, Chairperson, ja –
6 MR BUDLENDER SC: One qualification of
7 which, if I may suggest after what you've said, Mr Ntsebeza
8 had questions which he wished to raise with Mr Mokoena and
9 you indicated that those could be raised by interrogatory.

10 CHAIRPERSON: Yes. No, I did so, I've
11 already said that. When Mr Bham presented the document
12 which had been compiled by Lonmin in relation to the
13 payments they'd made and so on, I did indicate that there
14 was a point Mr Ntsebeza wished to raise - I actually said
15 that – relating to three of the deceased persons who were
16 not employees of Lonmin but Mr Ntsebeza wanted to ask why
17 they had been excluded, and I indicated that he would be
18 able to submit interrogatories and obviously the date fixed
19 for interrogatories applies, but he doesn't have to address
20 it to any particular witness. My suggestion was, and I
21 understood he accepted my suggestion, that that should be
22 addressed to Lonmin, let Lonmin justify their failure to
23 pay monies to those, the families of the three people who
24 weren't their employees but who were killed on the 16th. I
25 think it's clear that the interrogatories now in relation

Page 38364

1 to phase 2 falls away because we've decided to sit on
2 Monday afternoon the 29th to enable those who were going to
3 cross-examine to do the cross-examination they wanted to
4 do. Mr Mpofu?

5 MR MPOFU SC: Thank you, Chairperson.
6 Are you still talking about the Monday the 29th?
7 CHAIRPERSON: Yes.
8 MR MPOFU SC: Well, Chairperson, if I
9 may, there's in my camp at least very great dissatisfaction
10 about the lack of cross-examination for Mr Mokoena. Could
11 I suggest that if we're going to be here for half a day on
12 the 29th, could we be here for the full day and have him
13 recalled for the morning?
14 CHAIRPERSON: No, we dealt with the
15 question of Mr Mokoena and the time allotted to him. I'm
16 not going to reopen that. No, I'm sorry. So that is that.
17 So we'll now postpone –
18 MR BURGER SC: Chair, may I have my
19 opportunity now –
20 CHAIRPERSON: I beg your pardon, Mr
21 Burger, I'm sorry. I didn't see you had your light on.
22 MR BURGER SC: I'm afraid I'm completely
23 at sea on this direction on interrogatories now. As I
24 understand it that was mooted because some of my colleagues
25 wouldn't have an opportunity of posing questions today.

Page 38365

1 Then the Monday came up; they have an opportunity. So I
2 don't see any room for interrogatories now, and what Mr
3 Ntsebenza wants to ask is simply a question to Lonmin.
4 That's not an interrogatory by any manner or form. So do I
5 understand it correctly that there won't be
6 interrogatories? Mr Ntsebenza, Dumisa Ntsebenza –
7 CHAIRPERSON: He's Ntsebeza actually.
8 MR BURGER SC: - Ntsebeza, will ask
9 Lonmin a question on beneficiaries under the trust scheme
10 and we'll answer that, but that's then the extent of the
11 interrogatories?
12 CHAIRPERSON: I also wanted
13 interrogatories to be asked by the evidence leaders in
14 relation to the recording, if it ever existed, of the
15 discussion, or alleged discussion which showed that AMCU,
16 so it was alleged, was behind the strike, the one that Mr
17 Kwadi said he made and Mr Bham explained to us, gave us an
18 explanation as to why Mr Kwadi says it can't be produced.
19 I wanted statements taken from them.
20 MR BURGER SC: That I know of –
21 CHAIRPERSON: Him and Mr Botes.
22 MR BURGER SC: Yes. I wasn't aware that
23 there are interrogatories in that context.
24 CHAIRPERSON: No, actually you are
25 correct. The interrogatories were suggested in order to

Page 38366

1 deal with the problem that the way we were going to proceed
2 the parties who wished to, who have been allocated time to
3 cross-examine Mr Seedat were being deprived of that time
4 because we weren't going to, we're running out of time
5 today, and in place of the interrogatories we've now
6 decided to sit on Monday afternoon, the 29th, so they will
7 get the time allocated to them. So you're correct, Mr
8 Burger.
9 MR BURGER SC: Then I'm indebted to you,
10 Sir. The second thing I don't understand is Mr Budlender
11 says we don't know when we're going to argue. Now I
12 thought we're going to argue in the last week of October.
13 Is that correct or not?
14 CHAIRPERSON: Mr Burger, the situation is
15 a difficult one because I was originally intending to state
16 that we're simply going to postpone till a date which would
17 be announced to the parties either tomorrow or the day
18 after. Then this idea of sitting on the Monday afternoon
19 the 29th arose, which we have accepted, but it follows from
20 that that if evidence is still going to be heard on the
21 29th, obviously you can't argue before that. The question,
22 one possibility which is being considered is the end of
23 October, but we will have, we will be in a position to make
24 a definite statement about that either tomorrow or the day
25 after. I understood from Mr Budlender that he was hoping

1 to have a meeting on Wednesday, tomorrow, with the parties.
 2 Am I wrong? No, sorry, I withdraw that –
 3 MR BUDLENDER SC: No Chair, it's just a
 4 meeting of the evidence leaders.
 5 CHAIRPERSON: Meeting of the evidence
 6 leaders, alright. We're awaiting information which we need
 7 before we can fix the time and as soon as it is to hand we
 8 will communicate it to the parties. The last week of
 9 October is a distinct possibility. I can't put it higher
 10 than that at this stage. But it will be put higher either
 11 tomorrow or the day after.
 12 MR BURGER SC: It makes it extremely
 13 difficult for practitioners to fit in a week and we don't
 14 know what the week is, so I'm not in a position now to know
 15 when we're going to argue.
 16 CHAIRPERSON: I'm acutely aware of that,
 17 Mr Burger. The difficulty I have is one that I can't
 18 overcome today, but I will either be able to overcome it
 19 tomorrow or the day after.
 20 MR BUDLENDER SC: Chair, we're all
 21 practitioners, we all have the same problem and we have to
 22 try to find a way of resolving the problem.
 23 CHAIRPERSON: Alright, I think we've
 24 taken it about as far as we can go today. So we'll adjourn
 25 now until quarter to 2 on the afternoon of the 29th of

1 September.
 2 [COMMISSION ADJOURNED]

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38331:13 38336:18 38337:23 38338:12 amounts 38204:16 38223:12 38229:2 38255:16 38257:22 38270:4 38322:9 38348:17 amplification 38360:21 analysed 38339:24 analysis 38222:16 38297:19 38304:22 38324:20 38326:12 38326:13 38340:3 angle 38142:24 Anglo 38158:7,19,22 38273:12,15 annexure 38221:5,19 38321:12 announced 38359:5 38366:17 announcement 38218:14,17 announces 38170:1 38352:7 38353:7 annual 38158:17,20,24 38227:5 38238:8,10 38244:4 38306:12,12 38312:19 38313:15 38320:21 38322:9 38351:3,23 38354:1,5 38355:4 38357:11 annum 38327:4 answer 38133:18 38135:15 38139:10 38146:21 38156:25 38162:18 38169:10 38169:15 38172:24 38175:7 38176:9 38177:16 38178:3 38187:17 38248:23 38249:18 38253:6 38305:24 38318:7 38321:23 38329:5,6,6 38329:14,21,22 38330:2 38332:15 38338:1 38340:16 38344:19 38365:10 answered 38157:11 38184:18 38331:1 38361:12,16 answering 38156:12 38169:5 38296:25 answers 38169:8 38213:21 38311:15 38329:18 38361:13 answer's 38246:14 anticipate 38293:12 38294:22 anticipated 38281:23 38282:19 38292:25 anticipates 38281:24 anticipation 38282:11 anybody 38144:7 38162:23 38170:14 38171:1,16 38213:7 38288:12 38293:23	38302:7 anyway 38150:24 38156:15 38157:18 38158:24 38175:13 38208:17 38209:25 38210:2 38330:25 38339:22 apart 38285:10 apologise 38253:19 38330:20 38354:6 apology 38330:23 appalling 38273:19 38274:16,17 38294:6 apparent 38259:14 apparently 38196:23 38236:17 38316:8 appear 38209:7 38214:16 38227:9 appears 38205:2 38226:9 38245:1 38304:9 38309:23 38324:19 applicable 38313:3 applicants 38314:2,11 application 38329:15 applications 38322:18 applied 38160:22 38236:19 38263:17 38320:6 38321:3 38332:6 applies 38363:19 apply 38160:23 38321:9 appreciate 38213:12,13 38333:25 approach 38154:13 38155:6 38204:18 38320:18 approached 38289:19 38290:13,14 38293:4 appropriate 38226:20 38274:17 38279:24 38324:8 approval 38324:14 38325:1 38336:21 approvals 38252:5 approve 38266:13 approved 38284:9 38290:3,12,13 38314:3 38316:6 38322:25 38323:4 approving 38321:22 approximately 38225:7 38276:6,24 38346:5 April 38259:23 38261:11 38296:15 38323:4,6,7 38324:13 Arch 38161:9,21 area 38152:4 38162:9 38222:9 38227:14 38284:6,8 38314:20 areas 38227:23 aren't 38294:5 38330:15 argue 38139:16 38140:1 38144:2,3	38151:11,15 38158:3 38172:23 38175:23 38177:17,19 38249:21 38290:25 38291:5 38304:10 38366:11,12,21 38367:15 argued 38140:4 38329:15 arguing 38137:1 argument 38157:22 38167:10,12,23 38172:3 38224:14 38295:18 38296:1 38297:1,3 38322:4 38329:11,11 38331:7 38341:24 38358:14 38361:5 arguments 38322:3 arisen 38362:22 arithmetic 38256:7 38357:8 arm 38292:21,21 armed 38186:6 armoured 38161:3,20 arms 38161:11 38317:10 arm's 38292:19 arose 38359:11 38366:19 arrange 38256:5 arrangement 38131:6 38132:5 38232:16,20 38233:9,13 38260:4 38261:7 38263:25 38292:24 38309:11 38314:9 arrangements 38127:10 38231:4,13 38233:11,16 arranging 38258:24 arresting 38184:6 arrival 38129:9 38151:2 38314:11 arrive 38140:19 arrived 38161:21 38163:1 38190:15 38311:18 arrogant 38152:19 articles 38215:23 ascribe 38229:11 aside 38128:8 38147:25 38303:10 38323:22 38323:25 asked 38127:9,17 38128:13 38132:2 38133:8 38150:9 38164:16 38167:18 38170:18 38176:2 38192:18 38196:1 38202:13 38205:1 38210:3 38266:9 38280:22 38321:3 38322:11 38365:13 asking 38145:25 38147:19 38164:16	38175:18 38195:8,24 38198:16 38216:9 38328:25 38330:17 38362:12,15 aspect 38219:9 38250:8 aspects 38219:18 38220:7 assess 38349:6,8 asset 38252:6,16 38289:9 38290:21,22 38325:8 38351:17 assets 38231:9 38242:17 38251:21 38289:11 38296:7 38336:6 assist 38150:11 38189:19 38271:3 38281:10 38286:15 38351:15 assistance 38150:21 38220:15,17 38221:23,24 38248:5 38265:15 assisting 38293:6 associated 38172:10 38258:6 assume 38247:9 38256:12 38273:17 38296:4,6 38297:10 38303:13 38307:2 38323:6 38324:22 38334:1 assumed 38352:18 38353:11 assumes 38349:10 assuming 38296:7 38331:25 38344:10 assumption 38131:13 38299:22 38300:2 38305:20 38314:22 38326:24 assumptions 38344:16 38344:19 assurances 38159:23 38160:19 assure 38329:3 atmosphere 38350:5 attached 38246:1 attempt 38260:25 attempts 38189:22 attend 38359:3 attending 38222:23 38355:18 attention 38214:12 38248:19 attitude 38186:24 38187:4 38195:16,18 38200:12,12 attract 38187:8 audit 38222:13 audited 38262:15 38267:2 38306:14 auditors 38233:12 38306:14,15 August 38130:1 38133:23 38163:7	38168:8 38170:1 38179:21,24 38183:6 38183:9,10,13 38186:9,10,14 38188:17,17 38208:20,21 38224:17 38253:15 38265:8 38275:21,24 38276:2 38297:14,18 38297:19,21,24 38323:12,15 38324:21 38325:18 38350:4 authored 38304:17 authorities 38228:9 38236:3 authority 38239:16 automatically 38155:8 38251:1 availability 38227:12 available 38127:13 38129:10 38181:3 38209:8 38222:9 38226:20 38227:13 38255:2 38283:15,22 38284:21 38288:6 38289:18,18 38290:1 38290:2 38328:2 38332:3 38341:4 38360:17 avenues 38185:25 average 38257:23 38316:11 38337:17 averted 38158:2 avoid 38213:10 38342:15 avoids 38148:8 38149:10 awaiting 38367:6 aware 38161:24 38162:1,8 38190:25 38206:7,19 38256:11 38258:13,14 38273:4 38276:18 38281:14 38302:7 38309:15 38365:22 38367:16
B				
bachelor 38352:21 back 38131:4,5 38143:22,24 38151:13 38162:13 38163:12,13 38164:13,15 38168:20 38184:4 38186:25 38187:8,11 38187:14,17 38188:2 38188:7 38189:24,25 38201:1 38213:7 38215:7 38229:16 38232:12 38236:6 38237:6 38243:7 38245:2 38250:14 38252:19 38254:5,8 38255:21 38261:19 38265:5 38267:11,15				

<p>38271:10 38280:3 38289:22 38294:11 38303:17 38310:16 38313:13 38318:16 38332:17,22 38346:20 38348:12 38361:5 background 38171:5 38217:5 38231:1 38247:13 bad 38138:22 38139:25 38323:25 38326:22 38334:16 balance 38250:13 38252:15,20,21 38294:23 balances 38266:23 balancing 38301:16 bank 38286:23 38288:4 38292:4,14,20 38294:24 38295:4 38310:13,14 38334:10 banking 38286:21,24 38288:8 38289:19,20 38290:2,4,12,17 38292:3 38293:11 38300:1 38311:2 banks 38250:11 38282:3 38286:17 38292:17 38293:5 38294:1,2,18 38295:15,23 38298:2 38298:4 38301:16 38309:12 38311:13 38317:13 38335:15 bargain 38130:22 38131:18 bargaining 38129:23 38130:2,5,24,25 38131:5,16,20,22 38135:4,10,13,13 38136:23 38137:5,16 38217:24 Barnard 38129:13 38159:7 38163:21 38195:10 38203:4 38239:12 base 38131:13 38313:12 based 38148:23 38161:24 38227:25 38232:12 38322:17 38324:24 38326:12 38326:13 38349:11 BASF 38271:21,25 38272:1 basic 38276:8,15 38277:2,23 38322:3 basically 38132:14 basis 38134:6 38171:2 38172:18 38181:22 38228:10 38247:9 38289:17 38290:1 38311:2 38314:9 38326:16 38328:11</p>	<p>38346:20 38357:11 bear 38307:23 bearing 38233:6 38340:24 BEE 38331:21 beg 38182:24 38197:17 38198:8 38254:19 38364:20 begging 38156:24 beginning 38165:22 38168:19,23 38191:9 38255:3,3 38326:22 begs 38322:4 38341:24 behalf 38128:15 38132:3 38133:9 38202:14 38219:14 38223:19,22 38224:10 38310:12 38361:9 behaviour 38153:5 believe 38132:9 38152:25 38198:21 38235:16 38332:25 38347:11 38352:12 believed 38162:22 38171:6 38314:7 belong 38169:21 Ben 38222:3 beneath 38204:2 beneficiaries 38220:12 38221:18 38222:13 38365:9 beneficiary 38223:13 38223:18 38224:20 benefit 38183:23 38297:5 benefits 38222:25 38237:8 38250:10 38263:15 Bermuda 38259:22 38261:13,15,20,20,23 38262:15,19,21 38263:1,2,8,21 38267:1,1,18,20 best 38152:12 38156:22 38195:13 38220:19 38222:7 38229:2 38231:6 38253:25 38294:4 38332:7 betrayed 38163:14 38164:1,3,6,6,21 38177:25 better 38133:15 38147:21 38150:15 38178:24 38236:21 38237:7 38239:12 38257:11 38285:7 38292:10 38317:5 beyond 38286:8 38300:16 Bham 38127:8,23 38128:21 38129:5,11 38133:4,12 38134:9 38134:19 38145:12 38145:18,22,24 38146:20,24,25</p>	<p>38147:7,8 38148:15 38148:17,20,22 38149:3 38158:13 38178:19 38179:1,6,9 38179:16,19,23 38202:22 38209:9,11 38213:25 38214:1,11 38214:19 38215:13 38216:18 38218:3,14 38219:10,11,22 38220:1 38224:2,7,18 38224:23 38341:8 38363:11 38365:17 Bham's 38134:6 big 38173:5,9 38175:8 38175:15,19 38176:3 38336:13 bigger 38282:15,15 biggest 38318:2 billion 38246:3,12 38247:3 38249:16,16 38254:11,19 38256:8 38295:11,14 38324:11,13 38325:6 38326:4,4 38327:5 38333:7 38334:6 38335:19 38336:7 binding 38143:4 38319:15 38320:23 38321:6 Bishop 38151:2,24,25 38152:3,9,13,14,15 38152:17,22 38153:7 38153:9,12,15,20,20 38154:4 Bishop's 38152:18 bit 38129:7 38158:20 38195:19 38226:17 38236:24 38244:7 38253:3 38266:22 38294:20 38303:25 38316:4,9 38332:17 38345:22 38361:3 bits 38359:2 black 38177:23,25 38300:18 Blackberry 38270:25 38271:1 blame 38196:11 blaming 38156:9 bled 38325:8 block 38300:20 38302:20,21 blocks 38287:9 38299:14 38303:25 blood 38176:20,22,23 38194:21 bloodshed 38175:24 38176:23 38177:9 board 38140:16 38141:9 38230:12 38248:21 38264:8 38265:1,5 38295:15 38299:1,2 38317:1,4 38322:23,24 38325:13 38326:6</p>	<p>38349:22 38351:21 38352:7 38353:7,16 38355:6,9,10 boarding 38221:24,25 Boksburg 38258:2 bold 38300:22 bond 38264:5,13,23,25 38265:3,6,9,13 38295:3,5 bonds 38292:8 bonus 38204:13 38217:23 bonuses 38207:3 booed 38162:25 books 38222:1,20 38252:18 38295:3 38301:15 38317:12 38333:18 boom 38294:13 38296:1 38322:8 booming 38295:23 38311:11 38323:20 Bophuthatswana 38231:11 born 38168:21 borrow 38288:1 38291:13 borrowed 38287:18 Botes 38365:21 bottom 38174:10 38244:12 38283:7 38302:18 38313:13 38313:14 bought 38251:17,18,19 38295:10,12,12 bound 38353:8 boundaries 38231:16 38231:17 38232:15 boundary 38232:23 box 38244:8,9,11,12 brains 38318:9 Brakpan 38259:4 branch 38240:21 branches 38206:18 breach 38286:13 break 38182:16 38219:12 38237:14 38256:14 38318:10 38336:12 breakaway 38218:23 breakdown 38257:20 38289:16,18,21,25 38290:2,5,18 38350:5 38350:18 38353:9 bricks 38235:23 briefly 38152:2 38225:21 38238:7 bring 38139:22 38153:21 38187:13 38348:12 38361:6 bringing 38138:22 38173:5 38215:17 38286:6 broadened 38133:23 broader 38319:2 38349:21</p>	<p>broadly 38146:3 38352:24 38354:23 broken 38248:8 38312:19 brought 38137:15 38163:13 38264:13 38335:9 38350:8 brush 38147:25 buckets 38329:19 budget 38287:10,12,15 38287:16,21 38289:15 38290:7,8,9 38291:8,15,20 38299:18 38301:9 38304:1,3,5 38308:1 38308:4,12 38322:10 38322:13,23 38323:1 38324:16 38325:1 38348:19 budgeted 38308:2 budgets 38323:6,8 Budlender 38360:23 38361:1,21 38363:6 38366:10,25 38367:3 38367:20 build 38230:14 38250:4 38282:11 38284:17 38297:20 38299:15 38299:19 38302:10 38311:3,5 38312:18 38312:18 38315:21 38315:23 38316:19 38316:22 38317:20 38318:21,23,25 38319:25 38322:5 38332:2 38333:11 38334:15 38335:14 38337:16,17 38353:17,22 38356:4 builders 38286:17 building 38253:6 38284:23 38286:20 38291:9 38292:2 38297:17,24 38313:21,24,25 38314:3 38315:20 38316:8,11,15,23 38323:9,14 38324:23 38325:3 38334:18 38352:9 38353:1 38354:13 38356:6 buildings 38232:9 built 38228:10 38236:10 38250:2 38279:16 38282:21 38283:14,16,22 38284:6,20 38285:11 38285:15,16,25 38286:3,5,6,7 38289:17,25 38297:13,13 38305:10,11 38313:11 38314:8 38315:15 38318:12 38334:13 38337:14 38338:4</p>
--	--	---	---	---

<p>bulk 38357:15 bullet 38204:2,22 38205:8 38208:7,19 38227:10,18 38249:9 38253:22 38254:12 38313:19,20,24 bundle 38165:15 38173:22 38174:16 38174:17 38175:4 38179:2 38182:9 38197:19,20,23 38198:5,6 38203:10 38203:12 38211:7 38214:2 38234:9 38239:20 38248:1,6 38283:2 38343:2 38351:24 38354:3,3 bundles 38237:25 38312:10,10 burdened 38229:18 Burger 38225:20,23 38226:6,24 38228:3 38230:17 38232:5 38233:17 38234:6,22 38235:9,14,19 38237:10,12 38253:10 38265:14 38268:5 38270:21 38277:7,10,12 38311:22 38328:14 38328:21 38329:9 38330:5 38331:2,3 38341:1,4,8 38361:22 38362:1 38364:18,21 38364:22 38365:8,20 38365:22 38366:8,9 38366:14 38367:12 38367:17 Burger's 38268:15 38278:1 burial 38223:6 bursary 38128:24 business 38236:3 38257:11 38273:11 38273:12 38313:8 38334:11,18,24 38335:3,5,6 38336:10 38352:10 38353:2,3 38354:14 38355:16 38355:18,20 businesses 38231:15 busy 38174:7 38242:21 38264:12 buy 38230:3 38291:2 38301:17 38314:22 38315:18,25 38316:3 buying 38292:22 38316:2,20,21 38324:11,13</p>	<p>38154:9 38155:20 38163:13 38172:11 38179:17 38188:18 38188:22,23,25 38189:23 38194:22 38201:7,11,14 38212:16 38217:12 38230:19 38235:8 38255:11 38261:6 38281:3 38360:3 called 38130:1 38151:1 38161:15 38166:13 38194:7 38201:9,12 38226:3 38230:20,21 38276:3,4 38308:1 38359:22 calling 38359:17 38360:6,7 calls 38183:4 38188:16 38190:1,20 38201:3,5 38201:11,18,24 38208:14 38352:8 camouflage 38175:11 camp 38364:9 canvassed 38180:12 can't 38142:1 38147:24 38149:16 38186:25 38195:17 38245:19 38250:16 38275:22 38282:6 38288:3 38330:3,14 38331:16 38332:25 38333:11 38335:22 38365:18 38366:21 38367:9,17 capable 38150:15 capacity 38342:3 Cape 38222:5,17 capital 38211:2 38250:11 38287:10 38287:12,15 38289:14 38290:7,8,9 38291:8,14,17,18,20 38291:21 38299:18 38301:9 38306:22 38307:6 38322:10,13 38348:19 38356:12 38356:14 capitals 38300:22 care 38217:4 38252:12 38252:13 carefully 38300:25 38311:9 carnage 38150:16 38175:24 carried 38162:24 38256:16 carries 38251:5,9 carry 38137:22 38156:22 38168:25 38172:7 38300:8 38345:11 38358:25 carrying 38163:1 38164:16 38316:21 case 38135:18 38187:21 38212:17 38213:15 38216:17</p>	<p>38218:8 38232:21,23 38233:9 38243:20 38258:2 38290:6 38291:6 38294:14 38306:21,24 38315:2 38322:19 38334:1,2 cases 38233:10 38238:17 38260:24 cash 38249:9 38250:3 38255:2,8 38265:8 38294:20 38311:13 38335:21 38342:18 catastrophes 38140:24 catch 38149:8 categories 38217:2,19 categorise 38148:24 category 38133:8 cater 38283:11 38284:3 38284:18 cause 38261:1 caused 38168:3,8,16 38260:24 38359:14 causes 38167:3 cell 38183:4 38188:15 38190:18 38194:6 38309:18 cancel 38169:8 cent 38302:15 38308:13 Centre 38140:19 38142:15 38181:14 38181:18 38225:11 CEO 38232:5,7 38249:21 38274:25 certain 38154:4 38220:6 38222:10 38223:1,10 38238:18 38242:17 38347:23 38347:23 38360:23 certainly 38134:22 38191:13 38208:20 38236:23 38267:14 38271:3 38298:10 38328:14 38347:21 certainty 38264:20 38295:6 cetera 38236:14 38237:2 38324:22 38349:16,16 CFO 38265:2 38335:12 chain 38259:3 38342:15 chairman 38133:4 38145:12 38148:15 38181:15 38224:1 38235:20 38249:21 38264:21 38272:19 38274:18 38289:10 38290:19 38291:16 38294:11 38296:13 38305:8 38330:24 38362:5 chairpersons 38206:18 challenge 38236:1 38318:1 38320:17 38332:13 38354:16</p>	<p>38354:18,22 challenges 38226:18,19 38351:14 38352:16 chance 38318:6 38330:18 38341:2 change 38268:3 38341:16 38350:16 38351:11 changed 38140:14 38200:16 38260:4 38263:21 38315:19 changes 38340:1 chapter 38274:2 charge 38219:8 38233:7 charged 38228:15 38232:11 charges 38230:1 38233:7,8 charging 38272:12 38357:16 charter 38226:10 check 38222:13 38237:25 38241:21 38245:3 38297:18 38306:18 chief 38225:6 38237:11 38238:16,21 38239:20 38247:23 38265:2,15 38311:22 38325:21 children 38220:21 38221:11,25 38222:6 38222:18,19 38223:5 China 38327:3 choice 38159:12 38292:6 38313:22 38331:10 38335:3,5 38335:23 38336:4 38349:9 38358:3,3,4 choices 38336:2 38358:24 choose 38227:17 38276:10 38278:2 38319:19 38329:24 38331:13 38334:20 38334:23 chooses 38330:1 38357:25 chose 38278:17 38279:3 38299:5 38336:11 churches 38137:11 circa 38282:15 38338:20 circulated 38208:11 circumstances 38206:2 38212:15 38260:25 38292:9 38336:4 Civic 38140:19 38142:15 claim 38306:16 claiming 38134:2 claims 38176:3 clarification 38360:21 clarified 38307:3</p>	<p>clarify 38135:20 38217:21 38238:19 38240:1,3 38241:22 38242:1 38245:6 38257:4 38359:10 clarifying 38238:14 clarity 38143:16 38144:19 38362:4 clause 38260:23 clear 38132:13 38135:8 38135:25 38143:10 38143:12,19 38144:23 38145:3 38150:1 38175:22,23 38195:11 38199:24 38200:2,13 38209:19 38309:8 38311:17 38319:5 38328:1 38363:25 clearer 38132:21 clearly 38141:24 38201:8 38231:4 38267:25 38277:17 38281:24 38282:8 38287:22 38296:16 38299:25 38318:24 38335:5,11 client 38128:2 38129:8 climate 38295:16,17,25 clock 38210:15 close 38160:13 38212:19,23,24 38213:5,10,16 38225:14 38254:19 38315:8 38359:5 closed 38231:23 38298:2 38319:24 closeout 38298:10,13 38298:25 38299:7 38306:4 38308:21 closing 38213:4 cock 38358:12 cognizance 38305:12 coin 38282:8 colleague 38265:24 colleagues 38173:24 38234:12 38364:24 collection 38238:12 collective 38135:13 38136:23 38217:23 colluding 38197:5,8 38198:15,25 38199:9 colour 38300:19,20 coloured 38298:1 column 38227:8 38243:12,14 38245:24 38302:14 38302:25 38313:14 38354:16 38356:13 columns 38243:15,15 38333:3 combined 38308:4,5,12 come 38139:3,8 38148:19 38152:3 38160:7 38161:13 38167:19,20</p>
---	---	--	---	---

38183:18,25 38184:4 38184:14 38186:25 38187:11,17 38188:1 38188:7 38199:22 38207:11 38208:3 38209:10 38212:15 38216:22 38223:21 38229:17,17 38264:17 38272:14 38293:3 38295:1,15 38296:22,24 38297:22 38313:13 38314:16 38327:10 38327:12 38329:12 38340:15 comes 38129:9 38136:6 38151:13 38181:3 38186:16 38194:16 38249:3,25 38288:18 38290:24 38292:10 38303:3 38324:6 38334:11 comfort 38182:16 comfortable 38197:6 38199:7 coming 38133:14 38139:11 38153:16 38164:14 38184:13 38207:22 38211:23 38218:9 38264:8 38274:21 38287:23 38323:25 commence 38314:4,4 commenced 38286:22 38292:4 commencement 38260:12 commences 38214:21 comment 38140:2 38214:13 38215:25 38253:18 comments 38149:2 38180:2 38254:13 38360:24 commercial 38296:12 commercially 38334:22 commission 38127:2 38140:10 38147:11 38154:12 38157:8 38159:6 38163:17 38168:6 38178:18 38181:6 38202:7,7,8 38205:22 38209:8 38216:3 38220:5 38225:12 38227:1 38230:24,25 38237:20,20,21 38240:11 38255:13 38255:15,15 38256:8 38256:9 38260:2,21 38261:12,14 38262:5 38262:18 38263:7 38266:18,25 38267:17 38269:9,11 38269:15,16,21 38274:19 38280:8,8,9	38305:18 38311:21 38317:7 38327:20,20 38327:21 38329:18 38340:21 38359:19 38360:4,19 38368:2 commissioner 38152:6 38152:11,17 38173:25 38175:9 38176:18 38182:8 38183:16,22 38191:13,15 38192:14,15,18 38194:7,12 38197:23 38198:6 38199:15 38302:20 Commissioners 38219:12 38234:16 38238:6 38329:7 Commissioner's 38200:6 commissions 38270:3 38271:13 commitment 38286:14 38286:15 38290:23 38299:19,21 38300:21 38301:2,6,8 38301:10,22 38304:14,15 38305:7 38306:16 38307:22 38309:10 38310:8,9 38310:13,21 38311:1 38311:7,8 38312:13 38312:17,20 38317:20,25 38319:4 38319:6,14 38322:24 38324:17 38325:11 38325:14 38336:19 commitments 38286:13 38299:13 38312:15 38312:25 38313:1,4 38313:18 38322:22 38323:3 38324:3,17 38334:9 committed 38226:23 38313:5 38316:20 38318:25 38332:2,21 38334:15 Committee 38177:23 committing 38351:10 commodities 38294:13 38325:17 38326:10 commodity 38311:11 common 38139:1 38291:17,21 communicate 38367:8 communicated 38155:19 38167:15 communication 38195:12 communications 38128:11 communiqués 38168:15 communities 38229:17 38350:13 38352:14 38352:17	community 38227:25 38228:1,2 38350:9 38352:24 38356:12 38356:14,16,17 companies 38231:13 38232:14,18 38240:8 38241:5 38247:20 38294:13,19 38315:15 38322:17 38347:19 38350:13 company 38132:16 38135:24 38138:10 38178:1 38194:24 38195:25 38196:2 38204:9 38220:10,13 38228:7,8 38230:11 38231:21 38232:2,16 38232:24,25 38233:3 38233:6,7 38240:3,6 38240:21 38241:5,7,7 38241:8,20 38244:24 38253:7 38259:22 38261:13 38262:15 38262:19 38263:2,3 38264:23 38270:8,9,9 38271:25 38272:21 38274:25 38276:11 38278:4,5,15,18 38279:5,5,7,12,19 38295:21 38313:20 38315:5 38323:24 38325:9,14 38339:1,7 38339:15 38351:14 company's 38312:24 compared 38158:22 38216:8 38244:8 comparison 38244:9 competitive 38158:21 compiled 38363:12 complete 38169:12 38335:19 completed 38252:5 38285:4 completely 38364:22 complex 38213:8 38283:10 38317:2 complexity 38152:14 38213:13 compliance 38320:21 38335:8 complicated 38239:22 comply 38271:6 38319:17 38324:1 complying 38321:2 component 38250:18 comprehensively 38329:8 compromise 38196:6,8 compromised 38313:2 conceded 38157:15 38160:8 38165:4 conceding 38187:21 concentrate 38260:18 concentrators 38342:14 concept 38136:6	concern 38184:1 38188:14 38249:14 38260:10 38278:1 concerned 38184:12 38243:3 38291:5 38293:25 38296:10 38315:14,17 38317:8 38317:9 concerns 38167:20 38216:23 38233:15 38247:24 38332:14 conclude 38216:4 concluded 38260:7 38265:20 38268:7 concluding 38225:21 conclusion 38311:18 38340:15 38361:6 condition 38132:15 38237:7 38315:6 38357:24 38358:15 conditions 38140:13 38272:8,9,14 38273:18 38274:2,15 38274:16,23 38275:15 38277:6 38278:2 38294:6 38299:11 38341:25 38352:19 38353:13 38353:18 38355:2,18 38357:17,22 conference 38192:18 confidence 38294:19 38295:8,21,25 confident 38254:25 confirm 38154:5 38262:17 38273:3 38297:16 38317:6 confirmed 38135:12,22 38193:5 38246:22 conflict 38168:23 38169:19,20 confrontation 38350:7 confronted 38255:6 confused 38302:10 confusion 38135:19 38180:11 38245:10 congratulated 38218:21 conjunction 38282:3 consent 38140:5,17 38143:5,6 consented 38140:15 consequence 38360:9 consequences 38341:24 consequent 38227:16 consequently 38185:25 38186:7 38220:21 38222:9 conservation 38255:8 consider 38271:4 38273:16 consideration 38213:9 38220:16 considered 38209:24 38209:25 38212:19 38227:22 38266:11	38266:14 38325:16 38356:17 38366:22 considering 38250:8 38252:3 38360:20 considers 38250:16 38341:3 consistent 38262:14 Constance 38210:23 constraints 38226:22 38227:13 38360:5 constructing 38352:20 38353:13 construction 38282:7 38285:24 38290:10 38299:17 38314:10 38322:7 38332:4 38333:9 consumption 38257:9 38342:24 CONT 38237:23 contact 38193:21 38206:17 contacted 38142:6 contained 38359:8 Containerisation 38235:10,12 containers 38234:8 38236:11,12 38237:4 contains 38260:23 CONTD 38129:14 38225:23 38281:11 38331:6 contemplated 38291:25 38334:4 contemplating 38328:6 context 38134:20 38157:7,9,19 38158:10,15,15,16 38167:1,22 38171:10 38172:15 38187:6,12 38188:12 38196:9,13 38213:21 38234:8 38250:1 38314:15 38315:3,12 38365:23 contingency 38160:21 continue 38213:5 38283:7 38314:3,4 38326:25 38327:3,7 38335:24 continued 38161:17 38168:25 38313:7 continues 38280:13 38355:22 continuously 38320:9 38320:10,18 38349:17 contract 38272:10 contracts 38143:4 38272:6,14 contractual 38272:13 contrary 38140:5 contribute 38313:6 contributing 38352:15 contribution 38220:19 contributions 38221:11 controversial 38238:15
---	---	--	---	--

<p>controversy 38359:4 convened 38139:18 convenient 38237:14 conversation 38134:21 38152:13 38189:5 38190:25 38196:5,9 38196:14 conversely 38353:21 conversion 38281:13 38281:21 38282:6 38283:13,18 38284:5 38284:13,14,18,24 38285:3 38286:8 38287:3,11,18 38288:2,25 38289:7 38289:24 38290:8,9 38302:6 38303:15 38307:24 38312:15 38312:16 38313:19 38322:20,21 38324:14 conversions 38287:22 38299:17 38302:2 38322:18 convert 38237:4 38242:22 38288:5,10 38293:18,22 38299:14 converted 38251:20 38279:15 38284:15 38285:8 38287:9 38288:12 38289:6,9 converting 38303:12 38352:20 38353:14 convey 38189:2 conveyed 38192:6 convincing 38145:9 cooperation 38228:8 coordinate 38194:13 38194:14 coordinated 38195:1 38196:2 coordination 38196:10 copies 38127:12 38179:10 38234:10 38234:14,16,17 copy 38174:14 38258:10 38270:25 38274:5 38309:25 38340:4 38360:17 corner 38302:19 38326:7,8 corporate 38240:1 38243:8 38249:19,20 38249:23 Corporation 38271:20 38271:23 corral 38192:4 corralling 38192:3 correction 38232:8 38257:10,17 38344:21,23 correctly 38138:4 38172:18 38228:9,13 38229:15 38231:24 38239:12 38251:16</p>	<p>38257:16 38265:1,11 38277:8 38288:17 38297:14 38316:11 38365:5 correspond 38229:13 38230:1,8 correspondence 38163:21 corresponding 38245:21 38247:18 38252:18 38289:13 cost 38222:1 38223:5 38227:11 38230:4 38238:19 38256:24 38263:14 38287:21 38299:16,20,22 38303:11 38316:11 38316:15 38337:11 38337:17 38338:19 38343:4,7,19 38344:7 38344:25 38345:1,10 38345:11 38346:6,7,9 38346:14 38347:3 38348:22 38349:7 Costa 38154:2,8,8,17 38154:25 38155:2,9 38155:14,15,25 38157:2,13,23 38166:18 38203:13 38203:19,23 38204:3 38205:14 38206:2 38207:11 38216:10 Costa's 38155:7 38206:12 38208:19 costs 38221:23 38222:23 38233:6 38234:3 38252:15 38256:20,21,22 38257:3,5,13 38288:18 38342:24 38342:25 38343:1,21 38343:22,23 38344:2 38345:4,14,25 38346:2,5 38347:4 38348:13 38349:2,4,8 38349:9 couldn't 38142:13 38184:5 38239:10 38240:24 38339:7 council 38257:16 counsel 38174:23 38182:5 38281:6 38330:15,16,16,17 counterpart 38284:24 counter-parties 38328:8 counter-party 38233:4 countries 38231:9 country 38137:4,8 38177:24 38231:16 couple 38128:2 38225:20 38263:6 38359:2 course 38134:14,16 38138:2 38181:24 38183:24 38193:1</p>	<p>38201:20 38217:15 38227:25 38238:13 38254:22 38261:1 38273:7 38281:5 38298:7 38302:13 38304:25 38305:15 38314:5 38319:11 38325:5 38328:22 38340:6 38342:2 38361:14 court 38183:21 38186:8 38187:9 covenants 38333:20 38334:19 38335:15 38342:16 cover 38223:15 38234:3 38258:24 38268:17 38273:15 covered 38274:21 38322:13 38347:5 covering 38344:2 38348:18 covernance 38317:13 co-ordinate 38184:2,2 38186:24 Craig 38283:8 crash 38294:17 38314:24 38326:18 38326:18 crashed 38297:25 38298:2 38325:18 create 38131:22 38157:7 38231:14 38295:6 38350:23 created 38140:13 38154:4 creates 38301:14 creating 38335:13 38352:14 creation 38350:15 38351:12,16 criminal 38153:4 criminals 38152:20,25 38153:3,5 crisis 38130:13 38142:6 38142:6,8,10 38250:3 38252:11 38333:8,9 critical 38281:15 38354:21,23 38355:7 cross 38134:14 38237:15 38280:12 38327:16 38328:3 38330:11 38359:1 crossroads 38351:8 cross-examination 38127:16 38129:14 38134:20 38178:12 38180:14 38181:13 38181:14 38182:2 38203:5 38210:18 38214:5 38225:8 38237:23,24 38281:11 38327:17 38328:1 38330:8 38331:6 38340:19,25</p>	<p>38362:24 38364:3,10 cross-examine 38180:23,24 38181:4 38181:6,9 38225:3 38280:17 38328:3,4 38341:19 38362:25 38364:3 38366:3 cross-examined 38128:3 38178:18 38202:10 38237:13 cross-examiners 38129:1 cross-examining 38181:21 38330:16 crucial 38325:5 38351:22 crux 38313:17 culture 38178:1 currency 38259:2 current 38138:13 38236:25 38261:9 38317:2 38356:22 currently 38236:21 38237:8 38242:20 38282:15 38288:15 customary 38208:10 customer 38258:4,18 38258:22 38259:4 38272:11,12 customers 38233:5 38265:3 38271:15,18 38272:4,6,18 cut 38198:22 cutting 38145:3 38151:11 cycle 38325:17 38326:20,22 38327:3 38327:6</p>	<p>38363:18 38366:16 dated 38183:13 38203:13 38209:14 38209:21 38253:15 day 38184:7 38185:17 38186:20 38188:9 38189:1,6,21 38190:13 38192:23 38199:6 38228:12 38233:2,3 38274:20 38274:20 38314:21 38342:4 38344:23 38347:3,5,10,18 38348:23 38364:11 38364:12 38366:17 38366:24 38367:11 38367:19 days 38128:7,7 38140:8 38294:13 38348:18 38348:20 De 38359:5 dead 38177:7,11 38214:7 38334:11 38350:8 deal 38127:12 38133:12,13 38153:23 38210:9 38224:13 38225:21 38271:9 38284:13 38287:3 38324:5 38329:7 38349:3,5 38361:19 38362:23 38366:1 dealing 38129:19 38165:2 38197:2 38198:12 38199:6 38203:19 38213:14 38216:7 38283:9 38355:14 deals 38223:23 38224:15,18 38262:11 38267:16 38274:2 38283:8 38302:6 38352:25 dealt 38182:5 38225:7 38312:16 38361:24 38364:14 death 38150:16 38210:21 38213:19 38215:2 38220:13 38359:15 deaths 38159:6 debate 38234:7 38271:2 debated 38340:16 debt 38250:11 decade 38286:7 deceased 38219:15,20 38220:4,20 38222:4 38224:4,11,16 38363:15 deceased's 38128:4 38221:11 38223:4 December 38255:5 decent 38341:25 38351:16 38353:23</p>
--	--	---	--	---

<p>38357:22 deceptive 38165:2 decided 38136:16 38161:10 38236:6 38263:7,15 38265:10 38287:22 38318:10 38326:16 38332:7 38364:1 38366:6 decision 38134:14 38139:25 38141:1 38144:4 38146:13 38157:10 38188:25 38190:15 38210:23 38211:3 38217:24 38222:6 38255:9 38317:21 38325:12 38334:22 decisions 38157:7 38159:1 38315:7 38336:16 declared 38152:4 decline 38312:23 deduct 38243:23 38244:13 deep 38325:21 default 38204:4,17 38205:3,15 38206:3 defer 38265:23 definite 38366:24 deflecting 38176:15 defuse 38200:3 delay 38226:22 delegates 38154:2 delegation 38153:21 deliberate 38304:11 deliberated 38187:6 38207:21 38208:10 38212:19 deliberately 38165:2,3 38168:17 deliver 38313:4 38319:6 delivered 38351:4 delivery 38258:17 demand 38133:21,23 38134:17 38135:22 38135:23 38136:2,2 38138:18 38155:7 38157:14,14,25 38164:16 38184:4,24 38205:23 38217:3 38349:20 demanded 38217:3 demands 38132:17 38133:2,7,9 38155:16 38157:2 38214:23 demographics 38275:17 density 38237:1 deny 38157:17 38190:24 38335:2 denying 38180:14 depart 38319:20 departed 38275:2 department 38257:1 38293:17 38320:6</p>	<p>38321:2,4,10 Departments 38320:25 depended 38141:9 dependent 38220:21 38314:1,10 38342:8 depending 38233:11 38272:8 38307:12 38339:4 depends 38251:24 38337:15 38342:12 38344:8,9 depressed 38234:2 deprived 38366:3 dereliction 38144:5 describe 38266:3 described 38190:7 38204:4,17 38205:3 38261:5 describes 38221:10 38286:4 describing 38247:18 descriptive 38243:14 desensification 38281:25 despite 38227:19 detail 38129:7,9 38192:19,23 38223:20 38239:6 38253:8 detailed 38289:16,21 38289:23,24 38290:5 38290:18 details 38190:10 38192:1,10 38193:3 38221:4,17 38223:8 38223:12,15,17 38224:21 38225:2 38238:18 38252:1 38259:13 38298:25 38305:19 38306:25 determine 38213:2 determined 38342:7 38351:11 developer 38291:4 38292:21,23 38293:2 38293:3 developers 38294:1 developing 38292:21 38293:6 development 38205:10 38228:4,7 38248:20 38319:16 38356:23 deviation 38154:24 devil 38144:9,11 didn't 38143:20,22 38147:8 38149:8,25 38150:19 38189:23 38190:4,4 38192:24 38193:2,14 38194:4 38195:19,23 38196:16,17 38200:7 38245:2 38278:2 38294:5 38310:2 38316:3 38336:12,25 38337:1 38361:24 38364:21</p>	<p>died 38144:8 difference 38177:22 38184:17 38195:16 different 38142:17,24 38143:18 38183:2,3 38197:14 38200:12 38217:2,16,17 38231:11 38232:14 38242:12 38274:22 38282:19 38292:18 38295:17 38309:24 38314:18 38316:17 38318:3,17 38320:18 38332:12 38335:17 38339:19 38340:13 difficult 38156:8,10 38199:19 38213:2 38250:7 38274:23 38322:23 38332:11 38345:19 38366:15 38367:13 difficulties 38263:5 38321:11 38324:8 difficulty 38266:1,2 38270:24 38355:14 38367:17 digression 38253:4 diligence 38264:6,14,16 dire 38317:11 direct 38220:15,17 38242:3 directed 38160:1,2,4 38221:22 38249:3 direction 38321:20 38359:7,10,12,21 38360:22 38364:23 directive 38248:24 38253:5 directly 38167:18 38204:21 38261:22 38261:22,23 38273:17 director 38298:18,24 38298:24 38319:21 directors 38230:12 38241:19 disagree 38131:12,13 38136:5,13 38141:6 38144:19 38151:19 38158:3 38178:5,9 38317:23 disagreement 38151:22 disallow 38329:1 disarm 38193:7 disaster 38220:10 discharge 38359:16 discharging 38334:4 discount 38272:10,11 38272:11 38322:11 discretion 38207:4 discuss 38189:6 38205:17,23 discussed 38132:1 38136:16 38187:20 38208:12,15 38212:23 38358:10</p>	<p>discussing 38236:2 38249:8 38301:13 38323:2 discussion 38144:7 38175:22 38176:1 38180:3 38199:15,16 38208:25 38214:8 38216:20 38340:14 38365:15,15 discussions 38154:17 38208:11 38286:22 38292:4 38335:12,16 disgrace 38177:24 dishonest 38306:1 disingenuity 38277:25 disingenuous 38276:13 disinterest 38128:6 dismissal 38185:19 38186:3,12,21 dismissed 38187:14 displaced 38311:6 displayed 38313:9 dispute 38170:16 38171:8,9 38273:3 38359:11 disrespect 38218:5 dissatisfaction 38329:14 38364:9 distant 38211:23 38227:23 distil 38297:22 distilling 38297:12 38324:22 distinct 38367:9 distinction 38299:18 distributed 38256:5,6 dividend 38243:15,16 38243:17 38245:21 38247:3,5 38249:10 38253:22 38254:14 38254:14,16 38255:1 38255:11 38326:16 38336:24,24 38337:5 38337:23 38338:6,6,7 38338:9,10,11,11,12 38338:22 38339:5,9 dividends 38239:19 38243:19,23 38244:6 38244:12,14,14,17 38245:11,16,18,20,24 38245:24 38246:2,17 38246:25 38247:17 38247:18,19 38249:16 38250:5,14 38253:7 38254:1,3,9 38255:10 38322:9,12 38322:14 38325:7,15 38326:4 38331:18,20 38332:25 38333:1,4,5 38333:7,11,22,22 38334:6,7 38336:24 38337:2,2,4 38339:3 division 38238:7 38256:25 38257:1 divulge 38192:20 DMR 38306:4,23,23</p>	<p>38307:1 38309:1,9 38320:11,15,18 38323:3 38324:13 38332:1 38334:14 document 38128:23 38129:6 38178:20,22 38179:18,19 38180:1 38180:5 38182:21 38183:5,7 38198:9 38203:12,22 38209:7 38210:1,5 38219:12 38219:13,19 38220:2 38220:25 38221:5,19 38223:9,16 38224:14 38235:5,15 38236:7 38239:1,4 38247:23 38248:19 38249:11 38253:13,15,20,20 38256:4,6 38267:12 38267:15 38268:16 38268:23 38281:1,9 38288:16 38304:9,14 38304:18 38305:23 38306:5,10 38307:5 38307:20 38308:20 38309:25 38310:11 38310:20,21,22,24 38311:16,19 38312:22 38340:4 38354:4,7 38363:11 documents 38183:2 38238:10,12 38265:12 38274:4 38308:17 38316:25 doesn't 38176:8 38196:13 38243:22 38259:6 38287:15 38309:24 38363:19 doing 38149:3,5 38150:23 38152:8 38164:11 38184:19 38184:19 38272:12 38287:21 38292:12 38297:11 38304:3 38317:19 38320:2 38330:14 38333:1 38355:17 dollars 38244:16 38295:13 domain 38305:22 don't 38158:13 38174:4 38175:14,17 38175:18 38177:11 38180:20,22 38181:4 38181:9 38182:5 38184:16 38190:11 38190:14 38196:5,10 38216:25 38219:24 38226:6 38227:6 38238:16 38247:9 38252:1 38253:4 38256:25 38259:8,9,9 38260:10 38278:24 38280:22 38283:6 38294:2 38309:2 38311:14 38315:13</p>
--	--	---	--	---

38316:24 38321:25 38330:19 38341:25 38342:11 38359:3 38361:5,17 38362:20 38365:2 38366:10,11 38367:13 door 38131:5 38216:9 doors 38155:12 38298:3 doorstep 38353:19 dormant 38252:9 doubled 38294:16 doubly 38276:13 doubt 38183:23 38300:16 38301:14 Dr 38230:18 38273:22 38274:14 38311:22 38312:2 38328:17 drained 38342:16 dramatically 38279:16 draw 38214:11 38248:19 drawn 38292:16 38330:2 38359:21 dressed 38175:11 38214:24 drill 38133:22 38186:6 38203:18 38217:18 38279:6,8 38358:4 drilling 38204:13 drive 38185:18 38186:20 driving 38236:8 drop 38233:2 38339:13 dropped 38233:24 38340:6 due 38158:21 38238:13 38264:6,14,16 38280:17 38298:6 38302:13 38305:15 38319:11 Dumisa 38365:6 duties 38144:5 duty 38211:12 38359:13,16 dwelling 38277:22 dwellings 38276:7,15 38277:2	38231:8 38240:5,7 38242:4 38247:2,25 38248:22 38253:21 38271:15 38284:17 easy 38140:19 economic 38227:12 38252:12 38263:14 38352:15 education 38220:21,23 38221:7,23,24 38222:1,7,8,14,24 38223:1 educational 38221:22 38223:19 effect 38149:6 38251:25 38260:13 38262:3 38268:8,10 38287:11 38290:7,8 38290:10 38291:8 38333:9 38340:1 effective 38206:24 38251:25 effectively 38166:10 38233:21 38263:4 38284:7 38316:18 efficient 38252:1 effort 38356:5 efforts 38281:1,8 eight 38215:3 38308:25 38309:5,20,23 38310:2 38350:6 either 38135:4 38141:4 38181:1 38205:22 38209:23 38238:1 38256:16 38298:3 38347:8 38358:5 38360:15 38366:17 38366:24 38367:10 38367:18 elaborate 38217:5 elaboration 38141:20 38157:1 electricity 38226:21 38227:14 38228:18 38229:23 38230:6 electronic 38248:9 electronically 38310:1 element 38277:25 elements 38352:9 elicit 38329:6 email 38183:4 38185:16,19,21 38186:16,18 38192:2 38193:12 embarked 38222:12 38265:4 embarrassed 38329:13 embrace 38144:9,11 emerging 38214:24 emotions 38177:6 emphasised 38152:14 emphasising 38140:17 employ 38224:5,16 38335:22 employed 38224:11 38231:25 38232:5	employee 38138:11,20 38229:20 38274:21 38279:5,7 38292:9,13 38295:5 38354:19 38357:25 38358:16 38358:20,20 employees 38158:16 38171:15 38172:6,8,9 38195:25 38204:10 38207:3 38211:12,12 38211:16,19 38212:21 38215:21 38217:17 38220:20 38222:4 38227:9,17 38227:20,21,22 38229:14 38235:21 38237:6 38274:21 38275:18 38276:9,14 38277:4,5,18,21 38278:1,10,13,17,25 38283:11 38284:3,18 38284:21 38286:16 38292:5 38296:15,24 38297:11 38301:17 38311:4,5 38315:12 38315:16 38316:13 38316:18 38317:25 38323:11 38350:6,12 38350:19,25 38351:17 38352:19 38352:24 38353:12 38357:4 38363:16,24 employer 38358:20 employers 38137:4 employment 38357:24 38358:15 empowerment 38313:7 enable 38229:7 38232:11 38237:18 38364:2 encircle 38191:8 38192:22 encircling 38191:20,24 encourage 38154:14 38185:25 ended 38199:7 38270:5 38298:3 ends 38356:21 enduring 38220:19 engage 38163:22 38164:10 38167:19 38205:8,22 38216:22 38309:22 engaged 38155:19 38166:3 38167:4,10 38205:17 38215:20 38216:5,15 38320:10 38320:15 38352:16 engagement 38154:9 38154:10,17 38155:21 38165:9 38206:7,8 engagements 38165:5 38166:1,9,11,12,17 38166:20,22,23 38206:6,19	engaging 38142:2 English 38240:6 enhancing 38351:10 enjoy 38237:8 38280:5 enjoyed 38149:22 enjoying 38237:6 ensuing 38350:7 ensure 38128:18 38222:6 38295:2 38314:7 ensuring 38200:3 38350:14 enter 38309:17 entered 38309:21 entering 38286:21 38292:2 entertain 38156:1 38157:2,24,24,25 entertained 38155:15 38155:19 38196:24 entertainment 38155:21 entire 38322:13 38342:16 38350:11 38351:23 entirety 38361:16 entitled 38158:15 38170:8,19 38176:7 38180:16 38312:1 38320:7 38328:10 38329:5 entity 38230:20,21 38233:14 38240:15 38240:16,20 38241:1 38258:3,5,8 38268:1 38273:8,8,11,13 entry 38252:18 environmental 38334:25 envisaged 38138:18 38192:12 38293:23 envisioned 38292:25 EPL 38231:19 38232:9 38242:9,25 38243:4 38244:18 38245:11 38245:15,16,17,18 38249:2,3,4,12 38250:8,14 38260:8 38260:17,17 38270:16 38288:4 EPL's 38250:4 equal 38155:13 38158:18 equations 38349:1,16 error 38253:17 38262:13 38268:2,9 38269:13,24 38349:25 errors 38238:15,15 38239:25 erstwhile 38180:21 erupting 38199:13 escalate 38207:6 escalated 38155:9 especially 38325:24 essence 38217:7,23	38218:1 essentially 38143:12 38256:15 establish 38161:14 38222:18 38231:7 established 38128:24 38204:8 38220:22 38222:19 38231:18 establishing 38350:14 establishment 38283:17 38284:9 estimate 38276:5,22,24 38282:12 38343:7 estimated 38299:15,20 et 38236:13 38237:2 38324:22 38349:16 38349:16 etcetera 38250:11 38295:16 38342:8 evaluate 38349:14 38360:19 evasive 38330:1 evening 38145:14 38146:2 38194:18 event 38138:25 38139:1 38169:18 38181:13 38220:12 38220:14 events 38130:1 38179:21,23 38220:18 38354:20 38355:8 eventually 38137:9 everybody 38140:7 38183:23 38234:15 38311:3 38327:10 everything's 38295:22 evidence 38133:5,20 38147:11,12,16 38148:23 38161:9 38163:16 38164:1 38181:25 38202:13 38202:23 38204:4 38205:21 38215:5 38218:10 38225:9,16 38230:23,23 38235:1 38237:11 38238:16 38238:21 38239:20 38240:10,13 38247:23 38270:13 38279:13 38311:21 38325:20 38328:6,25 38358:17 38359:5,17 38359:19,24 38360:1 38360:4,5,8,8,10,19 38361:9 38365:13 38366:20 38367:4,5 evidence-in-chief 38253:16 38255:14 38285:10 38286:12 38331:18 38342:3 evidentiary 38361:6 evils 38334:16 exact 38163:14 38194:9 38194:11 38207:14 38263:18 38348:4
E				
e 38297:14 earlier 38134:17 38151:25 38174:14 38178:17 38189:21 38235:24 38255:14 38268:8 38324:10 38332:18 38333:20 38340:16 38356:2 38359:25 38361:3 early 38229:8 38261:19 38336:18 earn 38352:13 earnings 38288:6 easily 38336:20 east 38284:7 Eastern 38222:5,17				

<p>exactly 38131:25 38132:2,9,10 38143:1 38148:11 38154:3 38163:11 38185:1,5 38203:20 38204:6,19 38263:10,23 38284:14 38285:14 38289:23 38307:19 38307:21 38325:15 examination 38225:23 38237:16 38280:13 38328:4 38330:12 38359:2 examination-in-chief 38225:22 examined 38134:15 examiners 38327:17 example 38232:6 38236:8,18 38257:5 38289:17,25 38294:14 38295:9 examples 38236:14,15 exceeding 38254:24 exceeds 38263:14 Excel 38309:16 excess 38246:11 38327:5 exchange 38338:15 38339:25 38342:8 38344:9,11,16 exclude 38285:15 excluded 38316:23 38363:17 exclusive 38260:15 EXCO 38143:9 38187:10 38191:21 38191:24 38192:4,7 38192:21 38203:13 38203:24 38205:15 38206:3 38207:12,14 38207:17,19,20,22,23 38207:24 38208:11 38208:13,14,16,20 38209:18,19,22 38297:15,17 38323:13 38324:23 excuse 38181:19 38226:16 excused 38218:9,12 executive 38128:10 38265:2 38298:16 38307:20 38308:19 38308:20 38355:9,11 executives 38131:25 38132:11 exercise 38236:16 38280:25 38297:10 exhausted 38185:24 exhibit 38165:14 38174:1 38178:25,25 38179:13 38182:22 38183:3 38203:11 38207:11 38209:13 38211:7 38214:15 38219:16 38224:15 38225:25 38226:1</p>	<p>38234:21 38281:2 exhibits 38182:9 38219:25 38234:25 38237:25 exist 38231:16 38270:14 existed 38272:23 38339:16 38365:14 existing 38281:14 38283:16 exists 38210:1 38230:15 expand 38236:24 expect 38159:25 38160:3 38184:14 38230:3 38329:21,21 expectation 38164:11 38164:14 38185:9 expected 38137:1 38141:14 38164:18 38319:24 expects 38194:24 expenditure 38262:22 expense 38166:1 expenses 38222:24 38342:24 38343:17 experience 38131:21 38136:21 38137:2 38140:18 38160:12 38168:6,19 38195:7 38195:23 38228:4 38310:25 38322:17 38322:25 experienced 38161:12 38227:1 experiences 38315:15 experiencing 38163:19 38326:11 explain 38136:20 38152:7,11 38167:24 38206:11 38217:8,14 38221:8 38226:25 38235:16,19 38238:7 38253:5 38266:1,1 38267:6,23 38277:11 38309:24 38333:13 explained 38142:4 38152:2 38153:25 38154:22 38164:23 38168:5,20 38171:11 38190:8 38191:2 38216:5 38250:1 38365:17 explaining 38143:2,4,8 38164:2 38230:25 explains 38309:23 explanation 38309:23 38317:18 38322:15 38365:18 exploration 38231:22 explore 38334:10 explored 38229:5 exploring 38316:24 expressed 38360:9 expression 38192:3 expressly 38282:19</p>	<p>extend 38218:17 38299:22 38362:16 38362:21 extended 38242:21 extension 38239:8 38283:14 38284:8,8 38284:20 extensively 38212:20 38212:23 extent 38147:14 38151:17 38347:21 38365:10 external 38128:10 38241:7 extra 38182:9 38346:25 38348:2 38362:21 extract 38175:25 38332:22 38346:25 extracts 38354:3 extramural 38221:24 extraordinary 38141:13 38188:22 38188:24 38194:8 38220:14,18 extreme 38336:4 extremely 38236:20 38309:4 38332:10 38367:12 eye 38219:2 eyes 38144:25</p> <hr/> <p style="text-align: center;">F</p> <p>face 38185:19 38186:3 38186:11,21 38197:12 38199:12 38212:4 38213:14 38253:8 38299:24 faced 38144:7 38212:9 38335:2 faces 38347:24 38351:15 facie 38138:14 38296:2 38297:4 facilitate 38286:20 38292:2 38294:1 38296:6 38351:12 facilitated 38220:23 38221:16 facilitating 38294:4 38354:18 facilitation 38223:25 38296:11 facilitator 38292:20 facilities 38222:8,9 38228:1 38284:11 38286:24 38288:7,10 38362:21 facing 38213:18 fact 38133:8 38140:25 38146:18 38153:6 38155:6 38159:14 38163:9 38167:15 38172:12,15 38187:5 38195:4 38205:22 38206:23 38216:9 38236:11 38239:13</p>	<p>38246:23 38253:16 38254:9,19 38264:4 38268:9 38270:4 38276:16,21 38278:12 38282:10 38296:3,23 38303:19 38311:4 38335:23 38338:4 38346:24,24 38348:2 38356:23 38359:22 factor 38346:18 38348:2 facts 38145:6 38230:22 38259:19 38266:17 38266:17 38267:12 38268:11 failed 38151:17 38163:25 38177:24 38322:5 failing 38332:1 failure 38153:18 38363:22 fair 38184:24 38188:6 38257:20 38288:25 38295:7 fairly 38254:25 38255:16 38280:6 fairness 38144:2 38157:22 38184:3 38260:23 fall 38139:24 38172:2 38324:7 fallen 38217:25 falling 38295:23 falls 38364:1 false 38165:10 38167:8 38216:4 familiar 38214:4 38232:13,19 families 38128:4,9,15 38219:15,15,20 38220:3,15,24 38221:2,17 38222:4 38223:5,24 38224:1,4 38224:10,15,19 38350:9 38363:23 family 38128:8 38223:2 38223:21 38278:9 38299:14 38352:21 fancy 38174:9,22 far 38243:12 38263:14 38279:13,14 38291:5 38293:24 38296:9 38317:8 38329:1 38367:24 fate 38212:10 fault 38149:8 38198:9 favour 38146:21 38147:24 favourable 38232:18 38250:12 38263:20 fear 38131:3,10 38187:14,16,16 38350:5 feasibility 38242:21 February 38239:14,15</p>	<p>38239:17 fee 38231:2 38232:12 38233:19 38261:13 38262:20 38266:23 feedback 38191:21 38203:25 38204:22 38205:2 38206:8 38207:16 38297:23 38307:2 38324:24 feeling 38129:21 38160:15 38187:10 38197:10 feelings 38164:21 38199:10 feels 38361:15 fees 38221:24,25 38222:11 38272:12 feet 38257:21 38339:12 fellow 38219:11 felt 38159:8 38163:13 38164:1,3,5,6,7 38199:18 38311:7 fifth 38214:20 38360:11 fight 38358:13 figure 38244:20 38308:3 38344:12,22 38348:1 figures 38307:19,21 38308:1,14,22 38309:6,7 38333:5 file 38248:3,9 38255:19 38269:7 38312:5,6 filed 38298:10 38361:25 files 38238:1,3 filled 38342:20 final 38186:1,10 38309:1 finalised 38255:5 38296:15 finally 38223:17 38225:11 38234:6 38280:21,23 38285:3 finance 38227:12 38231:22 38232:2 38245:2,6 38247:13 38247:15 38251:5 38252:15 38295:1 38300:10 38311:2 38315:19 38325:8 financed 38322:10 finances 38250:19 38295:8 financially 38338:3 financials 38245:23 38262:15 38263:1,1,2 38266:16,20 38267:19,22,24 38268:3,13,16,17 38270:25 38271:1,9 38271:11 38332:23 38332:24 38333:3,4 financing 38251:9,22 38292:18 38295:1,16 38298:4 38300:2</p>
--	--	--	--	--

38301:13 38332:9,11 38335:17 find 38175:14,19 38197:14 38198:18 38211:23 38223:10 38226:13 38227:3 38236:4 38240:19 38245:19 38288:17 38296:19 38302:23 38316:6,16 38317:5 38318:1,2,10 38320:19 38332:9,11 38335:17 38355:24 38356:5 38367:22 finding 38167:5 38319:1 38345:19 38356:8 fine 38137:21 38141:7 38141:7 38149:11 38160:18 38173:4 38179:16 38233:24 38233:25 38254:24 38294:15 38295:22 finger 38218:22 finish 38127:19 38145:17,20 38163:5 38169:3,15 38171:23 38171:24 38318:6 38328:2 38335:21,22 38359:1 finished 38129:1,2 38145:24 38342:21 fire 38214:25 fired 38168:22,24 38188:2 38359:23 38360:2 first 38128:7 38169:3 38182:16,18 38186:3 38186:5 38196:1 38202:6,23,24 38203:3 38205:8 38206:16 38208:7,19 38214:14 38217:11 38220:8 38221:3 38225:24 38227:8 38236:7 38237:13 38238:19 38240:2 38242:1 38243:16 38246:6 38248:18 38260:18 38263:6 38276:13 38280:14 38280:20 38281:14 38299:12 38305:17 38309:14,21 38313:19 38317:16 38318:17 38320:20 38322:7 38329:22 38349:24 38350:24 38352:9,10 38353:6,9 38359:13 firstly 38142:4 38205:16 38306:11 first-name 38217:11 fit 38367:13 five 38161:15 38173:2 38179:9 38189:21	38201:4 38202:11,18 38202:20,21 38210:12,14,17 38213:23 38226:1 38257:11 38308:19 38322:20 fix 38367:7 fixed 38228:11 38256:21 38257:3 38343:4,21,23 38344:2,25 38345:11 38345:14,25 38346:2 38346:5,6,14 38348:13 38363:18 flats 38284:6 flexibility 38155:2 flip 38300:17 flow 38182:7 38250:14 38265:8 38270:15 flowed 38333:23 flowing 38128:2 38194:11 focus 38315:10 38323:11 38324:20 38356:3,7,9 focused 38352:20 38353:13 38356:1 38357:21 follow 38156:8 38246:4 38266:8 38296:14 38334:17 followed 38206:14 38225:10,10 38306:10 following 38153:14 38170:14 38175:25 38190:13 38203:24 38205:2,7 38214:21 38220:17 38255:6 38262:17 38263:2 38270:24 38276:5 38291:19,20 38323:9 38324:25 follows 38204:1 38225:9 38287:11 38359:10 38360:18 38366:19 follow-up 38207:22 38291:23 food 38222:2 foot 38174:21 38176:12 38183:16 38351:6 38356:13 force 38163:20,22 38164:11,13,19 38174:12 38175:12 forced 38335:9 38353:18 forcing 38183:18 forecasting 38326:14 foreclose 38334:10 38335:15 foreign 38241:5,8 foreseeing 38140:24 Forest 38328:17 Forest's 38311:23	38312:2 forget 38133:5,14 38145:11 38153:19 38169:24 forgetting 38281:5 forgotten 38175:2 form 38220:5 38238:11 38265:12 38365:4 formal 38265:4 formally 38264:24 38321:15,18 format's 38289:13 former 38352:20 38353:14 Forrest 38230:18 38274:14 Forrest's 38273:22 forth 38161:12 38197:5 38225:16 38296:1 38341:22 forum 38129:23 38130:2,5,22,23,23 38130:24,24,25 38131:18,20,22 38135:4,11,13,14 38136:3,6,14,21,24 38137:4,5,10,16 38139:17,23 38142:8 38142:14 38188:20 38194:9 forward 38161:15 38183:17 38198:20 38205:18 38255:10 38265:8 38287:8 38341:16 found 38174:25 38175:1 38236:20 38318:15 38360:16 four 38183:3 38201:3 38204:2,22 38211:12 38234:10,17 38257:11 38268:8 Fourth 38313:24 fraction 38348:14 framework 38141:11 38142:3 frameworks 38141:14 France 38236:15 frankly 38157:11 free 38222:16 38321:6 38321:7 Friday 38128:16,16 38186:2,11 38187:9 38187:24 38211:13 38215:1 friend 38127:24 38253:11 38270:22 38277:7 front 38144:25 38214:2 38235:15 38320:20 38320:25 fulfilled 38317:22 full 38160:5 38190:18 38217:4 38221:3,23 38223:17 38239:7 38261:19 38262:17	38262:22 38266:25 38278:13 38288:21 38292:7 38308:17 38329:19 38342:3 38345:8 38364:12 fully 38221:19 38224:15 38225:16 38274:22 38275:17 38329:7 fund 38128:24 38220:22,22 38221:3 38221:17,21,23 38222:14,15 38223:11 38229:6,6 38291:18 fundamental 38259:15 38350:16 38351:11 funding 38143:15 38286:23 38289:20 38290:4,14,15 38292:5 38336:15 funds 38250:24 38251:1 38268:4 38288:5 38290:22 38291:14 38303:12 38332:3 funeral 38223:7,15 further 38135:8 38157:1 38211:15 38213:4,11 38218:4 38218:12 38255:22 38266:22 38268:21 38274:19 38279:3 38283:18 38284:5 38324:12 38330:3 38334:10 38335:12 future 38313:25 38348:11,15	38198:18 38229:6 38252:2 38258:4 38297:11 38301:13 38311:2 38345:17 ghetto 38317:5 give 38136:16 38139:9 38139:11 38143:17 38143:22 38147:4 38156:25 38157:1,9 38157:19 38158:15 38165:18 38183:2,23 38184:5 38194:23 38196:2,17 38200:3,7 38200:17 38201:14 38202:16,16 38208:24 38210:4,11 38218:1 38219:16 38225:2,15 38248:2 38248:15 38251:25 38257:20 38263:11 38263:18 38270:7 38272:10 38281:2 38285:24 38287:11 38288:4 38290:7,8,10 38291:8 38292:16 38295:24 38298:4 38307:1 38308:17,21 38310:25 38318:6 38321:12 38324:10 38329:24 38343:20 38344:22 38359:17 38359:23 38360:3,14 38361:17 given 38128:13 38150:9,14 38155:5 38157:18 38160:19 38162:18 38163:7 38176:9 38182:21 38202:11 38203:25 38204:23 38206:8,23 38207:16 38219:14 38220:3,17 38224:14 38258:10 38266:16 38297:20 38360:7,22 gives 38324:13 38357:9 giving 38169:10 38199:19,25 38218:9 38303:1 glib 38349:1 God-given 38151:1,14 goes 38127:20,21 38134:20 38185:20 38198:1 38199:1 38215:1 38244:18 38255:16 38260:18 38261:19 38279:2 38295:19 38304:20 38304:22 38351:9 good 38127:3 38129:15 38129:17 38138:22 38150:14 38157:23 38158:1 38162:24 38236:18 38251:24 38255:8 38271:1 38311:10 38321:1 38323:24 38324:4
---	---	---	--	---

G

general 38158:25
38159:23 38160:19
38188:16,18 38189:5
38190:18 38195:7,13
38195:16,17,17,19
38196:10,14,15
38200:11,14,18
38201:3 38276:25
38328:6 38341:19
generally 38232:16
38250:12,24
38254:13 38306:23
38307:7
generate 38294:19
38335:21 38342:4
38345:7
generic 38190:8
38191:20 38192:21
38243:9
gentlemen 38159:3
Gents 38185:17
genuine 38164:8
geographical 38231:16
geographies 38232:14
German 38271:25
getting 38194:19

38325:23 38326:20 38326:20,25 38327:11 38336:10 governance 38141:11 governed 38260:9 government 38227:19 38236:3 38239:16 38350:12 38351:15 governs 38258:13 38260:12 go-ahead 38152:7 grabbed 38151:16 grant 38207:3 granted 38186:8 38296:18 great 38239:3 38270:24 38349:3,4 38364:9 greater 38356:11,14,16 grief 38350:8 grievance 38135:23 gross 38344:22 ground 38346:18,22 38348:8,11 group 38232:22 38233:22 38270:7,9 38323:11 groups 38166:4 38314:11 38324:21 growing 38327:3 grown 38228:2 38282:14 guarantee 38132:16 38183:19 guaranteed 38295:4 guess 38251:10 38252:3,16 38257:12 38270:1,15 38278:11 38295:7 38297:20 38306:19 guessing 38295:6 guilty 38144:4 guise 38241:10 guns 38173:5 38175:15 38175:20 38176:4 gunshot 38211:14 gunshots 38211:17 38213:18 guys 38240:22 Gwala 38158:25 38165:5,9 38167:4,18 38214:9 38217:10,12 38217:13 38218:5,8	38302:19 38304:1 38367:7 handed 38129:6 38182:10,21 38201:10,13 38219:12 38220:5 38234:9 handle 38280:19 hands 38235:11 38320:3 38339:19 hang 38323:18 38344:24 happen 38138:21 38143:3 38189:8 38192:23 38229:10 38258:23 38287:18 38295:9 38306:19 38314:13 38322:21 38324:15 38327:13 happened 38134:24 38137:17 38140:6 38143:23 38144:23 38144:25 38146:15 38170:17 38187:9 38206:16 38208:13 38213:19 38251:23 38294:17 38296:20 38311:23 38314:24 38317:20 38323:10 38324:19 38331:19 happening 38162:16 38215:15 38294:12 38304:7,23 38345:18 happens 38232:21 38329:14 happy 38180:19 38200:16 38295:23 38295:24 38296:4,6 38306:16,17 hard 38195:5,21 38200:8 38309:25 38329:10 38333:10 harmed 38151:7,13 hasn't 38128:12 38253:7 38322:25 haven't 38250:2 38251:4 38256:10 38257:10 38328:15 head 38128:17 38186:17 38209:9 38246:13 38261:15 38261:20,24 38262:6 38262:20 38263:8 38267:2,18 38269:12 38306:21,22 38307:5 headed 38219:20 38249:19 heading 38204:3 38276:4 38353:1,10 38353:15 headings 38355:15 heady 38294:13 health 38334:25 38335:1,1 hear 38215:17 heard 38147:17	38192:14 38193:16 38198:12 38210:22 38279:14,17 38331:4 38354:15 38366:20 hearing 38191:10 heavily 38352:16 heavy 38160:20 38162:8 hedge 38259:2 held 38142:14 38209:18 38242:2,24 38242:24,25 38306:25 help 38138:15 38187:11 38210:3 38265:25 38295:1 38301:7 38329:7,18 helpful 38157:7 38327:16 helping 38150:15 HEMRAJ 38302:20 he's 38138:8,8 38149:3 38149:5,5,7 38157:4 38158:14 38165:25 38169:10,11,15 38170:8,18 38171:1,1 38176:7,9,14 38178:8 38213:17 38217:10 38219:8 38281:1 38365:7 high 38177:6 38204:12 38233:10 38236:12 38339:10 higher 38155:1 38279:7 38307:8 38367:9,10 highlight 38220:6 38226:8,25 highlighted 38350:11 38354:21 38355:5 highlighting 38219:18 hindsight 38282:11 historically 38231:7 38239:1 history 38169:24 38171:6 38311:17 hoc 38221:7 38222:24 hold 38241:24 holder 38319:16 holders 38249:2 holding 38240:3 38253:7 holds 38240:4 home 38222:9 38227:24 38229:16 38229:18,24 38236:6 38314:2,3,12 38316:7 homeownership 38227:19 homes 38227:17 38228:10,25 38229:1 38229:3,15 38230:9 38230:14 38282:13 38297:20 38305:12 38315:23 38319:25 38324:24 38325:3	homework 38127:8 38173:11 honest 38160:15 38304:10,13 38305:16,25 38309:3 38309:4 38332:9 honestly 38173:4 38314:7 honour 38340:23 hope 38133:20 38187:7 38187:13 hopes 38341:11 hoping 38341:10 38366:25 hospitalised 38211:14 38211:16 hospitality 38280:5 host 38352:14 hostel 38237:6 38275:8 38275:9 38281:13,21 38281:25 38282:6 38283:8,13,16,18 38284:6,7,12,24 38285:2 38286:8 38287:3,9,18 38288:2 38288:12,25 38289:24 38290:9 38291:6 38299:14,17 38302:2,6 38303:25 38307:24 38312:14 38312:16 38313:18 38313:22 38317:2,2 hostels 38227:21 38236:25 38237:3 38275:10 38279:15 38282:14,20 38283:12 38284:4,14 38284:19 38285:8,8 38287:4 38288:5,11 38289:6,9,16 38290:20,20,25 38293:22 38302:4 38303:13,15 38304:5 38335:25 38352:21 hostile 38160:9 38200:1 hostilities 38160:1 hostility 38160:4 hot 38326:11 hottest 38326:3 hour 38237:19 38280:15 house 38228:15,16,22 38229:21 38230:3,4 38232:10 38235:25 38273:2 38282:7 38284:17,23 38285:23 38290:10 38299:17,19 38315:13 38316:11 38317:24 38322:6 38332:4 38333:9 38358:8 housed 38276:7 38277:1,22 housekeepers 38323:22	housekeeping 38359:2 38360:24 hovering 38294:15 human 38178:18 38211:2 38225:11 38306:22 38307:5,5 38340:21 hundred 38335:20 38337:17 hypothetical 38170:21 38171:1
I				
			idea 38136:6 38189:16 38263:25 38264:2 38265:9 38316:23 38366:18 ideal 38236:23 identical 38289:14,14 identifies 38223:20 identify 38291:3 identifying 38360:15 ignored 38146:18 illegal 38186:7,9 38211:10 illogical 38131:10 illusionary 38358:24 illustrate 38243:10 38245:22 ill-founded 38131:10 immediately 38222:21 38255:7 38259:13 impacted 38312:24 impairment 38252:21 38252:23,25 Impala 38158:7,18,22 38158:24 38197:2,7 38198:12,24 38199:8 38273:2,11 imperative 38351:9 implemented 38192:12 38192:13 38249:10 implementing 38230:16 implication 38142:10 implications 38306:5,7 implicit 38304:13 import 38359:11 important 38138:2 38144:15 38147:10 38166:25 38171:16 38227:18 38236:20 38249:1 38281:6 38306:5 38341:13 38351:17 importantly 38204:20 impossibility 38131:7 impress 38174:9,22 38175:16 impressed 38176:13 impression 38325:21 improbable 38309:19 improper 38148:25 improve 38351:11 improving 38352:19 38353:12	

<p>inaccurately 38267:7 38267:24</p> <p>inaudible 38145:22 38147:3 38224:24 38255:25 38269:1 38302:16 38345:15 38361:23</p> <p>incident 38161:1 38166:18 38177:2,2</p> <p>Incidentally 38230:9</p> <p>incidents 38153:4 38211:11</p> <p>inclined 38156:11</p> <p>include 38226:19 38250:17 38276:9 38277:3,17,19 38288:6,7 38328:16</p> <p>included 38223:2,5 38320:10</p> <p>includes 38243:19 38258:5</p> <p>including 38215:3 38230:12 38257:9,13 38350:15 38360:2</p> <p>inclusion 38277:20</p> <p>income 38244:13 38333:17 38343:12 38343:14,16,16 38346:19</p> <p>incomplete 38330:2</p> <p>incorporated 38256:5</p> <p>incorrect 38147:16 38153:8,13 38154:5 38175:20 38215:6</p> <p>incorrectly 38268:2 38269:22 38309:20 38309:21</p> <p>increase 38157:14 38158:17,20,24 38204:9 38206:24 38216:9 38227:16</p> <p>increased 38227:12,20 38257:8</p> <p>incur 38343:24 38345:1 38347:4</p> <p>Incwala 38242:7 38243:20,23 38244:1 38244:18,20,23 38245:11,14,17,20 38246:18,25 38247:17,18 38265:17,21 38266:9 38266:10 38331:19 38331:20</p> <p>indebted 38366:9</p> <p>independent 38253:19</p> <p>independently 38316:7</p> <p>indicate 38200:15 38218:16 38234:24 38361:16 38363:13</p> <p>indicated 38146:25 38181:18 38215:5 38327:6 38363:9,17</p> <p>indicates 38210:1 38295:20</p> <p>indication 38252:23</p>	<p>individual 38238:12 38292:22 38310:15 38310:15</p> <p>industry 38231:12 38343:3 38351:8,15</p> <p>inference 38193:24 38359:21</p> <p>inferences 38330:2</p> <p>infinitely 38236:21</p> <p>inform 38205:9</p> <p>informal 38227:15 38236:22 38238:20 38239:5 38273:18 38275:5 38276:7,14 38277:1,22 38278:18 38294:7 38311:6</p> <p>information 38190:8 38191:21,23 38192:21 38193:14 38194:3 38200:3,5 38270:8 38297:12,22 38310:3 38324:22 38341:13 38367:6</p> <p>informed 38127:8 38132:10 38320:19 38321:16</p> <p>informing 38212:14</p> <p>infrastructure 38317:3</p> <p>infuse 38178:1</p> <p>inherent 38250:18</p> <p>initial 38139:22 38251:22</p> <p>initially 38163:21</p> <p>initiative 38159:17 38353:6</p> <p>initiatives 38352:8</p> <p>injured 38211:13 38212:10</p> <p>injuring 38215:3</p> <p>injury 38359:14</p> <p>inputs 38297:5</p> <p>inquiry 38253:12,14,19</p> <p>inserted 38226:3</p> <p>insinuating 38214:7,8</p> <p>insisted 38216:11</p> <p>insistently 38195:9</p> <p>inspect 38258:10</p> <p>inspecting 38259:14</p> <p>inspections 38320:16</p> <p>instalment 38292:7</p> <p>instalments 38230:5</p> <p>instance 38220:13 38336:13 38342:23</p> <p>instances 38222:10</p> <p>institution 38222:2 38223:22 38288:2 38289:19,21 38290:3 38290:4,12,17 38293:11 38297:8 38300:9</p> <p>institutional 38296:19</p> <p>institutions 38222:14 38222:23 38224:21 38286:21 38287:23 38288:8 38292:3 38300:1 38301:14</p>	<p>38311:3 38334:3</p> <p>instruction 38265:15</p> <p>instructions 38128:1 38209:6</p> <p>insufficient 38226:21</p> <p>insurance 38220:11 38258:24</p> <p>insuring 38259:1</p> <p>integrated 38334:13</p> <p>intend 38219:17</p> <p>intended 38294:21 38301:5,15,17,18 38362:6</p> <p>intending 38341:19 38366:15</p> <p>intends 38292:1 38360:12</p> <p>intent 38304:11 38311:17</p> <p>intention 38192:16 38230:11,13,15 38291:1 38292:19 38362:18,18</p> <p>inter 38226:11 38250:2 38350:19</p> <p>interaction 38286:16</p> <p>interdict 38183:21 38187:9</p> <p>interest 38188:4 38199:23 38227:19 38228:15 38242:2,3,3 38242:6,12 38245:15 38245:15</p> <p>interested 38158:11 38264:25 38312:17 38315:20</p> <p>interesting 38309:6</p> <p>interests 38244:17</p> <p>interim 38253:25 38254:3,14,16 38261:19 38273:22</p> <p>interiors 38236:13</p> <p>interlocutory 38329:15</p> <p>internet 38236:6</p> <p>interpret 38132:23,24</p> <p>interpretation 38300:12 38304:18</p> <p>interpreted 38311:8</p> <p>interpreting 38141:10</p> <p>interrogate 38331:7</p> <p>interrogatories 38328:17,24 38329:19 38341:18 38341:20 38361:3,8 38361:12,18 38362:5 38362:16,18 38363:1 38363:18,19,25 38364:23 38365:2,6 38365:11,13,23,25 38366:5</p> <p>interrogatory 38224:9 38224:12 38328:7,11 38329:23,25 38330:6 38361:15 38363:9 38365:4</p> <p>interrupt 38134:9</p>	<p>38147:8 38156:18,19 38301:20 38341:12</p> <p>interrupted 38164:24</p> <p>interruptions 38156:9</p> <p>interview 38159:15 38167:23</p> <p>interviews 38323:12 38324:20</p> <p>inter-group 38230:19</p> <p>inter-union 38172:19</p> <p>intimidation 38211:11 38350:6</p> <p>introduce 38152:10,17 38218:15</p> <p>introduced 38153:14 38228:19,20 38234:25 38268:11</p> <p>invest 38227:23</p> <p>invested 38295:14 38324:11 38352:16</p> <p>investigation 38264:14</p> <p>investigations 38264:6</p> <p>investigators 38264:17</p> <p>investing 38296:23</p> <p>investments 38266:23</p> <p>invitation 38218:18</p> <p>invite 38215:18</p> <p>invited 38139:18 38218:23</p> <p>involve 38137:17 38141:2 38293:11</p> <p>involved 38130:8 38134:2 38137:11 38152:15 38231:13 38257:10 38281:7 38294:1,1 38298:25 38304:8 38322:18</p> <p>involvement 38147:14 38162:4</p> <p>IR 38195:9,10 38196:8 38196:13</p> <p>iron 38294:16</p> <p>irregular 38217:15</p> <p>irrespective 38255:8 38291:18</p> <p>irresponsible 38159:8 38210:24 38212:16</p> <p>ISMAIL 38225:18 38280:11 38327:23</p> <p>isn't 38143:22 38149:23 38224:5 38253:6 38256:25 38287:13 38289:9 38290:18 38316:4,9 38338:2 38339:19</p> <p>issue 38129:19 38133:5 38135:9,10,20 38136:1,3,9,10,10,13 38136:15,17 38143:10 38144:10 38148:23 38153:14 38153:23 38163:25 38164:25 38177:18 38183:20 38184:20 38185:11 38194:11 38203:17 38207:6</p>	<p>38213:4,8 38239:18 38239:21,22 38264:5 38264:9,24,25 38265:7,10,12,13 38309:3 38322:2 38328:3 38349:19,21</p> <p>issued 38168:16 38183:6,13,22,22 38185:23 38186:1,10 38187:8,19,22 38188:3 38194:25 38207:23 38247:24 38249:12 38253:21 38275:20 38278:23</p> <p>issues 38154:13 38169:18 38180:12 38182:4 38198:18 38199:6 38206:17 38225:24 38227:25 38240:1 38242:1 38258:3,16,23,24 38259:1 38271:10 38273:17 38299:6 38307:2,3 38315:10 38318:17 38319:10 38328:5 38331:9 38335:2 38350:11 38355:6</p> <p>issuing 38187:6 38265:9</p> <p>item 38269:14,19,21 38306:18</p> <p>items 38222:22</p> <p>it'll 38326:23</p> <p>I'd 38137:23 38182:17 38183:15 38238:14 38239:22 38247:14 38248:19 38259:16 38279:5,7,7,17 38292:10,11 38354:1 38358:6</p> <p>I'll 38149:11 38157:21 38166:9 38177:17 38179:9,10 38198:9 38209:5 38221:8 38244:3 38256:5 38282:21 38283:7 38292:16,23,23 38295:9 38296:25 38298:5 38300:19 38308:21 38310:24 38324:10 38328:15 38359:3</p> <p>I've 38142:3 38148:1 38148:10,11,22 38150:25 38154:21 38184:17 38189:17 38198:7,22 38215:22 38216:5,11 38226:16 38238:25 38239:1 38255:22 38262:16 38280:15 38283:1 38314:14 38328:17 38328:18 38330:13 38341:21 38342:1 38358:23 38363:10</p>
--	---	---	---	---

i.e 38292:6	junior 38178:22	38316:12 38326:17	lawful 38320:2	lesser 38334:16
J	jurisdiction 38232:17	knowledge 38171:5	lay 38161:11	lessons 38179:20,22
ja 38129:25 38132:20	jurisdictions 38231:11	38229:2 38233:17	Le 38180:8,10,17,21,25	38280:24 38281:4,10
38133:11,25 38135:7	justifiability 38360:13	38274:16 38299:4	38181:5,11	letter 38163:18
38138:24 38139:15	justified 38360:21	38300:3	lead 38138:19	38164:7,15,18
38139:21 38140:12	justify 38359:13	known 38130:25	38181:16	38349:23
38141:17 38142:25	38363:22	38131:18,21	leader 38144:5 38150:8	letters 38356:12,14
38149:16 38150:18	K	38136:24 38137:7,7	38150:13 38151:12	let's 38130:16
38153:17 38158:5	Karee 38168:21,24	38162:25 38187:23	38153:19,24	38136:16 38155:14
38160:16,25	38169:1,18 38283:10	38190:12 38211:3,17	38358:17	38156:17 38162:12
38162:11 38163:4	38286:4	38211:18 38212:7	leaders 38147:21	38162:12 38165:20
38165:20 38166:8	keep 38169:15 38219:2	38275:13 38354:23	38181:25 38202:13	38177:16 38179:5
38167:13 38171:10	38225:14,14 38271:2	38355:1	38225:9 38230:23,23	38188:2 38196:21
38172:25 38173:3,18	38315:2,5 38335:5	knows 38131:15	38235:1 38328:6,25	38203:1 38211:9
38174:8,12 38176:25	keeping 38186:8	38176:14 38234:15	38360:1,5,10 38361:9	38212:23 38217:12
38177:5 38178:10	38218:20	Kokstad 38222:16	38365:13 38367:4,6	38253:4,8 38256:11
38183:1 38191:17	kept 38250:25	koppie 38146:9,12,15	leadership 38140:23	38256:23 38266:5,15
38192:9 38200:2	38320:18	38147:15,17 38151:4	38141:10,12,13	38273:16 38281:5
38206:15 38211:9	key 38219:18 38220:6	38151:7 38152:2	38168:24 38169:21	38282:4,8,24 38287:2
38246:4,9 38267:11	38277:19 38290:6	38159:6,7,9 38162:9	38177:21 38184:7	38294:11 38295:13
38281:20 38289:2	38312:15,17	38162:19 38163:1,8	38206:18 38216:7	38296:18 38299:11
38297:18 38299:10	38351:14 38352:17	38164:16 38171:17	38236:2,18	38300:6,15 38301:20
38299:24 38306:2	38353:11	38193:7 38201:6,13	learned 38127:24	38302:13 38310:16
38310:4 38326:1	Kgotle 38307:13	38202:1 38210:21,24	38178:22 38234:12	38315:11 38318:17
38332:20 38337:22	kick 38296:18	38211:4	38253:11 38270:22	38322:1 38324:4
38338:17,18	killed 38159:19	Kwadi 38132:12	38277:7 38280:24	38325:1 38330:25
38339:14,20,21	38160:13 38170:15	38135:7,8,18 38136:9	learnt 38179:20,22	38332:17 38334:1
38340:9 38342:9	38171:8,15,15,17,19	38138:6,7,8,9,17	lease 38227:14	38337:16 38348:16
38343:15,18 38344:5	38172:8,15 38187:18	38139:2,7,8 38142:1	leave 38157:21	level 38205:9,17,23
38348:5,24,24	38210:22 38363:24	38174:6 38176:10	38169:12 38232:23	38206:7,8,9,13,23
38363:5	killing 38177:3	38365:17,18	leaves 38258:1 38259:3	38244:18,24
Jamieson 38211:8	38214:25,25	KwaZulu-Natal	leaving 38282:20	38249:19,21,23,24
38271:14	killings 38144:12	38222:16	led 38215:2 38247:23	38250:13,23,25
January 38295:14	38153:4	L	38311:22 38331:18	38251:23 38252:4
38324:12	kilometre 38276:6	labour 38186:7	38350:6	38333:24
jewellery 38257:8,16	38277:1 38356:18	38227:23 38236:2	leeway 38196:17	levels 38236:12
JJJ192 38173:10,13,14	kind 38131:4 38132:15	38286:13 38306:4	38199:20,21 38200:1	38243:18
38174:1 38182:8	38136:3 38137:10	38319:18 38320:8	38200:7,17	liabilities 38317:12
job 38195:9,9,10,20,20	38139:23 38148:12	38340:9 38342:23	left 38173:2 38236:9	liability 38335:13,13
38195:24 38217:19	38151:1 38152:14	38349:9 38352:18	38243:11 38244:2	liberty 38154:12
jobs 38315:5	38161:14 38218:17	38353:12	38250:3 38282:14	licence 38306:7
JOC 38151:24	38231:19 38232:25	lack 38227:13,18	38298:15 38302:18	38331:21 38332:1,5
Johannesburg	38254:13 38291:22	38355:23 38360:13	38307:22 38315:18	38332:18 38352:13
38236:11	38292:24 38297:12	38364:10	38316:2 38325:4	38352:22,25
joined 38134:11	38306:19 38331:1	lady 38328:18	38347:8 38350:7	38354:14
38275:1 38311:1	38332:13 38335:3	land 38226:20	left-hand 38356:13	license 38249:2
Joseph 38132:13	38336:15,16 38348:7	38227:13 38235:22	legal 38128:17	lie 38214:6
38214:6	kindly 38165:11	landing 38327:11,12	38181:14,17 38209:5	Lieutenant-Colonel
Joseph's 38143:1	38321:12	Langa 38210:13,19	38210:3 38225:11	38161:13,19 38162:3
journalists 38162:15	kinds 38272:13	38212:8,14 38213:15	38231:11,21 38232:2	life 38136:18 38274:20
JP 38343:2	38292:18	language 38287:8	38241:12,14,17	light 38138:23
July 38163:7 38204:23	knew 38144:22,24	38321:8,8	38259:12 38265:15	38187:20 38214:13
38207:12,14,16,17,25	38145:1 38151:2,6	laptops 38222:22	38265:24 38319:15	38215:22 38311:8
38208:9 38209:25	38161:6,6 38168:3,13	large 38211:22	38319:18 38331:9	38364:21
38221:12 38222:3,12	38171:6 38176:25	38350:13	38334:21 38336:12	lightly 38133:15
38223:3 38261:3	38185:11 38188:6,7	larger 38279:15	38352:11	liked 38173:8
38265:1,2,11 38323:7	38192:1,6,7,10,13,21	lasted 38188:19	legally 38250:17	likelihood 38213:6
June 38163:7 38203:14	38193:12 38214:7	38201:3 38326:20,20	legitimate 38148:23	38316:14
38207:19,21	38216:13 38276:16	lastly 38204:12	38329:4	liking 38168:25
38209:15,17,18,22,22	38276:20 38277:4	late 38228:5,19	leisure 38319:21	limited 38133:7
38209:24 38260:11	38281:21 38316:2	38230:2 38285:7	lend 38310:14	38134:18,23
38264:1 38268:7,12	knock 38155:12,12	38296:22,23	length 38292:19	38146:14 38230:21
38268:17 38295:12	knocked 38155:6	38314:15	38317:10	38231:8 38238:11
38323:7 38324:11	knocking 38216:8	lateness 38265:16	lengthy 38360:1	38240:5,6,7,7
June/July 38264:22	knowing 38160:5	law 38320:3	Lerato 38128:11	38242:4,4,13
			Lesotho 38222:5,17	38248:22,23 38251:5

38251:6,14,15 38256:17 38259:22 38259:24,25 38260:1 38260:3,5,8 38261:3 38261:4 38269:10 38270:7 38331:12,13 Limpopo 38242:17 line 38132:18 38138:9 38143:14 38154:13 38155:6,20 38165:19 38165:22 38167:18 38188:12 38195:5,21 38200:8 38204:21 38215:9 38216:2,20 38216:21 38269:14 38269:19,20 38313:3 lines 38239:9 link 38309:11 38355:6 linked 38350:18 38351:20 liquidation 38335:10 38339:2,7 list 38188:15 38248:16 38270:23 38278:17 38278:20 38281:18 38282:14 38360:1,6 listed 38241:20 listen 38150:2,3 38155:22 38156:24 listing 38231:21 lists 38227:10 literally 38151:1 38233:24 38342:16 little 38158:20 38234:9 38235:15 38236:24 38244:7 38257:20 38266:22 38276:4,8 38276:15 38277:2,22 38282:9 38302:9 38303:25 38316:4,9 38326:17 38333:5 live 38236:8 38274:23 38275:18 38276:11 38278:2,17,18 38282:1 38294:6 38314:19 38353:18 lived 38276:19 lives 38144:16 38166:1 38356:17 living 38238:23 38273:18 38274:2 38275:14 38276:6,14 38276:25 38277:5 38279:10,10 38299:11 38311:6 38341:25 38352:19 38353:12 38356:21 38356:24 38357:22 LMS 38231:25,25 38232:3,4,8,11 38233:14,17,20 38234:1 38240:25 38260:14,20,21 38269:15,16,22 38270:16,16,17 loan 38229:6 38251:5	38252:21,23 38293:15 38301:16 38325:8 38334:2 loaned 38250:25 loans 38250:13,21,22 38297:8 38314:2,3,12 38316:7 38331:20 38333:18,19,24 38335:13 local 38206:18 38221:25 38228:8 38236:3 38239:16,16 38262:6 38334:8 38352:17,24 locally 38288:8 38337:2 located 38175:4 38232:17 38250:10 location 38237:6 logic 38263:17 38296:14 38311:9 38315:19 38331:24 logical 38131:6 logistical 38233:1 38258:7 logistics 38258:24 London 38339:25 long 38145:3 38151:11 38162:16 38182:11 38202:16,16 38227:5 38231:5,5 38272:10 38272:22 38275:13 38326:24 38349:15 38353:18 38355:19 longer 38263:13 38283:11 38284:3,19 38321:6 38326:19 38327:7 38347:9 longstanding 38272:4,5 Lonmin's 38185:7 38187:4 38193:2 38224:12 38227:13 38228:3 38233:9 38249:20 38287:13 38287:15 38291:12 38298:21 38299:22 38304:15 38309:1,10 look 38142:6 38165:16 38173:16 38189:22 38197:19 38203:22 38204:21 38212:2 38227:3 38236:9 38244:12 38258:9 38259:12 38266:15 38270:17 38279:8 38280:19 38287:7 38288:14 38289:12 38293:18 38299:6,12 38300:24 38301:20 38306:21 38323:10 38325:15 38329:17 38340:1 38348:21 38349:13 38355:22 looked 38190:17 38212:20 38213:4 38245:18 38264:19	38270:12 38315:15 38325:13 38332:12 looking 38151:25 38198:19 38201:9 38242:21 38268:15 38268:19,22 38291:21 38310:1 38317:7 38361:18 looks 38138:17 38162:23 38317:4 loose 38356:21 lords 38357:16 Lordship 38152:5 lose 38233:1 38336:17 38344:3 38345:22 38348:23 38349:16 losing 38331:21 loss 38233:18 38258:25 38336:7,13 38342:2 38346:19,23 lost 38139:24 38331:21 38343:6,12,13,14 38346:10,19 38348:18,20 38354:6 lot 38175:24 38198:13 38208:11 38282:13 38298:5 38311:14 38325:23 38356:5 lots 38197:3 lower 38244:9 38338:7 38338:9,10 38339:5 38339:20,24 lowest 38155:15 LPD 38153:22 LRC 38340:20,20 lunch 38218:22 38219:3 38234:14 38237:16 38256:14 38279:25 38280:3,14 lunchtime 38218:23	38258:23 38263:7,8 38287:20 38305:20 38311:12 38349:2 38358:15 man 38145:10 38148:21 manage 38231:15 managed 38314:11 management 38128:19 38138:3 38160:7 38185:9 38188:20 38194:9 38196:12,24 38197:4,5,7 38198:14 38198:15,19,24 38199:8,19,20,24 38204:12 38207:2,4 38214:23 38215:16 38215:19 38216:4 38217:1,16,21,22,24 38222:4 38230:13,20 38231:1,14,15,18 38240:12,14,18,20 38256:16 38260:6 38266:23,24 manager 38155:1 38256:20 managers 38136:21 mandate 38138:13 38139:3,11 38143:11 38143:18 manifestly 38276:16 manner 38194:25 38365:4 march 38211:10 marching 38214:22 Marikana 38161:23,23 38170:2 38220:9,18 38227:24 38228:7 38239:7 38242:24 38273:19 38276:3 38283:14 38284:8,20 38312:15 38314:20 38342:4 38349:22,24 38350:18 38353:7 38354:20,24 38355:5 mark 38185:16,19 38186:16,21 38188:12 38190:14 38191:22 38193:14 38219:23,25 38238:6 marked 38180:1 markedly 38314:18 market 38143:14 38166:13 38167:15 38168:1 38216:25 38217:3,17 38257:8 38272:9 38283:19 38295:23 38297:25 38312:23 38314:24 38323:20 38326:12 38326:13 marketed 38259:25 38260:5 marketing 38231:24 38232:1,16,24,25 38233:3,6,7,13	38256:20,25 38257:6 38257:15 38261:8,12 38262:5 38263:7 38272:17 38273:2,5,9 markets 38250:11 38273:13 38298:2 market-driven 38286:16 marking 38245:25 married 38238:24 Masakhane 38221:16 38223:11 mass 38354:19 massacre 38276:1 massive 38252:21 38253:25 38264:13 38326:10,18 massively 38237:1 match 38158:7 material 38266:11,12 38266:14 38332:5 materials 38360:16 Mathunjwa 38130:8 38131:4,14,17,20 38132:1,2 38136:3 38137:2 38138:2,4 38142:1,5 38143:8 38145:1 38146:4 38147:21 38150:2,9 38150:23 38159:11 38160:22 38163:11 38163:19,25 38164:8 38164:17 38167:2,3 38201:8,9,10,12,13 38201:15 38215:5,10 38215:10 38216:12 Mathunjwa's 38136:25 38167:9,12 matrix 38306:13 matter 38140:16 38155:10,10 38195:11 38205:4,10 38205:16 38206:12 38210:9 38212:23 38217:20 38218:2,14 38266:12 38300:11 38311:25 38361:2 matters 38225:6,21 38264:18 38266:11 38266:13 38332:17 38362:22,23 matured 38216:7 Mbombo 38188:16,18 38189:5 38195:8,16 38195:19 38196:14 38200:15,19 38201:3 Mbombo's 38190:18 McGilligan 38128:17 McIntosh 38161:2,4,13 38161:19 McIntosh's 38162:4 meals 38223:6 mean 38184:10 38212:20 38215:18 38237:5 38243:14 38253:19 38257:20
---	---	---	---	--

38260:17 38280:4 38287:15 38295:9 38296:13 38316:23 38326:22 38328:23 38335:18 38348:16 38349:12 meaning 38197:9 means 38131:24 38157:9 38175:17 38176:23 38189:10 38197:8 38280:16 38281:25 38316:7 38332:9 38347:16 38352:23 meant 38139:10 38184:12 38218:5 38233:25 38356:13 media 38183:5,8,12,13 38185:21 38186:3 38192:19 38211:9 mediating 38292:13 meet 38157:24 38212:9 38222:7 38312:25 38313:2 38319:25 38335:25 38336:18 38342:18 meeting 38152:3 38159:16 38173:23 38182:7,19 38183:16 38188:19,23 38192:20 38195:2,5 38199:18 38207:12 38207:14,18,25 38208:3,6,9,16 38209:18,19,24 38221:22 38226:22 38236:19 38265:1,6 38334:24 38367:1,4,5 meetings 38159:15 38200:13 38207:23 38208:16 Melrose 38161:9,21,24 meltdown 38254:25 member 38359:23 members 38128:4 38145:6 38146:13,17 38164:15 38171:25 38172:13 38177:22 38192:22 38194:19 38214:23 38222:3 38317:4 38359:14 38360:2,7,20 membership 38230:12 memo 38208:2 38209:21 38297:15 38323:12 memorandum 38203:11,13,17 38205:14 38207:10 38207:17,21 38209:13 38214:22 38215:18 memorial 38220:22 38221:3,21 memory 38228:9,13 38231:24 38257:3	38265:11 38267:13 38296:19 men 38161:15 mention 38153:16 38154:8 38293:1 38340:24 mentioned 38153:6 38228:6 38235:24 38240:12 38255:14 38324:10 38326:9 38333:19 38335:18 38342:3 mentions 38288:16 Merchant 38286:22 38292:4,14 38294:24 message 38154:2 38163:6 Messina 38251:14,14 38251:17 38252:8 38295:12 38324:12 met 38151:24,25 38204:1 38253:12 38322:19 38328:17 38334:9 metal 38231:23,24 38232:15,21 38233:3 38233:8 38251:11,12 38256:17 38257:25 38258:1,4,22 38259:21,25 38260:1 38261:4,7 38262:16 38272:13 metals 38230:21 38232:22 38233:22 38261:13,22 38263:1 38264:18 38266:19 38269:9,11,17,23 38272:17,20,22,24 methods 38332:11 MHDC 38230:8,10,11 microphone 38145:22 38147:2 38224:24 38255:24 38269:1 38302:16 38345:15 38361:23 Middelkraal 38151:24 middle 38198:23 38214:3 38216:1 38265:18 38300:24 38333:8 migrant 38354:20 Mike 38216:9 military 38174:11 38175:10 milling 38162:15 Mills 38274:25 mind 38186:22 38200:16 38218:8 38229:4 38243:8 38298:9 38301:14 38307:23 38359:3 minds 38236:19 38332:7 mine 38170:3 38197:7 38197:8 38198:24,25 38199:8,9 38203:8	38212:19,24,24 38213:4,5,10 38242:22 38248:9 38286:4 38347:8 38348:11 mineral 38248:21 38295:22 38319:15 38320:7 Minerals 38248:20 miners 38201:6 Mines 38342:4 Mineworkers 38207:7 minimal 38348:9 minimum 38266:12 mining 38186:17 38196:24 38197:11 38199:1,11 38226:10 38232:13,18 38242:16,23 38248:20 38251:5,6,7 38251:10,14,14 38252:8 38293:18,19 38293:20 38294:9,13 38294:19 38295:21 38296:17 38315:15 38319:17 38322:17 38323:3,23 38325:23 38327:1,8 38350:8,13 Minister 38196:24 minority 38244:16 minute 38234:14 38344:25 minuted 38209:5 minutes 38139:9,10 38149:17 38173:2 38181:19,23 38182:13 38189:20 38201:4 38202:6,11 38202:18,20,21 38208:6,9 38210:11 38210:14 38213:23 38219:17 38225:7,10 38225:10,11,12 38235:16 38327:19 38340:20 misapprehension 38162:1 misleading 38168:17 38316:5 misnomer 38359:8 missed 38189:25 38308:9,10 38309:5 missing 38256:3 38319:13 mistake 38243:22 38304:10,13 38305:16,25 38306:1 38307:17,18 38309:4 38309:4,5 mistakes 38173:16 misunderstanding 38142:18 38216:12 misunderstood 38240:14 mitigated 38346:24 Mitsubishi 38271:20	38271:23 Mm 38198:10 Mmmm 38197:24 MOCs 38189:21 model 38295:2 38351:12 Mokoena's 38202:23 Molebatsi 38128:11,15 Molebatsi's 38128:17 moment 38127:11 38179:2 38208:9 38232:21 38238:20 38238:22 38257:25 38258:1 38305:4 38347:11,12 38359:9 Monday 38208:13,14 38208:15 38340:17 38340:22 38341:1 38358:25 38360:25 38362:10,14 38364:2 38364:6 38365:1 38366:6,18 money 38218:1 38229:5 38230:9,13 38244:18 38255:16 38286:14 38287:4,13 38287:15,18,24 38288:1,4,25 38289:6 38291:12 38295:11 38295:24 38302:7 38303:5,9,13 38311:12 38315:9 38323:22,25 38324:5 38325:8 38335:24 38336:18 38348:10 38348:12 38349:3,5 38349:15 38355:15 38357:15,20 monies 38363:23 month 38207:20 38228:14 38238:23 38238:24 38295:4 38356:25 38357:9 monthly 38208:13,16 38260:20 months 38143:13 38204:14 38280:22 38342:19 38357:9 Mooi 38279:6 mooted 38364:24 mop 38341:1 moral 38319:3 Morgan 38343:2 morning 38127:3 38129:15,17 38188:9 38191:15 38192:16 38199:18 38201:10 38234:9 38270:25 38332:18 38364:13 mortar 38235:23 mortgage 38292:7 motions 38294:4 38296:5 motivate 38151:21 mountain 38130:12 38131:8 38132:4,15	38132:17 38133:3,7 38133:13,17 38134:2 38134:23 38135:4,5,9 38135:21 38136:1 38138:21 38149:25 38150:1 38151:13 38153:21 38160:11 move 38149:11 38188:21 38189:1 38193:4,6 38224:25 38255:12 38271:9 38273:16 38311:21 moved 38158:19 movement 38268:3 moving 38178:17 38194:17 38198:20 38340:13 Mpembe 38159:1,15,23 38160:19 38195:8,13 38195:17,17 38200:11 Mpofu's 38141:21 38142:18 MPRDA 38334:21 MSDC 38285:14,16 MTC 38189:10 Munro 38191:22 Munroe 38185:16,19 38186:17 38193:11 38193:16 38194:2 murder 38350:6 M1 38236:8 <hr/> N naked 38145:6 name 38217:11 narrow 38135:10 38328:3 narrowly 38319:8 nation 38354:22 national 38188:20 38191:13 38192:14 38194:9 38199:15 38205:9,17,23 38206:8,13,23 38207:6,7 natural 38169:20 nature 38130:9 38216:8 38220:16,18 38224:19 Ncube 38192:1 near 38288:18 nearly 38352:3 necessarily 38157:24 38208:12 38222:8 38236:22 38334:15 38335:9 necessary 38141:24 38208:16 38281:8 38284:24 38286:23 38289:20 38290:3,14 38290:15 38292:5 38352:12 38361:17 need 38143:5 38185:18 38186:20 38193:2 38202:15 38207:5
---	---	---	--	--

38239:18,25 38242:1 38243:11,12,13 38245:3,9 38260:10 38263:5 38283:16 38284:15 38325:15 38337:20 38339:5 38341:18 38344:23 38349:8 38357:7 38361:6,12 38367:6 needed 38140:5,17 38184:2,2 38185:3 38193:3 38195:12 38222:18,19,21 38266:12 38331:20 needs 38141:12 38157:1 38201:24 38221:22 38222:8,15 38236:2 38297:19 38324:20 38328:2 38352:15 neglected 38215:20 negligence 38144:4 negligent 38151:18 38309:5 negotiate 38130:11 38132:16 38200:18 38200:24 38201:25 38202:1 38250:12 negotiated 38131:16 38155:11 38250:21 38250:22 38358:19 negotiating 38323:2 negotiation 38137:3 38142:3,8 38154:9 38155:8 38161:2,5,11 38204:8 negotiations 38136:22 38143:6 38154:15 38155:13 38167:11 38167:24,25 38216:8 38216:11,13 38217:20 38218:2 38296:21 negotiator 38161:12 neighbouring 38211:24 net 38344:7,22 38348:21 never 38131:8 38132:4 38144:15,15 38154:14 38159:13 38160:11 38162:7 38170:12,12 38216:10,16,16 38217:3,19,23 38271:1 38285:7 38317:22 38328:17 38328:18 38330:18 nevertheless 38294:7 new 38149:9 38169:22 38178:1 38197:12 38199:12 38226:10 38255:3 38263:25 38265:18,22 38280:5 38293:19,20 38294:8 38296:17 38313:11 38313:15 38323:3,19	38324:1,14 38325:2 38329:16 38330:6 news 38162:24 newspaper 38214:16 38347:18 NGCUKAITOBI 38181:15,22 38362:2 38362:4,11,15 nice 38144:12 night 38127:9 38194:10 38197:1,24 38198:11 38275:4,7 nil 38313:16 nitpick 38348:17 Nkaneng 38273:18 38274:9 38275:5 38355:2 38357:17 nod 38209:9 38246:13 nodding 38209:9 non 38223:23 38336:5 non-education 38223:1 non-executive 38298:24 non-existent 38358:3 non-statutory 38219:21 38221:1,13 Nooi 38279:6 normally 38207:20 38229:24 38263:12 38324:15 38347:20 north 38236:8 note 38218:15 38246:1 38247:12 38297:16 38327:14 notes 38297:16 notice 38187:9 38196:5 38239:16,16 38360:14 notices 38185:24 Notification 38248:20 notion 38308:6 notionally 38348:6 nought 38304:22 38305:2,2,6 November 38221:12 38223:3 38255:5 38296:16 38297:18 38297:21 38324:19 no-one 38307:8 Ntsebenza 38365:3,6,6 Ntsebeza 38224:9,13 38330:13,20,24 38363:7,14,16 38365:7,8 nuanced 38195:19 nub 38359:20 NUM 38140:8 38144:24 38145:1,4,8 38146:13,17 38149:23 38168:20 38168:22,23,24,25 38171:24,25 38172:10,12 38196:25 38197:11 38199:2,11 38200:1 38202:13 38205:1,9	38205:16,23 38206:6 38206:9,13,22 38214:24,24 number 38165:19 38179:10,11 38182:22 38183:5 38190:20 38211:22 38216:3 38219:16 38229:4 38238:14,17 38248:3 38256:11,12 38256:14 38267:25 38276:9,14,19 38277:3,5,17,21 38278:24 38281:2 38286:6 38287:9 38289:16,25 38292:6 38292:23 38303:17 38303:18,21,22 38309:17,19 38347:24 38360:2 numbered 38179:6 38359:12 numbers 38183:3 38245:2 38248:16 38287:12 38305:21 38306:11 38308:8,25 38309:15 38333:21 numerous 38169:18 NUM's 38202:14 Nyala 38161:19 nyana 38131:18 Nzuza 38133:8 38134:11,23	38353:11 obliged 38234:4 obliges 38260:24 obtained 38265:19 obtaining 38314:1 obtuse 38345:22 obviate 38341:17 obvious 38140:7 obviously 38210:2 38263:13 38328:23 38329:2,20 38338:10 38340:10 38363:18 38366:21 occasion 38234:7 occasions 38309:6 occupant 38228:17 occupants 38228:23 38229:1,7 occupation 38228:11 38228:12 38229:12 38229:13 occurred 38216:10 October 38158:17,21 38233:23 38244:8,8 38246:7,8 38260:12 38260:14 38261:17 38261:21,25 38262:8 38262:10,14 38297:25 38298:2 38314:23 38315:1 38323:5,5,15 38324:18 38325:18 38325:18 38366:12 38366:23 38367:9 odd 38229:1,12 odds 38266:3 offer 38150:21 38163:12 offered 38141:2 38167:21 38216:23 offering 38163:15 offers 38151:14 office 38160:13 38207:6 38261:16,21 38261:24 38262:6,20 38263:9 38267:2,18 38269:12 officers 38190:21 38193:22 38350:7 offices 38214:25 official 38190:7 oh 38148:19 38174:11 38175:1,11 38182:24 38197:16 38233:19 38248:4 38275:9 38283:7 38302:21 38318:8 38356:11 38362:19 okay 38130:7 38132:12 38132:13 38134:8 38135:7,24 38141:18 38144:20 38145:23 38146:1 38147:6 38151:20 38164:4 38165:13 38168:2 38175:7 38176:6	38177:14 38178:10 38179:16 38181:12 38181:20 38182:15 38198:7 38203:2 38210:17 38282:23 38246:12 38247:11 38247:21 38253:2 38270:20 38312:11 38334:3,12 38338:18 38352:1 old 38231:10,10 38293:18 38324:14 once 38136:23 38137:10 38155:4 38224:13 38229:20 38235:25 38252:5 38289:19 38290:2 38309:17,19 38323:19 38324:1 38346:23 once-off 38136:3,6,14 38137:3,8,10 ones 38173:9,9 38174:9 38174:11,12,22,22 38175:8,10,10 38176:10 38336:6 38337:14 one's 38320:3 ongoing 38170:2 onward 38223:25 onwards 38179:7 38228:19 38285:17 OO2 38214:15 OO3 38165:14 opened 38167:10,24,25 38214:25 opening 38216:11 38243:12 operate 38352:13,23,25 38354:14 operates 38241:20 operating 38240:4,8 38244:24 38247:20 38252:10 38260:8 38315:1 38335:21 38351:12 operation 38152:5,10 38250:25 38345:6 38356:18 operational 38242:17 38250:23 38273:8 operations 38183:9 38206:7,9,20 38252:12 38276:7 38277:1 38315:2 38352:14 operator 38203:18 38279:6,8 38283:6 38358:4 operators 38133:22 38186:6 38217:18 opinion 38205:10 opportunity 38139:24 38147:5 38150:25 38151:14,17 38157:1 38271:4 38316:2
---	---	--	--	--

<p>38328:18 38361:13 38364:19,25 38365:1 opposed 38278:3 38322:3 opt 38227:21 optimal 38263:12,13 38355:25 optimally 38231:14 option 38292:8 38316:1 options 38212:18 38291:24 38292:6,18 38318:3 38334:17 oral 38359:17,23 38360:8 order 38186:8 38205:17 38222:17 38232:11 38247:24 38249:2 38278:11 38281:1 38293:18,19 38293:20,20 38294:8 38294:8 38296:17 38323:3,19 38324:2 38324:14,15 38329:10 38362:25 38365:25 ordinate 38184:19 ore 38294:16 38342:13 38347:6,8,8 organisation 38146:16 38257:6 38259:5,7 38349:17 organisation's 38313:4 organise 38237:18 original 38198:4 38268:23 38293:9 38299:13,18 38310:21,22 38312:13 38313:10 38317:17,20 38318:18 originally 38128:8 38133:21 38134:15 38272:17 38280:22 38315:25 38366:15 ought 38202:14 38300:16 38355:17 ounce 38233:24,25 38254:24 38294:15 38342:17 outbreak 38170:2 outcome 38143:18 outlined 38205:2 output 38344:4 38345:22 38346:10 outset 38134:12 outside 38130:24 38131:18,22 38137:4 38151:24,24 38154:10,18,25 38155:3,8,16 38156:3 38157:3,14,25 38215:21 38216:5,15 38232:9 38276:19 38331:9 outsiders 38290:15 outstanding 38252:24</p>	<p>38328:7 overcome 38367:18,18 overhead 38299:10 overlooked 38147:11 38307:18 overlooking 38296:2 oversight 38308:9 oversights 38308:10 owe 38281:7 owed 38229:2 owing 38283:13 38284:5 38317:8 owned 38232:24 38259:23 38290:21 owner 38290:23 38291:4 owners 38314:1 ownership 38227:20 38228:23 38229:7,21 38229:24 38258:3,16 38258:17,20,22 38259:6 owning 38317:8 owns 38240:17 o'clock 38193:9 38194:10 38340:18</p> <hr/> <p style="text-align: center;">P</p> <p>pages 38165:15 38173:21,21 38179:8 38179:9 38197:19 38282:25 38283:6 38289:4 38307:20 Paginate 38198:10 paginated 38183:5,7 38198:5,6 38268:23 paging 38197:13 pangas 38163:2 papers 38237:18 paperwork 38252:5 paragraph 38135:20 38186:5 38211:9 38212:3 38214:20 38226:14 38259:20 38276:12 38283:9,11 38284:3 38290:16 38299:11,12 38313:17 38350:4 38351:6,7,13 38352:10 38354:17 38359:9 38360:11,18 paragraphs 38264:19 38359:12 parallel 38131:22 38317:7 paraphrase 38166:9 pardon 38182:24 38197:17 38198:8 38364:20 part 38128:6,19 38134:11 38139:18 38142:14 38153:18 38161:6 38172:11 38175:2 38195:12,14 38204:25 38206:21 38208:25 38213:10</p>	<p>38215:16 38226:1 38227:4 38232:7,8 38251:21 38257:11 38289:7 38295:21 38304:15 38309:10 38350:10 38351:9 partially 38266:1 participate 38136:4 particular 38156:9 38177:19 38195:21 38220:13 38292:21 38320:17 38352:11 38363:20 particularly 38143:6 38143:13 38163:18 38177:23 38216:2,6 38227:7 38271:2 38354:19 parties 38137:17 38140:9 38142:2 38225:2 38260:13,24 38266:21 38268:6 38309:8 38328:4,7,9 38328:23,25 38329:2 38329:4 38330:6,7,9 38330:11 38341:18 38355:23,25 38360:15 38366:2,17 38367:1,8 partly 38270:6 partner 38331:22 partnerships 38286:21 38292:3 parts 38236:15 party 38260:19,20 38266:22 38287:23 38329:25 38330:3 38360:11,12 38361:9 pass 38232:25 38233:3 38255:10 38259:7 passage 38166:6 38174:23 38176:11 38196:3,22 38197:15 38197:25 38198:3 38199:4 38354:2 passages 38197:18 38214:12,14 38216:20 38282:22 38300:7 38354:14 passed 38128:16 passing 38336:23 pay 38138:10 38212:21 38213:3 38228:17 38230:4,5,5,6,7 38235:24 38255:1,10 38272:10 38295:5,5 38316:13 38326:16 38333:11,22 38336:24 38337:1 38345:14 38346:6 38363:23 payable 38261:12,14 38261:18,22,22,23 38262:5,20 38267:18 paying 38213:5 38228:14,21</p>	<p>38235:25 38245:21 38322:9 38334:5 38345:11 payment 38138:19 38221:8 38223:12,13 38229:23 38233:5 38258:7 38270:9 38325:5 payments 38219:21 38220:24,25 38221:2 38221:4,5,9,14,15,18 38221:20 38223:2,2,7 38223:8,13,15,18,19 38223:24,25 38224:3 38224:19 38230:19 38230:19 38240:11 38255:13,17 38256:8 38256:15 38263:3,8 38270:11 38337:23 38363:13 payroll 38223:16 pays 38260:20 38261:20 38325:6 peace 38276:3 peak 38322:8 38325:17 peer 38186:17 pension 38229:6,6 people's 38335:1 perceived 38154:14 percent 38310:9 percentage 38304:20 38304:21 38314:21 perception 38134:21 38154:3 38155:5 38199:25,25 38200:2 period 38188:16 38226:2 38233:14 38261:11,17 38267:8 38268:17 38287:10 38294:18 38295:7 38315:10 38326:19 38327:7 38329:10 permanent 38131:5 38132:5 38272:4 permanently 38130:10 persist 38326:15 persisted 38134:16 persistent 38195:11 person 38151:16 38159:2 38213:14,17 38221:4 38228:11 38238:23,23 38299:5 38309:24 38310:5,19 38310:24 persona 38241:13,15 38241:17 personal 38274:15 38299:4 38300:3 38310:25 persons 38224:4,10,11 38224:16 38277:21 38363:15 perspective 38184:1 38193:2 38263:13 38293:6 persuade 38142:13</p>	<p>38161:11 38201:5 38310:14 Peter 38128:16 Petroleum 38248:21 38319:16 PGM 38258:25 phase 38180:12,15,18 38180:19,21,24,25 38181:7,10,21 38299:6 38328:3,5 38330:6 38341:19,20 38361:6 38364:1 Phillimore 38350:4 phone 38183:4 38188:15 38189:19 38190:18 38194:6 38201:10,13,15 phoned 38151:25 38189:9,10,12,24 phrase 38133:15 38181:8 38290:6 38291:7,9 pick 38310:2 picked 38196:19 38236:15 picture 38293:3 pictures 38236:13 piece 38173:10 38235:22 Pillay 38178:25 38179:12,15 38202:19,20,23,25 38203:2,5,9,16,21 38204:7,16,20,25 38205:7,13,20 38206:1,11,21 38207:8 38209:15,21 38210:6,7 38234:20 38234:24 38235:3,5 Pillay's 38198:10 pipeline 38342:20 place 38128:1 38141:16 38150:10 38175:14 38184:6 38188:25 38220:12 38252:5 38289:8 38292:12 38306:18 38307:18 38312:4 38324:21 38358:18 38362:19 38366:5 placed 38144:3 38205:21 38230:24 places 38173:16 38211:23 38286:24 38307:19 plan 38183:17 38191:8 38192:1,2,11,19 38286:14 38297:22 38298:22,22 38306:4 38319:18 38352:18 38353:12 plans 38161:7 38190:8 38191:2,4,14 38192:25 38298:8,11 38320:8 platinum 38231:2,8,8</p>
--	--	--	--	--

<p>38232:22,22 38233:21,22,25 38234:2 38238:11 38240:5,5,7,7 38242:4,4 38247:25 38247:25 38248:22 38248:23 38254:23 38255:7 38256:18 38257:6,7 38259:24 38260:2,5,8 38261:3 38261:12,15,24 38262:6 38266:4 38271:14,15,15 38273:12,13 38286:19 38292:1 38294:14,16 38295:12 38298:18 38298:18,19 38299:7 38312:23 38323:20 38324:6,12 38333:6 38342:8,17 38343:3 38344:8,11,18 38346:18,21,25 38348:3,8,11 Platinum's 38273:15 38298:22 Plats 38284:17 play 38351:9 PLC 38232:9 38240:3,6 38240:15,17,21,22,25 38241:3,15,17,20 38242:3,6,8,9,25 38243:5 38244:15,19 38245:12 38246:19 38247:5,20 38249:20 38249:21,24 38250:9 38250:13,14,17,25 38251:19,23 38252:4 38253:24 38259:23 38260:6,7,15 38266:19 38270:12 38270:16 38333:16 38333:18,21,23,24 38334:6,8 PLCs 38238:8 PLC's 38241:10 please 38145:10 38146:19 38147:23 38155:22 38156:17 38156:24 38164:13 38165:11,16 38166:15 38170:9,20 38209:8 38211:8 38214:3 38215:18 38216:19 38279:19 38321:10 38330:19 pleased 38341:11 plug 38297:9 plus 38146:8 38256:21 38303:14 38314:11 plus-minus 38342:9 point 38134:17 38135:1 38137:23 38138:14 38138:22,22 38141:21,25 38142:11,18,23</p>	<p>38144:2,5 38146:24 38147:9,13 38149:15 38149:18,21,23,24 38153:2 38155:5 38157:22 38177:15 38177:18 38186:4 38188:5 38197:10 38198:16 38199:10 38205:8 38208:7,19 38215:13 38218:16 38220:8 38222:5 38227:18 38240:2 38248:18 38249:9 38253:21,22 38254:13 38259:3,4 38287:20,22 38297:2 38297:7,9 38313:19 38313:20,24 38318:14 38319:14 38329:22,23 38334:10 38339:22 38340:14 38341:20 38347:23 38349:2 38358:21,23 38363:14 pointed 38206:3 38314:16 pointer 38245:25 pointing 38197:4 38198:14 points 38204:2,22 38227:11 38249:22 38290:11 38341:21 police 38152:4,4,10 38160:20 38161:5,7 38161:10,12 38162:8 38162:12,14,16,21,21 38173:5 38184:19,20 38185:3,11 38190:6 38190:21 38191:17 38191:20 38193:4,21 38194:4 38195:14 38196:3,7,7 38280:23 38280:24 38281:3,10 38350:7 policemen 38170:15 38215:3 policies 38220:11,11 policy 38187:20 38250:21 political 38197:10 38199:10 pony 38325:25 poor 38144:4 38271:2 population 38145:7 38276:25 38327:4 pose 38330:6,8 posing 38328:18 38329:9 38364:25 position 38138:10 38144:7 38150:8,10 38150:13 38151:16 38153:24 38159:2 38164:8 38166:4 38177:25 38180:18 38184:7,8 38185:7</p>	<p>38186:21 38194:22 38204:5,17 38205:3 38205:15 38206:3 38268:10 38273:3 38277:23 38286:12 38297:6 38301:21 38311:11 38319:13 38325:13,16 38327:9 38344:7 38366:23 38367:14 positions 38177:21 possibilities 38229:5 possibility 38366:22 38367:9 possible 38131:17 38142:17 38171:12 38177:8 38185:24 38190:2 38208:14 38222:7 38297:6 38338:23,25 38361:7 possibly 38188:21,21 38189:18,25 38194:17,18 38195:18 38237:5 38238:15 38301:22 post 38137:12 38335:25 postpone 38364:17 38366:16 post-dated 38134:21 potential 38349:8,13 potentially 38306:8 38314:17 practical 38179:13 practice 38137:7 38216:6 38217:15,22 38230:7 practitioners 38367:13 38367:21 precedence 38313:21 38313:24 precedent 38164:10 38204:10 precedents 38144:13 preceding 38215:23 38216:20 precise 38348:17 precisely 38181:9 predictable 38327:12 predicted 38326:18 38327:9,13 preface 38220:1 prefer 38127:18 38203:2 preference 38202:25 preferred 38279:1 38316:4 premise 38253:12 preparations 38223:6 prepare 38180:1 prepared 38150:1,2 38155:2 38178:23 38179:19 38204:12 38207:11,17 38220:3 38234:10 38235:15 38235:24 38267:3</p>	<p>38278:13 38287:21 38295:15 38298:4 38308:20 38316:13 38323:7,9,14 38327:18 prepares 38270:22 preparing 38255:4 38305:18 38324:16 prerogative 38207:2 38217:1,21 prescribed 38222:1 38319:18 presence 38128:18 38162:8 38192:15 38241:10 present 38128:12,13,15 38129:2 38133:7,13 38134:23 38192:19 38234:18 38284:7 38297:23 38309:2 38312:17 38329:11 presentation 38220:6,9 38236:5 38297:19 38316:25 38324:23 presentations 38128:5 38128:8,10,14,20 38220:4 presented 38140:10 38150:25 38154:11 38190:7 38191:1 38216:3 38306:23 38359:25 38363:11 presently 38356:21 preservation 38249:9 press 38192:18 38214:15,17,19,20 38215:7,23 38275:20 38276:2 pressures 38227:16 presumably 38185:6 38192:12 38275:12 38281:3 38306:3 38345:5 38353:15 38355:6 presume 38219:1 Pretorius 38280:25 pretty 38311:10 38317:11 prevailing 38260:25 38350:10 prevented 38140:1 38141:3 preventing 38140:24 previous 38231:12 38255:8 38261:7 38266:9 previously 38147:9 38151:1 38228:7 38278:8 pre-approved 38314:1 38314:12 pre-marked 38234:25 price 38228:11,16 38230:4 38233:2,21 38233:24 38234:2 38254:23 38255:7</p>	<p>38294:14 38312:23 38324:6 38339:12,25 38340:6,10 38342:8 38344:9,11,18 prices 38294:14,16 38311:11 prima 38138:14 38296:2 38297:4 primarily 38231:9 38256:19 primary 38239:19 38266:2 38352:8 principally 38221:22 principle 38346:6 print 38127:9 printed 38127:11 38178:22 38256:4 printer 38127:10 printers 38222:22 prior 38208:20 38215:8 38252:2 38259:23 38265:1 38272:21 priority 38315:4 38353:9 private 38222:11 38286:16 38309:12 38334:3 privy 38190:9 38191:13 probability 38212:9 probably 38194:2 38206:16 38208:15 38213:18,19 38229:9 38229:16 38247:10 38257:3 38266:11 38269:15 38282:12 38295:11 38304:18 38309:21 38326:14 38334:1 38336:16 38338:7 38357:5 problem 38139:2 38156:22 38161:10 38169:6 38172:19 38187:15,23 38216:16 38243:9 38259:15 38269:6 38281:21,22 38282:20 38318:2,10 38319:1 38320:19 38340:16 38366:1 38367:21,22 problems 38264:11 38313:19 38321:19 38323:16 proceed 38314:10 38366:1 proceeded 38152:17 38314:21 PROCEEDINGS 38127:1 process 38265:4 38281:13 38287:3,8 38287:19 38288:2 38289:1 38292:11 38296:17,18 38306:9 38324:25 38325:3</p>
---	--	---	---	--

38328:7 38329:16 38342:13,14 38351:10 processes 38204:8 38215:19 38216:14 proclamation 38239:7 38239:7,10 produce 38128:23 38245:7 38344:1 38347:4,5,6,24 produced 38232:22 38233:22 38271:14 38285:8 38305:20 38306:12,20 38356:2 38365:18 product 38233:1 38342:21 production 38345:8,17 38347:9,24 productive 38336:6 38357:20 products 38259:24 38260:5,16,17,19,20 38340:3 profit 38343:13,16 38345:6 38348:21 profitability 38313:21 profitable 38315:5 profits 38324:4 program 38321:9,11 programme 38284:23 38284:24 38285:3 38290:10 38322:7 38327:19 38332:4 38333:10 progress 38239:10 38313:8 progressive 38230:14 project 38287:16 38291:18,19,20 38295:9 38303:16,17 38303:18,21,22 38304:23 38307:22 38307:22,23,23,24 38308:11 projected 38265:7 projects 38287:24 38291:17,21 38304:2 prolonged 38343:8 promise 38218:20 promised 38218:21 38280:23 promises 38284:13 38313:6 promote 38169:22 proofread 38197:20,21 proper 38184:14 38353:17 properly 38132:10 38237:4 38317:24 properties 38228:24 property 38227:24 38258:1 proportion 38275:14 proposal 38153:13 38203:23,25 38208:6	38208:18,24 38210:1 propose 38361:3,7 proposed 38205:8 proposing 38141:8 38191:15 proposition 38130:17 38130:20 38144:20 38144:21 38145:24 38147:15,16 38178:14,16 38196:23 38253:4 38294:9 prospecting 38242:16 38242:20 prospective 38314:1 protect 38172:14 protected 38143:11,15 protection 38162:17,21 proud 38274:12 provide 38220:15,20 38234:5 38270:10 38282:13 38283:17 38286:23 38289:20 38290:3,14 38292:5 38292:18 38294:2 38300:1,10 38341:25 38353:23 38358:18 provided 38219:14 38222:21 38231:18 38231:20 38260:1,21 38276:11 38278:4,5 38278:14,19 38279:4 38279:11,19 38361:13 Provident 38221:17 38223:11 provides 38221:23 38283:21 providing 38259:5 38349:7 38354:16 38357:22 38360:17 provincial 38152:6,10 38173:25 38176:18 38182:7 38183:16 38191:14 38192:14 38192:18 38194:7,12 38197:23 38200:6 provision 38229:22 38284:10 38303:18 38303:24 38308:11 38322:6 38324:17 38354:18 prudent 38252:6 38323:21 Pty 38242:13 38251:5 38251:14,14 public 38168:17 38214:6 38305:22 publicly 38152:4 published 38226:11 pulled 38297:9 purchase 38230:4 38252:3 38260:18 38283:15,22 38284:21 38336:13 purchased 38227:17	purely 38349:11,12 purpose 38185:2 38224:19 38256:12 38267:3 purposes 38222:25 38223:8 38277:14 38284:9 38309:2 38312:17 38340:19 pursuant 38258:12 pursue 38265:6 push 38283:19 pushed 38131:8 puts 38309:15 38323:24 putting 38138:5,14 38141:23 38170:11 38176:8 38245:7 38295:20 38296:3 38297:4 38298:6 38301:15 38304:9 38317:2 38334:13 38335:1	38234:12 38263:6 38302:13 38311:14 38311:15,15 38317:16 38328:8,11 38328:16,25 38329:12 38330:8,10 38330:17 38331:1,9 38331:10 38341:2 38362:6,20,22 38363:8 38364:25 quick 38280:6 quickly 38129:20 38197:14 38250:22 38251:19 quite 38149:8 38235:21 38239:22,25 38279:16 38295:24 38296:4,6 38306:4 38310:25 38326:24 quota 38315:16 quoted 38182:19 38323:23 38325:22 quoting 38171:1 38174:13	rands 38337:8 range 38233:8 38291:24 rapidly 38361:7 rash 38326:24 rate 38238:22 38239:5 38278:8 38327:3 38338:15 38342:8 rates 38229:23 38230:7 38250:12 38344:9,11 38344:16 ratification 38299:2 ratio 38229:11 RDO 38129:23 38130:1 38130:5 38205:23 38206:9,23 RDOs 38130:12,22 38131:8 38132:4 38133:8,13 38134:1 38134:18,24 38185:24 38204:9 38206:25 38214:22 reach 38349:14 reached 38189:23 react 38142:22 reacted 38339:4 reaction 38141:22 38142:9 38145:2,15 38146:2 38163:6 read 38164:18 38166:9 38183:15 38197:19 38216:21 38226:14 38227:6 38243:13 38254:12 38273:22 38273:23,25 38274:1 38275:4 38281:24 38282:7 38299:21 38301:12 38305:9 38311:9 38347:17 38350:2 38351:8 38359:9 reading 38132:18 38170:4,19 38218:6 38277:8 reads 38211:10 ready 38127:16 38129:5 38265:12 real 38236:7,18 38296:5,10 38298:7 38332:16 realise 38313:6 38326:6 realised 38213:1 38284:23 38311:1 38330:21 38341:11 realises 38353:16 really 38134:6 38141:20 38142:11 38143:23 38148:21 38149:23 38183:19 38197:7 38198:25 38199:8 38201:14 38215:15 38240:3 38256:15 38265:3,13 38300:16 38322:4 38329:5 38346:6
Q			R	
quadruple 38219:24 qualification 38363:6 qualify 38236:1 quarter 38188:18 38189:3,20 38237:19 38340:17,23 38367:25 queries 38270:23 query 38230:18 question 38131:14 38141:20 38146:22 38147:20 38148:2,4,7 38148:8,9 38149:7,9 38149:17,24,24 38150:9 38155:23 38156:12,24,25 38163:24 38164:17 38169:6 38171:1,3 38181:8 38182:1 38205:20 38206:1,22 38212:24 38217:6 38249:19 38254:19 38266:9 38271:13 38278:1 38291:24 38293:17 38296:25 38298:7 38310:5,6,19 38311:12 38318:4,17 38320:13 38321:2,21 38322:4 38328:19 38329:3,4,5,6 38341:24 38344:20 38345:20 38358:17 38361:2 38364:15 38365:3,9 38366:21 questioning 38181:7 38270:23 questions 38127:4,7 38157:20 38181:1 38182:3,6 38198:17 38199:17 38202:4,13 38202:19 38207:9 38210:6,7 38218:4,12				

38355:17 38359:6,8 38359:20 reams 38329:12,12 reason 38143:17 38153:25 38155:9 38206:15 38207:5 38208:23 38217:25 38220:14 38229:19 38229:20 38250:9 38251:24 38265:16 38317:6,10 reasonable 38150:8,13 38151:15 38153:24 38261:1 38322:2 38326:5 reasonableness 38319:11,12 38341:22 reasons 38209:7 38217:17 38229:11 38263:11,18 38265:7 rebasng 38228:16 rebuild 38353:10 rebuke 38164:12 recall 38177:4,5 38187:10 38194:17 38195:1,3 38199:14 38199:14 38201:23 38207:13 38210:25 38225:1 38238:24 38239:11,13 38259:8 38264:8,25 38265:11 38306:14 38313:10 38316:11,25 38317:4 recalled 38364:13 receive 38157:14 38231:2 received 38141:25 38147:21,21 38150:14 38158:17 38191:21 38227:2 38280:21,23 receiving 38211:14 38278:10 38328:16 reception 38147:20,22 38150:10,14 recognised 38220:10 38220:13 38310:12 38333:10 38349:22 38350:22 recognises 38351:21 38353:2 recognising 38355:17 recollection 38133:19 38133:20 38134:5 38186:18 38200:20 reconsider 38301:21 record 38128:1 38180:11 38194:10 38209:10 38214:12 38226:15 38239:4 38285:23 38326:3 38357:7 recording 38365:14 records 38190:18 38194:7	recoup 38288:11,13,20 38288:21 recover 38289:7 38348:14 recovered 38234:1,2 38289:8 38316:15 recovery 38348:21 recreation 38284:10 recruit 38211:22 recruitment 38211:22 redo 38247:14 reduce 38256:1 38312:22 reduced 38237:1 38264:1 38279:15 38337:23 38338:5 38348:2 reducing 38336:24 reduction 38280:18 refer 38132:8 38145:5 38153:3 38165:11 38175:25 38176:3 38203:6 38211:7 38226:7,9 38274:6 38309:14,18 38354:1 reference 38137:6 38143:1,3,7 38153:12 38163:20 38227:7 38239:4 38244:4 38245:22 38255:22 38269:2,3 38273:14 38286:24 38329:8 38353:25 38354:6 38357:6,7 referenced 38203:8 references 38285:24 38308:21,25 referred 38153:3 38163:17 38215:22 38218:5 38224:3 38254:17 38269:16 38325:20 38342:1 referring 38166:7 38174:3,24 38176:11 38225:25 38238:13 38239:8 38269:15 38305:13 refers 38177:3 38201:9 38249:20 38254:15 38352:22 refiners 38260:20 refinery 38232:23 38258:2 38259:4 reflect 38262:17 38267:7 38299:8 38309:8 reflected 38185:21 38262:18,20,25 38263:3 38264:18 38266:24,25 38268:1 38269:12,22 reflecting 38308:2 reflection 38359:6 reflects 38310:11,19 38356:23 refresh 38267:13	refusal 38139:16,16,22 refused 38139:13 38159:3 38265:17 regard 38128:6 38147:16 38188:15 38189:19 38205:7 38217:4 38286:22 38292:4 38300:3 38327:18 38342:1 38354:2 regime 38232:17 38263:20 region 38257:3 registered 38241:4,6 38241:10 38259:22 regret 38170:1 Regrettably 38226:15 38226:17 regularly 38272:6,14 regulate 38261:6 regulated 38258:20 regulator 38306:6 regulatory 38352:12 reimbursing 38288:18 reinforcement 38190:9 38191:20,23 38192:22 reject 38146:13 rejected 38144:24 38145:1,8 38146:6 38150:20 rejecting 38145:4 rejection 38146:3 related 38200:4 38222:24 38223:1 38233:21 38256:22 38258:3,23 38266:21 38266:22 relates 38203:17 38239:7 38277:20 38303:14 38361:2 relating 38219:13 38363:15 relation 38128:23 38135:9 38147:12 38152:24 38154:25 38158:25,25 38166:17 38210:20 38221:21 38240:11 38253:21,24 38256:17 38260:16 38271:10 38285:23 38319:6 38360:13 38362:5,22 38363:12 38363:25 38365:14 relations 38186:7 38196:13 38306:6 38351:10 relationship 38140:8 38161:15 38168:19 38260:13 38264:17 38292:13 38294:23 38350:25 38351:21 38352:23 38353:3,9 38353:17,22 relatively 38229:3	release 38183:5,12 38186:4 38211:10 releases 38185:22 relevant 38157:19 38226:2 38241:24,25 38289:19 38290:2,12 38297:11 38306:21 38321:13 religious 38151:12 reluctance 38229:10,25 rely 38299:4 38360:12 relying 38359:18 remain 38186:6 38227:8 38289:11 remainder 38229:12 38239:11 remained 38185:7 remaining 38229:1 38303:12 remains 38229:4 38313:5 remarks 38219:1 remember 38139:4 38173:10 38176:20 38176:21 38196:22 38197:1,9,24 38198:11 38199:9,17 38201:8,14 38210:21 38211:6 38225:15 38229:15 38251:16 38257:16 38264:22 38275:3 38288:16 38297:14 38323:22 38329:17 38335:11 remind 38210:20 38225:16 38314:23 remiss 38159:1 remove 38261:1 rendered 38231:3 renegotiated 38272:11 renewal 38272:15 rent 38229:16 38292:24 38295:5 38315:14 38316:1,4 38316:13 rental 38227:21 38228:13,22 38238:23 38279:1 38283:15,23 38284:21 38288:17 38288:20 38289:7 38292:7,10 38295:3 38315:25 38316:1,16 38316:17,23 38317:7 38318:13 rentals 38239:6 38288:13,15 rented 38227:17 38232:10 38236:24 38291:3,4 38316:14 rent-to-buy 38292:7,11 reopen 38137:16 38143:5 38364:16 repay 38331:20 repayments 38295:3 repeat 38148:7,12	38166:15 38182:6 repeatedly 38136:10 rephrase 38148:3,9 38149:8 38172:3 rephrased 38148:1 rephrasing 38149:7 replace 38197:11 38199:2,11 replicated 38309:15,20 reply 38224:13 38249:3 38321:19 report 38131:25 38208:18 38211:12 38211:13,19 38214:16 38226:4,9 38226:11 38227:3,4 38230:18 38244:4 38273:22,24 38274:5 38298:10,13 38299:1 38299:7,21 38301:5 38305:9,19 38306:4 38306:12,19,20 38308:21 38311:23 38312:3 38314:25 38319:4,5 38321:1 38329:19 38343:2 38347:18 38351:3,23 38354:1,5 38355:5 38356:23 reported 38193:18 38265:6 reporting 38191:22 38214:16 reports 38215:7 38226:7 38238:9 38305:1 38320:10,21 38320:22 report-back 38226:13 represent 38210:19 representation 38128:19 representative 38358:21 representatives 38204:1 38209:6 38210:3 38222:12 representing 38241:15 reproduced 38165:15 repudiated 38293:8 38311:24 repudiating 38317:17 38318:18 repudiation 38312:3 request 38131:3 38141:25 38271:4,7 requested 38204:11 38328:13 require 38350:16 required 38129:7 38139:10 38205:5 38226:18 38287:11 38290:7,8,10 38291:8 38291:15,19 requirement 38227:19 requirements 38228:17 38319:17 38322:20
--	--	--	---	--

<p>requires 38250:25 res 38307:5 research 38231:6 reserves 38250:3 resolution 38220:15 resolve 38144:9,11 38163:25 38185:4 38205:4,15 38206:4 resolved 38137:10 38140:16 38220:19 resolving 38150:11 38367:22 resource 38331:13 resources 38181:14,17 38225:11 38232:3 38234:4 38237:2 38248:22 38313:23 38319:16 38320:7 respect 38141:11,14 38159:2 38215:22 38243:10 38244:22 38251:6 38257:24 38261:11,17 38268:5 38273:8 38277:9 38311:25 38313:18 38317:19 38319:20 38341:20 respectively 38278:10 respond 38132:6 38135:1 38186:19 38271:5 38308:16 38309:13 38319:23 38320:4 38322:16 38332:7,13 responded 38186:18 respondents 38314:19 responding 38166:25 38249:22 responds 38130:17 response 38217:4 38224:12 38249:17 38250:1 38253:5,14 38298:6 38309:12 38335:14 responsibilities 38258:5 responsibility 38162:12 38229:25 responsible 38177:21 38187:19,22 38229:21,22 38259:5 38329:3 rest 38146:15 38257:21 restatement 38268:12 restrain 38149:2 Restructuring 38313:20 result 38142:17 38166:12 38211:17 38220:3 38280:14 38313:2 38315:7 38317:21 38356:3 resulting 38226:22 resumes 38127:2 38202:7,8 38237:20 38237:21 38280:8,9</p>	<p>38327:20,21 resuscitate 38136:18 retail 38284:10 38288:6 retain 38289:6 retained 38244:13 38291:14 retracted 38215:6 retrench 38315:8 retroactive 38268:10 return 38184:5,24,25 38185:18,25 38186:2 38186:10,13,15,20 38188:10 38190:13 38296:7 38348:7 returned 38313:21 review 38313:17 38321:9,10 reviewed 38272:6,8,14 38310:5 revised 38174:2,18 38204:11 38245:7 38313:3,8 revision 38204:13 re-establish 38350:24 38351:22 re-examination 38202:22 38213:24 38214:1 38234:11 38341:2 rid 38196:25 ride 38140:19 right 38152:9 38153:10 38155:6 38172:20 38181:12,25 38182:15 38184:1 38191:4 38209:2,20 38211:2 38219:9 38226:5 38236:10 38238:25 38240:23 38242:5,14,16,16,19 38242:20 38243:1,6 38245:13 38254:18 38267:5 38268:20 38271:16,17 38275:22 38279:23 38280:2 38282:10,12 38286:10,19 38289:9 38289:10 38290:18 38300:13,13 38301:8 38303:19 38317:14 38319:17 38324:3 38330:7 38331:23 38343:5 38344:17 38347:11,21,22 38351:18 38357:1,5 rightly 38324:25 rights 38178:18 38225:12 38242:24 38265:10 38293:19 38293:19,20 38294:9 38296:9,18 38315:9 38323:3,19 38324:2 38325:10 38340:21 right-hand 38243:13 rigidity 38154:24</p>	<p>rising 38227:11 38294:14 risk 38233:4,11 38256:16,19 38257:24 38258:10 38258:13,15 38316:21 38317:13 38332:5 38334:12 38335:1 risks 38232:24,25 38233:1,5,6 38258:6 38258:6,7,7 38317:9 rival 38170:16 38171:8 38211:15 rivalry 38168:4,8,17 38171:22 38172:19 RMB 38294:25 38296:20 38297:2,7,8 38297:9 rock 38133:22 38186:5 38203:18 38217:18 38279:6,8 38358:4 role 38231:1 roll 38230:14 38308:14 rolled 38231:23 room 38218:23 38237:7 38278:9 38316:18 38365:2 root 38172:19 Rough 38346:15 roughly 38246:18 38348:23 round 38129:19 38144:6 38177:15 38194:10 38197:22 Roux 38180:9,10,17,21 38180:25 38181:5,11 Rover 38359:6 row 38243:16,23 38245:25 38247:17 38247:19 38333:3 rows 38243:14 38245:9 rule 38343:3 38361:4,8 38361:11 ruled 38181:6 rules 38216:13 ruling 38180:14 38328:10,13 38331:4 38359:4,6,10 38361:17 rumours 38197:3 38198:13,17 run 38355:19 running 38210:16 38257:11,22 38263:14 38280:15 38366:4 runs 38183:7 38351:2 Rustenburg 38140:19 38142:15 R1 38239:6 38278:10 38278:11,11 R1.2 38256:8 R1.5 38295:13 38324:11 R10 38344:22</p>	<p>R12 38136:2,15,17 38163:12 R138 38302:1,11 R143 38221:9 38222:24 R18 38245:16 R2 38221:6,13 38223:4 R2.089 38325:6 R2.5 38246:2 R200 38229:9 38257:23 38316:12,20 R25 38230:10 38338:20 R250 38288:16 38337:18 R300 38229:9 38337:9 38338:16 R35 38348:13 R4.5 38324:12 R5 38229:3 38295:11 38336:7 R50 38342:4 R500 38228:14 R6 38228:21 R62 38228:12 38229:8 R700 38216:24 R800 38238:24 38239:6 38246:18 38278:9 R82 38245:17 R9 38221:20 38223:14 38335:19</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>sacrifices 38331:17 sad 38294:7 Sadly 38228:24 safe 38184:6,15,21,25 38186:13,14 38188:8 38188:10 38190:13 38193:3 38352:9 38353:1 safeguarded 38160:21 safety 38184:13 38334:25 38352:11 salaries 38158:6,7 38206:25 sale 38251:23,23,25 38256:18 38258:17 38260:16,17 38292:7 38315:16 sales 38230:21 38231:23 38232:1,1 38232:15 38240:11 38251:11,12 38255:13 38256:9,17 38256:21 38259:22 38259:25 38260:1 38261:4,8 38262:16 38263:1 38266:18,25 38269:9,9,11,11,15 38269:16,17,21,23 38270:3 38271:13 38272:18,20,23,24 SAPS 38183:22 38184:3,6 38186:24 38187:1 38188:22,24 38189:1 38190:4 38194:13,14,15,15</p>	<p>38195:1 38198:6 38200:16,23 38201:24 38359:13 38359:14,16,22,22,25 38360:2,3,5,7,7,20 SARS 38233:13,15 38267:4 sat 38330:13 satisfied 38148:8 Saturday 38211:16 Saturdays 38347:17,20 save 38315:4 38344:6 38348:17 saved 38346:10 saving 38144:15 savings 38342:23 saw 38155:10 38274:12 38305:18 38355:6 38356:2 saying 38129:22 38130:11 38132:14 38132:14,21 38137:6 38140:22,25 38142:3 38144:10,14,17 38145:13 38146:1,11 38149:4 38155:19 38162:11 38163:24 38166:10 38167:3 38169:25 38171:2,17 38172:17,18 38185:20 38186:19 38194:22 38201:24 38205:14 38208:18 38210:13 38215:15 38216:24 38220:2 38259:14 38269:21 38270:13 38301:5,10 38304:6 38317:4 38321:1 38323:13 38348:1 says 38127:25 38132:12,25 38135:18,19 38136:9 38138:8,9 38139:7,8 38139:8 38165:16 38166:8 38172:23 38174:6 38183:22 38185:17 38186:4 38194:19 38207:15 38215:13,14 38216:20,22 38243:16 38248:13 38248:20 38250:5 38259:9,17 38269:14 38274:14 38276:22 38276:24,24 38279:3 38287:8 38289:15 38290:17 38292:10 38292:23 38299:25 38299:25 38300:20 38301:8 38302:14,22 38302:24,25 38308:4 38319:16 38350:4 38351:14 38353:10 38357:2 38365:18 38366:11</p>
--	---	---	--	--

<p>scanners 38222:22 scared 38153:20 38159:20 38162:20 scenario 38298:1,1 scene 38360:3,3 schedule 38222:10 38223:9,11,16,20,23 38255:17 38285:7 schedules 38223:10 38246:22 scheme 38217:23 38228:18,20 38316:5 38365:9 school 38220:22 38221:25 38222:11 38222:13 schooling 38228:1 schools 38222:16 science 38348:4 scope 38363:1 Scotsman 38138:8 screen 38198:10 38211:8 38239:23 38248:13 38302:17 38312:22 38333:2 38351:7 38354:12 scroll 38259:21 38266:21,21 38267:16 38268:18 38268:21,22,22,23 38269:8 38307:22 38332:25 38333:5 38352:6 scrutiny 38233:12,12 sea 38364:23 search 38236:7 seasoned 38131:15 38142:5 seated 38225:20 second 38127:7 38176:19 38186:4 38194:20 38197:20 38197:21 38206:21 38223:16 38226:24 38229:18,20 38230:20 38237:14 38243:23 38262:2 38277:24 38280:21 38310:5,6 38313:19 38315:9 38317:17 38322:2 38329:23 38350:3 38352:11 38359:16 38366:10 secondly 38140:7 38143:9 38167:14 seconds 38188:19,23 38189:2,21,22,22 second-in-command 38133:16 second-last 38283:10 secretarial 38231:21 38232:2 section 38227:5 38228:8 38247:24 38248:21,23 38253:12,14</p>	<p>38256:25 38273:24 38273:24 38321:20 sections 38274:5 38321:13 sector 38197:11 38199:1,11 38350:11 secure 38314:12 security 38187:15,23 38191:22 Seedat's 38304:22 seeks 38276:3 seen 38196:3 38230:8 38233:8 38239:1 38262:16 sees 38353:8 select 38292:8 sell 38288:11 38339:12 38347:1 selling 38336:18 sells 38233:4 Semenya 38281:7 38317:23 38320:4 send 38210:24 sending 38227:23 sends 38193:11 senior 38128:18 38190:21 seniority 38128:13 sense 38159:2 38172:16 38240:12 38252:4 38263:16 38265:6 38269:14 38294:10 38296:12 38317:24 38336:10 sensible 38179:4 38323:24 38324:2 38334:22 sensitive 38146:16 sent 38163:18 38185:16 38192:1 38268:1 38297:15,16 38306:10 38323:12 sentence 38167:1 38277:8 38289:23 38290:17 38299:12 sentences 38185:23 sentiment 38168:25 38188:1 Seoka 38151:2 separate 38179:13 38199:19,21 38204:9 38227:1 38240:15 38241:12,14,16,19 38244:15 38256:23 38273:10,12 38282:6 38302:5,24 38308:20 38308:25 38309:5 38317:16 38318:17 38319:3 separately 38241:20 38302:5 38312:16 September 38127:1 38233:23 38244:11 38246:11 38261:11 38261:18,21 38262:1 38262:4 38265:9</p>	<p>38267:9 38275:1,2 38315:1 38323:8 38324:7 38360:14 38361:11 38368:1 sequence 38225:8 sequences 38308:17 series 38238:8 serious 38170:1 38177:20 38239:25 seriously 38335:7 serves 38228:9,13 38231:24 service 38231:2 38325:11 38333:24 serviced 38333:19 services 38223:7 38227:16 38228:18 38230:20 38231:1,18 38231:19,19 38232:1 38234:4 38235:24 38240:12,14,18,20 38256:16 38260:6,21 38266:24 38273:9 38276:8,15 38277:2 38277:23 session 38188:22,24 38194:8 38237:15 38340:17 set 38128:8 38164:10 38204:10 38220:25 38221:19 38223:8,16 38223:19 38228:7 38230:22 38241:19 38263:12 38268:11 38290:9,11 38299:13 38308:17 38312:13 38321:11 sets 38223:11 38244:5 setting 38192:2 settle 38183:24 settlement 38239:6 38278:18 38294:7 settlements 38227:15 38238:20 38273:19 38274:22 38275:6 38311:7 38349:14 seven 38170:14 38171:8 38172:1,1 severely 38312:24 sex 38352:21 38353:14 shack 38238:24 shacks 38294:6 shaft 38335:18,24 shafts 38315:8 share 38236:17 38245:20,22 38295:9 38339:12,24 38340:6 38340:10 38342:2 shared 38164:9 38351:12 shareholder 38242:8 38251:10 38266:10 38336:21 shareholders 38226:11 38243:16,18,24 38244:2,15,23</p>	<p>38249:10 38253:23 38254:15 38315:9 38322:11 38325:7,9 38333:22 38336:17 38336:20,22 38339:4 38339:6 38350:16,24 38355:14,19 shareholding 38231:20 shares 38339:12,15,18 38339:24 sheet 38250:13 38252:15,20,21 38294:23 shift 38162:12,13 38186:2,11 38243:11 38322:1 shooting 38312:14 38360:13,20 shootings 38142:16 38275:13 38359:14 shop 38315:3 38319:24 short 38145:3 38151:11 38151:23 38169:16 shortage 38227:14 38281:15 38286:9 38354:21,24 38355:7 shorten 38247:10 shortly 38188:25 38221:8 38224:12 shot 38359:23 shots 38360:2 shottists 38360:9 shouldn't 38133:14 38135:19 38142:15 38156:22 38302:3 38361:19 show 38165:1 38194:7 38244:3,3 38247:19 38267:19,22,24 38279:20,21 38285:9 38286:7 38314:15 38323:14 38340:5 showed 38132:3 38169:19 38317:1 38332:23 38365:15 shown 38340:4 shows 38268:9 38270:11 38283:19 shut 38315:3 side 38200:6 38243:13 sides 38282:8 sideways 38350:2 sign 38177:8 signatories 38137:15 38140:6,15 signed 38260:11 38261:4 38306:20 38310:19 significant 38276:9,14 38276:19 38277:3,5 38277:17,21 38294:18 38313:25 38314:21 significantly 38233:2 38234:1,3 signing 38309:25</p>	<p>signs 38175:22,23 38254:24 38327:6 silk 38280:5 similar 38186:4 38231:13 38236:16 38292:17 38293:5 38295:9 38309:16 similarly 38250:15 simple 38141:4 38147:19 38291:1,6 38320:14 simply 38144:6 38150:9 38227:6 38365:3 38366:16 Sinclair 38190:22 38191:22 38193:16 38193:21 38194:3,8 single 38190:6 38231:15 38235:22 38237:7 38238:23 38245:19 38278:9 38299:14 38316:18 38320:22 38321:1 38325:24 38352:20 38353:14 sink 38335:20 sir 38129:17 38153:11 38287:14 38312:8 38316:10 38324:9 38327:1 38328:21 38330:5 38335:11,17 38337:16,25 38347:2 38348:9 38356:4 38366:10 sit 38140:9 38340:22 38364:1 38366:6 sits 38252:15 sitting 38208:12 38366:18 situation 38140:14 38144:8,10,11 38152:2,8,11 38163:9 38165:3 38168:22 38177:7,11 38183:25 38184:15 38185:4 38196:25 38206:4 38213:17 38282:18 38298:3 38315:11 38317:11 38320:16 38321:16 38324:5 38366:14 situations 38140:24 six 38174:19 38189:22 38204:14 38308:18 38352:8 38359:12 sixth 38360:18 six-monthly 38289:17 38290:1 size 38336:21 sketch 38230:25 skimmed 38274:3 sky 38139:24 sleight 38303:25 slightly 38142:24 38282:18 38340:13 SLP 38240:2 38243:2</p>
---	---	---	---	--

<p>38281:18,24 38282:1 38282:19 38283:19 38286:18,25 38291:25 38293:8,21 38299:25,25 38300:9 38301:8,12,12,22 38302:15 38304:15 38308:13 38310:17 38311:9,16,19,24 38312:3 38318:19 38320:21,23 38321:5 38322:8 38323:2 38332:2,19 38336:19 SLPs 38282:5,7 38284:22 38293:2 38296:14 slum 38357:16 small 38131:17,22 38182:9 38225:24 38229:3 38348:14 snipers 38173:9 38174:10,23 38175:8 social 38286:13 38306:4 38319:18 38320:8 38349:8 38352:13,18,22,25 38353:12 38354:14 38356:23 society 38350:13 soft 38327:11,12 38332:16 sold 38228:11 38271:15 38336:7,10 38339:15 sole 38251:10 solicit 38205:10 solution 38140:20 38236:4,5 38237:3 38316:17 38317:5 38318:1,2,14,15 38319:1 38320:19 38355:22,25 38356:6 38356:8 solutions 38236:20 38318:10 solve 38150:15 38161:10 solved 38187:16 somebody 38133:14 38159:9 38160:12 38171:4 38293:5 38305:21 38341:9 somebody's 38291:2 soon 38129:9 38145:23 38210:22 38232:22 38367:7 sore 38226:17 sort 38195:10 38196:25 38215:18 38257:22 38286:15 38293:3 38305:3 38309:10 38332:15 sorted 38241:23 sorts 38137:11 38217:19 sought 38147:13 sound 38294:9</p>	<p>sounded 38149:14 sounds 38143:1 38179:4 38340:13 38357:1 source 38245:10 38312:2 38333:17 sources 38220:24 38221:1 South 38214:6 38231:10 38240:4,7 38240:21,22 38241:2 38241:7,10,10,15 38242:6,12 38243:20 38333:17 38350:10 38354:22 sparked 38215:2 speak 38130:23 38131:7 38142:4 38145:24 38152:6,20 38155:20 38163:15 38195:17 38201:6 38234:13 38239:12 38245:3,6 38291:17 38291:21 38299:5 speaking 38127:25 38146:3 38152:22 38257:9,17 speaks 38310:8 special 38139:17,23 38174:11 38175:11 38203:18 38267:3 specialised 38174:11 specific 38174:4 38319:3 specifically 38128:9,14 38128:18 38203:23 38205:1 38206:2 speculating 38326:12 speculation 38294:21 spend 38149:17 38219:17 38238:16 38276:10 38278:13 38279:4,18 38286:14 38301:23,24 38302:2 38302:6,15,25 38303:1,2 38304:5,15 38307:25 38308:4 38310:10 38331:14 spending 38278:3 38304:7 38357:10,14 spent 38214:4 38275:4 38275:7 38277:13 38289:6 38302:7,11 38303:5,9,12 38304:4 38304:5,6,24 38324:12 38336:7 38348:7 38357:15 spirit 38188:3 spite 38322:19 splendid 38280:14 spoke 38151:3 38152:1 38189:2 38190:22,23 38216:10 38238:21 38279:8 spoken 38154:1 38239:1 38251:4</p>	<p>38280:15 sport 38284:10 spread 38227:15 spreadsheet 38310:2 spreadsheets 38309:17 spurned 38151:14 squalid 38278:2 38353:18 38355:2 38357:17 squeeze 38280:16 squeezed 38328:9 SSSS 38255:20 SSSS2 38225:25 38239:19 38247:14 38248:1 38282:24 38283:6 38285:24 38287:2 38299:10 38312:4 38351:4,5,23 SSSS4 38234:22 38235:3 38238:2,6,8 38244:4 38255:17,18 38283:1 38354:4,5 SSSS5 38235:3 38238:2 38238:7,9,10 38239:5 38245:23 38246:23 38255:20 38259:18 38266:7,20 38269:7 38275:19 38286:2 38332:23 38340:4 38349:25 38357:8 SSSS6 38235:6,7,13 SSS4 38244:5 stack 38237:4 stacked 38236:12 stage 38128:25 38134:17 38153:5,15 38161:9 38163:19 38188:20 38192:13 38195:18 38200:15 38201:5,8 38224:25 38242:18 38269:10 38279:24 38289:22 38290:5 38320:6 38321:20 38323:20 38330:4 38360:24 38367:10 stakeholders 38313:6 38350:15 38351:13 stand 38283:16 standing 38152:1 38227:2 stands 38253:18 38341:21 standstill 38334:11 start 38165:21 38169:21 38216:24 38225:24 38238:13 38239:18 38259:17 38259:21 38262:4 38263:8 38266:5 38287:3 38297:17,23 38299:9 38312:12 38316:8 38323:9,14 38324:18,23 38325:2 38325:2,3 38327:25 38346:22</p>	<p>started 38128:22 38156:11 38161:16 38209:22 38235:25 38246:7 38281:13 38296:17 38297:19 38314:5 38323:10 38324:21 38342:19 starter 38297:20 38324:24 starting 38215:9 38226:14 38253:13 38344:12 starts 38183:7 38197:23 38248:1 38323:4 state 38222:17 38259:18,19 38366:15 stated 38203:24,24 38204:22 38214:21 38215:25 38222:14 statement 38153:12 38155:17 38165:4,7 38166:15,16,22 38170:17 38172:13 38172:15 38176:3,9 38178:6,7,8 38183:8 38183:13 38184:11 38201:16 38214:5,13 38214:15,17,20,20 38215:4,6,8,14 38217:8 38218:2 38246:23 38249:7 38250:5 38253:8 38259:19 38267:12 38275:20 38276:2 38278:12,23 38279:2 38279:3 38290:24 38320:22 38353:15 38360:12,15,17 38366:24 statements 38128:2 38154:4,5 38166:13 38216:12 38226:2 38227:5 38238:10 38245:3,19 38255:4 38262:21 38266:4,5 38267:2 38325:20 38333:14 38359:18 38361:24,25 38365:19 states 38220:17 stating 38215:23 stationary 38222:2,20 stationed 38162:14 statistically 38145:7 statistics 38145:11 38146:1 statutory 38219:21 38220:24 38221:15 38223:24 stay 38227:21 38316:18 steam 38345:8 step 38332:17 38361:4 steps 38249:8 sticking 38344:19</p>	<p>stock 38279:16 38297:25 38314:24 38316:17,24 38339:25 stockpiles 38342:13 stop 38127:7 38143:20 38144:12 38150:22 38216:25 38253:18 38263:7 38266:22,22 38266:22 38296:21 38299:11 38307:5 38308:11 38330:15 38358:25 stopped 38163:19 stops 38297:1 story 38145:3 38151:11 straddle 38243:12 straight 38325:9 strange 38190:17 38196:23 38307:16 38308:1 38309:10 strategic 38352:8 38353:6 strategy 38334:14 strictly 38146:14 strike 38134:11,12 38137:9 38143:7,11 38143:15 38152:15 38164:9 38168:3,8,16 38171:20 38172:10 38172:12,13 38184:6 38190:17 38212:22 38212:25 38213:1,2,3 38213:8 38340:2,3,7 38342:2,10,22 38343:7,8 38345:12 38345:23 38346:7,23 38347:13,14 38348:18 38349:2,11 38349:12,13,15,19 38365:16 strikers 38147:12 38152:24 38153:3,5 38161:11,15 38163:20 38186:9 38191:8 38195:22 38196:16,17 38200:8 38200:17,18,24 38201:25 38212:9 38213:14 strikes 38340:5 striking 38186:1,5 38195:6 38213:6 strong 38187:10 38294:22 strongly 38351:3 structure 38131:9,9 38155:3 38240:1 38243:8 38250:9,18 38251:25 38263:12 38263:14,16 38265:18,22 structured 38271:3 structures 38131:16,23 38154:10,18,25 38155:9,11,16</p>
---	--	---	---	---

38156:3 38157:3,15 38158:1 38215:20,21 38216:5,15 38249:9 38250:17 student 38223:17,18,20 38223:22 38236:9 studies 38242:21 stupid 38196:11 subject 38226:12 38230:18 38232:8 38233:12,12,20 38257:10,17 38264:6 38341:21 38344:21 38344:23 sublet 38227:17 submission 38267:3 38284:22 submit 38224:9 38328:24 38363:18 submitted 38159:5 38281:17 38282:1 38299:1 38361:8 submitting 38359:17 subsequent 38157:20 38230:21 38284:4 subsequently 38133:22 38139:23 38141:1 38204:18 38239:1 subsidiaries 38240:4 38242:6 38251:2 38260:9 38333:18 subsidiary 38242:12 38251:4,17,19,20 38259:23 38262:6 subsiding 38357:16 substance 38250:15 substantial 38239:17 38255:16 38275:14 38296:7 substantive 38155:10 38206:17 substitute 38330:11 subtract 38244:1 subtracted 38244:25 subtraction 38247:16 succeed 38189:23 success 38141:9 38227:9 successful 38230:16 successfully 38148:8 38149:10 38236:17 suddenly 38131:4 38296:21,22 38327:13 suffer 38233:18 38341:25 suffice 38320:13 sufficient 38226:19 38227:13 38311:5 suggest 38140:9 38159:9,10 38193:15 38238:15 38239:25 38243:17 38245:5,8 38270:22 38328:8 38332:8 38363:7 38364:11	suggested 38129:8 38131:17 38136:25 38136:25 38148:22 38164:10 38168:16 38216:14 38238:22 38314:4,5 38331:19 38335:12 38358:25 38365:25 suggesting 38141:23 38205:16 38240:13 38263:19 38288:21 38318:22 38326:5 38335:8 suggestion 38128:5 38179:3,5 38206:12 38268:15 38309:3 38311:22,25 38363:20,21 suggests 38193:12 38343:3 suitable 38128:25 suited 38292:9 suits 38355:25 sum 38308:3 38337:19 summarising 38204:3 summary 38219:21 38220:25 38307:20 38308:19,20 summer 38326:11,15 summers 38325:24 38326:3,7,20,20 sums 38288:17 sumdry 38238:12 sunk 38288:24 38335:19 38347:3,4 38348:14,22 super 38324:4 38327:2 super-cycle 38326:10 super-good 38326:7 supplemental 38261:5 suppliers 38257:7 supply 38226:21 support 38149:23,25 38159:14 38219:14 38219:20 38221:10 38223:2,4,24 supported 38159:17 38257:6 supporters 38211:15 supporting 38171:20 38199:22 supports 38296:3 suppose 38178:24 supposed 38330:15 sure 38138:12 38149:9 38158:3,23 38170:24 38170:24 38196:12 38196:19 38203:9 38218:8 38226:16 38230:15 38235:18 38235:20 38241:18 38242:16 38252:22 38263:10 38264:22 38272:20,23 38282:23 38285:14 38293:20 38298:9	38301:5 38315:4 38322:21 38325:13 38329:2,13 38332:3 38336:20,22 38341:8 surely 38159:25 38187:18,22 38262:7 38262:8 38290:15 38326:21 38328:20 38337:24 38358:13 surmising 38213:16 surprised 38305:21 surrender 38176:20 38194:21 survey 38229:13 38230:1 38235:21 38274:20 38296:15 38297:11 38315:12 surveyed 38230:3 surveys 38275:16 38278:7 38296:24 survivability 38334:17 38334:24 survive 38315:3,6,11 38335:3 surviving 38335:6 suspect 38189:24 38263:17,25 38266:13 38276:8,13 38277:3,4 38333:23 38336:20 suspicion 38277:13,15 38277:16,20 sustainability 38226:4 38226:7 38227:4 sustainable 38276:3 38350:14,23 38352:10 38353:1,3 38354:13 38355:15 38355:19 Swaziland 38222:17 swore 38225:15 system 38204:13 38342:17 s.u.o 38129:13 38203:4 38225:18 38280:11 38327:23 S2 38283:2 S5 38283:1	38161:21 38167:1 38172:11 38181:16 38182:12,16,18,21 38185:3,15 38193:25 38194:15 38195:5,21 38198:25 38200:8 38202:5 38209:6 38211:3 38224:13,15 38228:23 38229:7,25 38230:13 38234:11 38237:14 38247:22 38249:6 38253:8 38257:8 38264:19 38266:4 38271:6 38273:21 38279:19 38279:24 38280:2 38281:15 38282:21 38287:1 38292:12,23 38295:22 38297:8 38305:12 38306:19 38308:22 38309:3 38312:1 38313:23 38322:11 38327:15 38328:12 38330:5 38336:12 38339:5 38345:3,14 38347:10 38348:3 38349:23 38357:25 38358:7,9 38358:17 38361:4 38362:19 taken 38141:1 38149:6 38188:25 38204:18 38206:12,22 38214:15 38220:14 38233:5 38249:8 38258:3 38316:16 38322:11 38336:5 38346:21 38365:19 38367:24 takes 38228:11 38293:14 38312:3 38357:3 talk 38131:14 38132:3 38155:2 38163:22 38175:19 38196:16 38250:8 38254:14 38285:13 38287:14 38291:14,17 38293:11 38305:22 38321:8 38327:16 talked 38136:1 38278:8 38323:13 talking 38131:15 38143:21 38144:13 38151:8 38153:8 38154:24 38161:18 38172:2 38173:20 38177:8 38194:17 38233:13,23 38234:15 38244:16 38249:22 38251:11 38255:15 38258:11 38289:24 38293:8 38300:1 38303:14 38313:1 38314:24 38327:4 38330:22	38334:14 38335:16 38336:15,15 38339:23 38364:6 talks 38161:16 38177:6 38198:24 38220:11 38301:13 38352:10 tangent 38169:12,13,15 target 38226:19 38302:15 38304:6 38305:1,2,6,6,7,10 38307:24 38308:4,13 38310:10 38313:10 38313:12,14,15 targets 38226:23 38313:3,9 task 38174:12 38175:11 Tatana 38177:2,2 tax 38232:17 38263:13 38263:20 38278:11 tea 38327:15 team 38161:2,5 38222:4 38231:15 38259:12 38341:9 teatime 38280:19 TEBA 38221:10 38223:7,8,15,25 technical 38298:25 technicalities 38141:15 38141:17 38143:1,3,8 38144:13 38150:12 technician 38203:10 telephone 38191:1,12 tell 38133:19 38164:5,6 38174:9,21 38189:7 38190:4,19 38191:3 38200:23 38202:1 38234:20 38251:9 38272:24 38274:8,24 38296:20 38300:19 telling 38167:2 38358:8 tells 38243:14 38246:24 tenants 38227:18 tense 38183:25 tenure 38291:24 38292:6 term 38133:16 38231:5 38272:7,7,8,10 terminology 38291:22 terms 38147:20 38195:25 38196:8,9 38197:6 38198:20,20 38199:7 38215:15 38217:12 38233:4 38234:5 38236:24 38241:5 38248:21 38259:25 38260:6,14 38261:7,10 38262:14 38266:16 38268:3 38273:14 38287:21 38295:11 38309:11 38311:18 38318:5 38321:3,9,13,21 38329:8 38338:22 38343:6 territory 38305:4
T				
	table 38140:10,18 38183:4 38192:11 38239:18,21,23,25 38243:8,9,11,25 38245:8,9 38247:14 38254:9 38289:13 38300:17 38302:5 38305:16 38307:21 38308:6,8,18,23,23 38308:23,24,24 38310:7 38312:14 38313:9 38340:15 tables 38309:14,18,20 38309:24 38310:2 take 38142:7,14 38150:3 38152:5			

<p>tertiary 38220:23 38221:25 38222:2,23</p> <p>test 38264:23 38265:3 38265:13</p> <p>testified 38133:6</p> <p>testimony 38133:14 38220:3 38239:9,15</p> <p>textually 38277:9,11</p> <p>thank 38127:22 38128:21 38129:11 38129:15 38138:16 38138:24 38144:1 38146:7 38150:7,19 38156:6,20,23 38158:9 38165:17 38168:2 38179:25 38180:8 38181:25 38199:5 38202:3,5 38203:5 38207:8 38209:11 38210:5 38213:22,24 38214:1 38216:18 38217:13 38218:3,9,11,19,25 38218:25 38219:4,9,23 38219:11 38224:1,2 38224:23 38225:5,13 38225:19 38230:17 38234:6 38235:7,13 38237:9,10,12,17,24 38279:23 38280:25 38281:8,12 38331:3 38341:10,12,15 38350:2 38356:19 38358:6 38361:1 38364:5</p> <p>thanks 38127:14 38213:23</p> <p>that'll 38358:12</p> <p>that's 38303:3</p> <p>theme 38351:2,23</p> <p>theoretically 38336:9 38346:19 38347:7 38348:1</p> <p>thereof 38360:14</p> <p>thereto 38291:8</p> <p>there'd 38253:25 38327:10</p> <p>there'll 38202:21</p> <p>there's 38127:10 38135:18 38137:23 38153:12 38158:10 38158:23 38163:22 38164:10,13 38175:19 38180:14 38187:16 38209:6 38215:10 38222:11 38223:17 38227:25 38230:22 38233:1 38236:13,14,15,19 38243:9 38244:15 38247:4 38252:20 38254:25 38256:3 38257:4 38258:12 38259:1 38271:3 38276:4 38283:9 38287:12 38293:1,22</p>	<p>38294:20 38296:2 38300:17 38302:5,24 38303:25 38306:13 38307:20 38308:7,19 38311:14 38320:24 38329:14 38343:2 38345:6 38347:8,8 38348:2 38363:1 38364:9</p> <p>they'd 38142:10 38212:21 38363:13</p> <p>they're 38127:12,16 38139:7 38191:7 38213:1 38229:9 38242:25 38243:4 38252:13 38268:16 38282:2,8 38283:20 38296:8 38353:18</p> <p>they've 38230:16 38235:25 38280:24</p> <p>thing 38129:23 38130:1 38130:4 38131:19 38137:3 38141:4,13 38152:9,13 38153:7 38163:14 38171:16 38197:2 38198:12 38200:4 38216:14 38231:17 38280:20 38280:21 38281:6 38282:12 38284:18 38317:14 38318:12 38324:2,8 38331:1 38352:25 38366:10</p> <p>things 38135:3 38142:25 38144:13 38144:14 38164:11 38166:11 38170:11 38177:1 38180:2 38183:24 38199:12 38230:2 38247:10 38255:2 38259:2 38272:13 38280:13 38293:21 38294:25 38296:21 38319:23 38320:2 38321:7 38347:17 38350:17</p> <p>thinking 38322:19 38326:23</p> <p>thinks 38280:17</p> <p>third 38163:20,22 38164:11,13,19 38186:5 38239:17 38249:9 38260:19,19 38261:5 38313:14 38359:20</p> <p>thought 38129:7 38131:19 38138:18 38152:8,12 38156:12 38160:21 38195:24 38241:23 38295:19 38296:1 38318:23 38326:14 38327:10 38328:15 38331:25 38332:4 38334:22 38358:16 38366:12</p> <p>thousand 38303:11</p>	<p>three 38143:13 38156:21 38174:19 38179:10 38183:2 38189:20,22,22 38201:21 38221:1 38224:10 38225:24 38272:7 38285:6,9,18 38286:7 38303:10 38305:10,10,11 38308:10 38356:3 38363:15,23</p> <p>three-quarters 38197:22</p> <p>throat 38226:17</p> <p>throw 38316:20</p> <p>thrust 38359:8</p> <p>thumb 38343:3</p> <p>thumbnail 38230:25</p> <p>Thursday 38161:18 38185:17,20,22 38186:9 38188:9 38190:20 38236:5 38323:23</p> <p>tie 38356:20</p> <p>till 38232:20 38326:23 38366:16</p> <p>tilted 38350:1</p> <p>timeline 38297:16</p> <p>times 38152:24 38189:20 38225:3,9 38280:18 38357:9,9</p> <p>title 38179:20</p> <p>titles 38333:3</p> <p>today 38129:9 38130:23 38183:23 38185:17,21 38186:9 38186:19 38194:20 38219:3 38229:9 38232:20 38243:3 38255:14 38328:2,5,9 38364:25 38366:5 38367:18,24</p> <p>today's 38295:11</p> <p>toiletries 38222:20</p> <p>told 38128:22 38152:9 38165:1,3 38190:7 38191:7,8 38194:23 38202:19 38261:8 38266:17 38271:14 38273:1 38274:11 38285:9 38314:18,18 38321:19 38323:22</p> <p>tomorrow 38176:18 38183:20 38185:18 38186:20 38191:7 38194:18,19,23 38196:11 38347:4,6 38366:17,24 38367:1 38367:11,19</p> <p>tool 38213:10</p> <p>top 38174:7 38177:10 38215:9 38244:11 38292:1 38351:25 38352:7</p> <p>topic 38255:13</p> <p>tot 38175:25</p>	<p>total 38201:3 38221:20 38223:3 38243:17 38244:1,19,21,24 38246:25 38247:1,2 38254:9 38256:24 38286:6 38303:1 38308:12 38312:21 38338:12,22</p> <p>touch 38336:4</p> <p>tough 38294:3 38315:6 38315:7 38336:1</p> <p>township 38239:11 38283:17 38284:9</p> <p>townships 38236:22</p> <p>track 38270:3</p> <p>traditionally 38131:18</p> <p>tragedy 38137:13 38140:1,14 38141:3,3 38143:21 38158:2 38349:23 38350:10 38350:18 38353:8,8</p> <p>tragic 38179:20,23</p> <p>trail 38270:11</p> <p>train 38264:14</p> <p>tranches 38314:10</p> <p>transaction 38240:25 38267:7 38336:20</p> <p>transactions 38259:16 38266:23 38310:15</p> <p>transcribers 38156:10</p> <p>transcript 38173:10,22 38174:2 38180:3 38182:18 38191:6,9 38194:16 38198:3,4 38218:6</p> <p>transcripts 38200:13</p> <p>transfer 38233:2 38252:6 38257:24 38258:11,15,16,19,21 38258:23 38273:7</p> <p>transferred 38228:25 38250:23 38251:1 38252:17</p> <p>transform 38178:1</p> <p>transformation 38177:23 38313:7</p> <p>transient 38130:9</p> <p>transition 38261:6,6,10 38262:14</p> <p>translate 38233:7</p> <p>translated 38337:7</p> <p>transport 38222:2 38223:6</p> <p>traverse 38182:4</p> <p>traversed 38332:18</p> <p>treasury 38231:21 38232:2</p> <p>treatment 38237:2 38260:18,19</p> <p>treats 38332:16</p> <p>trick 38325:24</p> <p>tried 38142:12,15 38161:14 38189:19 38235:17 38270:2 38292:16 38318:3 38320:19</p>	<p>triggers 38216:14</p> <p>troll 38361:18</p> <p>true 38166:18 38212:6 38259:18,19 38279:22 38282:18</p> <p>truly 38273:19</p> <p>trust 38220:22 38221:3 38221:21 38222:14 38222:15 38223:17 38308:22 38350:5,12 38350:14,19,25 38351:21 38352:23 38353:3,9,10,17,22 38365:9</p> <p>truth 38165:25 38198:19</p> <p>truthfully 38225:16</p> <p>try 38156:18,18 38161:10 38169:15 38195:13 38201:5 38231:14 38248:11 38255:21 38257:8 38270:20 38293:25 38317:25 38320:18 38332:8 38367:22</p> <p>trying 38136:19 38154:3,6 38167:24 38188:12 38189:25 38201:24 38211:13 38213:21 38217:8,14 38217:21 38254:4 38264:5,12 38271:2 38294:25 38296:6,8 38318:9 38335:17 38356:5</p> <p>Tuesday 38161:14,16 38161:20 38173:24 38182:8 38186:24 38187:21 38191:4,14 38192:8,15 38194:12 38361:10,10,25</p> <p>tuition 38222:11</p> <p>turn 38214:3 38216:19 38261:20 38295:2 38312:21</p> <p>turnover 38232:12 38233:20 38260:2,21 38262:18 38263:4 38342:5,6,6,7,11 38343:7,10,19 38345:7</p> <p>turns 38359:7</p> <p>Twala 38161:1 38210:21,22</p> <p>twisting 38165:25</p> <p>two 38127:5,7 38128:7 38128:7 38138:1 38140:9 38142:25 38147:21 38159:14 38166:11 38169:13 38170:15,16 38172:10 38185:21 38185:23 38203:25 38207:23 38211:13 38211:15 38214:12 38214:13 38215:3</p>
---	--	---	---	---

38226:8 38231:9,11 38234:16 38235:1,16 38237:24 38238:1,8 38240:4 38244:7 38271:15,17 38272:7 38272:18 38280:13 38282:8 38289:4 38294:17 38299:18 38307:19 38317:16 38318:11,17 38322:8 38322:12 38325:23 38326:2,6 38330:14 38340:5 38342:19 38350:7 type 38137:10 38191:23 38199:21 types 38217:16,17 typical 38274:20,20 T-shirts 38214:24	understanding 38129:21 38136:20 38136:20 38137:1,5 38138:3 38139:1 38185:14 38197:7 38199:8 38206:5 38207:1 38309:8 understood 38137:2 38138:4 38167:12 38169:20 38172:18 38180:17,23 38187:4 38193:15 38216:7,16 38286:11 38299:8,19 38309:9 38310:20 38311:9 38350:17 38363:21 38366:25 undertake 38204:12 38234:14 38295:24 undertaken 38210:4 undertook 38222:15 unfair 38148:25 38329:20,24 unfairness 38260:24 38261:2 unfortunate 38294:3 38299:4 38311:20 unfortunately 38248:3 38300:18 38330:13 38354:2 unfounded 38131:6 unhelpful 38330:1 uniforms 38222:21 unilaterally 38137:20 38311:24 38319:20 union 38147:14 38168:3,8,17 38169:21,22,23 38171:22 38197:9 38199:1 38207:7 38215:20,21 38216:7 38230:12 unionist 38131:15,21 38142:5 unions 38137:4 38142:7 38143:5 38170:16 38171:8 38195:25 38206:17 38217:24 38297:20 38297:23 38323:13 38324:24 38350:12 unit 38235:22 38315:14 38316:18,21 38358:18 units 38236:13 38237:5 38283:13 38284:6 38285:8 38288:12,15 38291:5,6 38292:23 38299:15 38313:22 38317:2 38352:22 unlawful 38322:3 unplanned 38227:15 unprotected 38143:7 38143:11,16 38152:15 38164:9,12 38213:8 unrealistic 38316:9	38329:1,20 unreasonable 38329:20 unrest 38198:22 38340:9 38349:9 38350:11 unsound 38277:9,11 untold 38350:8 untrue 38165:6,10 38166:14,23 untruths 38165:3 unusual 38232:15 updated 38320:16 upgraded 38218:22 upgrading 38313:22 upper 38244:8 upset 38196:13 urbanising 38327:5 urging 38195:5 use 38140:25 38152:21 38153:8 38181:18 38210:17 38228:17 38231:14 38288:10 38291:13,17,21 38321:7 38357:20 usual 38176:15 US\$800 38143:14	vice-president 38128:10 38204:1 38211:2 vicinity 38226:20 video 38283:6 view 38197:10 38199:10 38211:3 38234:8 38249:20 38292:16 38297:4 38316:16 38324:10 38327:2 38360:9 viewed 38142:23 views 38295:20 village 38213:15 villages 38211:24 violate 38334:21 38335:15 violating 38317:13 38342:16 violation 38333:20 38334:18 violence 38170:2 38183:8 38215:2 violent 38211:11 38212:4 38213:18 visible 38256:2 visit 38222:13 visited 38222:4 visits 38222:19 vital 38350:14 voice 38226:16 voicemail 38189:24 volume 38225:25 38226:1,8 38238:1,1 38238:4,4,6,7 38246:23 38248:10 38248:11,12,16 38253:13 38267:15 38283:3,4 38285:25 38299:9 38312:7,8,9 38312:10 38351:24 38351:25 38352:1 volumes 38235:1 38238:8 38248:9 voluntary 38221:2 vote 38339:12 voted 38336:22 VVVV 38211:7,8 VVVV2 38180:1 VVVV3 38182:22	wait 38316:22 waiting 38129:8 38178:20 38194:18 38201:12 38278:16 38278:20 38281:18 38282:14 38327:17 wake 38349:22 38353:7 walk 38294:2 38330:15 walking 38296:9 wanted 38130:8 38132:5 38136:3 38138:2 38140:9 38147:1,13 38148:9 38159:18 38160:6,7,9 38171:24,25 38172:9 38175:3 38178:16 38180:23 38182:4 38184:18 38194:12 38194:14,14,15,25 38195:20,21 38200:8 38200:23 38211:12 38218:17 38235:22 38235:22 38236:17 38281:19 38314:19 38314:20,22 38316:18 38328:4 38339:25 38360:3 38362:2 38363:16 38364:3 38365:12,19 wants 38145:18 38157:10 38197:11 38199:2,11 38365:3 wasn't 38184:9,25 38187:16 38194:13 38251:18 38254:17 38283:23 38288:11 38291:6,11,12 38292:15 38294:20 38339:9 38365:22 wasn't 38130:3 38134:1,10 38206:1 38206:14,22 38210:1 38265:4 38301:2,10 38303:8 38304:2,8 38305:19 38324:2,8,9 38326:13,24 38349:11,20 38354:2 waste 38138:25 38147:19 38148:24 38170:22 38210:16 38237:2 38330:25 wasted 38170:24 watch 38225:14 water 38226:21 38227:14 38228:18 38229:23 38230:6 38237:1,2 waters 38264:23 38265:3,13 way 38137:7 38155:15 38159:25 38167:11 38195:21 38197:22 38203:8 38204:10 38205:18 38212:8 38225:21 38230:14 38252:1 38265:12
U				
ugh 38315:13 uh-uh 38256:3 38315:13 UK 38241:20 38250:10 ultimate 38258:17 ultimately 38142:13 38236:21 38270:5 38319:13 38331:10 ultimatum 38183:21 38184:5,20 38185:11 38185:20 38186:1,10 38187:6,7,10,13,18 38187:19,23 38188:1 38188:3 38194:25 38196:2 umbrage 38312:1 unable 38206:11,13 unbroken 38237:15 uncommon 38231:12 underneath 38244:22 38289:15 understand 38128:22 38129:23 38130:13 38131:11 38134:7 38136:4 38140:22 38141:24 38142:23 38144:16,16,18 38147:12 38152:16 38164:20 38167:16 38180:14 38181:6 38184:17 38198:4 38202:9 38215:4 38218:13 38224:3,8 38225:6,20 38248:6 38253:11 38267:4 38269:5 38274:22 38275:17 38277:12 38279:13 38285:3 38298:23 38321:17 38321:18 38326:22 38339:22 38345:20 38347:25 38358:23 38360:23 38362:11 38362:21 38364:24 38365:5 38366:10	vague 38286:15 valid 38290:24 validity 38149:19 valuable 38336:6 value 38253:9 38259:3 38299:25 38339:20 38339:24 38340:1 38342:2,15 38348:10 38348:12 38350:15 38350:23 38351:12 38352:15 38355:20 variable 38342:25 38343:1,19,21 38344:6 38345:3 38346:9 variance 38313:16 variation 38320:24 38321:22,22 variations 38321:14 various 38193:21 38220:24 38227:10 38264:18 38265:7 vary 38319:20 38321:7 vast 38229:14 38314:23 vehicle 38161:3,20 ventilation 38348:13 vents 38355:5 venue 38160:13 verbatim 38178:23 38218:6 version 38152:19 38174:14 38188:24 38197:21,21 38245:7 versus 38149:23 38229:12 veto 38265:22 38266:9 viable 38318:2 vice 38205:14	v	W	

<p>38268:25 38293:12 38295:6 38298:3 38299:23 38320:2,2 38328:23 38329:25 38341:16 38342:20 38343:19 38350:17 38356:15 38357:21 38366:1 38367:22 ways 38292:18 38317:11 38332:12 38335:17 weapons 38160:12 38163:2 weather 38326:25 Wednesday 38145:14 38146:2 38161:17 38173:23 38190:19 38191:15 38367:1 week 38153:14 38185:7 38187:4 38218:20 38335:18 38361:10 38366:12 38367:8,13 38367:14 weekend 38215:2 weekly 38208:14 weeks 38169:13 38205:5 weigh 38334:12 welcome 38270:10 welcomed 38162:23 welfare 38221:10 38223:24 went 38143:14,22,24 38151:2,7 38161:6 38163:11 38168:20 38215:16 38236:6 38261:15,15 38262:22,22,25 38265:2 38288:4 38294:4 38358:2 weren't 38150:2 38185:10 38363:24 38366:4 weren't 38162:1 38274:11 38296:10 38298:8 Wesley 38173:1 38202:16 38219:6 38225:1,5 38327:16 West 38170:2 Western 38230:21 38231:2,8,22 38232:15 38238:11 38240:5,6 38242:4 38247:2,3,25 38248:22 38251:4,6,7 38251:10,11,12,13 38253:21 38256:17 38259:21,24,25 38260:1,2,5,7 38261:3,3,7,12,13,14 38261:22,23 38262:5 38262:16,18 38263:1 38264:18 38266:3,19 38269:9,11,16,23 38271:14 38272:17</p>	<p>38272:20,22,24 38298:17,18,19,22 38299:6 38333:6 we'd 38178:24 38241:23 38278:8 38293:18 we'll 38127:12,19 38129:10 38153:22 38157:1 38179:7 38182:15 38201:2 38219:25 38237:15 38241:24 38253:7 38261:5 38270:20 38271:10 38280:2 38281:3 38284:15 38299:6,7,9 38313:23 38316:8,22,22 38318:12 38319:10 38325:2 38335:24 38354:3 38364:17 38365:10 38367:24 we're 38129:21 38147:10 38171:18 38177:8 38178:17 38179:2 38188:2 38198:17,19 38199:6 38200:4 38213:13 38217:25 38234:15 38236:3 38243:3 38244:16 38255:15 38261:8 38268:22,25 38269:7 38280:15 38284:16,17 38289:24 38294:25 38295:24 38296:9 38297:17 38304:3,3 38305:4 38306:16 38312:14,25 38314:24 38321:2 38336:17 38339:23 38344:10,12 38349:15 38352:3 38362:13 38364:11 38366:4,11,12,16 38367:6,15,20 we've 38142:6,8 38147:17,24 38152:3 38166:3 38174:15 38183:21 38190:17 38196:3 38230:8 38236:25 38245:18 38264:19 38266:16 38266:17,17 38268:20 38270:2,17 38273:1 38275:16 38279:14 38280:3 38296:8 38303:11 38312:15 38316:5 38321:11 38323:14 38324:3,4 38325:1 38340:14,15,18 38352:18 38354:11 38354:15 38364:1 38366:5 38367:23 what's 38138:2 38140:2 38142:8</p>	<p>38158:15 38171:21 38174:17 38178:2,25 38192:23 38209:13 38244:1,3 38249:1,17 38304:7,23 38309:6 38309:12 38344:7,19 where's 38269:18 38322:24 whilst 38194:22 38213:16 38222:20 white 38300:18 whoever's 38250:22 wholly 38259:23 who'd 38314:11 who'll 38284:3,19 who's 38155:1 38186:19 38264:25 38291:3,18 38292:22 width 38312:22 willing 38140:18 willingly 38228:23 willingness 38355:24 winches 38217:18 window 38150:24 38226:12,14 winter 38326:7,8 winters 38325:23 wisdom 38282:10 wise 38140:25 wish 38181:5 38214:13 38215:25 38218:13 38219:16 38328:23 38361:21 wished 38180:2 38339:10 38363:8,14 38366:2 wishes 38224:9 withdraw 38332:1 38367:2 withdrawn 38315:24 38316:1 witness 38127:4,8 38128:3,13 38129:3 38130:17 38134:14 38138:1,15 38174:3,7 38177:15 38181:10 38181:21 38182:1 38218:12 38225:22 38234:10,13,17 38330:7,18 38359:23 38362:25 38363:20 witnesses 38133:6 38359:17,18 38360:1 38360:6 wives 38221:11 38223:5 WMSL 38262:19 wonder 38127:25 38270:21 wonderful 38316:5 38326:15 38327:2 wonderfully 38296:22 Wonderkop 38284:13 38286:5 won't 38157:17 38181:7,20 38218:8</p>	<p>38289:8 38321:20 38329:21 38365:5 word 38277:19 38321:18 38334:16 wording 38289:14 words 38131:10 38138:20 38152:22 38152:23 38153:8 38167:19 38171:19 38178:23 38199:25 38205:3,13 38216:22 38223:18 38241:13 38297:9 38321:7 work 38143:22,24 38161:23 38164:14 38171:16,17,18,19,24 38171:25 38172:9,10 38172:12,14 38183:18,25 38184:4 38184:5,13,15,24,25 38185:18,25 38186:2 38186:6,11,13,13,20 38186:25 38187:8,11 38187:14 38188:2,7 38188:10 38194:24 38196:6,8 38198:10 38205:4 38211:13,19 38212:2,3,5,8,15 38213:7,15 38231:22 38232:14 38236:23 38247:8 38294:5 38297:21 38328:23 38335:5 38342:13,14 38347:17 38355:23 worked 38129:8 38232:19 worker 38214:25 workers 38133:9,10 38144:24,24 38146:17 38154:1,10 38154:12,18 38155:5 38155:12,16,20 38156:1 38157:2 38159:4 38160:6 38162:23 38164:13 38164:19 38165:6,10 38166:17 38167:4,11 38168:22 38170:15 38172:11 38183:18 38184:4,14 38186:1 38186:14 38187:8,11 38187:14 38188:7,10 38190:13 38193:7 38195:6 38212:25 38215:17 38216:5,8 38216:10,15 38227:2 38285:11 38302:8 38309:12 38310:15 38342:1 38353:17 38357:16,22 workforce 38275:14 38354:20 38357:3 working 38198:9 38253:12 38313:5 38329:10 38347:20 38348:18,20</p>	<p>38351:10 workplace 38130:25 38226:21 works 38236:4 38243:25 workshop 38306:24 38307:2 workshops 38306:24 38321:16 38323:11 work-shopped 38306:25 world 38236:14,16 38312:23 worried 38144:12 38331:21 worry 38170:6 worse 38160:1 38163:9 worsened 38227:15 worth 38210:14 38229:8,9 38302:1 wouldn't 38184:20,23 38188:6 38251:8 38279:14,20 38333:10 38339:1,11 38364:25 wouldn't 38160:23 38273:7 38298:24 wounds 38211:15,17 WPL 38231:8,19 38232:9,12 38233:20 38242:9,25 38243:4 38244:18 38245:11 38245:15,16,17,18,19 38245:20,23,24 38246:2,11 38247:5 38249:2,3,4,12,15 38250:4,8,14 38251:17,19,20,22 38252:7,15,17,18,20 38252:21 38253:5 38260:15,16,18,19,20 38260:20 38266:20 38270:16 38288:4 38289:20 38290:4,16 38290:17 38299:2 38319:21 38332:1,19 38332:19,19,23 38333:14,23 38334:2 38334:3,8 WPL/EPL 38250:17 38308:11 38332:22 write 38301:4 38329:11 38329:18 writing 38320:25 written 38264:1 38286:19 38292:25 38294:22 38296:14 38298:8 38321:4,4,12 38321:22 38359:18 38360:12 wrong 38127:10 38133:19 38136:11 38156:12 38198:9 38238:18 38244:2,3 38253:11 38255:22 38259:15 38268:25</p>
--	---	--	--	---

<p>38269:3,7 38304:19 38309:19 38310:3 38318:5 38367:2 wrongly 38324:25 wrote 38325:22 38349:24 WWW2 38179:15 WWW3 38182:23,25 38183:4 38185:16 WWW4 38183:4 38188:15 38201:1 WWW5 38183:5 38185:22 WWW6 38183:6 38185:22 38186:5 W5 38185:23</p> <hr/> <p style="text-align: center;">X</p> <p>X 38219:24 38292:23 38306:16 38336:17 Xolani 38158:25 38165:5,9 38167:18 38214:9 38215:10 38216:20,21 38217:6 38217:8,11 38218:5 XXXX1 38219:24 XXX3 38203:6,11 38207:11 X-amount 38218:1</p> <hr/> <p style="text-align: center;">Y</p> <p>Y 38306:16 years 38228:20,21,24 38230:10 38244:7 38257:12,24 38265:17 38268:8 38272:22 38283:13 38284:4 38285:6,12 38285:14 38286:1,2 38294:17 38302:25 38308:2 38312:19 38322:8,12,21 38323:24,25 38326:16,25 38327:11 38330:14 38352:17 38354:24 38355:2 yesterday 38128:3 38129:6,20 38132:3 38140:23 38160:8 38166:14 38181:18 38199:14 you'd 38142:1,4 38187:20 38212:2 38279:15 38293:8 38315:24 38337:22 38337:23 38339:2 38340:4 38341:11 you'll 38130:10 38132:14 38133:20 38185:23 38199:14 38203:12,24 38204:2 38215:9 38222:10 38223:10 38224:12 38225:13 38227:3 38240:19 38244:21</p>	<p>38246:1 38252:20 38254:9 38271:6 38273:17 38275:20 38283:8 38284:14 38286:2 38288:17 38289:22 38302:23 38307:18,21 38315:4 38330:18 38340:25 38342:22,23 38346:20 38348:14 you're 38127:3 38128:22 38131:14 38141:8 38144:12,13 38148:6 38169:5 38170:11 38172:17 38174:7,13 38176:5,8 38180:9,16 38194:22 38206:11,13 38209:9 38218:9 38225:17 38236:8 38237:22 38249:7 38255:1,4,6 38258:11,13 38259:15 38280:10 38290:21 38291:21 38298:9 38303:13 38305:13 38306:17 38309:17 38310:23 38320:17 38321:3 38324:15 38325:24 38327:4,22 38333:20 38334:9,25 38335:2 38336:14,15 38340:13 38343:24 38344:2 38345:16 38347:11 38348:11 38353:16,21 38357:13 38362:9 38366:7 you've 38138:1 38145:24 38150:3 38157:15 38165:4 38173:1 38178:20 38181:13 38182:21 38184:18 38215:25 38217:25 38224:3,14 38238:18 38244:1,24 38248:2 38249:8 38250:1 38254:23 38257:4,4 38273:21 38274:9,15 38279:20 38289:14 38290:23 38298:6 38316:1 38319:23 38321:1 38325:4,10 38335:19 38335:20 38345:11 38346:4,10,10,19,24 38346:25 38348:7,21 38358:4 38363:7 YYYY 38281:3,10</p> <hr/> <p style="text-align: center;">Z</p> <p>zero 38313:12 Zokwana 38145:1,15 38146:3,5,13 38147:22 38150:3 38159:11,24 38160:2</p>	<p>38160:22 38162:25</p> <hr/> <p style="text-align: center;">\$</p> <p>\$171 38244:22 \$186 38254:10 \$2 38233:24 38254:24 38294:15 38323:21 \$20 38257:17 \$23 38269:11 \$30 38337:6 38338:14 \$400 38295:14 \$50 38257:12,14 \$800 38233:25 38255:7</p> <hr/> <p style="text-align: center;">0</p> <p>0% 38304:24 000 38145:6,7,8,8 38146:8,12 38150:12 38160:11 38163:1 38164:16 38214:22 38221:9 38222:24 38228:12,21 38229:3 38229:8,9,9 38233:24 38254:24 38281:18 38282:11,13,16 38294:15 38316:12 38323:21 38335:22 38337:18 06:30 38188:8 068 38357:3,8 07 38300:21 38301:23 38302:8 08/9 38284:5 08:33 38127:2 08:52 38141:22 09:12 38158:16 09:32 38174:1 09:52 38188:11</p> <hr/> <p style="text-align: center;">1</p> <p>1 38165:21 38180:24 38181:10,21 38228:9 38238:1,4,6 38239:2 38239:3 38244:8,8 38246:7,8 38247:3 38255:19 38256:9 38259:23 38260:12 38260:13 38261:11 38261:17,21 38283:3 38283:4 38285:25,25 38286:7 38308:23 38328:3 38341:20 38356:25 38357:9 38360:3 1st 38324:18 1% 38261:22 1.45 38326:4 10 38144:8 38149:17 38166:1 38214:6 38216:3 38225:7 38228:21 38239:14 38239:15 38285:12 38285:13 38335:22 10th 38134:15 38208:21 38211:13 38212:11</p>	<p>10/11 38284:5 10:32 38202:8 10:39 38201:2,4 10:47 38201:2,4 10:52 38215:25 100 38297:20 38323:14 38324:24 38338:20 100% 38305:3,11 38313:16 1006 38307:20 1044 38308:7,7 1057 38285:25 38300:15,17 1059 38299:9,10,10,10 1095 38299:10 11 38194:10 38283:13 38300:22 38301:23 38302:8 11th 38134:11,21,22 38186:8 38211:16 11:11 38229:2 11:57 38237:21 114 38299:14 1147 38308:23 1151 38308:23 1156 38308:24 1167 38308:24 1168 38308:24 12 38133:21 38134:3 38135:22 38136:13 38138:10 38143:10 38143:12,16,22 38155:7 38163:2,15 38164:16 38189:20 38239:9 38260:11 38264:1 38302:25 38308:2,24 38357:9 12th 38268:11 12:17 38249:6 12:36 38263:5 12:56 38277:24 1200 38312:20 38313:11 38316:13 121 38243:24 13 38302:25 38308:3,24 38354:5 13:56 38280:9 1300 38312:20 134 38132:13 138 38135:18 38301:23 38302:23 38303:14 38304:6 38307:25 38308:5,6,13 14 38188:17 38228:20 38228:24 38286:1,1 14th 38161:14 38170:1 38200:15 14:16 38295:4 14:36 38309:2 14:55 38322:6 1404 38226:9,12 141 38139:7 1424 38227:3 145 38299:16 145.9 38287:12 1455 38351:24,24</p>	<p>38352:2 149 38285:25,25 15 38127:11 38182:13 38188:17 38202:6 38239:10 38246:1 38257:17 38276:6,25 38282:16 38284:5 38286:1 38327:19 38356:18 15th 38144:23 38145:3 38190:19 15.5 38313:17 15:17 38327:21 15:37 38342:22 15:57 38358:23 150 38243:25 150-odd 38295:13 1548 38253:15 1558 38248:1,12 38253:13,20 1571 38249:7 16 38127:1,12 38183:6 38183:9,10,13 38186:9 38188:17 16th 38133:23 38134:10,16 38140:14 38142:16 38185:20 38186:14 38190:20 38200:23 38201:2 38208:20 38224:17 38275:23 38363:24 17 38132:18 17th 38186:2,11,13,15 172 38303:1,3,14 18 38132:18 38135:20 38146:12 38214:14 38214:16 18% 38242:3 38245:15 38245:20 38246:17 180 38225:9 186 38244:14,19 19 38146:12 38150:12 192 38173:18 196 38244:5,5,6 1999 38286:1</p> <hr/> <p style="text-align: center;">2</p> <p>2 38163:18 38165:21 38180:12,15,18,19,21 38180:25 38181:7 38182:18 38183:17 38189:20,20 38207:16 38238:1,4,7 38239:8 38259:20 38274:2 38283:14 38284:20 38299:6 38308:23 38312:7,8,9 38312:10 38328:5 38330:7 38340:17,23 38341:19 38360:3 38364:1 38367:25 2nd 38204:23 2% 38233:10 38255:15 38256:8 38260:2,21 38261:12,18,21</p>
--	--	--	---	--

<p>38262:5 38267:17 2.089 38326:4 2.1 38259:21 2.9.2 38262:11 38267:16 20 38165:20 38173:21 38173:22 38177:7,11 38348:18,20,25 20% 38322:11,13 38340:6,6 38342:2 20:16 38189:25 20:16:26 38188:18 200 38228:9 38239:2,3 38239:6 38278:10 38323:21 38357:10 2000 38229:8 38286:1,5 38313:11 38323:5,15 2001 38326:10,23 2003 38326:23 2004 38239:19 38247:14 38286:3,5 2005 38285:23 2006 38244:9,10 38262:19 38278:20 38282:2 38285:17,21 38287:10 38294:12 38295:12 38296:14 38299:14 38311:10 38312:25 38318:19 38319:4,6,14 38320:8 38322:14 38323:1 38324:11 2006/7 38283:12 38284:19 38322:7 38326:3,4 2007 38230:2 38231:23 38235:21 38238:9 38243:10,12,15,25 38244:8,10,10,11,11 38251:8,10 38259:24 38261:11,11,25 38263:7,21,22 38269:4 38275:1 38294:12 38295:14 38296:15,16,22,22,23 38297:14,18,21 38311:10 38312:20 38314:19,19 38323:4 38323:8,8,12,15 38324:2,12,19 2007/2008 38323:9 2007/8 38262:24 38263:3 38283:12 38322:7,14 38325:6 38326:3,5 2008 38226:2 38233:23 38238:11 38243:10 38243:15,24 38244:4 38244:8,10,10,13,22 38246:1,8,11 38249:11,15 38252:11 38253:23 38254:1,16 38256:8 38257:23 38260:12 38260:14 38262:1,3,5 38262:11 38266:5,16</p>	<p>38266:18 38267:9,16 38268:8 38275:2 38294:18 38296:23 38296:24 38297:18 38297:19,21,24,25 38298:2 38312:20 38314:15,24 38315:1 38319:22,24 38324:21 38325:18 38332:10 38333:5 2008/9 38312:24 2009 38233:23,23 38239:15,17 38245:23 38246:5,6,8 38246:24 38247:3 38262:4 38312:3,20 38313:9,10 38314:25 38315:2,10 38317:10 38319:5 38332:24 38333:3,4,5,6,21 38334:5 38335:25 38337:1 2010 38168:20 38169:17 38226:8 38239:14 38298:16 38303:3,8 38314:8 38337:4,5 2010/2011 38292:17 2011 38287:10 38293:5 38299:15 38312:18 38312:18 38314:9 38318:22,23,25 38334:16 2012 38168:6,11 38179:21,24 38186:9 38203:14 38204:23 38208:21 38209:16 38221:12 38223:3 38226:3,25 38227:4 38238:9,11 38239:13 38239:14 38256:8 38257:23 38260:11 38261:3 38264:1 38265:19 38268:12 38268:15,17,17 38269:5,25 38275:23 38275:25 38276:1 38278:22 38303:8 38340:2 38342:15 38351:3 2012/13 38308:3 2013 38222:3 38298:14 38303:8 38308:14 38356:23 38357:13 2014 38127:1 38221:12 38222:12 38223:3 38285:4 38340:3 38360:14 2016 38130:1 38168:8 38275:21,22 205 38247:1 21 38228:8 21% 38302:22,23 38304:6 38308:13 212 38244:24 218 38286:5</p>	<p>22 38145:7,8 221 38268:16 38269:8 229 38259:18 38267:15 23 38138:9 23rd 38360:14 38361:10,25 231 38256:9 232 38255:25 233 38256:2 234 38255:21,21,23 38256:3 235 38246:23 38255:17 38255:18,21 38256:3 236 38255:21 24 38165:21 24th 38275:21 38276:2 240 38229:11 240-odd 38228:25 244 38286:2 38357:8 25 38225:11,12 38300:17 38337:21 38340:20,21 25.2F 38319:15 250 38327:5 251 38244:19,21 26 38176:17 38357:3,8 26th 38209:21 38265:2 26% 38242:12 38266:10 27 38177:10 38198:5 27th 38203:14 38209:15,17,22 275 38338:22 38349:25 38349:25 28 38197:19,20,23 38198:5,10 38239:16 29 38197:19 38266:21 29th 38340:17,22 38341:1,5 38359:1 38362:10,14 38364:2 38364:6,12 38366:6 38366:19,21 38367:25</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 38146:8 38160:11 38163:1 38165:21 38211:9 38214:22 38284:8 38285:25 38299:9 38308:23 38313:12,15,16 38351:25 38359:9 3.2 38299:11 30 38181:19,23 38188:19,23 38189:2 38200:2 38225:10 38244:11 38261:11 38261:17,21 38266:21 38268:23 38340:20 30th 38267:9 300 38338:13 3000 38315:8 304 38183:5 305 38183:7 306 38183:7</p>	<p>31st 38253:15 310 38303:1 317 38221:13 38223:4 34 38350:8 35 38345:3,13,14 38346:5,12,19,24 38347:3,5 38348:1,7 38348:23 36 38174:15,16,19,21 366 38275:20 367 38276:4 369 38286:4 37 38174:7,8,21 38176:12 374 38239:5 375 38349:25,25 37743 38239:9 37760 38238:21 378 38340:4</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 38145:6,8 38211:9 38225:25 38226:8 38248:10,11,12 38253:13 38303:17 38303:22 38307:22 38307:23 38308:11 38312:14 38340:18 38351:24 38352:1 38359:25 4.1 38249:19 4000 38314:17 41 38173:22 38244:23 42 38165:15 428 38179:6,11 432 38179:11 448 38203:12 477 38221:13 38223:4 480 38194:19 49 38165:13,16,17 38166:10 38214:3 38215:8,9</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 38226:19 38234:22 38261:3 38273:24 38281:18 38282:11 38282:13 38299:15 38299:19 38305:12 38310:14,15 38311:7 38312:18 38313:14 38315:23 38332:2,22 38337:15 38344:22 50 38314:2,11 38316:6 38316:8,22 38344:3 38344:12,15 38345:2 38345:7,13,17,22 38347:10 50% 38261:14 38262:20 38267:1,1 38276:6,24 38277:17 500 38133:21 38134:3 38135:22 38136:2,13 38136:15,17 38138:10 38143:10 38143:12,16,22</p>	<p>38155:7 38163:2,12 38163:15 38226:19 38238:22 38278:11 38299:15,19 38305:12 38310:14 38310:15 38311:7 38312:18 38315:23 38332:2,22 5000 38278:21 506 38221:6 51 38166:10 38167:18 38216:19 52 38248:21 547 38221:20 5497 38314:8 5500 38311:4 38312:21 38313:15 38314:8 38317:20 38318:22 38318:23 38319:7,25</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 38194:16 38303:18,21 38307:24 6:15AM 38190:20 6:29am 38185:17,20 38186:12,13 6:30 38193:12 6:30AM 38190:12 609 38357:10,14 620-odd 38303:11 646 38312:4,13,13 647 38312:21 65 38244:15,20 662 38256:9 665 38299:17,20 38301:8,22 38302:23 38302:24 38304:2,16 38305:6 38307:24 38308:5,6,12 38309:9 38310:8,12,14 38325:11 684 38313:17 685 38313:16 691 38221:6 696 38354:4,6,11 698 38354:10</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 38233:10 7:00am 38185:18 38186:20 70 38266:7,20 38345:3 70% 38343:4 38344:25 38345:10 700 38167:21 38312:20 38349:1 719 38256:9 75% 38266:12,12 77 38165:15 38289:3 38291:25 79 38282:25 38283:6,8 38287:2,8 38289:16 38289:22,22 798 38286:7</p> <hr/> <p style="text-align: center;">8</p> <hr/>
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8 38188:18 38189:3
 38196:22 38197:1,17
 38197:17 38198:4
 38243:12 38327:4
 38335:19
8PM 38190:19
8% 38233:10
80 38282:25 38283:6
 38284:13
80% 38335:19
800 38229:1 38239:2,3
 38247:4 38316:13
81 38284:17
810 38299:16,16
 38304:2
82% 38240:5 38245:15
 38245:22 38246:18
84 38245:23 38332:24
85% 38229:15
 38271:14 38272:18
 38278:25 38314:19
 38315:12
850 38278:11

9

9 38167:19 38193:8
 38197:17,21
 38216:20,21
9% 38327:4
9/10 38284:5
90s 38228:5
9000 38317:21
92% 38357:2
929 38221:20
93 38247:24 38248:23
 38249:2 38253:12,14
 38321:20
950 38356:25 38357:9
99 38228:19
991 38357:10

